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AILA Backgrounder

LEGAL IMMIGRATION TO THE UNITED STATES

Legal immigration is a highly regulated and tightly controlled system that serves the national interest. Through our legal immigration system, U.S. citizens and lawful permanent residents unite with close family members, and U.S. employers gain access to the specific skills necessary to strengthen the U.S. economy and remain competitive in the global economy. Through legal immigration, the U.S. also fulfills its longstanding tradition of protecting a fraction of the world's refugees. Legal immigration is good for America – citizens and immigrants alike.

Who is a legal immigrant? A legal immigrant is a foreign-born individual who has been admitted to reside in the United States as a *lawful permanent resident* (LPR). LPRs are given immigrant visas, commonly referred to as *"green cards."*

Nonimmigrants are foreign-born individuals who are permitted to enter the United States for a limited period of time, and are given only temporary (nonimmigrant) visas. Examples of nonimmigrants are students, tourists, temporary workers, business executives, and diplomats.

How does someone come to the U.S. as an immigrant?

- Through **family-based immigration**, a U.S. citizen or LPR can sponsor his or her close family members for permanent residence. A *U.S. citizen* can sponsor his or her spouse, parent (if the sponsor is over 21), children, and brothers and sisters. An *LPR* can sponsor his or her spouse, minor children, and adult unmarried children. As a result of recent changes in the law, all citizens or LPRs wishing to petition for a family member must have an income at least 125% of the federal poverty level and sign a legally enforceable affidavit to support their family member.

- Through **employment-based immigration**, a U.S. employer can sponsor a foreign-born employee for permanent residence. Typically, the employer must first demonstrate to the Department of Labor that there is no qualified U.S. worker available for the job for which an immigrant visa is being sought.

- As a **refugee or asylee**, a person may gain permanent residence in the U.S. A person located outside the United States who seeks protection in the U.S. on the grounds that he or she faces persecution in his or her homeland can enter this country as a **refugee**. In order to be admitted to the U.S. as a refugee, the person must prove that he or she has a *"well-founded fear of persecution"* on the basis of at least one of the following internationally recognized grounds: *race; religion; membership in a social group; political opinion; or national origin.* Refugees generally apply for admission to the United States in refugee camps or at designated processing sites outside their home countries. In some instances, refugees may apply for protection from within their home countries (for example, Cuba, Vietnam, former Soviet Union). If accepted as a refugee, the person is sent to the U.S. and receives assistance through the "refugee resettlement program."

  A person who is already in the United States and fears persecution if sent back to his or her home country may apply for **asylum** in the U.S. Like a refugee, an asylum applicant must prove that he or she has a "well-founded" fear of persecution based on one of the

five enumerated grounds listed above. Once granted asylum, the person is called an **"asylee."** In most cases, an individual must apply for asylum within one year of arriving in the U.S. Refugees and asylees may apply for permanent residence after one year in the U.S.

How many immigrants are admitted to the United States every year? By statute, Congress has placed a limit on the number of foreign-born individuals who are admitted to the United States annually as family-based or employment-based immigrants or as refugees.

- **Family-based immigration is limited by statute to 480,000 persons per year.** Family-based immigration is governed by a formula that imposes a cap on every family-based immigration category, with the exception of "*immediate relatives"* (spouses, minor unmarried children, and parents of U.S. citizens). The formula allows unused employment-based immigrant visas in one year to be dedicated to family-based immigration the following year, and unused family-based immigration visas in one year to be added to the cap the next year. This formula means that there are slight variations from year to year in family-based immigration. Because of the numerical cap, there are long waiting periods to obtain a visa in most of the family-based immigrant categories.

  There is no numerical cap on the number of *immediate relatives* (spouses, minor unmarried children and parents of U.S. citizens) admitted annually to the U.S. as immigrants. However, the number of immediate relatives is subtracted from the 480,000 cap on family-based immigration to determine the number of other family-based immigrants to be admitted in the following year (with a floor of 226,000).

- **Employment-based immigration is limited by statute to 140,000 persons per year.** In most cases, before the Immigration and Naturalization Service (INS) will issue an employment-based immigrant visa to a foreign-born individual, the employer first must obtain a "labor certification" from the U.S. Department of Labor confirming that there are no U.S. workers able, qualified and willing to perform the work for which the foreign-born individual is being hired. The Department of Labor also must confirm that employment of the foreign-born individual will not adversely affect the wages and working conditions of U.S. workers. The labor certification process takes an average of 2 years to complete.

- The United States accepts only a **limited number of refugees** from around the world each year. This number is determined every year by the President in consultation with Congress. The total number of annual "refugee slots" is divided among different regions of the world. For fiscal year 2004, the number of refugee admissions was set at 70,000. Regional ceilings are as follows:

Africa	25,000	Latin America/Caribbean	3,500
East Asia	6,500	Near East/South Asia	2,000
Europe & Central Asia	13,000	Unallocated Reserve	20,000

  There is no limit on the number of people who can be granted asylum each year. Both refugees and asylees may apply to become LPRs after one year, but only 10,000 asylees are permitted to become LPRs in any fiscal year. No such limitation is imposed on refugees.

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FAMILY-BASED IMMIGRATION

Historically, family reunification has been the principal policy underpinning U.S. immigration law. Family-based immigration, a tightly regulated system, allows for close relatives of U.S. Citizens and Legal Permanent Residents (LPRs) to rejoin their families here in America.

Family-based immigrants are admitted to the U.S. either as *immediate relatives* of U.S. citizens or through the *family preference system*.

Immediate Relatives are:

- Spouses of U.S. citizens;
- Unmarried minor children of U.S. citizens; and
- Parents of U.S. citizens.

There is no cap on the number of visas available each year for immediate relatives.

The Family Preference System allows into the U.S.:

- Adult children (unmarried and married) and brothers and sisters of U.S. citizens; and
- Spouses and unmarried children (minor and adult) of LPRs.

There are a limited number of visas available every year under the Family Preference system.

Under current immigration law, visas are allocated as follows:

The Family Preference System

U.S. Sponsor	Relationship	Preference #	Visa Allocated
U.S. Citizen	unmarried adult children (21 yrs or older)	1st	23,400visas/yr[1]
LPR	spouses and minor children	2nd A	87,900 visas/yr
LPR	unmarried adult children (21 yrs or older)	2nd B	26,300 visas/yr
U.S. Citizen	married adult children	3rd	23,400 visas/yr[2]
U.S. Citizen	brothers and sisters	4th	65,000 visas/yr[3]

[1] Plus any visas left over from the 4th preference.
[2] Plus any visas left over from the 1st and 2nd preferences.
[3] Plus any visas left over from the previous preferences.

AILA Backgrounder

BUSINESS IMMIGRATION TO THE UNITED STATES
A BASIC OVERVIEW

Current U.S. immigration law allows people who have skills and talents needed in the United States to be admitted to the United States to work on a temporary or permanent basis. This paper provides a basic overview of the current employment-based immigration system.

Nonimmigrant (Temporary) Visas for Business

- **There are more than 20 different kinds of nonimmigrant visa names and types.** Each is defined by Congress in the statute to meet a particular need of the U.S. economy. Some of these visas can be used for employment in the United States, under tightly regulated conditions.

- **These foreign nationals are allowed to enter the United States for temporary, specifically defined periods of time** and in most cases must show intent to return to their home country at the end of their temporary stay.

- **Nonimmigrants with permission to work in the United States are either sponsored by a U.S. employer based on a specific job offer and must work only for that employer, or have work permission for specific objectives.** (For example, students granted practical training in their field of study or professors and researchers working in international exchange programs.)

- **Most foreign nationals undergo *at least two* screening processes in order to come to the United States.** The State Department Consular Officer decides whether the individual's purpose in coming matches one of the approved categories, and whether the person meets all other eligibility criteria for admission (that is, they're not a criminal, have not previously committed fraud, etc.) before issuing a visa to allow the individual to come to the United States. Upon arrival, all nonimmigrants are inspected by the INS to reconfirm their qualification for admission, and to determine the appropriate nonimmigrant classification and authorize a specific length of stay. Some employer-sponsored nonimmigrants must have INS approve a petition on their behalf, based on highly defined criteria, before even applying for their visa.

- **Some work-authorized categories are limited by annual levels** (for example, H-1B professionals, and H-2B temporary or seasonal workers).

Immigrant (Permanent Resident) Visas for Business

- **There are five basic types of business immigrant visas,** ranked in order of priority of need by U.S. employers and the economy, as determined by Congress. *All categories are limited by annual levels and per-country levels.*

- **These immigrants become permanent residents** -- obtain "green cards" -- and the indefinite right to live and work in the United States, as long as they do not commit any offense that would render them deportable.

- **Business immigrants usually are sponsored by a U.S. employer based on a demonstrated need.** Some business immigrants may self-petition if they meet statutory criteria for "extraordinary ability" in their field, or if their entry would be in the "national interest."

- **Protections for U.S. workers are built into the system.** Most business immigrant cases require Department of Labor certification that no U.S. workers are able, qualified or willing to take the position offered to the foreign national and that admitting the immigrant won't negatively impact the wages and working conditions of similarly situated U.S. workers. The only categories exempt from this requirement are those for individuals who are extraordinary or outstanding in their field or whose presence is in the "national interest."

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EMPLOYMENT-BASED IMMIGRATION

THE EMPLOYMENT PREFERENCE SYSTEM allows certain immigrants to obtain permanent residence ("green cards") in the United States to work. Currently, immigration law allots **140,000** employment-based visas to immigrants. These employment-based visas are divided into the following categories:

FIRST PREFERENCE:	Up to **40,000** visas a year may be issued to *priority workers*. People who have "extraordinary ability," "outstanding professors and researchers," and "certain multinational executives and managers" fall into this category. In addition, any visas left over from the fourth and fifth preferences (see below) are added to this category.
SECOND PREFERENCE:	Up to **40,000** visas a year (plus any visas left over from the first preference) may be issued to persons who are "members of the professions holding advanced degrees or aliens of exceptional ability" in their field.
THIRD PREFERENCE:	Up to **40,000** visas a year (plus any visas left over from the first and second preferences) may be issued to *skilled workers, professionals, and other workers*. The *other workers* category covers workers who are "capable of performing unskilled labor," and who are not temporary or seasonal. Workers in this category are limited to **5,000** visas per year. *Skilled workers* must be capable of performing skilled labor requiring at least two years training or experience.
FOURTH PREFERENCE:	Up to **10,000** visas a year may be issued to certain special immigrants, including ministers, religious workers, former U.S. government employees and others.
FIFTH PREFERENCE:	Up to **10,000** visas a year may be issued to persons who have between $500,000 and $3 million to invest in a job-creating enterprise in the U.S. At least 10 U.S. workers must be employed by each investor. The amount of investment needed can vary depending on which area of the country will benefit from the investment. If the investor fails to meet the conditions specified, he or she can lose permanent resident status.

NONIMMIGRANT (TEMPORARY) VISAS
A BASIC PRIMER

There is a wide range of temporary visas, used for many different purposes, with validity periods ranging from a few days to several years. The INS must approve some in advance before being reviewed and issued by the State Department; others are only reviewed by the State Department. Visas may be granted to the principal applicant and to his or her dependents (spouse and minor children).

There is a difference between a visa and a status, although both are referred to in the same manner and with the same alphabetical designation (based on the respective section of the Immigration and Nationality Act). A visa is simply a document in the person's passport. It serves as a "ticket" to ensure that a foreign national can board the airplane to the U.S. A person's visa status is the category in which he or she is admitted to the United States and also determines the period of time he or she may remain. An individual's visa status is granted by the INS once the applicant arrives at the border or a port of entry, and can be changed or extended by the INS at one of its remote Service Centers.

The different temporary visa categories are:

A: Diplomatic employees and their households
B: Business visitors (B-1) or tourists (B-2)
C: Transit visa (pass-through at an airport or seaport)
D: Crewmember (air or sea)
E: Treaty-Investors or Treaty-Traders (from countries where we have a treaty of commerce and investment)
F: Students
G: Employees of International Organizations (IMF, OPIC, OAS, International Red Cross, etc.)
H: Temporary Workers. Can be professionals (H-1B), nurses (H-1C), agricultural workers (H-2A), temporary or seasonal workers (H-2B), or trainees (H-3)
I: Representatives of international media
J: Exchange visitors (educational exchange students, au pairs, graduate medical trainees, practical training students, professors and researchers, short-term scholars, camp counselors)
K: Fiances and fiancees; spouses of U.S. citizens married abroad
L: Intracompany transferees (executives, managers, persons with proprietary knowledge)
M: Language and vocational students
N: NATO employees

O: ***Extraordinary ability aliens***

P: Athletes, entertainment groups (such as orchestras) and support personnel
Q: Cultural exchange visitors (example: *Smithsonian Folklife Festival*)

R: ***Religious workers***

S: Criminal informants
T: Victims of international trafficking in persons
U: Victims of spousal or child abuse
V: Spouses and minor children of permanent residents who are waiting for green cards.

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AILA Issue Paper

Comprehensive Immigration Reform

THE ISSUE: Our current immigration system needs reform. It meets neither our security nor our economic needs, nor does it adequately reunify close family members of U.S. citizens and legal permanent residents. The status quo also encourages illegality. Serious reform will contribute to our national security, respond to worker shortages that remain a critical issue because of demographic, economic and education trends, and reunify families. Such reforms need to be comprehensive and must include: an earned adjustment for people who are living here, working and contributing to the U.S.; a future flow visa program that would allow essential workers to enter the U.S. safely, legally, and expeditiously; and backlog reductions in family-based immigration and decreased delays in business-based immigration. Proposals that fail to embrace these components and seek reform through increased enforcement of the current unworkable system will only serve to perpetuate and exacerbate the current problems.

BACKGROUND: Our immigration system is broken and increasingly disconnected from our nation's security needs and the economic and social contexts that must inform U.S. immigration policies. Employers in many sectors (such as health care and construction) cannot acquire needed workers and/or find that their most valuable workers are undocumented. Hard-working, tax-paying people who contribute to our economy have no legal channels to obtain proper documentation and are forced to live underground. Families remain separated for years due to bureaucratic processing delays and long backlogs. Without access to legal migration channels, smugglers and black market counterfeiters profit from undocumented workers, and we spend precious resources at our borders and elsewhere targeting, not those who want to do us harm, but people who seek to fill our labor market needs or reunify with their families.

Comprehensive immigration reform will make legality the norm and enhance our security: It will bring hard working immigrants out of the shadows to be reviewed and scrutinized by our government, create a legal flow by which needed workers can enter and leave the U.S., shut down black markets that represent a weak spot in our security apparatus, facilitate family reunification, and help us maximize our security efforts.

CURRENT STATUS: Several measures have been introduced in the 108th Congress. In addition, the House Democratic Leadership issued a statement of principles on immigration reform and President Bush announced his Administration's immigration reform proposal.

Bipartisan Senate Bill: S. 2010, the Immigration Reform Act of 2004 introduced by Senators Chuck Hagel (R-NE) and Tom Daschle (D-SD), is the only initiative introduced to date that includes all three components necessary for comprehensive immigration reform: family reunification through family backlog reduction; a new temporary worker program; and access to an earned adjustment for eligible people already living and working in the U.S. While AILA has concerns with some of the bill's provisions, the Immigration Reform Act is a giant step forward to help this nation achieve the goal of creating an immigration system that reflects our nation's values, our traditions, and our needs.

The Immigration Reform Act of 2004 addresses the issue of family reunification with the following provisions: immediate relatives are no longer subtracted from the 480,000 cap on family-based immigration; the spouses and minor children of legal permanent residents are reclassified as immediate relatives; grounds of inadmissibility are addressed; and derivative eligibility is expanded for all immediate relatives.

The Immigration Act of 2004 also includes a "Willing Worker" program that revolves around a needed reform of the current H-2B program and the creation of a new H-2C program. The bill reforms the H-2B program as follows: it caps the program at 100,000 for five years, after which the numbers revert to 66,000; admission of H-2B visa holders is limited to nine months in any twelve month period (with a maximum of 36 months in any 48 month period); and, with some exceptions, it does not allow portability. The new H-2C program is a two-year program renewable for another two years. It is capped at 250,000 annually, and sunsets five years after regulations are issued. Portability is allowed after three months, with exceptions for earlier transfers allowed under certain circumstances. An attestation is required for both visas, with employers having to meet certain U.S. worker recruitment requirements. Dual intent is allowed in both visas and derivative status is available for both as well. The bill's worker protection provisions include a complaint-driven procedure in which the DOL and the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) will investigate claims and provide for mediation, and in certain instances hearings and further appeals. Employer groups and unions can petition for these workers. The bill also creates a commission to review the impact of the program and report on wage determinations. Petition and filing fees for each worker are on a sliding scale, based on the number of the employer's employees.

S. 2010 also includes an earned adjustment for those who meet several requirements including: physical presence for five years prior to the bill's introduction; successful fulfillment of a past work requirement (working at least three of the five years preceding introduction) and a prospective work requirement (at least one year following enactment); payment of income taxes or entry into an agreement with the IRS to pay all outstanding liabilities; and payment of a $1,000 fee. Other provisions of this earned adjustment include: spouses and minor children are eligible to adjust with the principal applicant; administrative and judicial review provisions are included in recognition of the problems generated by past laws, as are certain waivers and grounds of inadmissibility; and, to encourage employer participation, employers are not subject to civil and criminal tax liability related to the employment of these individuals. Those workers who meet the physical presence requirement, but not the work requirement of the earned adjustment, are eligible for a transitional worker status of three years would be granted employment authorization and permission to travel, and would be eligible to adjust status to permanent resident.

Other Legislation: Bills introduced by Representatives Flake (R-AZ), Kolbe (R-AZ) and Senators McCain (R-AZ) (H.R. 2899/S.1461) and Cornyn (R-TX) (S. 1387) take important steps toward achieving reform, but fall short in one way or another. However, it is very significant that Senators from border states acknowledge the need for a legalization program for eligible people living here (although the provisions in their bills on this subject raise some concerns) as well as a worker program. It also is significant that they recognize, as plainly articulated by Senator McCain, that our nation cannot achieve border security unless we reform our immigration laws. Missing from their initiatives is any recognition of the need to reduce the backlogs in family-based immigration.

S. 1461/H.R. 2899 would allow undocumented immigrants living and working in the U.S. to become lawful temporary workers, permit them to change employers, and provide them with an option to become legal permanent residents through either an employer-sponsored petition or a self-petition. However, along with not addressing the long backlogs in family immigration, this measure appears to encompass those who would fall under the current H-2A, H2-B and H-1B programs (without terminating these programs). AILA strongly believe that this bill should not cover agricultural workers or foreign professionals.

More specifically, S. 1461/H.R. 2899 would create two new nonimmigrant worker visa categories: the H-4A and H-4B temporary worker categories. H-4A workers would be admitted initially for a three-year period that is renewable for an additional three years. Employers must attempt to recruit U.S. workers prior to filing a petition for an H-4A worker and re-advertise prior to filing an extension petition. H-4A workers can switch employers and are eligible to adjust to permanent resident status. Immediate family members of H-4A workers cannot accompany the worker unless they also have H-

4A status. The legislation also creates an electronic job registry to satisfy the job recruitment requirements and to advertise the job to non-US workers, as well as an employment eligibility confirmation system that would confirm a person's identity and employment authorization. Both the job registry and employment eligibility confirmation system are ambitious initiatives that raise many concerns. Our government has yet to create a database of the size that this one would need to be that works properly. In addition, the proposal is unclear about how the registry would work – specifically, how U.S. workers and foreign workers would gain access to it and thus how it would match willing workers with employers. The massive employment eligibility confirmation system would be a welcome alternative to the dysfunctional and ineffective employer sanctions program currently in place. However, a system of this size and scope has yet to be developed that works effectively and can easily correct mistakes.

S. 1461/H.R. 2899 also would offer the opportunity for undocumented people to apply for temporary H-4B status. Such individuals must have entered the U.S. before August 1, 2003, and resided in the U.S. in an unlawful status after such date and through the application for H-4B status. These individuals must also have been employed since that date and through the date of application or be the spouse or child of an H-4B worker. To apply for permanent residence, they must remain in valid H-4B status for three years and then apply for a change to H-4A status. From H-4A status, they can apply for permanent residence either through employer sponsorship or self-petitioning. Given the requirements of this section, it would take anywhere from three (unlikely) to nine years for an H-4B worker to adjust status to permanent resident.

Among other provisions, S. 138, introduced by Senator Cornyn, would create a guest worker program with any country entering into an agreement with the U.S. Workers enrolled in the program would be eligible for a "W" visa and be placed in job openings in the U.S. The program would encompass both seasonal and nonseasonal employment, with no limitations on the types of employment for which a W visa could be utilized. Seasonal guestworkers would be limited to 270 days in any calendar year, and nonseasonal guestworkers to 12 months -- with two one-year extensions permitted. Workers would be required to return to their home countries for 6 months before reapplying. W workers, having worked in the program for three continuous years, are eligible to apply from their home countries for legal permanent resident status. Priority would be granted based on a point system including factors such as whether the worker is sponsored, has received promotions and pay increases, paid taxes, is proficient in English, is educated, and has refrained from illegal activity. AILA does not support the provisions in S. 1387 that fail to limit the types of employment encompassed in the W visa. We believe that this bill should not cover agricultural workers or foreign professionals. In addition, the requirements in S. 1387 mandating that W workers return to their home countries to apply for permanent residence through a point system would be disruptive to the labor force and insert a substantial degree of uncertainty thereby limiting the participation of potential workers.

House Democratic Leaders Introduce Statement of Principles: The House Democratic Leaders issued on January 28, 2004 the "Democratic Statement of Principles on Immigration Reform." This statement reflects Democratic congressional leadership's support for reforming our immigration policies in ways that better reflect "our core mutual values of family unity, fundamental fairness and economic opportunity," and recognizes "the profound contribution immigration has made to the prosperity of our nation." These lawmakers call for a "more rational and responsible immigration policy" that also will "improve border security and controls." The principles reflect the understanding that meaningful reform of our immigration laws can only be achieved by addressing a variety of interrelated issues. Reforms that target one problem in the system while ignoring others will have but a fleeting impact and ultimately will perpetuate the chronic dysfunction that currently characterizes our system. These principles are: family reunification, earned access to legalization, immigrant student adjustment, border safety and protection, an enhanced temporary worker program, civil liberties, and fairness for immigrants and legal residents.

President Bush Announces Reform Proposal: The Bush Administration on January 7, 2004 unveiled its immigration proposal. The Administration's reform proposal is centered on an uncapped temporary worker program intended to "match willing foreign workers with willing U.S. employers when no Americans can be found to fill the job." The program would grant program participants temporary legal status and authorize working participants to remain in the U.S. for three years, with their participation renewable for an unspecified period. Initially, the program would be open to both undocumented people as well as foreign workers living abroad (with the program restricted to those outside of the U.S. at some future, unspecified date). American employers must make reasonable efforts to find U.S. workers. Under this proposal, participants would be allowed to travel back and forth between their countries of origin and "enjoy the same protections that American workers have with respect to wages and employment rights." The proposal also includes incentives for people to return to their home countries and calls for increased workplace enforcement as well as an unspecified increase in legal immigration.

While these and other general provisions of the plan are known, much is still unclear and could spell the difference between a proposal that works and one that does not. For instance, it is unclear if the proposal would create meaningful access to permanent legal status because, while it does not prohibit temporary workers from applying for legal permanent residency, it would allow them to do so only under existing immigration law. The question thus remains whether the Administration's plan would adequately deal with the three-year, ten-year, and permanent bars, as well as the grounds of inadmissibility that put road blocks in the way of undocumented people using this program to adjust. It also is unclear if the proposal adequately addresses other major concerns such as the long backlogs in legal immigration. The proposal would allow temporary worker program participants who seek to remain in America to pursue citizenship, and calls for a "reasonable increase in the annual limit of legal immigration" for others who seek to immigrate to this country. These temporary workers would be placed in line behind those already in line. However, unless current law is changed, the process to become a legal permanent resident could take decades for these temporary workers. Finally, the proposal is silent on the pressing issue of family backlog reductions. Our current immigration system is characterized by long backlogs that keep close family members separated for as long as 20 years. Finally, AILA has long maintained that comprehensive immigration reform is needed to address the current situation. (See below.)

AILA's POSITION: Our immigration system needs to work for America. Congress must address this issue because the status quo is unacceptable. AILA supports reform that reflects the following:

1. Immigration Reform Must Be Comprehensive: Since many of the problems with the U.S.'s current immigration system are interrelated, reform must be comprehensive to successfully address our nation's needs and realities. The status quo is unacceptable, especially in a post-September 11 world in which enhanced security is central, and we need to balance our security with the continued flow of people and goods. Our current system is characterized by families being separated for long periods of time and U.S. employers unable to bring in needed workers. People are forced to live an underground existence, hiding from government for fear of being separated from their families and jobs. The current enforcement system fails to prevent illegal immigration, and precious resources that should be spent on enhancing our security are wasted on stopping hard-working people from filling vacancies in the U.S. Our immigration system needs to be reformed so that legality is the norm, and immigration is legal, safe, orderly, and reflective of the needs of American families, businesses, and national security.

2. Immigration Reform Is an Important Component of Our Enhanced National Security and Effective Enforcement: Immigration reform that legalizes hard-working people already here and that creates a new worker program will help the U.S. government focus resources on enhancing security, not on detaining hard-working people who are filling vacancies in the U.S. labor market and/or seeking to reunite with their close family members. In addition, an earned adjustment program will encourage people to come out of the shadows and be scrutinized by our government, and a new worker visa program will create a legal flow through which people can

enter and leave the U.S. The legality that results from these initiatives will contribute to our national security by helping to focus resources on those who mean to do us harm. Such legality also will facilitate enforcement efforts by allowing our government to focus resources. Enforcing a dysfunctional system only has lead to more dysfunction, not better enforcement.

3. Immigration Reform Needs to Include an Earned Adjustment Program for Eligible People in the U.S. without Authorization: People who work hard, pay taxes, and contribute to the U.S. should be allowed to obtain permanent residence. This reform would stabilize the workforce of U.S. employers, encourage people to come out of the shadows to be scrutinized by our government, and allow immigrants to work and travel legally and be treated equally. Many have been here for years, are paying taxes, raising families (typically including U.S. citizen and lawful permanent resident spouses and children), contributing to their communities and are essential to the industries within which they work. In order to unite families and keep them together, appropriate waivers must be available for grounds of admissibility and deportability.

4. Immigration Reform Needs to Include a New Temporary Worker Visa Program: Current immigration laws do not meet the needs of our economy given projections of worker shortages as our country's demographics shift. A new temporary program would give workers the opportunity to work where they are needed and employers experiencing these shortages the workforce they need to remain competitive. Such a program would provide legal visas, family unity, full labor rights, labor mobility and a path to permanent residence and citizenship over time. Such a program would diminish significantly future illegal immigration by providing people with a legal avenue to enter the U.S. and return, as many wish, to their home countries, communities, and families.

5. Immigration Reform Must Open Up Legal Channels for Family- and Business-Based Immigration: Our immigration system has been characterized by long backlogs in family-based immigration and long delays in business-based immigration. Illegal immigration is a symptom of a system that fails to reunify families and address economic conditions in the U.S. and abroad. To ensure an orderly future process, our system must reduce bureaucratic obstacles and undue restrictions to permanent legal immigration. Developing an increased legal migration flow will make immigration more orderly and legal. It also will allow more people to reunite with their families and work legally in the U.S., and would facilitate fair, equitable, and efficient immigration law, policy, and processing. It is essential to make legal future immigration that otherwise will happen illegally.

6. Immigration Reform Initiatives Must Be Adequately Funded: To be successful, immigration reform must be adequately funded. Congress frequently has passed new immigration laws with unfunded, complicated, and conflicting mandates that have contributed to long backlogs and ineffective, inefficient and unfair services. Reforms must be accompanied by clear mandates and adequate funding in the form of direct congressional appropriations.

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ESSENTIAL WORKERS HELP OUR ECONOMY

What are Essential Workers?

- **"Essential Workers"** are the unskilled and semi-skilled workers employed in all sectors of our economy. Essential workers include restaurant workers, retail clerks, construction trades people, manufacturing line workers, hotel service workers, food production workers, landscape workers, and health care aids. These individuals often work in the jobs that many Americans do not choose, but which are "essential" to keep our economy and our country growing.

Aren't there enough U.S. workers for these jobs?

- **New jobs will increase dramatically by 2012, boosting the demand for Essential Workers**. Bureau of Labor Statistics (BLS) projections indicate that the U.S. will create 21.3 million new jobs by 2012. During this period, employment growth will be concentrated in the service-producing sector, with health services, leisure and hospitality, transportation and warehousing among the fastest growing sectors.
- **Unskilled and semi-skilled occupations have the highest projected growth rate.** The Department of Labor ranked the top 30 occupations with the largest projected job growth from 2002-2012. Of the occupations listed, 20 require only short-term or moderate-term on the job training.
- **As the baby boomers age demand increases for Essential Workers.** The aging population and increased life expectancies will increase the need for health services. The healthcare services industry is expected add roughly 3.5 million jobs- 1 out of every 6 new jobs created by 2012.
- **The U.S. is not producing enough new workers**. The Bureau of Labor Statistics projects that as the baby boomers retire, growth in the work force will slow to 0.4% per year. Barring unforeseen increases in immigration and/or participation rates among the elderly, there will be a reduction in the total size of the nation's workforce.
- **Employers are doing the "right" things.** Essential Worker employers have led the way in welfare-to-work, school-to-work and other initiatives that have been successful in reducing welfare rolls and getting graduates jobs, but these efforts still are insufficient. Employers are raising wages, offering improved benefits, signing bonuses and relocation pay.

Isn't there already a visa category for essential workers that these employers can use?

- **Yes and No.** The H-2B temporary visa program is useful only for employers who can establish that their need for foreign workers is temporary (seasonal, a one-time occurrence, or a peak load or intermittent need). If the employer's need is year-round or does not fall into one of the definitions used by the Department of Labor or Immigration Service, the employer cannot use the H-2B visa to fill labor needs. A nonimmigrant visa category does not exist for employers who need workers for more than one year or for employers who have permanent or long-term jobs, for example in the health care, retail, hospitality and other industries. Even for employers with truly temporary needs, the H-2B category is fraught with bureaucratic red tape that makes it extremely time-consuming and difficult to use. The permanent immigrant category for non-professionals in occupations that require less than two years' experience is virtually useless; only 5,000 visas are available annually, and the backlog of waiting cases is typically over ten years long. As a result, employers often are forced to send their work overseas, cut back, or close their doors.

With concerns about national security, is now the time to look at a temporary worker program?

- **Yes.** A temporary worker program would help control immigration by legalizing the flow of people seeking to enter and leave this country. It would help satisfy the U.S. demand for workers and provide a legal and safe mechanism for workers to enter and leave the U.S. As Senator McCain articulated, "Immigration is a national security issue for all Americans and a matter of life and death for many living along our borders."

Is immigration a tool that can help strengthen our economy?

- **Yes. Alan Greenspan, Chairman of the Federal Reserve Bank, and others have called upon Congress to reexamine our immigration policies as a means of maintaining a strong economy.** In Congressional testimony, Mr. Greenspan demonstrated the link between alleviating inflationary pressures caused by a tight labor market and stated that tight labor markets could be the greatest threat to our economy, as they promote inflation. He stated that Congress should look at the contributions that immigrant workers can make to help reduce the chance of inflation and help our economy.

What needs to be done?

- **Congress and the Administration need to commit to passing bi-partisan comprehensive immigration reform to match willing workers with willing employers.** The United States needs a regulated, workable immigration system that allows foreign nationals to work here when there is evidence of a shortage of available U.S. workers, that allows those individuals already here and working to obtain legal status and work authorization and reduces the backlogs allowing the families of workers in the U.S. to reunite. Such initiatives must receive adequate funding in order to succeed and reduce the long visa processing backlogs that make current programs difficult to use.

  Several measures have been proposed that take important steps towards introduced achieving reform. Members of Congress from border states were among the first to recognize the need for this reform and take action. Representatives Flake (R-AZ), Kolbe (R-AZ) and Senator McCain (R-AZ) (H.R. 2899/S.1461) and Senator Cornyn (R-TX) (S. 1387) introduced legislation that would create an earned adjustment for eligible people living here (although the provisions in their bills on this subject raise some concerns) as well as a worker program. However, these bills fall short in several respects.

  Bipartisan efforts in the Senate resulted in the Immigration Reform Act of 2004 (S. 2010), introduced by Senators Chuck Hagel (R-NE) and Tom Daschle (D-SD). S. 2010 is the only initiative introduced to date that includes access to an earned adjustment, a reform of the existing H-2B program; a new "willing worker" temporary program; and family backlog reduction. Although AILA has concerns with some provisions in the bill, S. 2010 is a major step towards achieving a workable immigration system.

  The Bush Administration also has recognized the need to overhaul our immigration laws. The President has announced a proposal that is based on a temporary worker program of 3 years, renewable for an undetermined period. Initially, the program would be open to both undocumented people as well as foreign workers living abroad. The proposal also includes incentives for people to return to their home countries and calls for increased workplace enforcement as well as an unspecified increase in legal immigration. While these and other general provisions of the plan are known, much is still unclear and could spell the difference between a proposal that works and one that does not.

  Our country's leaders have recognized the need to improve our immigration laws. Now it is time to roll up our sleeves and get to work on comprehensive solutions that will meet the needs

of our economy and ensure that our immigration laws in sync with our security needs and the needs of American businesses and families.

38IP2004 02/13/04

AILA Issue Paper

AGJOBS — WE NEED REFORM TO ACHIEVE A STABLE AND LEGAL AGRICULTURAL WORK FORCE

THE ISSUE: Our immigration laws fail to account for the economic and social realities confronting the United States. Nowhere is this fact more evident than in the agricultural sector. The shortage of legal, documented agricultural workers in the U.S. has reached crisis proportions. According to a conservative estimate by the Department of Labor (DOL), of the United States' 1.6 million agricultural work force, over 50% is comprised of undocumented foreign nationals. Private estimates run to 75% or higher. These individuals work grueling jobs to put food on our table and yet they remain unable to assert the most basic rights and protections.

Bipartisan legislation introduced in the House and Senate, the Agricultural Job Opportunity, Benefits, and Security (AgJobs) Act of 2003 (S. 1645/H.R. 3142), takes a two-pronged approach to achieving a stable and legal, agricultural work force. The legislation's long-term focus is on streamlining the H-2A guest worker program to make it more practical, secure and fair, while short-term relief is provided through the bill's earned adjustment program. The bill thus recognizes that immigration reform must include both a legal means by which employers can hire foreign workers in the absence of available U.S. workers and a means to legitimize the status of those immigrants already present in the U.S. who have been supporting our economy with their labor. The AgJobs Act was introduced on September 23, 2003, by Representatives Chris Cannon (R-UT) and Howard Berman (D-CA), and by Senators Larry Craig (R-ID) and Edward Kennedy (D-MA).

BACKGROUND: The bipartisan AgJobs legislation is a landmark example of business, immigrant, agriculture, labor, civic and faith-based groups working together to fix long-standing problems with agricultural labor policy. The goodwill and cooperation between all parties on this issue can provide a model for addressing vital labor force challenges and other difficult policy issues in the future. The AgJobs Act would reform the H-2A process so that agricultural employers unable to find American workers would be able to hire needed foreign workers. Furthermore, the legislation provides a reasonable mechanism for undocumented agricultural workers to earn legal status, as more fully discussed below. These two key elements are the cornerstone for the comprehensive immigration reform for service sector workers so urgently needed to address this nation's economic and security interests.

Long-term relief via a streamlined H-2A program: The legislation's long-term focus is on streamlining the outdated and unworkable H-2A foreign agricultural worker program while preserving and enhancing key labor protections. Currently, agricultural employers who are unable to hire sufficient numbers of domestic workers for their operations are required to undergo a complicated, lengthy, uncertain, and expensive process of demonstrating such shortage to the government. Only then are they permitted to arrange for the hiring of temporary nonimmigrant guest workers. Indeed, the current H-2A program is so difficult to navigate and expensive that it places only about 40,000-50,000 guest workers per year—a mere 2 to 3% of the estimated total agricultural work force. A General Accounting Office study found that the DOL missed statutory deadlines for processing employer applications to participate in the H-2A program more than 40% of the time. Moreover, workers without the proper documentation must live in the shadows and are vulnerable to severe exploitation.

The bipartisan AgJobs Act would replace the current bureaucratic nightmare for both employers and prospective workers with a "win-win" solution. A streamlined "attestation" process similar to the one used in connection with the H-1B program would speed up the certification of H-2A employers and the hiring of needed workers. H-2A workers would have new rights to seek redress through

mediation and federal court enforcement of specific rights. American consumers also would benefit from a safe, stable, American-grown food supply rather than having to rely increasingly on foreign imports. The AgJobs Act would bring about the comprehensive reforms needed to stabilize the current agricultural labor crisis and would ensure a future workforce for the labor-intensive U.S. agricultural sector.

Short-term relief in the form of an earned adjustment program: In the short-term, the bipartisan AgJobs Act would provide relief through its earned adjustment program under which undocumented agricultural workers would be eligible to apply first for temporary resident status based on their past work experience, and then to become permanent residents upon satisfying prospective work requirements. To be eligible for the program, individuals would have to demonstrate that they performed agricultural work in the U.S. the lesser of 575 hours or 100 work days during any 12 consecutive months in the 18-month period ending on August 31, 2003. Eligible applicants would be granted temporary resident status while they work towards the permanent residence requirements. Workers would be eligible to apply for permanent residence status if they meet the following requirements: performed at least 2060 hours or 360 work days (whichever is less) of agricultural employment during the six-year period ending on August 31, 2009, including at least 240 work days during the first three years following adjustment to temporary status, and at least 75 days of agricultural work during each of three 12-month periods in the six years following adjustment to temporary resident status. Eligible individuals would have to apply for adjustment to permanent resident status by August 31, 2010.

AILA'S POSITION: AILA strongly supports the passage of the bipartisan AgJobs bill. This legislation is not only a plus for workers and employers, but also represents a major step towards reforming an immigration system that is out of whack with reality. The bill's provisions would constitute a positive gain for both workers and employers by creating a stable labor force and a useable program through which future workers can legally enter.

Why this bipartisan legislation is good for America: It is in the national security interest of the U.S. to know who is working in food production and to have an effective means of monitoring these essential workers. This legislation provides that capability. With the enactment of AgJobs, an estimated 500,000 workers would be brought out of the underground economy and scrutinized by our government as they begin the process toward legal status. Moreover, future guest workers under the H-2A program would be screened and monitored to address security concerns. Encouraging people to come out of the shadows and be reviewed by our government will enhance our security by allowing our government to focus on the people who mean to do us harm rather than on those who cross our borders to fill our labor market needs.

Earned adjustment does not equal "amnesty": Critics of this legislation have misleadingly dubbed its earned adjustment program an "amnesty program." This is not the case. Under the bill, workers would not only have to demonstrate past work contributions to the U.S. economy, but also make a substantial future work commitment to earn the right to remain in this country. Moreover, the AgJobs' earned adjustment program would be a one-time opportunity for workers already present in this country who have a significant U.S. work history, so it would not encourage future unauthorized migration.

Moreover, while the legislation focuses on the unique needs of the agricultural sector, its dual-pronged approach sets the stage for much-needed comprehensive immigration reform encompassing other sectors of our economy. To fully address our economic, humanitarian and security needs, such reform must include: an earned legalization for undocumented immigrants living and working in the U.S.; a new worker program that would legalize future flows of essential workers; and a reduction of the backlogs in family-based immigrant visas.

47IP4001 2/23/04

AILA Issue Paper

Student Adjustment for Deserving Children

THE ISSUE: Children in the U.S. each year are prevented from pursuing their dreams of going to college because they have no legal status. Despite the fact that many of these children have grown up in the U.S., attended local schools, and have demonstrated a sustained commitment to learn English and succeed in our educational system, our immigration laws provide no avenue for these students to become legal. Many of these children were brought to the U.S. by their parents at an age at which they were too young to understand the legality of their arrival, let alone take action to rectify this decision. Bi-partisan legislation introduced in the 108th Congress would allow immigrant students who have grown up in this country, graduated from high school, and have no criminal record, to go to college and legalize their immigration status.

BACKGROUND: Numerous cases in the past year highlight the need for comprehensive legislation that would adjust the status of children who are long-term residents of the U.S. For example:

- **Jesus Apodaca**, an 18-year-old honor student, was brought by his parents to the U.S. illegally when he was 12. In opposing Jesus's deportation, Senator Ben Nighthorse Campbell of Colorado accurately described Jesus's plight, "This kid is an American, for crying out loud, he just doesn't have his citizenship. He came in as a little boy. I'm not even sure when you are 12 years old and your daddy says 'let's go,' that you even understand the immigration laws."
- **Hitesh Tolani**, now 20 years old, was brought to the U.S. from Sierra Leone at 18 months of age. While he and his mother were awaiting permanent citizenship, several family members died, thus invalidating their petition. Hitesh was a college junior when he and his mother were ordered deported last November.

Neither these individuals, nor the many similarly situated children to whom this legislation would apply, had available to them the two traditional means of gaining legal status: a sponsoring family member or an employer.

In recognition of the fundamental unfairness these cases demonstrate, lawmakers in Colorado and South Carolina have introduced private legislation that would legalize the status of these two children. The problem with this type of legislation is that the injustice that these children face is not unique. A comprehensive student adjustment bill is the appropriate solution to the current situation and an obviously preferable alternative to the ad hoc, piecemeal approach of private bill sponsorship.

In the 108th Congress, two bipartisan measures were introduced that would address the needs of the many children who face the same circumstances. In the House, Representatives Chris Cannon (R-UT), along with Howard Berman (D-CA) and Lucille Roybal-Allard (D-CA), introduced H.R. 1684, the Student Adjustment Act on April 9, 2003. The Student Adjustment Act would legalize young people who have good moral character, have lived in the U.S. at least five years, are in school in 7th grade or above, and are under 21 years old. In addition, this bill would amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to again permit states to determine residency for in-state tuition purposes. The practical effect of this amendment is that these deserving children will now have the opportunity to afford the college they have worked so many years to attend. The House has yet to move on this legislation.

In the Senate, Senators Orrin Hatch (R-UT) and Richard Durbin (D-IL), introduced S.1545, the Development, Relief, and Education for Alien Minors (DREAM) Act on July 31, 2003. The DREAM Act would grant conditional permanent resident status to young people who came to the

U.S. before the age of 16, have good moral character, have lived in the U.S. at least five years at the time of enactment, and have graduated from high school. As with the Student Adjustment Act, the DREAM Act would permit states to determine residency for in-state tuition rates.

In late October, the Senate Judiciary Committee debated the DREAM Act and passed it out of committee by a 16-3 vote. Although we are pleased that the bill moved out of committee on such a strong vote, we are disappointed with an amendment introduced by Senator Dianne Feinstein (D-CA) and Charles Grassley (R-IA) that weakens the bill in several ways. The Feinstein/Grassley amendment makes DREAM Act beneficiaries ineligible for federal financial aid grants (such as Pell Grants), eliminates the community service option as a way to lift conditional residency status, and requires DREAM Act beneficiaries to register in SEVIS, the system that tracks foreign students.

As a consequence of the Feinstein/Grassley amendment, DREAM Act beneficiaries would now need to satisfy one of the two following requirements within six years of their high school graduation to have their conditional status lifted:

(1) Graduate from a two-year college or pursuing a BA or higher degree and be in good standing for at least two years (graduation from certain 1-year occupational programs administered by accredited non-profit or public schools would also satisfy this condition); or

(2) Serve in the US Armed Forces for at least 2 years and, if discharged, has received an honorable discharge.

AILA strongly opposed the Feinstein/Grassley amendment and will work hard to restore provisions this amendment eliminated and oppose any additional weakening amendments.

AILA's POSITION: AILA strongly supports the passage of bipartisan legislation that provides deserving students with an opportunity to apply for legal status and continue their education, and urges Congress and the Administration to support a measure worthy of these deserving children. By providing the opportunity for these children to go to college and gain legal status, America will both strengthen its economic foundation by creating a more educated work force and introduce justice and fairness to our immigration system.

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2/18/04

AILA Issue Paper

CONSUMER PROTECTION AND THE UNAUTHORIZED PRACTICE OF LAW

ISSUE: Immigration law is complex and in a perpetual state of flux, with both laws and policies changing rapidly and requiring constant monitoring. These factors have created a pressing need to enhance and improve the availability of qualified immigration assistance. This need is made stunningly clear whenever the law changes or even when significant changes merely have been proposed. Not only are there never enough lawyers and authorized legal clinics to help people file petitions and applications, but there are numerous instances of people being victimized by fraudulent immigration consultants. These fraudulent consultants, commonly called "notarios," prey on people who are confused by immigrations laws, unaware of their legal rights, and feel vulnerable as they work their way through the maze of immigration laws. These "consultants" extract thousands of dollars to prepare applications that are not filed or are incorrectly filed. The stakes are high when dealing with immigration law. Filing the wrong documents, missing a deadline, or failing to fully disclose all the facts in a case can mean the difference between legal status, deportation, and in the case of some asylum seekers, even death.

BACKGROUND: There is an epidemic of fraud directed against aliens going through the immigration process or seeking to determine their eligibility under the law. Much of this fraud is being perpetrated by immigration "consultants" who pose as licensed immigration attorneys. Many of these "consultants" target Spanish-speaking immigrants by becoming notaries public in order to advertise as "notarios," who are regarded as "attorneys" in Latin America. These "notarios" attempt to fill the void left when legitimate and professional aid is unavailable. They also take advantage of especially vulnerable consumers who generally are less familiar with the law and their legal rights, unaware of their complexity and when it is in their best interests to seek authorized representation, and are uncomfortable with the culture and customs of the U.S. legal system.

A number of bills have been introduced in the past attempting to address the problems posed by immigration consultants, but none have struck the right chords. Some bills have focused on fraud, while others have sought to regulate the activity through licensure. AILA believes the former approach to be inadequate and the latter approach to be misguided, but expects legislation that comprehensively addresses the issue to be introduced soon in the 108th Congress.

AILA'S POSITION: AILA supports consumer protection legislation that would:

- Authorize and fund programs to educate immigrants about their rights, ways to secure legal representation, and methods of law enforcement, redress and assistance.

- Establish jurisdiction at the federal level to prosecute fraudulent consultants who are not presently within the purview of federal law enforcement. Federal jurisdiction is needed given the extent of the problem throughout the country and the fact that fraudulent practices are exploiting federal immigration laws.

- Protect immigrant applicants who come forward to turn in fraudulent operations.

- Provide remedies, where appropriate, for immigrants whose rights have been impaired by fraudulent service providers.

To be truly effective in the area of consumer protection, other measures need to be undertaken as well, including: increasing the availability of representation for the poor and indigent; developing

outreach measures that highlight the availability of legal representatives and accredited representation and identifying methods for distinguishing this representation from unaccredited representation; promoting increased public service by the immigration bar; improving the accreditation process of the Bureau of Immigration Appeals; seeking state-government level solutions to immigration-related unlicensed practice of law and consumer protection problems; and enhancing the competency of Recognized Organizations.

34IP4001 2/17/04

AILA Issue Paper

SOCIAL SECURITY NO-MATCH LETTERS: A SYMPTOM OF A BROKEN IMMIGRATION SYSTEM

THE ISSUE: The Social Security Administration (SSA) in 2002 sent out a record number of "no-match" letters that resulted in thousands of workers resigning or losing their jobs. As a result, employers found themselves suddenly facing worker shortages, and low- and semi-skilled service-oriented industries (many of which already suffer from worker shortages) were squeezed between an American workforce unwilling to fill these positions and an American immigration system with no effective legal channels for obtaining low- and semi-skilled foreign labor. This squeeze caused by the no-match letters is one of the many symptoms of a broken immigration system that needs to be reformed to allow U.S. businesses with labor shortages access to legal workers.

BACKGROUND: The SSA annually reviews W-2 forms and credits social security earnings to workers. If a name or a Social Security Number (SSN) on a W-2 form does not match SSA records, the Social Security earnings go into an earnings suspense file while the SSA works to resolve discrepancies. In recent years, the SSA has been unable to match employee information with SSA records for 6 million to 7 million workers a year. SSA has deposited an estimated $327 billion dollars in the earnings suspense file as a result of the cumulative effect of these no-matches.
In 2002, the SSA issued a no-match letter to each employer with at least one employee whose information did not match the SSA's records. This policy resulted in the SSA issuing 900,000 letters to U.S. employers, the equivalent of 1 in 8 employers receiving these letters. Roughly 7 million workers were included on these letters.

Both employers and employees reacted to the no-match letters with panic and uncertainty. In some cases, employees resigned immediately after being notified of their no-match status. In other cases, employers immediately fired individuals appearing on the list. Others gave employees a limited timeframe to correct the inconsistent information. Reports indicate that U.S. employers lost thousands of workers due to the effects of the no-match letter. In several reported cases, individual employers lost hundreds of workers from their businesses over the course of a few days. For the industries that already faced worker shortages, such drastic labor losses were devastating. Although the SSA explicitly indicated that that a no-match could result from the use of hyphenated names or typographical errors within the SSA databases and that the no-match letter was not a basis for taking adverse action against an employee, these instructions often went unheeded as employers tried to comply with seemingly conflicting regulations issued by the Internal Revenue Service (IRS) and Immigration and Naturalization Service (INS) as well as employee protection laws.

In 2003, the SSA took steps to reduce the panic associated with these letters. These no-match letters did not include any reference to IRS fines, and letters were sent only to those employers with more than 10 employees with mismatched information or for whom mismatched employees represented ½ of 1% of the W-2 forms filed with SSA. SSA sent out an estimated 130,000 letters in 2003 compared to about 900,000 in 2002. However, even with the change in determining which employers should receive letters, the total number of employees referenced by last year's letters did not drop significantly from 2002. The SSA restructured its method for calculating which employers should receive no-match letters because very few employers submitted corrected information to the SSA, and much of the information received still did not match the agency's database information.

AILA's POSITION: AILA supports a corrected and well functioning SSA database. However, a corrected database ultimately only will be achieved when Congress takes action to correct the broken immigration system that has created a class of undocumented workers that has contributed to the no-match problem.

The sheer volume of employees referenced by the no-match letters, although not entirely related to undocumented workers, is a symptom of an immigration system that is not responsive to current economic realities. This symptom can only be cured by comprehensive immigration reform. This reform would regularize the status of foreign nationals who are already here working, paying taxes, contributing to Social Security, and have no way to legalize their status. Reform also must address other problems inherent in the current immigration system by promoting family unity and devising a system of future flows whereby low- and semi-skilled workers would have a legal channel for entering the United States to help alleviate labor shortages. Adequate funding for implementing reform must also be appropriated.

Without such reform, the no-match letters and other symptoms of our broken immigration system will continue to reflect a system that needs to be changed.

38IP3003 02/13/04

SOCIAL SECURITY AND IMMIGRATION

The Social Security Administration (SSA) has several programs and policies that directly impact our immigrant population. Several of these programs underscore the fact that numerous American businesses depend on foreign workers, many of whom are unable to obtain proper documentation, and these workers are paying taxes and contributing to Social Security. Without comprehensive immigration reform that would enable these workers to regularize their status and obtain proper documentation, the SSA will never be able to achieve important policy objectives such as reducing the earnings suspense fund or correcting its databases and records. Furthermore without this reform, American businesses will be denied the legitimate workers they need, and the undocumented communities that need to be brought out of the shadows in order to separate contributing individuals from those that may be here to do us harm could be driven farther underground.

No-Match Letters: The SSA annually reviews W-2 forms and credits social security earnings to workers. If a name or a Social Security Number (SSN) on a W-2 form does not match SSA records, the Social Security earnings go into a suspense file while the SSA works to resolve discrepancies. In recent years, the SSA has been unable to match employee information with SSA records for 6-7 million workers a year. SSA has deposited over $327 billion dollars in the earnings suspense file as a result of the cumulative effect of these no-matches. The no-match letters are an annual attempt by the agency to reduce the earning suspense file and clean up its database to prepare for the release of its new Internet based Social Security Number Verification System (which is discussed later in this backgrounder).

Previously, the SSA would send no-match letters to employers when information submitted for at least 10% of their employees did not match SSA records. Until 2000, that system resulted in about 40,000 letters sent annually to employers. In 2001, that number jumped to 110,000 letters, with 1 in 60 employers receiving no-match letters. In 2002, the SSA sent a letter to every employer who had at least one employee whose information did not match the SSA's records. This change in practice resulted in the SSA issuing roughly 900,000 letters, the equivalent of 1 in 8 employers receiving these letters. Approximately 7 million workers were included on these letters.

The sheer volume of no-match letters sent out last year, combined with language in the no-match letter indicating that the Internal Revenue Service (IRS) could fine an employer for each incorrectly reported social security number, resulted in panic and uncertainty among both employers and employees. Despite language indicating otherwise, the letters were confused with notification of immigration violations. Even savvy employers were very confused as to how to respond to the letters and at the same time obey the immigrant worker protection laws. Some employers immediately fired individuals appearing on the list. Others gave employees a limited timeframe to correct the inconsistent information. In some cases, employees resigned immediately after being notified of their no-match status. Reports indicate that U.S. employers lost thousands of workers due to the effects of the no-match letter.

In 2003, the SSA made significant changes to the number of no-match letters it issued. Letters were only be sent to those employers with more than 10 employees with mismatched information or for whom mismatched employees represented ½ of 1% of the W-2 forms filed with SSA. In total, the SSA sent out approximately 130,000 letters, roughly 770,000 less than in 2002. However, even with the change in determining which employers should receive letters, the total number of employees referenced in the 2003 letters did not drop significantly from last year. The SSA restructured its method for calculating which employers should receive no-match letters because very few employers

submitted corrected information to the SSA, and much of the information received still did not match the agency's database information.

The 2003 no-match letter also contained several content revisions. Most importantly, they did not include any reference to the IRS fines. The letter also explained on the first page that that it is not a statement about the employee's immigration status. As in previous years, the letter informed the employer that some of the information reported on the Form W-2 did not match the SSA's records. This lack of a match could be the result of a typographical error or human mistake. The letter provided a list of the SSNs of all employees with no-match information and requests that the employer provide the correct information within 60 days. The letter also advised employers not to take any adverse action against an employee just because the SSN appeared on the no-match list, and that taking adverse action could violate state and federal law and subject the employer to legal consequences.

In addition to the reduction in volume of letters and the content changes to the employer letter, the SSA also sent a no-match letter to each "no-match" employee about two to three weeks before it sent the no-match letter to the employer. If the SSA does not have a valid address listed for a particular employee, the agency will send the letter directly to the employer. Employers should note that even if an employee corrects his or her SSN information before the employer no-match letters are sent, the employer would still receive a letter listing that employee as a no-match. The receipt by the employer of this no-match letter is a function of the process of producing the letters and has nothing to do with the validity of the employee's corrected information.

No-Match Letters and the IRS: Although the SSA does not have any power to enforce its request for corrected information, the SSA is required by law to provide the IRS with information on no-match W-2 forms. The IRS is authorized by regulation to fine employers $50 for each incorrectly reported social security number and is planning to begin enforcing the regulation after it develops a program for imposing penalties. The agency has indicated that it is currently considering fining employers for infractions that took place in 2002 and issuing the fines in 2004.

The IRS has discussed implementing a new program concerning the application of fines, however employers are subject to current regulations that impose penalties if incorrect information is submitted to the IRS. However, these regulations provide waivers from penalties if the employer acts in a responsible manner and if the events of noncompliance are beyond the employer's control. As currently interpreted by an IRS representative, the regulations carve out a safe harbors for employers if less than ½ of 1%, or less than 10, of the W-2 forms issued by a single employer do not match SSA records. In addition, IRS representatives have indicated that the agency will not fine an employer for incorrect information on the W-2 forms if they are based on a duly executed W-4 form and the employer has shown due diligence in trying to obtain the correct information. According to the letter, "[a]n employer may rely on the SSN that an employee provides in response to a solicitation, and the employer may use that SSN in filing a Form W-2 for that employee." Employers may document that the employee provided the SSN to the employer and the employer subsequently relied on that SSN in good faith and used it on the W-2 form. Once the IRS notifies the employer that the employee's SSN is incorrect, the employer may have to document solicitation of the correct SSN for an additional two years.

Once the Social Security Number Verification System (SSNVS) (see below) is fully operational, employers will be able to verify an employee's social security number via the Internet. The IRS is not requiring that employers use this system, but it will be considered within the context of due diligence. An IRS representative has indicated that discontinued use of the system could be a factor in determining that the employer has not satisfied the threshold of due diligence. It is unclear how these safe harbors will change once the IRS develops its new plan.

Social Security Number Verification System (SSNVS): The SSNVS is an Internet-based system that enables employers to verify that an employee's social security number is correct. The program is

currently operating in six states (California, Texas, Florida, New York, Illinois, and Nebraska) for volunteering employers and is set to sunset in 2008. However, Congress has mandated that SSNVS be expanded to all 50 states, by December 1, 2004. Prior to such expansion, the Secretary of Homeland Security must submit to Congress, by June 1, 2004, a report evaluating whether previously identified problems with the pilot program have been substantially resolved, and describing what actions the Secretary intends to undertake to resolve any outstanding problems prior to the program's expansion. Such problems include: failure to provide timely and accurate data due, in part, to inaccurate and outdated DHS data bases.

Information Sharing with the DHS: According to SSA and IRS representatives, neither agency is currently sharing detailed information with the Department of Homeland Security (DHS). The only information that the SSA shares with the DHS is information relevant to investigations between the two agencies and an annual review, required by law, of earnings reported for Social Security numbers that were assigned for purposes other than employment. The SSA is considering a program whereby it would share more information with the DHS and possibly grant the DHS authority to issue social security numbers (much like a hospital's authority to issue a social security card to newborn infants). The IRS indicates that it does not share any information on no-match letters with any agency, but the new IRS program currently under development would include meetings with the DHS.

SSA Verification of Foreign Nationals' Documentation with DHS: On September 1, 2002, the SSA implemented a nationwide policy change in the processing of SSN applications submitted by all foreign nationals. The change requires the SSA to verify a foreign national's immigration documents and status with the DHS's systematic alien verification for entitlements (save) information service and database before processing an application for an SSN or a replacement card. Under the policy of total verification, the SSA now requires all foreign nationals, regardless of how long they have been in the country, to have their DHS documentation verified by save before their SSN applications are processed. A more rigorous check is required for foreign nationals who were either born in, or most recently resided in, Iran, Iraq, Sudan or Libya.

AILA Issue Paper

IMMIGRATION AND THE DEPARTMENT OF HOMELAND SECURITY

THE ISSUE: On November 25, 2002, President Bush signed into law The Homeland Security Act of 2002 (PL 107-296) which created the Department of Homeland Security (DHS). The DHS gained Cabinet-level status on January 24, 2003, merging 22 agencies involving 170,000 employees. Because the former Immigration and Naturalization Service (INS), along with numerous other agencies, merged into DHS on March 1, 2003, the DHS now administers the nation's immigration functions. The reorganization, however, did not impact the Executive Office for Immigration Review (EOIR) which oversees the immigration courts. The EOIR remains housed in the Department of Justice (DOJ). (Please see AILA's issue paper entitled "The Importance of Independence and Accountability in our Immigration Courts" for a discussion of issues related to the EOIR.)

AILA long has called for the reorganization of our immigration functions based on three principles that are central to effective reform: coordinating the separated service and enforcement functions; placing at the helm one leader with the authority to develop and administer policy for all immigration functions; and adequately funding our immigration functions. Unfortunately, the DHS's reorganization of our immigration functions does not coordinate services and enforcement and does not have one person in charge of these functions. In addition, it appears that adequate funding for immigration services will continue to be an issue.

BACKGROUND: The Homeland Security Act (HSA) includes the following immigration-related provisions that radically restructure our nation's immigration functions:

1. Directorate of Border and Transportation Security (BTS): The Undersecretary for Border and Transportation Security is responsible for preventing the entry of terrorists into the U.S., securing the borders, carrying out the immigration enforcement functions of the former INS, establishing national immigration enforcement policies and priorities, and establishing and administering rules governing the granting of visas or other forms of permission, including parole. Asa Hutchinson is the current BTS Undersecretary.

   While the law established the Bureau of Border Security under BTS to perform these functions, the Administration reconfigured the structure and divided mission responsibilities into two enforcement bureaus:

   - The United States Immigration and Customs Enforcement (ICE): ICE is in charge of interior enforcement and is made up of about 14,000 employees from the INS, U.S. Customs Service, and the Federal Protective Service. Former INS Acting Commissioner Michael Garcia leads ICE as Assistant Secretary. The new website for the ICE can be found by typing in the following web address: http://www.ice.immigration.gov.

   - The United States Customs and Border Protection (CBP): CBP is made up of about 30,000 employees, including inspectors from the legacy INS, U.S. Customs, Agricultural Quarantine Inspections, and Border Patrol. CBP is charged with focusing on the movement of people and goods across the borders, and ensuring consistent inspection procedures and coordinated border enforcement. Former U.S. Customs Commissioner Robert Bonner serves as the Commissioner of the CBP. The new link to the CBP can be found at http://cbp.gov

2. Visa Issuance: The HSA vests the Secretary of Homeland Security with exclusive authority to administer all laws, and to issue regulations, relating to the functions of consular officers in the granting or refusal of visas. In addition, the Secretary has the authority to develop programs of homeland security training for consular officers. The Act also mandates that information on visa denials be entered into an electronic data system. Thus, whenever a consular officer denies a visa, the fact of the denial, the basis for the denial, and the name of the person denied are to be entered into the interoperable electronic database established under the Enhanced Border Security and Visa Entry Reform Act.

   The DHS and the Department of State (DOS) entered into a Memorandum of Understanding (MOU) clarifying the roles and responsibilities of both agencies. Under this agreement, the State Department retains day-to-day control over managing the visa process and the foreign policy of the United States. The Department of Homeland Security is responsible for establishing and reviewing visa policy and ensuring that homeland security requirements are fully reflected in the visa process. The Department of Homeland Security has final decision-making responsibilities over policy areas that include classification, admissibility and documentation; place of visa application; personal appearance; visa validity periods and multiple entry visas; the Visa Waiver Program; notices of visa denials; and processing of persons from state sponsors of terrorism.

3. United States Citizenship and Immigration Services (CIS): CIS has jurisdiction over the immigration services functions and is headed by a Director, Eduardo Aguirre, who reports to the Deputy Secretary for Homeland Security. The Director is responsible for adjudication of all applications and petitions previously adjudicated by the INS, including asylum and refugee applications. The CIS has approximately 15,000 employees. The new link to CIS is http://uscis.gov

4. Children's Affairs: The Act also transferred the care and custody of unaccompanied alien children from INS to the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services.

5. Office of Civil Rights: The Act created the new position of Officer for Civil Rights and Civil Liberties which has been filled by Dan Sutherland. This office is responsible for reviewing and assessing abuses, including racial and ethnic profiling, by employees and officials of the department. Congress will receive an annual report outlining the alleged abuses reported to the office and any actions taken in response.

6. FOIA: The HSA provided broad Freedom of Information Act (FOIA) exemptions for information related to the security of critical infrastructure or protected systems, including computer systems and information. Improper disclosure of this information by a federal employee could trigger criminal liability. If this provision is interpreted broadly, the FOIA exemption could have a dramatic chilling affect on both the ability to request information contained in the immigration databases as well as the dissemination of policy memos and other official information from the immigration-related bureaus.

7. Ombudsman: The HSA established an ombudsman (and local ombudsman offices) to identify severe problem areas in the delivery of immigration services, report these problems, and propose changes. Prakash Khatri has been named the Ombudsman.

8. Congressional Oversight: The agency's creation has generated questions about how congressional oversight of our immigration functions might change. The Senate Judiciary Committee (chaired by Senator Orrin Hatch (R-UT) with Senator Leahy (D-VT) as Ranking Member) will maintain jurisdiction over all immigration laws. Senator Susan Collins (R-ME),

chair of the Senate Governmental Affairs Committee, has indicated that her committee will play a close role in the oversight of the Department of Homeland Security, but that Judiciary will continue its traditional role. Senator Saxby Chambliss (R-GA) chairs the Senate Immigration Subcommittee and Senator Edward Kennedy (D-MA) continues as Ranking Member.

The House created a Select Committee on Homeland Security (chaired by Representative Christopher Cox (R-CA), with Ranking Member Jim Turner (D-TX). While the Select Committee was created as a temporary committee with discussions ongoing about making it permanent, it has been charged with coordinating the work of many House committees, and the jurisdiction of the House Judiciary Committee, chaired by Representative James Sensenbrenner (R-WI) and Representative John Conyers (D-MI) as Ranking Member, remains somewhat unclear. The House Subcommittee on Immigration, Border Security and Claims (formerly the Immigration and Claims Subcommittee) is chaired by Representative John Hostettler (R-IN), with Representative Sheila Jackson Lee (D-TX) continuing as Ranking Member of the Subcommittee.

Both the House and Senate have Homeland Security Appropriations Subcommittees. The House Subcommittee is chaired by Representative Hal Rodgers (R-KY), with Representative Martin Sabo (D-MN) as the Ranking Member. The Senate Homeland Security Appropriations Subcommittee is chaired by Senator Thad Cochran (R-MS), with Senator Robert Byrd (D-WV) serving as the Ranking Member.

AILA'S POSITION: With our immigration functions housed in the DHS, it is vitally important that this new agency balance national security goals with laws and policies that welcome newcomers and recognize the strong and vital connections between the United States and the rest of the world. AILA has strongly criticized the INS for its past performance. However, it is both unfair and inaccurate to blame the INS alone. Congress and the Administration need to learn from the past and take responsibility for how the INS functioned in the past. In fact, the Department of Homeland Security cannot succeed in its mission if it is confronted with similar conflicting, underfunded and complicated mandates.

AILA has raised the following concerns with Congress and the DHS:

- Concurrent Jurisdiction: In a February 28, 2003 rulemaking purporting to transfer immigration authorities to the DHS, the Attorney General asserted the DOJ's concurrent authority to promulgate substantive rules in numerous areas. The implications of this assertion of concurrent jurisdiction are enormous, with the potential for either complete gridlock or for the DOJ and DHS to issue conflicting regulations in a whole range of areas. Such dual rulemaking authority could precipitate Cabinet-level institutional power struggles and paralyze the government's ability to administer our immigration laws fairly and consistently.

  The most complete solution to this problem would be to reconstitute EOIR as an independent adjudicative body with no substantive rulemaking authority. Unleashing EOIR from its DOJ moorings would eliminate concerns about conflicting interagency authority. In addition to neutralizing concurrent jurisdiction concerns, this restructuring would further other important goals. It would provide immigration adjudicators with the independence necessary to conduct fair and impartial hearings. This change thereby would significantly enhance the perceived legitimacy of immigration decisions, a major concern under the present system.

  Alternatively, DOJ must be limited to making procedural rules related to the operation of EOIR and compelled to abandon its asserted authority to make any substantive immigration rules.

- Coordination: While the two enforcement bureaus (ICE and CBP) are clearly separated from CIS, successful adjudication and enforcement initiatives depend on their close coordination.

Such coordination is not formalized anywhere in the new law, is not reflected in DHS' current practices, and does not appear to be a priority. This lack of coordination within the DHS needs to be addressed through oversight and practice, as does the lack of necessary coordination between the DHS and other federal agencies including the Departments of Justice and State, the FBI and the CIA.

- Culture of "No" and Consequences of Delays: Widespread reports of unfair, arbitrary and inconsistent adjudications have reinforced the perception that adjudicators' "fail safe" position is "no," notwithstanding the merits of the petition or application. Reinforcing this view is the increased numbers of unnecessary requests for additional information that contribute to the dramatic slowdown in the processing of petitions and applications. CIS needs to efficiently and fairly adjudicate petitions and applications. In addition, many organizations and individuals are reporting severe delays in processing that have led to negative impacts for American business and family members.

- Both Immigration Functions Important: Enforcement and services are two sides of the same coin and merit equal attention, support and funding. Both need to function efficiently, effectively and fairly to provide needed services and enhance our safety if the agency is to provide quality service while ensuring national security. Especially in light of the historical underfunding of immigration functions, it is imperative that CIS be accorded adequate resources to do its job. AILA long has supported direct congressional appropriations to supplement the user fees that almost totally fund the CIS. Such direct congressional appropriations are necessary in order to ensure that the CIS lets the appropriate people into the country and bars those who mean to do us harm, and adequately delivers services. Instead, however, the Administration's FY 05 budget proposal would reduce CIS funding by 41% at a time that the agency has proposed an increase in fees. At a time when the quality of service is at an historic low, increases of this magnitude are difficult to justify. Processing backlogs have reached crisis proportions, while the agency wastes resources revisiting issues already resolved and harassing honest petitioners with requests for paperwork unrelated to their immigration eligibility. Making matters worse, the public's only available avenue to resolve government errors and problems is a contractor-run 800 number that has proven to be useless to deal with these issues. Adding insult to injury, the proposed fee increase would force applicants to pay for these failures.

- Expertise and Accountability: Officials charged with organizing our immigration functions and leading CIS, ICE, and CBP should understand immigration policy, recognize the importance of both adjudications and enforcement, and work to ensure the necessary coordination of the separated adjudications and enforcement functions. Furthermore, DHS must ensure the full provision of services and effective and fair enforcement, while minimizing disruptions and delays, as the new agency develops its polices, practices, and infrastructure. Officials in charge must remain accountable and willing to address on-going problems that will emerge from this massive reorganization.

- Ports of Entry: Enforcement and adjudications come together at our ports of entry, with the CBP taking over operations at these ports. Our national and economic security depends on the efficient flow of people and goods through these ports. Unfortunately, the Homeland Security Act was largely silent on how our immigration functions should operate there. It is critical that those responsible for inspections at our entry points be fully trained in the policies and practices of the CIS. Unfortunately, current reports suggests that CBP is giving inadequate attention to immigration and is initiating polices that do not reflect the intricacy of the subject and its importance to our country. To take one example, the "One Face at the Border" program does not ensure that an immigration specialist will be available at secondary inspections. The proposed expansion of US VISIT at our land ports-of-entry also is troubling due to the lack of clarity about the function of this program, inadequate funding and training of staff, impossible deadlines, unresolved issues regarding technology, and other concerns. (Please see AILA's issue

paper "America's Borders: Balancing our Security and Economic Needs" for more information on our ports-of-entry.)

- Local Immigration Offices: Local offices are the backbone of our immigration functions and must be staffed by knowledgeable people capable of making crucial, often life and death, decisions. These offices must be accessible to the communities they serve and must operate within a clear chain of command. These offices must be adequately funded because expertise, accountability and accessibility alone cannot solve the pervasive financial crisis and resulting backlogs.

- Visa Policy: With the Department of Homeland Security's authority to establish and administer rules governing the granting of visas, it is vitally important that visas be granted to the people who come to build America and denied to those who mean to do us harm. We must balance our national security and economic security needs by recognizing that the U.S. is tied to the rest of the world economically, socially, and politically. However, severe delays at the consulates continue to hamper the visa issuance process, with serious consequences for businesses, families, schools and others in the United States. The gridlock that has paralyzed the visa issuance process in the past two year must be resolved – the agencies charged with clearing security checks must be motivated to give these operations the priority that they deserve.

- Refugees: To ensure that refugee and asylum adjudicators are properly trained, that there is a clear line of accountability from headquarters to the field on refugee protection matters, and that the flexibility to respond to refugee emergencies is maximized, the dedicated corps for Asylum and Refugee claims should be preserved within the Citizenship and Immigration Services structure, as should the policy-making mechanisms that support the corps' activities. Of great concern is the small number of refugees that have gained admission into the U.S. during the past two fiscal years. Although 70,000 slots were available for refugee admissions each fiscal year, only about 28,000 refugees were admitted to the U.S. during each year.

- Civil Rights Protections: While the law establishing the new department recognizes the need for internal oversight by creating a civil rights officer and a privacy officer, provisions in the bill do not go far enough to empower these officials to effectively protect civil rights and liberties. Such authority is vitally needed, given the scope and authority of the new agency.

- Ombudsman: The ombudsman should be empowered to: assist individuals and employers in resolving problems with CIS, ICE and CBP; identify areas in which individuals and employers have problems in dealing with CIS, ICE, and CBP; and propose changes in the administrative practices of CIS, ICE and CBP to mitigate identified problems. The statute, however, restricts the Ombudsman to CIS. Additionally, the Ombudsman should submit annual reports to Congress on problems and improvements within CIS, ICE and CBP, and should be provided with sufficient funding to successfully fulfill the obligations of this position.

- Private Sector Liaison and Advisory Councils: Congress needs to adequately fund this new office and ensure that all voices in the private sector are represented and heard.

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AILA Issue Paper

AMERICA'S BORDERS:

BALANCING OUR SECURITY AND ECONOMIC NEEDS

THE ISSUE: The Department of Homeland Security (DHS) took over operations at our nation's ports of entry and along our borders on March 1, 2003. The DHS must address the challenge of enhancing our security while facilitating the flow of legitimate cross-border travel and trade necessary for our nation's economic survival. The Homeland Security Act of 2002 (P.L. 107-296), which created the DHS, codifies this challenge. One of the department's seven primary missions is to "[e]nsure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland." Given this mandate, the DHS must develop the means to use technology and databases, the inspections process, and special programs at our borders to balance efficient legitimate travel and trade with our enhanced security needs.

BACKGROUND: The United States has over 300 ports of entry through which authorized travelers and commercial goods enter the country. In 2001, over 510 million people (63% of whom were foreign nationals) and over $1.35 trillion in imports entered the U.S. through these ports. If the inspection of each of these entrants took even a little longer than it currently does, the ports (particularly land ports) would come to a grinding halt. The DHS thus has the challenge of streamlining current border procedures and evaluating future initiatives so that the border crossing processes are both more secure and efficient. Otherwise, security measures that do not take into account travel and trade could cripple our nation's economic viability.

Getting to the Border -- Visa holders currently are subject to security checks at multiple venues and times before they are permitted to enter the U.S. At consular offices abroad, foreign nationals are run through security checks using the Consular Lookout and Support System (CLASS). A new DOS rule, which went into effect on August 1, 2003, changed DOS policy for granting waivers for nonimmigrant visa applicant interviews. As a result, most visa applicants are now subject to face-to-face interviews with a consular officer. For various reasons, the consular post also may send the foreign national's information to Washington, D.C. for security clearances by the Department of State (DOS) and other relevant agencies such as the Federal Bureau of Investigation (FBI). Because visas are not issued until the DOS gets an affirmative response from these agencies, long delays for visa issuances are now commonplace.

By October 26, 2004, all consular posts abroad will be required to issue biometric visas. Two digital index finger prints and a photo will be taken of visa applicants, and their information will be checked against the Automated Biometric Identification System (IDENT) database. Recently, in Vancouver, IDENT clearance was taking 3 days. The lengthy timeframe is due in part to database transmission lines.

Arrival at the Ports of Entry -- After a visa is issued, most foreign nationals proceed directly to U.S. ports of entry. Some points of embarkation also are equipped with pre-inspection stations. These facilities, which require international cooperation, allow a foreign national to be investigated without disrupting the flow of people at our national borders.

Foreign nationals must go through primary inspection once they arrive at our ports of entry. During primary inspection, inspectors examine passports and visa documents and run security checks using the Interagency Border Inspection System (IBIS), which interfaces with the DOS's CLASS database, as well as with FBI and Drug Enforcement Agency (DEA) databases. Based on this primary check,

some foreign nationals are allowed to proceed into the U.S., while others are sent to secondary inspection for closer scrutiny. The secondary inspection process involves additional interviews, additional document screening, and more security checks through a battery of databases. A partial list of the databases utilized at this stage include: the National Automated Immigration Lookout System (NAILS), which contains lookout information and access to several databases in order to give the inspector biographical and case data on foreign nationals who have been found inadmissible to the U.S.; the Central Index System (CIS); the Non-Immigrant Information System (NIIS); the Computer Linked Application Management System (CLAIMS); the National Crime Information Center (NCIC); and the Automated Biometric Identification System (IDENT).

Some land ports of entry have special technology-based programs that allow low-risk travelers to use special lanes. These technologies are used in a limited capacity and include the NEXUS and FAST programs along the Northern Border, and SENTRI along the Southern Border. Although each program differs slightly, they all are based on the same principle: pre-screen and identify low-risk travelers so that they may cross the border without having to go through the traditional inspections process. For example, the NEXUS programs allow applicants to be pre-screened and approved for entry into the U.S. Travelers are given a card containing their personal data and are allowed to cross the border using special dedicated commuter lanes. These lanes are equipped with technology that accesses the information on the card, and presents it to the inspector at the port of entry. This pre-clearance method has been efficient for those enrolled in the program. However, becoming enrolled in the program is a challenge due to the time it takes to process an application and the fact that applications can be denied for very minor customs violations. Due to the stringent nature of the application process, one out of every thirty applications is denied, and no mechanism exists to appeal a denial.

NSEERS: As part of the entry process, certain foreign nationals have to register with the National Security Entry Exit Registration System (NSEERS). This system is designed to register and keep track of arriving nonimmigrants from Iran, Iraq, Sudan, and Libya, and certain male nonimmigrants from Pakistan, Saudi Arabia, and Yemen. Nonimmigrant aliens from other countries may be required to register if they match current intelligence characteristics or database searches, have made unexplained trips (especially if the countries visited include certain middle Eastern countries or other countries such as North Korea or Cuba), or have previously overstayed their period of admission in the United States. Inspectors also have the authority to register any nonimmigrant at their discretion. Accounts of the registration process at the border indicate that it can take several hours and is very intrusive. Once the registrants enter the country, DHS may notify a particular individual to appear before immigration officials to re-register and for additional interviews. Persons subjected to Special Registration must register their departure with NSEERS and must leave the U.S. through a designated port of departure. Those who fail to comply with departure control rules under NSEERS may be subject to future inadmissibility to the United States.

Ports of Entry Under DHS -- Under the DHS, the management of the Border Patrol, primary and secondary inspections, and immigration investigations falls under the jurisdiction of the Bureau of Customs and Border Protections (CBP). This bureau consists of 30,000 employees formerly from the Agricultural Quarantine Inspection program, INS inspection services, and the Customs Service and is headed by Commissioner Robert Bonner, former U.S. Customs Commissioner. Commissioner Bonner reports directly to the Under Secretary for Border and Transportation Security, Asa Hutchinson. However, the Bureau of Immigration and Customs Enforcement (ICE) has an important, though surprising role, at our nation's border. Apparently, the computer system for DHS functions, such as US VISIT, are developed and managed by ICE, even if they are specific to the POEs.

Prior to March 1, the ports of entry were managed by separate chains of command and inspections personnel from both Customs and INS. CBP, on March 1, became the sole governmental presence along the border and at the ports of entry and has the mandate to fuse the old agencies' chains of

command at each port of entry into one common chain and put all inspectors under a single port director. While the Bureau of Citizenship and Immigration Services (CIS) is responsible for handling benefit adjudications, applications for asylum and other immigration benefits and customer service functions, CIS will not have a presence at the border. Rather, the CBP inspectors are being cross-trained on adjudications.

CBP is continuing its border consolidation efforts with its "One Face at the Border" program. This program will establish a new position of CBP Officer to interact with all border traffic and goods. The new position is expected to go into effect in the Spring of 2004. According to CBP reports, the new CBP Officer will be responsible for primary and secondary inspections and will not have the assistance of an immigration specialist. Given the complex immigration issues arising at our nation's ports of entry, the absence of such an immigration specialist raises concerns regarding the treatment of foreign nationals at our borders. Furthermore, it is unclear why CBP refused to create a immigration specialist position when it clearly recognized the need, and established, an agricultural specialist position.

US VISIT—The DHS has started implementing the United States Visitor and Immigrant Status Indicator Technology program (US VISIT), an entry-exit system to register each time foreign nationals cross the border. As originally set forth in Section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208) (IIRAIRA), the entry-exit system would have applied to all non-U.S. citizens who enter or exit the United States at any port of entry. The Data Management Improvement Act of 2000 (DMIA) (P.L. 106-215) subsequently altered this system and merged the entry-exit system with a searchable centralized database, prohibited INS from introducing new entry or exit documentary requirements on any visitors to the country (such as Canadians), and staggered the entry exit implementation deadlines into three groups:

- Airports and seaports-- December 31, 2003
- Top 50 high traffic land border ports-- December 31, 2004
- Remaining implementation for all other ports-- December 31, 2005

In 2001, Congress in the PATRIOT Act (P.L. 107-56) mandated that the entry-exit system include the use of biometric technology and tamper-resistant documents readable at all ports of entry. Later that year, with the passage of the Enhanced Border Security and Visa Entry Reform Act (P.L. 107-173), Congress finally addressed the entry-exit system as a program that balances security with the economic realities of our busy ports of entry. To strike this balance, the Act includes a provision that mandates that the program utilize technologies that facilitate the efficient flow of commerce and travel. This provision is extremely important because a system that impedes travel across the borders would shut down our borders. For example, the Ambassador Bridge in Detroit daily handles about 30,000 vehicle crossings. Experts have testified that taking 30 seconds per car, with only half of the 30,000 cars going through the inspections process, would, in effect, shut down this port of entry: cars would have to wait roughly three days just to enter the U.S.

At this time, US VISIT will only apply to nonimmigrant visa holders. Canadians will not be required to have additional travel documents unless Congress revisits present policy, and foreign nationals entering the U.S. pursuant to a Visa Waiver will not be included. (Although, a congressional mandate requires Visa Waiver countries to issue machine readable, tamper-proof passports that include biometric identifiers by October 26, 2004.)

The first phase of US VISIT was implemented at select airports and seaports on January 5, 2004. US VISIT entry capabilities went into in effect at 115 airports and 14 seaports, and US VISIT exit checks were established at the BWI airport in Baltimore, Maryland and the Miami seaport. Although this schedule lags behind the deadlines mandated by the DMIA, implementation of US VISIT at limited

sites should provide DHS an opportunity to monitor the effectiveness of the US VISIT program and make improvements before implementing it on a broader scale.

In the air and seaports, visa holders entering the U.S. will be processed through the US VISIT program during primary inspections. Upon entry, the nonimmigrant visa holder's travel documents will be scanned; a photo and index fingerprints will be taken and checked against databases such as IBIS and the watch lists. Information will be collected on immigration and citizenship status; nationality; country of residence; and the person's address while in the United States. An IDENT biometric database check will be performed after the individual is admitted to the U.S. If a nonimmigrant visa holder departs the U.S. from a port with US VISIT exit capabilities, the individual will have to input his or her departure information, visa data and fingerprints into the US VISIT system through an automated self-service kiosk (similar to an ATM machine).

The Administration's goal is for US VISIT to collect information, confirm identity, measure security risks and assess the legitimacy of travel. Ultimately, the information captured through US VISIT would be available at the ports of entry and throughout the entire immigration enforcement system. The system would also track changes in a foreign national's immigration status and make updates and adjustments accordingly.

AILA's POSITION: Each action the DHS takes at our borders should be examined in the light of how the agency balances our enhanced security needs with the efficient flow of travel and trade. Such a balance demands sufficient appropriations along with the following:

1. Reduce delay at the border through the use of interoperable technology and pre-screening activities that receive sufficient funding: The DHS should examine ways to expand the use of pre-inspection stations and authorize pre-clearances for low-risk travelers. Clearing travelers before their voyage to the United States gives inspectors more time to scrutinize each applicant for entry, reduces delays at the border, and provides international travelers with a sense of certainty that they will be admitted into the U.S. AILA also supports the department's efforts to increase the interoperability of the DHS database systems and other agencies' database systems to give inspectors a more thorough review of each applicant requesting entry into the U.S. A complete and accurate database system would also include a mechanism for correcting database errors, which is currently extremely difficult to achieve. Having incorrect information only serves to hinder the inspections process and discredit the reliability of the security checks. Such initiatives will require sufficient funding to succeed. The department should make this objective a top priority.

2. Coordinate CBP policies at the Border with CIS: Enforcement and adjudications come together at our ports of entry. Our national security and economic security depend on the efficient movement of cross-border travel and trade at these ports. As the CBP develops its policies and procedures, it must prioritize its coordination with the Bureau of Citizenship and Immigration Services (CIS). Furthermore, CBP inspectors and investigators must be knowledgeable about the policies and practices of the CIS. To ensure consistent policies, key responsibilities should reside with the CIS personnel present at each port. Failure to take these actions will result in inconsistent adjudications, which will have a deterrent effect on international travel to the U.S.

3. Take time to develop and adequately fund an entry-exit system that works: As our entry-exit system, US VISIT must enhance our security and allow the flow of people and goods to support our economy. Such a system needs to be adequately funded. The U.S. government needs to appropriate billions of dollars to purchase real estate, upgrade facilities, develop an infrastructure and technological capabilities, and hire inspectors to manage the program. This cost includes neither the millions of dollars needed to fully address current staffing shortages of inspectors at ports of entry nor the money now needed to supply all ports with basic technology such as document readers. With a preliminary estimated price tag of billions of dollars, the $380 million appropriated in fiscal year 2003, is grossly insufficient to fund even the beginning of this system.

While having a program in place is desirable, having a functional and reliable program is necessary. US VISIT does not appear to be adequately funded. Once it is fully operational, it could triple or quadruple the interview time that is currently in place at ports of entry, resulting in serious delays in DHS's ability to clear incoming flights. Such delays would undermine the entire effort to maintain an efficient border, and efficiency is a vital component in increased security. In addition, the separate databases from the three immigration bureaus have not been fully integrated into US VISIT. Due to this lack of information transfer, visitors who have applied for visa extensions might be detained for overstaying their visas, when in reality, they had maintained proper visa status. Having complete and correct information will make the difference between having a workable secure system or a discredited inefficient one.

While US VISIT is still in its infancy, database studies and reports should be completed on the feasibility of every aspect of the program. The Administration and Congress should use that information to develop a comprehensive plan that takes into account adequate funding, resources and appropriate deadlines, and determine whether the same level of security could be obtained through increased intelligence and database security checks performed outside the country.

AILA Issue Paper

STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAW

ISSUE: The Department of Justice (DOJ) drafted a legal opinion in 2002 that reversed a long standing agency interpretation by taking the position that states and localities, as sovereign entities, have the "inherent authority" to enforce federal immigration laws, including civil violations of immigration law. In the wake of that opinion, which remains unpublished, Representative Charlie Norwood (R-GA) introduced the Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act, H.R. 2671, a bill promoting state and local law enforcement of federal immigration laws. Senators Jeff Sessions (R-AL) and Zell Miller (D-GA) have introduced parallel legislation in the Senate, the Homeland Security Enhancement Act (HSEA), S. 1906.[4] Both bills purport to reaffirm the "inherent authority" of state and local governments to enforce civil immigration laws. Furthermore, both bills would criminalize all immigration status violations for the first time in this country's history.

The CLEAR Act would *require* state and local police to enforce federal civil immigration laws or lose certain critical funding. The HSEA takes a slightly different tack by denying funding to states or localities that have policies or practices in place which prevent their police from enforcing such laws. Both bills would impose expansive new responsibilities on state and local police departments where resources already are stretched perilously thin. With no requirement that the police receive training in immigration law, these bills are certain to trigger civil rights abuses against citizens and non-citizens alike. Moreover, these bills would undermine rather than enhance our safety by jeopardizing critical community-based policing initiatives that are predicated on earning the trust and confidence of the served communities.

BACKGROUND: In April 2002, the media reported that the DOJ was poised to issue a legal opinion that states and localities, as sovereign entities, have the "inherent authority" to enforce federal immigration laws, including civil violations of immigration law. In the face of widespread criticism of this change of opinion, the DOJ never made the opinion public and has refused repeated requests to provide a copy of it. The DOJ does acknowledge, however, that the opinion exists and that it accurately reflects the Administration's position.

The CLEAR Act and the HSEA go beyond the issue of authority and attempt to create a comprehensive regime for local police to support federal enforcement of the civil immigration laws. Both the legal opinion and the bills in Congress are dangerously flawed for the following reasons:

- **Local law enforcement agencies lack the experience and training to enforce federal immigration law.**

  Federal immigration law is an extremely complicated body of law that requires extensive training and expertise to properly understand and enforce. There are many different ways for people to be lawfully present in the United States, and the Department of Homeland Security (DHS) issues many different types of documents that entitle someone to be in the United States legally. Local law enforcement officials do not have the training and expertise that is required to determine who is allowed to be in the United States and who is not. Adequate training would need to be on-going and extensive to adequately protect against abuses. Neither the CLEAR Act, nor the HSEA would mandate such training and any training provided would be at the state's or locality's expense.

- **Relying on local law enforcement agencies to enforce federal immigration law will undermine important community relationships.**

[4] The HSEA also contains provisions that would (1) deny funding to states that issue driver's licenses to undocumented immigrants, and (2) prohibit the federal government from accepting or recognizing any consular identification cards issued by foreign states. This paper does not address those aspects of the HSEA but the issues are discussed at length in other papers prepared by AILA.

Community-based policing is one of the most powerful law enforcement tools available. By developing strong ties with local communities, police departments are able to obtain valuable information that helps them fight crime. The development of community-based policing has been widely recognized as an effective tool for keeping kids off drugs, combating gang violence, and reducing crime rates in neighborhoods nationwide.

Immigration enforcement by local police undermines community-policing efforts. Immigrants who live in tightly-knit communities often have information about the people around them that police want. A local police department that begins to enforce immigration laws will lose the trust of the community it serves and protects. In communities where people are afraid to talk to local police, more crimes go unreported, fewer witnesses come forth, and people are less likely to report suspicious activity. Many immigrants come from countries where people are afraid of the police, and police nationwide have spent years building trust that will be destroyed by asking local police to do the job of a federal agency.

Many local law enforcement agencies oppose taking on these new responsibilities as underscored in the statements below:

- "We've tried very hard for years to build bridges to all segments of our community. This would be a setback in that regard." *San Antonio, TX., Police Chief Albert Ortiz*
- "I don't think it's a good idea. We've made tremendous inroads into a lot of our immigrant communities. To get into the enforcement of immigration laws would build wedges and walls that have taken a long time to break down." *Sacramento, CA., Police Chief Arturo Venegas, Jr.*
- "Communication is big in inner-city neighborhoods and the underpinning of that is trust. If a victim thinks they're going to be a suspect (in an immigration violation), they're not going to call on us, and that's just going to separate us further." *Denver, CO., Police Chief Gerry Whitman*

- **Asking local law enforcement agencies to enforce federal immigration law will drain these agencies of scarce dollars, further limit resources and lead to problems in enforcement.**

Communities around the country struggle every year to provide enough money and resources to meet their law enforcement needs. In many communities, response times to 911 calls are dangerously slow and police are no longer able to even investigate certain crimes. Law enforcement officials in these communities need to spend more time enforcing laws that only they can enforce, and need more resources to protect the neighborhoods in which they live and work.

The CLEAR Act and the HSEA would eliminate funding to states and localities for the incarceration of criminal aliens if the states or localities decide that enforcing civil violations of the immigration laws would undermine the safety and well-being of their communities. Perversely, the bill would ***not*** provide the states and localities with the funding necessary to cover the costs of training officers or implementing the new enforcement mandates. As such, obligating these local agencies to begin enforcing federal immigration law is plainly a disservice to the communities they serve.

Following are statements by local law enforcement officials on this issue:

- "We have enough problems just doing our routine calls and investigating the everyday things. This would put an additional burden on us that we probably wouldn't be able to handle." *Anaheim, CA., Police Department Spokesman, Mike Hidalgo*
- "That's a whole new area of the law that we have to come up to speed on. We have enough on our plates right now. It's not as if we're looking for extra things to do." *Glenwood Springs, CO., Police Chief Terry Wilson*
- "I do not believe it is appropriate to allocate the limited resources of the Tucson Police Department to the issue of immigration control." *Tucson, AZ., Police Chief Richard Miranda*

- **The CLEAR Act would divert funds from visa application fees to offset costs associated with implementing this bill's mandates.**

  The CLEAR Act would require DHS to deposit ***one-third*** of all fees collected for immigrant and nonimmigrant visa applications and for adjustment of status applications into a "State and Local Immigration Law Enforcement Fee Account". This misguided funding approach exemplifies the fundamental shortsightedness of the CLEAR Act. Diverting funds from a system plagued by insufficient resources, backlogs and delays makes zero sense from a policy perspective (unless the unstated agenda of the bill's authors and sponsors is to shut the country's doors even to legal immigration). While the bill would require that application fees be adjusted to cover the "full costs of carrying out the [program], the full costs of processing visas, and a significant portion of the costs of Federal enforcement of immigration violations," these fee increases would make the cost of doing business in the United States prohibitively expensive and would deter productive members of our society from becoming permanent residents.

- **Past attempts by local law enforcement agencies to enforce immigration law have failed, and many local officials have opposed turning their police into immigration agents.**

  In 1997, local authorities in Chandler, Arizona conducted a series of roundups to help Border Patrol agents find violators of federal immigration laws. Widespread complaints by local residents, including U.S. citizens and at least one local elected official who were stopped during the operations, led to an investigation by the Arizona Attorney General. The official report on the investigation concluded that police stopped Hispanics without probable cause, bullied women and children suspected of being illegal immigrants and made late-night entries into homes of suspected illegal immigrants, among other violations. In 1999, the Chandler City Council unanimously approved a $400,000 settlement of a lawsuit stemming from police roles in the roundup.

  Mayors from cities across the country, including New York, Los Angeles, San Francisco, and Chicago, have opposed local police becoming immigration agents for the reasons articulated above: state and local police do not understand immigration law and would thus do a poor job of enforcing such laws, important community relationships that are essential to fighting crime would be damaged, state and local resources would be strained and drained, and states and localities would have to deal with the many negative consequences that would result from poorly conceived attempts to enforce federal immigration laws.

- **The legal authority the Department of Justice reportedly cites to support their legal opinion for state and local authorities enforcing immigration law is questionable at best.**

  The Department of Justice reportedly cites as justification for this legal opinion a 1984 Tenth Circuit case, *United States v. Salinas-Calderon*. However, *Salinas-Calderon* doesn't support a state law enforcement officer's power to enforce immigration laws, particularly where the immigration laws are not criminal in nature (and most immigration laws are NOT criminal in nature). Rather, *Salinas-Calderon* deals with the narrow, criminal issue of whether a state trooper had probable cause under the 4th Amendment to make an arrest after having lawfully stopped and questioned a person (for possible criminal violations). The case does not address whether state law enforcement officials may detain and interrogate individuals in an effort to enforce civil violations of federal immigration law.

AILA'S POSITION: AILA opposes the CLEAR Act, the HSEA, and the use of state and local police departments for the enforcement of civil immigration laws in the strongest possible terms. For the reasons discussed above, the two bills would impose an unconscionable burden on overtaxed state and local law enforcement agencies, jeopardize public safety, promote racial profiling and other abuses, divert scarce resources from critical local law enforcement activities, and threaten the viability of already under-funded immigration services. That is why many state and local police strongly oppose the CLEAR Act and the HSEA. 21IP3005D 2/17/04

AILA Issue Paper

POST-9/11 EXECUTIVE ACTIONS UNDERMINE CIVIL LIBERTIES: CONGRESS SET TO RESPOND

ISSUE: The Administration, since September 11, 2001, has initiated new policies and practices that negate fundamental due process protections and jeopardize basic civil liberties for non-citizens in the United States. These constitutionally dubious initiatives undermine our historical commitment to the fair treatment of every individual before the law and do not enhance our security. Issued without Congressional consultation or approval, these new measures include regulations that increase secrecy, limit accountability, and erode (or threaten to erode) important due process principles that set our nation apart from other countries. While effective steps must be taken to protect the American public from further terrorist acts, our government must not trample on the Constitution and on those basic rights and protections that make American democracy so unique and so strong.

Many Members of Congress have expressed concern about the impact post-9/11 executive branch policies have had on the rights of non-citizens in the U.S., the effectiveness of our enforcement activities, and on our standing and credibility in the world. Members in both Chambers of Congress have announced their intention to introduce legislation this session that will seek to roll back some of the most egregious policies and strike an appropriate balance between security needs and liberty interests. This bill, which Members are referring to as the Civil Liberties Restoration Act (CLRA), would go far towards restoring due process protections, civil liberties, and the confidence of immigrant communities in the fairness of our government.

BACKGROUND: Under the guise of combating terrorism, post-9/11 regulations and programs initiated by the Administration have undermined law enforcement officials' ability to perform their duties, have done little to gather worthwhile intelligence, have granted the executive branch broad powers to act in secret, and have made it difficult for foreign visitors to maintain their legal status. These actions waste law enforcement's valuable resources by focusing on people who pose no threat to our national security and violate fundamental principles of justice. The Civil Liberties Restoration Act would address several troubling policies, including the following:

- **Closing immigration hearings and refusing to disclose basic information on detainees:** On September 21, 2001, the Department of Justice (DOJ), through what is now known as the "Creppy memo," ordered immigration judges to close all hearings related to individuals detained in the course of the 9/11 investigation. Not only were the hearings held in secret - excluding all visitors, family, and press – but the very identities of the jailed individuals were withheld from public disclosure. Even though these cases involved no classified evidence, the records of these proceedings were never released and court officials were prohibited from confirming or denying the mere existence of the cases.

  To this day, the government refuses to provide any information about these cases despite repeated Freedom of Information Act (FOIA) requests. These FOIA denials were litigated up to the Supreme Court, which recently declined to grant *certiorari*, leaving intact a split federal appeals court decision upholding the denials. The immigration process should be open to the public; secret hearings are the practice of repressive regimes, not open and democratic societies. The CLRA would prohibit blanket closures of immigration proceedings, authorizing closure only after a judge has determined that there is a compelling reason to keep out the public or withhold information in a particular case or portion thereof.

- **Holding non-citizens in jail indefinitely without charges:** The DOJ issued regulations on September 20, 2001 authorizing the INS to hold any non-citizen in custody for 48 hours or an unspecified "additional reasonable period of time" before charging the person with an offense. Congress subsequently weighed in on this subject in the USA PATRIOT Act when it authorized detention of up to 7 days before charges must be brought *in the case of certified suspected terrorists*. The DOJ, however, has never invoked that USA PATRIOT Act provision and has relied instead on its own open-ended regulation as

the operating detention standard. The DOJ rule is unlimited in its application, and can be applied to any non-citizen regardless of the circumstances surrounding his or her arrest. A DOJ Inspector General Report (April 2003) on post-9/11 detainees documents how INS detained non-citizens for weeks, and in some cases months, before charging them with immigration violations. Tellingly, none of the detainees ever was charged with a terrorism-related offense.

As amply manifest in its implementation, this rule violates a fundamental principle in our constitutional system—that no person should be subject to arrest and imprisonment without reason, explanation, and due process of law. It also demonstrates that DOJ willfully circumvented Congress's conclusions about how long it is reasonable to detain an individual without charging them when they are suspected of terrorist activity. The CLRA would explicitly supercede the DOJ regulation by requiring charges to be filed, and notice of charges to be served, within 48 hours of the detention. If the government is unable to comply with that obligation, then the detainee must be brought before an immigration judge within 72 hours of the detention.

- **Keeping non-citizens jailed even after an immigration judge has found them eligible for release:** The Attorney General issued regulations on October 31, 2001 that require people in immigration proceedings to remain in custody even though an immigration judge has found them eligible for bond. In its rationale for the regulation, the DOJ did not assert that immigration judges or the Board of Immigration Appeals (BIA) were abusing their power or unnecessarily denying motions to stay a bond redetermination. Rather, the DOJ argued that the new regulation will "avoid the necessity for a case-by-case determination of whether a stay should be granted in particular cases." This regulation effectively enables prosecutors to circumvent the considered decision of independent adjudicators regarding the likelihood that an individual will appear for future proceedings and the threat a detainee poses to the community. It thus completely eviscerates the longstanding role of immigration judges in making bond determinations and the BIA in reviewing those decisions.

  When important liberty interests are at stake, a case-by-case review is exactly what the principles of our judicial system demand. Making the DHS the chief prosecutor and the chief judge on the issue of releasing people from jail is a violation of fundamental principles of due process. The CLRA would eliminate the power of DHS prosecutors to automatically stay bond redeterminations and would define the conditions under which temporary stays should be granted.

- **Denying bond to whole classes of non-citizens without individual case consideration**: The detention of non-citizens for indefinite periods without an individualized assessment of their eligibility for release on bond or other conditions raises serious constitutional questions. Although the Supreme Court has upheld mandatory detention when Congress has expressly required such detention for a discrete class of non-citizens, it has not authorized the executive branch to make similarly sweeping group-wide detention decisions. Nevertheless, since September 11, 2001, DOJ and DHS have established policies mandating the detention of certain classes of non-citizens without any possibility for release until the conclusion of proceedings against them. For example, all of the individuals who were detained on immigration violations during the course of the post-9/11 investigation were subjected to a "hold until cleared" policy. Even individuals who did not contest their removability, and against whom final orders of removal had been entered, remained in detention until the FBI cleared them. It bears repeating that the government never charged any of these detainees with a terrorism-related offense.

  DOJ and DHS also have extended mandatory detention policies to certain non-citizens seeking asylum from persecution in their home countries. In Matter of D-J, the Attorney General reversed a Board of Immigration Appeals decision upholding bond to a detained asylum seeker from Haiti. The AG's precedent decision argued that releasing the individual on bond would trigger a wave of sea-going migrations from Haiti and would divert Coast Guard resources from the fight against terrorism. He then concluded, on that specious basis, that national security interests necessitated the mandatory detention of all similarly situated asylum applicants during the pendency of their proceedings. This harsh and inappropriate policy towards refugees was reinforced by DHS's Operation Liberty Shield initiative,

pursuant to which all asylum seekers from thirty-plus unspecified countries were subject to mandatory detention. Unilateral executive branch decisions to mandatorily detain whole classes of individuals contravene important due process principles and individual liberty interests. The CLRA would ensure that every person held in custody by the government is accorded an individualized bond hearing to determine whether they constitute a flight risk or danger to society.

- **Entering certain immigration status violators into a criminal database and exempting the data from accuracy requirements of the Privacy Act:** The DOJ has reversed a legal opinion drafted under a previous Administration and concluded that states and localities, as sovereign entities, have the "inherent authority" to enforce federal immigration laws, including civil violations of immigration law. This opinion conflicts with the long-standing legal tradition that immigration is exclusively a federal matter. Moreover, by conscripting local police to serve as federal immigration agents, immigrant communities will lose their confidence in the police, thereby undoing decades of community-based policing initiatives that have been so successful around the country.

  As a corollary to this reversal of position, DOJ announced in December 2001 that it would begin to enter the names of hundreds of thousands of immigration status violators into the National Crime Information Center (NCIC) database so that local police could apprehend them. Compounding the potentially disastrous consequences of this initiative is a regulation issued by DOJ in March 2003 that exempts the NCIC database from the accuracy requirements of the Privacy Act. Hence, the database will provide information of dubious accuracy to local law enforcement officials who have little or no training in immigration law, increasing the likelihood of civil rights abuses. To forestall some of these concerns, the Civil Liberties Restoration Act would require information entered into the NCIC database to comply with the Privacy Act accuracy standards.

- **Implementing a discriminatory "special registration" policy:** The National Security Entry-Exit Registration System (NSEERS or special registration) imposed new registration requirements on certain applicants for admission to the U.S. as well as on certain non-citizens already living in the U.S. The latter requirement, known as call-in registration, required all males 16 years of age or older, who were citizens or nationals of one of twenty-five designated predominantly Muslim countries, and who entered the U.S. as nonimmigrants before certain designated dates, to be interrogated, fingerprinted, and photographed. Administration protests to the contrary notwithstanding, the call-in registration program plainly targeted people based on national origin, race and religion, rather than on specific intelligence information. Billed as a national security initiative, NSEERS obligated men from Muslim countries to register so that the government could get a better sense of who was in the country. Dutifully, more than 85,000 people registered; tragically, more than 13,000 of the registrants were placed into removal proceedings due to immigration status violations. Although many of the violations were technical in nature and many of the registrants were on the path to normalizing their status, they were placed in proceedings nevertheless.

  As with the post-9/11 detainees, none of the call-in registrants was charged with a terrorist-related offense, providing further evidence that this initiative succeeded only in alienating immigrant communities, straining international relations, and diverting precious law enforcement resources from identifying people who actually intend to harm our country. In December 2003, DHS wisely suspended certain re-registration requirements associated with the program, but left other components intact. The CLRA would terminate the NSEERS program in its entirety and provide relief from immigration consequences to many individuals who were placed in immigration proceedings as a result of this failed program.

- **Instituting "reforms" that severely undermine due process rights for immigrants appearing before the Board of Immigration Appeals**: Despite nearly universal agreement that our immigration system is replete with serious deficiencies, the Administration has begun dismantling the only review apparatus currently in place, the immigration appeals system. Through a series of regulations issued by Attorney General John Ashcroft, the Board of Immigration Appeals (BIA) - court of last resort for immigrants fighting deportation - has been stripped of its ability to serve as a meaningful watchdog over

lower courts. Because the Executive Office for Immigration Review (which currently houses the immigration courts) is a regulatory creation, the Attorney General possesses virtually unfettered discretion to reconstitute the system in whatever way he deems appropriate. The "reforms" at issue include the following: reducing the overall number of judges sitting on the Board of Immigration Appeals from 23 to 11 by reassigning the 5 most "immigrant friendly" judges to other positions; making one judge review of lower court decisions the norm as opposed to the traditional three judge panels; expanding dramatically the range of cases which can be affirmed without any opinion; and eliminating the Board's de novo review authority. (See AILA Issue Paper entitled "The Importance of Independence and Accountability in Our Immigration Courts".)

The results of this initiative have been stunning. A report commissioned by the American Bar Association (ABA) to evaluate the regulations determined that the increased speed in the decision-making process has had a significant impact on substantive outcomes: "decisions in favor of the respondents have decreased alarmingly from 1 in 4 to 1 in 10." Not only did the regulations fail miserably from a fairness perspective, they also failed to achieve their stated purpose of improving efficiency. The United States Courts of Appeals have experienced a massive surge in BIA appeals, in volume and rate, since the regulations were implemented. Hence, the net effect of the Attorney General's streamlining measures has been to shift the backlog to another branch of government - the federal courts – instead of eliminate it.

The need for independence and accountability in our immigration court system has been recognized time and again. For example, the United States Commission on Immigration Reform concluded in 1997, after years of study, that the Immigration Courts and the Board of Immigration Appeals should be removed from the Department of Justice and given the status of an independent agency within the Executive Branch. Yet, despite this clear prescription for improving the fairness and functionality of the system, the Attorney General has proceeded to undermine rather than strengthen the independence of the BIA. The CLRA would create an independent immigration court system and establish, for the first time, explicit statutory parameters for its makeup and functions.

CONCLUSION: AILA strongly supports policies undertaken since 9/11 that truly protect the public from further terrorist acts (such as the Enhanced Border Security and Visa Entry Reform Act, P.L. 107-173). The executive actions highlighted above, however, have done nothing to enhance our security and have eroded our constitutionally protected civil liberties. In thoughtful, measured fashion, the Civil Liberties Restoration Act reins in those policies that go too far in tilting the scales against individual rights and reaffirms our Constitutional commitment to provide due process to all persons.

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AILA Issue Paper

THE IMPORTANCE OF INDEPENDENCE AND ACCOUNTABILITY IN OUR IMMIGRATION COURTS

ISSUE: There is universal agreement that our immigration system is seriously deficient in training, coordination, and decision-making. Despite this fact, the Bush Administration is dismantling the only review apparatus currently in place, the immigration appeals system. Through a series of regulations issued by Attorney General John Ashcroft, the Board of Immigration Appeals (BIA), the court of last resort for immigrants fighting deportation, has been systematically stripped of its ability to serve as the watchdog for the lower courts. In a one-year period, the rate of rejected appeals skyrocketed from 59% to 86%. The AG's directives stripping the courts of any meaningful discretionary review highlights the need for major reform of the immigration court system and increased independence for the courts.

In considering the ability of immigration courts to act as independent bodies protecting critical due process rights, there should be no question as to the appropriate level of due process afforded to individuals in this system. The Supreme Court in *Plyler v. Doe* stated that: "Whatever his status under immigration laws, an alien is surely a 'person'…. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."

BACKGROUND: The need to reform our immigration courts to ensure efficiency and accountability, restore public confidence, and safeguard due process, has been recognized for many years. In 1980, a Congressional commission on immigration found that the structure of the immigration courts lacked an adequate framework for achieving efficient and fair proceedings. Similarly, the United States Commission on Immigration Reform (USCIR) concluded in 1997, after years of study, that the Immigration Courts and the Board of Immigration Appeals should be removed from the Department of Justice and given the status of an independent agency within the Executive Branch. The report observed that: "Experience teaches that the review function works best when it is well-insulated from the initial adjudicatory function and *when it is conducted by decision-makers entrusted with the highest degree of independence.* Not only is independence in decision-making the hallmark of meaningful and effective review, it is also critical to the reality and the perception of fair and impartial review." [5]

Yet despite this clear prescription for improving the fairness of our system, the Attorney General has elected to undermine rather than strengthen the independence of the BIA. In a single-minded effort to improve the BIA's efficiency and reduce the backlog of pending cases, the regulations were designed to limit the consideration that Board Members could accord to each case. A report commissioned by the American Bar Association (ABA) to evaluate the regulations determined that the increased speed in the decision-making process has had a significant impact on substantive outcomes: "Decisions in favor of the respondents have decreased alarmingly from 1 in 4 to 1 in 10." Not only did the regulations fail miserably from a fairness perspective, they also failed to achieve their stated purpose of improving efficiency. As a direct result of these regulations, the United States Courts of Appeals have experienced a massive surge in BIA appeals, in both volume and rate. Hence, the net effect of the Attorney General's streamlining measures has been to shift the backlog to another branch of government - the federal courts – rather than eliminate it, while raising serious concerns about due process and the adequacy of appellate review.

AILA'S POSITION: In furtherance of our country's historical and institutional commitment to protecting due process, AILA advocates for the creation of a separate, Executive Branch agency that would include the

[5] Unites States Commission on Immigration Reform (USCIR), 1997 Report to Congress, Becoming An American: Immigration and Immigrant Policy, at 175 (September 1997) (emphasis added).

trial-level immigration courts and the BIA. Such an Article I body would best protect and advance America's core legal values by safeguarding the independence and impartiality of the immigration court system.

Such a court also would enhance administrative efficiency, increase accountability and facilitate Congressional oversight of our immigration functions. Because the immigration courts handle more than 260,000 matters annually and employ 221 immigration judges in more than 52 locations across the country, administrative efficiency is a practical necessity. To achieve this efficiency, our immigration system needs to have one full-time, high-level person in charge of administering our immigration courts. Such authority would: improve accountability by fully integrating policy making with policy implementation, ensure direct access to high-level officials within the executive branch, and attract top-flight managerial talent.

In the immediate term, AILA believes the following changes are necessary to improve the level of due process available to non-citizens appearing before our immigration courts:

The three-judge deliberative panel must be reinstated. The DOJ regulation that broadly expands the type of cases that warrant single member review presupposes that the cases the BIA reviews are simple, straightforward, and unambiguous and warrant little time for serious deliberation. Nothing could be further from the truth. These cases often raise complex questions of statutory and regulatory interpretation and arise in a constantly evolving legal landscape. The regulation dramatically reverses long-standing BIA practice, and threatens the due process rights of immigrants who find themselves at the mercy of the courts. The three-judge panel is the appropriate and effective means of assuring adequate deliberation and the diverse interplay of legal opinions in cases that could ultimately involve life and death determinations.

The BIA must end its practice of issuing one- to two-sentence summary opinions. The regulation also broadly expanded the class of cases deemed appropriate for summary opinions. The Supreme Court has held, however, that an agency's statement of reasons for its decisions is one of several "minimal" due process requirements that must be observed. The BIA must have the time and resources to fully explain the reasoning behind the decisions that it makes. Efficiency can and must be achieved without destroying the integrity of the process. Moreover, the efficiency gains touted by DOJ in reducing some of the backlog are somewhat illusory. The increase in one-line summary dismissals has precipitated a flight to the federal courts of appeals for those individuals fortunate enough to have legal representation. (Fewer than half of the individuals who appear before an immigration judge are assisted by counsel.) The federal courts, in turn, have no underlying decision to review and must remand back to the BIA. This circularity plainly breeds inefficiencies.

The Board of Immigration Appeals must have a sufficient number of judges to do its job fairly and efficiently. To prevent future backlogs and to ensure thoughtful and thorough deliberation, the BIA must have enough judges to get the job done. The Board annually adjudicates about 30,000 cases. This massive case load, in conjunction with the critical functions performed by the Board, illustrates the need to increase, not reduce, the number of BIA judges. The counterintuitive reduction in BIA members from 23 to 11, in the context of reducing current backlogs and preventing future ones, is plainly bad policy. The reduction in members, in conjunction with the backlog reduction deadline, also sent a chilling message to Board members: reduce your backlog or lose your job. This message was not lost, as evidenced by the dramatic increase in the rate of rejected appeals. From October 2001, around the time the deadline was announced, to October 2002, the rate of rejected appeals skyrocketed from 59% to 86%.

The Board of Immigration Appeals must maintain its important role in assuring that decisions are fair and correct by having de novo review authority. In the majority of immigration cases, the Board is the only avenue for appeal and an opportunity for a complete review of an immigration judge's decision that offers critical protections against mistake or malfeasance. Despite the important role that the Board plays in our immigration system, under the DOJ regulations, the BIA lacks the authority to review the facts and testimony of the underlying case in making its decision unless they are "clearly erroneous." The result is a cursory BIA review of matters that often rise or fall on the particular facts of a given case. The Board needs to be able to review all aspects of an immigration judge's findings before making a decision on appeal.

The Board has a strict policy for deferring to the findings of fact made by immigration judges. However, there are situations where a de novo review and analysis of an immigration judge's findings of fact are appropriate. Although regulations require that immigration hearings be recorded, in the vast majority of cases immigration judges render oral decisions immediately upon the completion of testimony. As a result, immigration judges occasionally will misstate or omit important factual information in their decisions. Further, 56% of all people who appear before an immigration judge do not have an attorney. When combined with the language barriers that many people face, immigration decisions are sometimes based on confusion or the innocent mistakes of an unrepresented person.

The unique perspective of the Board and the use of de novo review are particularly compelling in asylum cases. As the Board itself has recognized, "in many cases, the expertise, independence, and sound judgment of this Board is all that stands between an asylum applicant and return to a place where he or she will face persecution or death." For example, the Board established the right of a woman to seek political asylum based on genital mutilation (*Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996)) after a de novo review of an immigration judge's decision denying relief. Without de novo review authority, this ground of asylum would not exist.

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AILA Issue Paper

RESTORE FAIRNESS AND DUE PROCESS: 1996 IMMIGRATION LAWS GO TOO FAR

THE ISSUE: In 1996, the 104th Congress passed and the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) and the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Touted as legislation that would control illegal immigration and combat terrorism, these laws did very little to address those issues. Instead, IIRAIRA and AEDPA include many provisions that significantly affect American families, legal immigrants and others seeking to enter the United States legally. Under the 1996 laws, legal immigrants routinely are detained without bond, deported without consideration for discretionary relief, restricted in their access to counsel, and barred from appealing to the courts. The laws expand the grounds of deportation, subjecting long-term immigrants to mandatory detention and automatic deportation for relatively insignificant crimes. Low-level immigration officials act as judge and jury, and the federal courts have been denied the power to review most deportation decisions and INS activities. Moreover, these laws are being applied retroactively. As a result, many immigrants have been expelled from their adoptive country for one-time offenses and youthful indiscretions that occurred, in some cases, many years ago. The 1996 laws are merciless: providing for no second chances, changing the rules in the middle of the game, and denying people their day in court. The 1996 immigration laws are tearing families apart and need to be reformed.

BACKGROUND: The media nationwide has profiled the cases of many people who have been hurt by the 1996 immigration laws. Many members of Congress who supported these laws now recognize that the laws went too far and must be changed. In the 107th Congress, several bipartisan bills were introduced in the House and the Senate that recognized the need to change these laws. Senators Edward Kennedy (D-MA) and Bob Graham (D-FL) introduced the Immigrant Fairness Restoration Act, S. 955, and Representative John Conyers (D-MI), with bi-partisan support introduced the Restoration of Fairness in Immigration Act, H.R. 3894. Both of these bills offer comprehensive reform on the issues of due process, judicial review, detention standards, refugee protection, and family unification.

In July 2002, the House Judiciary committee approved H.R. 1452, the Family Reunification Act of 2001. The Committee approved the bill after House Judiciary Chairman James Sensenbrenner (R-WI) and the bill's sponsor, Representative Barney Frank (D-MA), reached a compromise that the former Chair of the Judiciary committee, Representative Henry Hyde (R-IL), also supported. This bipartisan legislation targets the harshest aspects of the 1996 laws, and would restore some discretion in cases involving long-term legal permanent residents, address the problem of mandatory detention, and make other important changes. AILA strongly supported this compromise measure as an important first step in addressing the overly harsh laws passed in 1996.

At the start of the 108th Congress, Representative Conyers, along with 22 co-sponsors, introduced H.R. 47, which mirrors the previous due process bill, H.R. 3894.

AILA'S POSITION: AILA strongly supports H.R. 47 and other legislation yet to be introduced that would restore due process and a day in court for legal permanent residents, and believes that our laws must reflect the following:

Make the punishment fit the crime. Current laws punish legal immigrants out of proportion to their crimes. Even worse, the laws have been interpreted to apply retroactively. As a result, thousands of legal immigrants face removal for offenses that occurred many years ago, some of which were not even deportable offenses at the time they occurred. AILA supports restoring balance and fairness to our immigration laws by:

- Not changing the rules in the middle of the game. Deporting people many years later for crimes that were not deportable offenses when they were committed is unjust. Yet, the 1996 laws were written to apply

retroactively. Making laws retroactive is unconstitutional in criminal law, and should be avoided in the immigration laws. The retroactivity of the 1996 laws should be repealed.

- Amending the definition of "aggravated felony" to include only serious offenses. IIRAIRA greatly expanded the definition of "aggravated felony" for immigration purposes. This definition is unrelated to any criminal definitions and includes non-violent crimes such as shoplifting and writing bad checks. The definition should be amended to ensure that legal immigrants with relatively minor offenses are not classified as "aggravated felons" and thereby subject to automatic deportation with no discretion by an immigration judge.

- Restoring the definition of "conviction" and "term of imprisonment". IIRAIRA fundamentally changed the meaning of these terms. As a result, a person who never spent a night in jail is treated the same as a person who has served years in prison, and a state judge's decision to suspend or withhold sentencing is given no consideration. Even an expunged conviction is still treated as a conviction under immigration law. These laws should be changed to ensure that immigration laws respect criminal court judge and jury decisions.

- Restoring the definition of "crimes involving moral turpitude" to require the imposition of a sentence. Prior to the 1996 laws, an immigrant had to have been sentenced to a year for a crime involving moral turpitude in order to be deportable. As a result of IIRAIRA, this deportability ground is applied to any crime that *could* lead to a sentence of a year—even relatively minor crimes for which no jail time was served.

- Allowing immigrants who have been wrongly deported, or who were ordered deported because of the overly-harsh 1996 immigration laws, to reopen their cases.

Immigration Judges should make decisions based on the facts of the case. The 1996 laws stripped immigration judges of the discretion they had to evaluate cases on an individual basis and grant relief to deserving immigrants and their families. AILA supports returning integrity to the process by:

- Giving back to long-time legal residents—who have not committed a serious offense—the right to apply for relief from deportation. The 1996 laws took away an immigration judge's discretion to consider the facts of a case, the length of time the person has lived in this country, or any evidence of rehabilitation. Immigration judges should be given back the authority to consider all the facts of a case before making a decision to deport a legal resident, and should be given back the discretion to grant relief in deserving cases.

- Repealing the "stop-time" rule. The 1996 laws created a legal fiction that immigrants who committed an offense in the past are not allowed to claim that they had been residing in this country since that time. As a result, immigrants face removal based on something they did many years ago, and are unable to show that since that time they have been law-abiding members of their community. These legal fictions have no place in our laws. Immigration judges should be able to make decisions based on all the real facts of a case.

- Restoring the opportunity for long-time residents to apply for relief from deportation if they can prove extreme hardship to themselves. The 1996 laws took away the ability to consider the effect of deportation on the person seeking relief. People who have resided in this country for many years should be given back the opportunity to show the effects that removal would have on their lives.

- Ending the use of secret evidence. Under the 1996 laws, the government is given unprecedented authority to deport or detain an immigrant based on evidence they have never seen and, hence, cannot possibly refute. In rejecting this principle, one court has said, "One would be hard pressed to design a procedure more likely to result in erroneous deprivations. Secrecy is not congenial to truth seeking. No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and the opportunity to meet it." This simple statement is a fundamental requisite of any fair legal system. Proceedings conducted out of sight of the accused and their attorneys are a feature of totalitarian governments, not of our own.

Federal judges should have the ability to review agency decisions. The decision to deport is momentous, especially for refugees fleeing persecution and for those legal immigrants who have lived most of their lives in this country. Important issues of fairness and justice are at stake, and our system of checks and balances should apply to decisions that our immigration agency makes by:

- Ensuring that there is adequate judicial review of immigration orders and decisions. Our judicial system is one of checks and balances and immigrants deserve their day in court.

Use detention only when needed. The detention of individuals is an extraordinary power that should only be used in extraordinary circumstances. AILA supports reforms that would ensure that detention is not used to needlessly separate American families by:

- Ending the practice of mandatory detention. The 1996 laws require INS to put immigrants in jail even when they pose no danger or flight risk. AILA supports reforms that would require the Attorney General to release an immigrant from detention if he or she will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.

- Ending the practice of indefinite detention. As a result of the 1996 laws, thousand of immigrants are being held in jail indefinitely (the INS refers to them as "lifers") because we cannot remove them from the country. AILA supports reforms that would require the release of long-term detainees who cannot be removed to their countries of origin if the Attorney General cannot negotiate their return with the government of that country, and regular review of an immigrant's continued long-term detention.

Recognize immigrants' strong ties to their American families and communities. Family reunification has always been the cornerstone of our immigration system. Our immigration laws should be reformed to unite families instead of dividing them by:

- Repealing the 3/10-year bars and the permanent bar to re-entry. These bars divide and separate families and force people underground. They do not fulfill their intended purpose to be a deterrent to people overstaying their visas.

- Modifying and/or expanding waivers for grounds of inadmissibility. As a result of the 1996 laws, new grounds of inadmissibility were created and waivers were severely restricted. For example, false claims of U.S. citizenship, unlawful voting, and alien smuggling (for no commercial gain, as when a relative drives their sibling across the border) result in a permanent bar with no opportunity for a waiver or review. This is true regardless of any mitigating facts. The general policy of creating broad grounds of inadmissibility with no opportunity for relief must be changed to allow discretion to take into account circumstances including innocent intent, family ties in the U.S., or other humanitarian considerations.

- Ending the practice of excluding legal permanent residents returning from short trips abroad. After passage of the 1996 laws, as a result of a minor offense that may have occurred years in the past, a legal permanent resident returning from abroad is treated as though he or she were applying for admission to the United States for the first time. Immigrants who leave the United States temporarily do not necessarily abandon their homes here, and should not be treated as if they do.

- Treating immigrants in the United States in any status with dignity and respect.

We need to use our resources wisely: In the current environment, our government needs to use our resources wisely. We need to focus on the people who mean to do us harm, not legal permanent residents who have jobs and families here, contribute to their communities, and who share the same security concerns as the rest of us.

AILA Backgrounder

ACCESS TO COUNSEL

Access to counsel is a hallmark of our democracy. Unfortunately, many noncitizens are now being denied this access at our nation's ports of entry and in the interior of our country. The government's immigration policies have changed rapidly and dramatically in the post-9/11 era, triggering serious concerns about the infringement of immigrants' fundamental rights. Indeed, the Department of Justice (DOJ) Inspector General's report on immigrant detentions after 9/11 provides a scathing critique of immigration enforcement and detention practices, outlining a handful of clear constitutional violations. The migration of the government's immigration functions (except for the immigration court system) from DOJ to the Department of Homeland Security (DHS) has only exacerbated concerns about denial of access to representation.

In the post-9/11 environment, including the new administrative immigration regime, the need for a meaningful and enforceable right to legal representation has assumed new importance. Immigrants often lack the language skills and the necessary understanding of our legal processes to adequately present their cases, protect their interests, and preserve their rights. Not only can counsel help individuals assert their claims and protect their interests, counsel also plays an important role in facilitating and streamlining the admission process. Counsel's participation promotes efficiency and encourages correct decision making.

Immigration officers have the power to make decisions that can fundamentally alter a person's life. Decisions to remove or deny entry to individuals can tear families apart, deprive people of their livelihood, or return them to situations where they face persecution. The magnitude of these decisions underscores the need for and importance of ensuring access to counsel for noncitizens both at the border and in the interior.

REPRESENTATION IN IMMIGRATION MATTERS ADJUDICATED AT PORTS OF ENTRY

Background: Asylum seekers, business persons, relatives of U.S. citizens and other legal U.S. residents routinely are denied access to legal counsel in immigration-related matters at our nation's ports of entry. Since 1980, the Immigration and Naturalization Service (the functions of which have now migrated to the Department of Homeland Security (DHS)) has maintained that individuals applying for entry to the U.S. have no right to counsel at the border unless taken into custody as the focus of a criminal investigation. The INS based this position on its view that the ultimate power to determine whether someone is admissible or excludable rests in the administrative hearings that take place subsequent to an inspection at the border. It is at these hearings, according to the immigration agency, that the right to legal representation attaches.

However, the expedited removal provision in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) eliminates all avenues for administrative or judicial review for many applicants for admission. (The "expedited removal" provision is a mechanism for turning away arriving aliens who the government alleges have made a material misrepresentation during the entry process or who lack the required documentation for entry.) Using this draconian procedure, an inspections officer can bar a person from entering the United States for five years or life, depending upon the particular ground(s) alleged in the case. An individual inspections officer prepares and implements the decision to order a person removed with no opportunity for further administrative or judicial review of the order.

Issue: The Administrative Procedure Act (APA) mandates that a person compelled to appear before a federal agency is entitled to be represented by counsel or a qualified representative. Specifically, the APA contains sweeping language assuring a right to representation in administrative matters before agencies of the United States. The provision states:

> A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified

> representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. (5 U.S.C. §555(b)).

Despite the APA's assertion of a right to representation by counsel, a proviso posted to the Federal Register in 1980 maintains that this right is superfluous at primary or secondary inspections because individuals will have access to counsel in subsequent administrative proceedings. The Federal Register notice announcing this regulation states:

> The right of representation does not apply to a person who is being processed through primary or secondary inspection at a port of entry.…While the inspector has authority to admit an applicant for entry, he is not authorized to finally bar the alien….Subsequent administrative proceedings will determine whether or not an alien is admissible or excludable and it is at this point that the alien has the right to representation. (45 Fed Reg. 81732 (Dec. 12, 1980)).

However, the expedited removal provision in IIRAIRA precludes the opportunity for subsequent administrative hearings by providing the inspector with final authority to bar an alien from entering the United States for five years or life (depending upon the particular ground(s) alleged in the expedited removal order). The inspector prepares the order of expedited removal which is subject only to review by a supervisor, who must concur with the decision for the removal to be effective. There are no avenues of administrative or judicial review available to challenge orders of expedited removal.

Significantly, the government has not limited access to counsel in other border-related inspections. For example, there are no bars to representation in customs-related matters at the border. Attorneys and customs brokers (representatives authorized by regulation in customs-related matters) frequently provide valuable on-site assistance in clearing goods at the border, a reality that is readily acknowledged (and appreciated) by government officials. Thus, current border practices allow forty-foot freight containers to have expert representation regarding their entrance to this nation, while asylum seekers, business persons and other visitors are denied such assistance when confronted with equally complex situations.

AILA's Position: Access to counsel at the border can help guarantee that the government's broad powers to admit or bar noncitizens from entry are not used improperly or arbitrarily. The denial of access to counsel in situations where persons may be barred forever from the United States without appeal clearly violates the APA and contravenes fundamental due process principles. Given the expansive application of expedited removal procedures at the border and ports of entry, this denial of access to counsel is now ubiquitous and the government's rationale for this policy (representation will be permitted at "subsequent administrative hearings") is no longer supportable. The government has failed to offer any reasons for continuing to deny access to counsel. Congress should pass legislation affirming that the APA's guarantee of access to counsel applies to immigration matters at the border.

REPRESENTATION IN IMMIGRATION MATTERS IN THE INTERIOR SINCE 9/11

Background: Actions taken by DOJ officials and DHS officials during the post-9/11 period and the call-in registration program evince an agency mindset that the right to counsel is somehow discretionary and subsidiary to other agency prerogatives. In addition, the Attorney General for the first time unilaterally expanded the expedited removal program to individuals in the interior of our country.

As reported in the June 2, 2003, DOJ Inspector General's Report, in the wake of 9/11, many foreign nationals were detained without charges for extended periods of time and were prevented from any meaningful contact with legal counsel. Denial of access amounts to denial of counsel. Furthermore, numerous reports from attorneys representing individuals subject to the NSEERS call-in registration program indicate that their clients were frequently denied access to counsel during interviews and questioning. These reports were reinforced by a spokesman for the INS, Bill Strassberger, who indicated that INS did not believe that immigrants possessed a right to counsel during the booking process, even if questioning takes place during that process. Finally, on November 13, 2002, the Attorney General issued a Notice in the Federal

Register expanding application of the expedited removal procedures to any alien who arrives in the U.S. by sea, without inspection, and who has not been physically present in the U.S. for at least 2 continuous years prior to the determination of inadmissibility. Accordingly, for the first time, the government has instituted a policy that will prevent individuals already here in the U.S. from obtaining legal representation during removal proceedings.

Issue: The right to counsel has been recognized for individuals placed in removal proceedings after entering the U.S. Indeed, a right to counsel for immigrants in removal proceedings is protected by federal regulation, statute, and the Constitution. Section 292 of the Immigration and Nationality Act (INA) explicitly provides that a right to counsel (at no expense to the government) exists during removal proceedings before an immigration judge.

This right has been difficult to enforce in the post-9/11 era because the government largely has adopted the attitude that foreign nationals with immigration problems should be treated like terrorists. The Supreme Court has established the clear principle that constitutional due process applies to all "persons" in this country, including noncitizens. The government's efforts to impede and circumvent foreign nationals' access to legal counsel are tantamount to an assault on that principle.

AILA's Position: The right to legal representation for noncitizens facing removal from the interior of this country is well established. Moreover, as a practical matter, in these times of rapidly changing immigration policy, attorneys with expertise in the field are indispensable to ensure the protection of immigrants' substantive and procedural rights. Expansion of expedited removal proceedings to individuals already here in the U.S. moves us in precisely the wrong direction by circumventing the right to representation. Likewise, actions by immigration authorities that materially interfere with access to counsel diminish and devalue the right, increasing the likelihood that the right will be further degraded going forward.

Congress should move to strengthen the right to counsel by prohibiting expedited removal of noncitizens already present in the interior. Congress also should make intentional agency denials of access to counsel an actionable offense.

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AILA Issue Paper

L-1 VISAS AND U.S. ECONOMIC GROWTH: PRESERVING AND STRENGTHENING THE INTRACOMPANY TRANSFEREE VISA CATEGORY

Issue: For almost 35 years, the L-1 visa has been a vital tool for both U.S. companies with an international presence, and international firms expanding into the U.S. Although not a heavily utilized visa, the L-1 visa has done much to foster foreign investment in the U.S. It is the principal immigration vehicle foreign companies use to build U.S. factories, open offices, and hire significant numbers of U.S. workers to staff their U.S. operations. Unless foreign companies are able to bring key personnel to their American operations, they are unlikely to establish or expand their presence in our country.

Recent proposals to restrict use of the L-1 visa would unnecessarily limit its legitimate use, thereby diminishing the economic competitiveness of U.S. companies, impeding foreign investment in the U.S., and resulting in the loss of American jobs.

Examples of How the L-1 Visa Benefits the American Economy

- Opening New U.S. Company: A global mineral exploration and mining company opened a significant mine in Washington State thanks to the L-1 visa category, which enabled the company to bring in key personnel to institute procedures, policies, and U.S. operations of this foreign-based company. The transferred personnel allowed the company to apply its management methods and training procedures for specialized equipment and mining procedures that had been developed at the head office. Without the L-1 visa category, the company would have had difficulties in setting up its operations and may have not made this investment.
- Critical Supervision for the Development of a New Vaccine: A publicly traded U.S. manufacturer of biotechnology products is a leading producer of vaccines, including those for tick-born encephalitis, Lymes disease, influenza, and hepatitis. Through the use of an L-1 visa, the company was able to bring in the engineering director of a subsidiary company located in Asia (who had the requisite knowledge of the company's research, operations, and practices) to supervise a staff of 250 engineers and scientists in all aspects of a new vaccine's development.
- Improving Products: A large U.S.-based paper company utilized the L visa to transfer cutting edge technology in the development of high brightness paper to its U.S. operations. The technology process had been perfected in the company's Scandinavian plant, and the engineers with specialized knowledge in this process brought the technology to the U.S. facilities. This process will soon replace the old industry standard in the production of paper. The ability to bring the process to the U.S. plants will save the U.S. production capacity, thereby retaining and creating American jobs.
- Transferring Knowledge: A large U.S.-based multinational medical technology company with facilities around the world relies on the L visa category to transfer key foreign personnel with specialized knowledge of the company's research, development and implementation projects for life saving medical devices. The company also uses the L visa category as part of its global strategy to rotate managers through its larger facilities.
- Expanding Market Potential: An Illinois-based manufacturer of industrial and construction equipment wanted to upgrade and tailor the design of its product line for sale in foreign markets. In order to meet this objective, a design engineer from the company's German subsidiary, who possessed critical expertise in the engineering aspects of key machinery, was brought in using the L-1 visa for a 2-year period to guide design and engineering.

- Enhancing U.S. Products: A foreign-based software company that develops specialized software for large organizations acquired a U.S. company. To integrate the company's proprietary software with newly acquired products and intellectual property, the company needed to temporarily transfer an engineer to the U.S. who possesses knowledge of that software. Without this engineer, it would have been difficult, if not impossible, to get the software up and running in the U.S.

Background: Since its creation in 1970, the L-1 visa for intracompany transferees has been an essential vehicle for job creation and business investment in the U.S. Through the L-1 visa, large and small American-based companies have brought in qualified personnel from their operations abroad to the U.S. Foreign-based companies also have used this visa to invest in the U.S. economy by establishing and expanding business operations here.

L-1 visa holders enter the U.S. on a temporary basis either on an L-1(A) visa for executive or managerial positions or on an L-1(B) visa which requires the employee to possess specialized or advanced knowledge that generally is not found in the particular industry. (Where the specialized knowledge relates to the company's operations, products, procedures, and services, it must be noteworthy or uncommon knowledge.) In most cases, the foreign national must have worked for the multinational firm abroad for a full year before being eligible for the visa category.

According to the most recent available data from the Department of State, L visas comprised just 0.02% (112,624) of the total number of visas issued by the Department of State (DOS) during FY 2002. L visa issuance peaked in FY 2001 at 120,538, reflecting the economic boom. Usage has subsequently declined. As of May 31, 2003, the DOS had issued a total of 69,105 L visas this fiscal year. Out of this total, only slightly more than half of those visas went to L-1 principal visa holders, with the rest taken by spouses and minor children of the L-1 principal.

Current Issues: Current law prohibits using an L visa to send a foreign national to the United States to work alongside the workforce of a third party, under the control of the third party, performing the same kind of work done by the third entity's employees and displacing U.S. employees.

According to current law and DOS guidance issued over seven years ago, an L-1 visa holder can visit a third party site only when the petitioning organization controls the time, place, and content of the work assignment, and, in the case of an L-1(B) visa, if the visa holder possesses specialized knowledge unique to the petitioning company. For example, if an international company has developed proprietary computer software that will improve a U.S. company's production capabilities, it is permissible for an L-1 visa holder to install the software at the third-party client site and train the client's workforce in its very specialized uses. The ability of an L-1 intracompany transferee to visit customer sites promotes business profits, lowers costs to consumers through the development of innovative products and services, and, as experience has shown, leads to the creation of jobs for American workers.

Some L visas recently were granted in which the visa holder was assigned at a third party site and was not using specialized knowledge or under the control of the petitioning employer. These visas were erroneously granted and are clearly prohibited by current law and DOS guidance. This prohibition needs to be enforced. Reportedly, the State Department already has taken steps to clarify the L visa requirements upon learning that a limited number of L-1 visas were inappropriately granted.

In the wake of these erroneously issued L-1 visas, several bills have been introduced. Senator Saxby Chambliss (R-GA) introduced, S.1635, the L-1 Visa (Intracompany Transferee) Reform Act of 2003. This bill recognizes the importance of the L-1 visa to the U.S. economy and limits the program in a way that is less damaging than measures already introduced in Congress. Specifically, S.1635 would target the L-1B visa holders and prevent them from being primarily stationed at the worksite of a third party in cases where they would not be controlled and supervised by the petitioning employer, or if their placement at the third party site was part of an arrangement to provide labor for the third party rather than in connection with their duties involving specialized knowledge specific to the petitioning employer. The bill also would reinstate the 1-year work requirement for L-1 blanket petitions and require the Department of Homeland Security to maintain statistics on the L program.

The remainder of the bills introduced thus far promotes reform of such breadth that they would dramatically reduce the benefits of the L-1 visa and hurt American workers and employers. Representative John Mica (R-FL) introduced H.R. 2154, which would require all employers petitioning for an L-1 visa to file attestations with the Department of Labor (DOL) and would unnecessarily restrict legitimate uses of the L-1 visa. Representative Rosa De Lauro (D-CT) introduced H.R. 2702, which includes provisions that would effectively negate the L visa category by requiring a lengthy DOL application process and a prevailing wage determination that does not recognize the total compensation and expatriate benefits packages offered transferred international personnel, and which would impose an inadequate cap as well as an educational degree requirement. These provisions would halt the expedient transfer of international personnel so necessary today and stifle a job-creating visa that has operated with a nearly unblemished record for over 30 years.

Both bills also would subject the L visa to DOL regulations. Experience has shown that DOL regulations often are oppressive in practice and only questionably effective. To impose such regulations on the L program would lead to excessive bureaucratic red tape that would frustrate its primary purpose as a vehicle to expeditiously shift key personnel from international offices to U.S. affiliated operations.

In addition, Senator Christopher Dodd (D-CT) and Representative Nancy Johnson (R-CT) introduced S. 1452/H.R. 2849, companion bills that focus on both the L-1 and H-1B visas. These bills fail to differentiate between the two visas. The H-1B visa program allows U.S. employers to hire highly educated foreign professionals on a temporary basis who provide specialized or unique skills and global market expertise and relieve temporary worker shortages. In contrast, U.S. employers use the L-1 visa to transfer to this country their own foreign national executives or managers or employees who possess specialized or advanced knowledge. Like the bills cited above, S. 1452 and H.R. 2849 include provisions that would unnecessarily restrict the legitimate use of the L-1 visa.

The Dodd/Johnson legislation would require labor attestations that include lay-off protections for U.S. workers and a prohibition on the outsourcing of L-1 visa holders. Petitions for an L-1B visa would require an additional application stating that the employer has taken good faith steps to recruit US workers for the position. The bills would also increase the work experience requirement with the foreign employer from one year to two years and would cut the duration of stay for L visa holders (including permissible extensions) by two years.

AILA's Position: AILA opposes any measures that would unnecessarily restrict companies' ability to use the L-1 visa category. A narrowly tailored solution, such as S.1635, would address the concerns noted above. AILA supports a new statutory construct that would refine the current law by prohibiting the use of L-1 visas in simple contract labor arrangements, in which a third party (other than the petitioner) controls the beneficiary's work and essential elements of the beneficiary's employment. The petitioning company or a qualified related organization should be required to supervise the L-1 worker and to control the essential elements of the employment, including the individual's work product, time, place and content of work.

AILA's proposal would strengthen the law in several ways. It would preclude abuse of the L visa category in simple contract labor arrangements. It would maintain the efficiency of a visa category vital for U.S. companies' transfer of key international employees to the United States. And it would continue to permit the American economy and U.S. workers and employers to benefit from foreign companies' investment in the United States.

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AILA Issue Paper

HIGHLY EDUCATED FOREIGN PROFESSIONALS: KEY CONTRIBUTORS TO AMERICA'S ECONOMIC ACHIEVEMENT

THE ISSUE: The H-1B visa program, which allows U.S. employers to hire highly educated foreign professionals on a temporary basis, helps fulfill the need for professional workers essential to both our economic development and our nation's ability to compete in a global environment. Congress and the Administration need to ensure that American employers have access to these professionals now and in the future.

BACKGROUND: Through the H-1B program, U.S. employers are able to hire, on a temporary basis, highly educated foreign professionals for "specialty occupations"-- jobs that require at least a bachelor's degree or the equivalent in the field of specialty. Examples include doctors, engineers, professors, accountants, researchers, medical personnel and computer professionals. Besides using these foreign professionals to obtain essential skills or rare and unique knowledge, U.S. employers use the program to acquire special expertise in overseas markets, trends or distribution (therefore allowing U.S. businesses to compete in global markets), or to alleviate temporary shortages of U.S. professionals in specific occupations.

Employers would not go through the extra burdens, costs, and delays of hiring foreign professionals through the H-1B program if they were able to find U.S. workers with the required expertise. Beginning in 1998, employers had to pay a $1,000 fee for each application, in addition to other fees and related costs. Application processing times currently are taking anywhere from 3 to 5 months. This lengthy adjudication process is further compounded by Department of State delays in issuing visas. Employers thus may have to wait for over half a year before filling a specific professional position.

During the last decade's economic boom, highly educated foreign nationals filled vacancies in both the Information Technology (IT) fields and in many non-technology-oriented industries such as: education (elementary, secondary and higher); engineering; architectural and related services; scientific research and development; semiconductor and other component manufacturing; medical and surgical hospitals and other related medical services; pharmaceutical and medicine manufacturing; and management, scientific and technical consulting services.

As the American economy grew in the last decade, U.S. businesses found that rigidity in the H-1B program threatened the economic boom since it did not permit the program to adjust to meet the demand for highly educated professionals. As a result, the American Competitiveness in the 21st Century Act (AC21) (PL 106-313) increased the program's numerical cap to 195,000 for three fiscal years. Although these additional numbers helped ensure that H-1Bs filled vacancies across our economy, the temporary elevation of the numerical cap failed to provide the program with a long-term solution that reflected how and why U.S. employers utilize these highly educated foreign professionals. As a result, the numerical restriction reverted to 65,000 on October 1, 2003 and the cap and was reached 5 months into fiscal year 2004.

Today, many industries continue to have need of highly educated professionals and turn to the H-1B program to fill these specialized positions that would otherwise remain vacant. In the science-oriented sectors there still are not enough U.S. students graduating with advanced degrees to fill these highly specialized positions. In other fields, such as education, there are shortages in specific areas of the country and positions continue to go unfilled. In addition, as U.S. companies try to revitalize their businesses, they need access to professionals with unique knowledge, skills and expertise in overseas markets. These professionals give U.S. companies the ability to develop new products, platforms and programs, enter new markets, and expand their client base. The result is increased productivity and job creation for American workers.

How are U.S. workers protected? The H-1B program has built-in safeguards to ensure that highly educated foreign professionals do not undercut the wages offered U.S. workers. Employers must offer the foreign professional a wage that is the **higher** of either the typical wage in the region for that type of work ("prevailing wage"), or what the employer actually pays existing employees with similar experience and duties. A U.S. employer using this program must guarantee that: (1) the foreign professional will be paid at or above the rate paid for a similar position at the employer's own offices, or at those of its local competitors; (2) the foreign professional will not adversely affect the working conditions of U.S. colleagues; (3) U.S. colleagues will be given notice of the professional's presence among them; and (4) there is no strike or lockout at the worksite. The employer also must demonstrate that the position requires a professional in a specialty occupation and that the intended employee has the required qualifications.

Under the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) (PL 105-277), employers who use a higher percentage of H-1B visas must meet additional requirements, including documenting recruitment in the U.S., and are forbidden from laying off American workers to hire a H-1B professional. Penalties for companies that violate the law include fines of up to $35,000, a three-year bar from participating in visa programs, and repayment of salaries and benefits to any under-paid foreign professional.

AILA's POSITION: The H-1B visa is a tool to keep the U.S. economy vibrant and keep jobs in America. Highly educated foreign professionals allow U.S. employers to develop new products, create groundbreaking research, implement new projects, expand operations, create additional new jobs, and compete in the global marketplace. As evidenced by reaching the cap so early in the fiscal year, H-1B professionals remain essential to fill specific positions in companies across the country. As the U.S. economy improves and demand increases, U.S. employers will need increased access to these professionals. If the H-1B program cannot give U.S. employers such access, the consequence could be detrimental to America's economy. In the short term, limitations on access would prevent employers from fully utilizing the special skills of these highly educated foreign professionals. In the longer term, such rigidity would limit our labor market supply of these available professionals, thereby hampering our economic vitality. The result will be American jobs lost and American projects losing out to foreign competition. Congress needs to support an H-1B program that reflects our nation's need for these professionals and allows U.S. employers access now and in the future to the talents of these highly educated foreign professionals.

38IP3005 02/18/04

AILA Issue Paper

H-1B PROFESSIONALS AT A GLANCE

Who are H-1B Professionals:

- **Temporary highly educated professionals:** H-1B visa holders are foreign professionals who are hired by a U.S. employer to temporarily fill "specialty occupations," those jobs requiring a bachelor's degree or the equivalent. H-1B professionals include teachers, doctors, engineers, professors, lawyers, physical therapists, and computer professionals.

- **Comprise a low percentage of the workforce:** During the economic boom, when H-1B professionals were at their height, these temporary professionals comprised less than **one-tenth of one percent** of the U.S. workforce of more than 127 million people.

Employers Hire H-1B professionals for Three Reasons:

- **To provide specialized or unique skills:** Employers hire H-1B professionals to obtain essential technical skills or knowledge that is relatively unique and not readily found in the U.S.

- **To relieve temporary worker shortages:** H-1B professionals fill positions when there is a temporary shortage of workers with specific skills in a specific field, thus allowing employers to respond quickly to shifts in the labor market.

- **To supply global market expertise:** Employers often need H-1B professionals who bring special expertise in overseas needs, markets or trends that enable U.S. businesses to compete globally.

Employers Must Protect U.S. Workers When They Hire H-1B Professionals:

- **Protect wages:** Employers must pay each H-1B professional a wage that is the higher of either the typical wage in the region for that type of work ("prevailing wage"), or what the employer actually pays existing employees with similar experience and duties.

- **Protect working conditions:** Employers cannot use H-1B professionals to break a strike and must notify their U.S. workforce when hiring an H-1B professional. Employers cannot make the H-1Bs work under conditions different from their U.S. counterparts, including hours, shifts and benefits.

- **Recruit in the U.S. and not displace U.S. workers:** Employers who use a lot of H-1B visas first must try to find U.S. workers before they can hire an H-1B professional. They also must attest that they are not using an H-1B visa if they have laid-off or displaced a similarly situated U.S. worker.

- **Subject to penalties:** Employers who fail to comply with Department of Labor regulations may be subject to investigation, civil and administrative penalties, payment of back wages, and even debarment from participating in key immigration programs.

Numerical Cap on H-1B Professionals:

- **A statutory cap regulates the H-1B program:** A rigid cap in the past denied employers access to professional workers in response to shifts in market forces. In the late 1990s, with demand high, U.S. businesses lobbied intensely for an increase in the restrictive cap. As a result, the cap was increased to 195,000 per year. The cap reverted back to 65,000 in October 2003, and was hit 5 months into fiscal year 2004. As our economy starts to develop, this rigidity will impede our progress. Congress and the Administration must develop new mechanisms to ensure that American companies have access to H-1B professionals.

38IP3002B 2/25/04

AILA Issue Paper

Three Year, Ten Year & Permanent Bars to Admission

ISSUE: The 1996 Illegal Immigration Reform and Responsibility Act (IIRAIRA) created three year, ten year, and permanent bars on admission to the U.S. for a variety of immigration status violations. These bars apply widely and affect immigrants who have family in the U.S., have worked and paid taxes in the U.S., and in many cases are otherwise eligible for permanent resident status.

BACKGROUND: The three year bar applies to individuals who have been unlawfully present in the United States for a continuous period of more than 180 days, but less than one year, and who voluntarily depart the country.

The ten year bar applies to individuals unlawfully present in the U.S. for an aggregate period of one year or more who depart voluntarily. Unlawful presence begins to accrue when the period of authorized stay expires or after an entry to the U.S. without inspection.

The "permanent" bar applies to any person who has ever been ordered removed (or has resided in the U.S. unlawfully for more than 1 year in the aggregate), leaves the United States, and then returns or attempts to return without being admitted.

The following classic example highlights the excessive harshness of these bars.

Example: An individual applies for and receives a 10 year visitor visa and enters the U.S. pursuant to such visa to visit family. At the border, the inspecting immigration officer annotates Form I-94 by hand authorizing only a 90 day period of admission. The visitor, believing the visa authorizes his stay in the U.S. for the next 10 years, does not realize that the annotated Form I-94 limits his period of stay and he remains in the U.S. for 10 months. At day 91 of his stay in the U.S., he begins to accrue unlawful presence and 180 days after that, he automatically becomes subject to the 3 year bar on reentry. (If he were to stay in the U.S. for a year after hitting day 90, he would become subject to the 10 year bar on reentry.) Now even if this individual is eligible to become a permanent resident through family or employer sponsorship, he will be unable to attain that status: he is ineligible for adjustment of status (Section 245(i) of the Immigration and Nationality Act has expired), and he is ineligible to receive a permanent immigrant visa at a U.S. consulate until he has been outside the U.S. for the 3 (or 10 depending on the circumstances) year period.

AILA'S POSITION: AILA strongly supports eliminating the 3 year, 10 year, and permanent bars. Rather than stemming illegal immigration, these bars encourage people to remain in the U.S. in an undocumented status. The bars undermine rather than promote our country's national security goals. If we eliminate these rigid bars, individuals will be encouraged to come out of the shadows and normalize their status by leaving the country and applying for a lawful visa authorizing their reentry. These bars make our immigration system inflexible and dysfunctional and are an obvious symptom of the need to reform our immigration laws.

34IP3004
2/23/04

AILA Issue Paper

ELIMINATE THE ASYLEE ADJUSTMENT CAP

ISSUE: Under our immigration laws, an individual granted asylum in the United States may apply to adjust his or her status to that of a lawful permanent resident one year after the application for asylum has been approved. However, our laws also include a numerical cap of 10,000 annually that limits the number of asylees who may become permanent residents, *regardless of the number granted asylum each year*. As a result, more than 150,000 individuals *lawfully granted asylum in the United States* are currently waiting to have their applications for lawful permanent residence status processed. While they are waiting, these individuals are forced to remain in a legal limbo for many years.

BACKGROUND: Congress established the current asylee adjustment cap in the Immigration Act of 1990. Since 1995, when the INS reformed asylum procedures, more than 10,000 individuals each year have been granted asylum. All asylee adjustment applications over the statutory cap of 10,000 are carried over to the following year for adjudication, thereby creating a burgeoning backlog of pending applications. As a result, there is presently a backlog of over 150,000 asylee adjustment applications.

To compound the backlog problem, over the last decade the former INS has failed to award the full number of statutorily available adjustments. The American Immigration Law Foundation (AILF), AILA's sister foundation, initiated litigation to force the government to recapture all unused adjustment slots. On February 12, 2004, in the case of *Ngwanyia v. Ashcroft*, a U.S. District Judge ruled that this failure to utilize the full 10,000 adjustment slots was a violation of law and characterized the government's actions as "egregious" and a "national embarrassment." The practical effect of the ruling is that 22,000 unused slots for adjustment must now be used.

Despite this successful litigation, an individual granted asylum today will still be unable to become a permanent resident for at least thirteen years, and will be ineligible to naturalize for at least eighteen years. In contrast, individuals admitted into the U.S. as refugees are not subject to a cap on adjustments. Given that the standards for asylee and refugee status are the same (i.e., a well-founded fear of persecution), the difference in eligibility for permanent residence does not make sense. A refugee can adjust to permanent residence in less than two years, and is eligible to naturalize in five years. Thus an asylee will have to wait at least three times as long as a refugee to become a citizen and be able to fully participate in our society.

Individuals granted asylum already have been screened through a rigorous process during which they must submit testimonial and/or documentary evidence supporting their claims and respond to questions by a trained asylum officer or an Immigration Judge. Additionally, applicants must submit to a thorough criminal background investigation. Moreover, all of these individuals are already in the United States and have been admitted for an indefinite stay. They are already eligible to work based on their asylum status. More expeditious granting of permanent resident status and eligibility for naturalization for asylees would therefore not increase the level of immigration to the United States. It only would hasten the integration into our society of deserving individuals, to whom the U.S. already has extended its protection.

AILA'S POSITION: AILA strongly supports the elimination of the annual cap on the adjustment of status of asylees (found in Section 209(a) of the Immigration and Nationality Act).

34IP4005 2/20/04

AILA Issue Paper

Restricting Immigrant Access to Driver's Licenses

THE ISSUE: The U.S. Congress and state legislatures recently have begun considering measures to restrict immigrants' access to driver's licenses. These proposals go well beyond denying undocumented immigrants access to drivers' licenses and are likely to effect legal immigrants and even U.S. citizens. While intended to increase national security, these measures will not enhance our security but will interfere with effective law enforcement.

BACKGROUND: Representative Jeff Flake (R-AZ) introduced H.R. 655 in February of 2003. This measure would bar federal agencies from accepting for any identification-related purpose any state-issued driver's license, or other comparable identification document, unless the state requires that such licenses or documents issued to nonimmigrant aliens expire upon the expiration of the aliens' nonimmigrant visa.

At the same time, some state officials have linked the denial of driver's licenses to undocumented immigrants to efforts to combat terrorism, alleging that the driver's licenses that several of the terrorists obtained facilitated their activities. (However, the terrorists did not need U.S.-issued driver's licenses to board planes on September 11 because they had foreign passports that would have enabled them to board.) Since September 11, many states are considering proposals to tighten the rules regarding driver's license eligibility and to further restrict immigrants' access to driver's licenses.

AILA'S POSITION: AILA opposes limiting immigrants' access to driver's licenses based on immigration status. Denying driver's licenses to large segments of the population is an inefficient way to enforce immigration laws and prevent terrorism and would make everyone in the community less safe.

Restrictive Licensing Will Impede Law Enforcement and National Security. Many local law enforcement officials oppose restrictive licensing proposals because driver's license databases play an important role in enforcement. Restrictive proposals will undermine law enforcement because:

- Licensing noncitizens enriches our domestic intelligence by allowing law enforcement authorities to verify and obtain the identities, residences, and addresses of millions of foreign nationals. Restrictive licensing will deprive authorities of this information.
- The proliferation of fraudulent documents that will result from restrictive licensing will impede law enforcement efforts by contaminating intelligence regarding who is present in the United States.

State Driver's License Agencies Have Neither the Authorization nor Knowledge to Interpret Immigration Laws and Documents. Restrictive licensing will require state motor vehicle administrators to become INS law and document experts in order to evaluate properly an applicant's immigration status and determine when such status expires. Immigration law creates approximately 60 ever-changing nonimmigrant visa categories in addition to classifications for asylees, refugees, parolees, persons in immigration proceedings, persons under orders of supervision, and applicants for many of these categories, as well as applicants for extension, change, or adjustment of status, to name a few. The scheme of documents issued by the INS, the State Department, and other agencies as evidence of these classifications is even more perplexing and includes visa stamps, laminated cards, unlaminated handwritten cards, forms, letters, and many other documents, either in combination or alone, which, even to the trained eye, often do not clearly show an applicant's status or duration of lawful admission. Additionally, due to extensive INS delays in application processing, many immigrants and lawful nonimmigrants will be unable to present documentation of their status. It is highly unlikely that motor vehicle administrators will be able to determine correctly whether a particular document or combination of documents establishes lawful status. This task requires the interpretation and application of a complex body of law. Requiring DMV personnel to understand and

enforce immigration laws will most likely result in legal United States residents facing wrongful license denials and revocations for reasons that are wholly unrelated to driver competence.

Restrictive Licensing Will Severely Jeopardize Highway Safety. Proposals to restrict immigrants' access to driver's licenses will result in more unlicensed drivers operating vehicles on U.S. roads. Whether licensed or not, many individuals will have no choice but to drive—to work, to schools, to doctors, and to many other destinations—to meet basic everyday needs. Thus, restrictive licensing has the potential to reduce the safety of Americans and all drivers on our roads because it will:

- Remove an entire segment of the driving population from the reach of administrators charged with testing and certifying driver competence, which will contribute to the national highway mortality rate of 40,000 persons each year;
- Deprive motor vehicle administrators of the driving records of millions of drivers;
- Discourage or prevent millions of drivers from registering their vehicles;
- Eliminate incentives for foreign nationals to attend driver education schools;
- Increase the rate of minor traffic violations for unlicensed driving, which will divert law enforcement and judicial resources from truly serious offenses; and
- Create incentives for unlicensed drivers to flee accident scenes.

Denying driver's licenses based on immigration status also will prevent millions of drivers from obtaining insurance, which will increase uninsured motorist pools, contribute to current uninsured motorist losses of $4.1 billion, and increase insurance rates.

Production and Sale of Falsified Documents is Likely to Increase if Larger Numbers of Noncitizens are Denied Drivers Licenses. Restrictive licensing will encourage the fraudulent production and use of the many documents that are available to establish lawful immigration status by transforming the driver's license into a de facto INS document that will become necessary to establish lawful status. These fraudulent documents will further complicate the task of motor vehicle administrators by requiring them to detect fraudulent INS documents. Additionally, restrictive licensing will increase the market for easily obtained fraudulent documents, such as birth certificates and social security numbers, to establish identity. According to the Department of Health and Human Services, there are 14,000 different versions of birth certificates currently in circulation.

21IP2003
2/28/04

AILA Issue Paper

PERMANENT PARTNERS

ISSUE: One of the fundamental tenets of our immigration system is the idea that legal permanent residents and U.S. citizens should be able to sponsor their loved ones, defined as spouses and other immediate family members, for immigration status. This principle of family unification is an unassailable characteristic of our immigration system. However, same sex partners of U.S. citizens and legal permanent residents are not considered "spouses and other immediate family members" for immigration purposes. Even long-term, committed, permanent relationships fail to receive legal recognition under our immigration laws. This outdated and biased definition forces U.S. citizens and legal permanent residents to make unconscionable, life-altering decisions to either relocate to a foreign country, or permanently separate from their loved ones. Legislation introduced in the 108th Congress would amend our immigrations laws to make "permanent partners" of U.S. citizens and legal permanent residents eligible for legal status.

BACKGROUND: Representative Jerrold Nadler (D-NY), along with 89 original co-sponsors, introduced the Permanent Partners Immigration Act, H.R. 832, on February 13, 2003. Senator Patrick Leahy (D-VT), introduced the Senate companion bill, S. 1510, on July 31, 2003. H.R. 832 and S. 1510 would modify the Immigration and Nationality Act to provide same-sex partners of U.S. citizens and lawful permanent residents access to immigration status by adding the term "permanent partners" to the statutory definition of family. H.R. 832 and S.1510 would define a "permanent partner" as any person 18 or older who is:

(a) in a committed, intimate relationship with an adult U.S. citizen or legal permanent resident 18 years or older in which both parties intend a lifelong commitment;
(b) financially interdependent with that other person;
(c) not married to, or in a permanent partnership with, anyone other than that other person;
(d) unable to contract with that person a marriage cognizable under the Immigration and Nationality Act; and
(e) is not a first, second, or third degree blood relation of that other individual.

These bills are imminently fair in that same sex relationships would be treated no differently than opposite sex relationships (other than the marriage requirement for opposite sex couples). Just as in a filing involving an opposite sex couple, evidence required to prove a same sex partnership would be no less stringent. A foreign partner would be placed on a two-year conditional residency and be required to attend an interview before the granting of a green card, and couples would be subject to severe criminal penalties for fraud or other abuse.

Importantly, H.R. 832 and S.1510 would bring U.S. immigration law in line with the 15 other countries that already recognize same sex partnerships for immigration purposes; Australia, Belgium, Canada, Denmark, Finland, France, Germany, Iceland, Israel, the Netherlands, New Zealand, Norway, South Africa, Sweden and the United Kingdom.

AILA'S POSITION: AILA strongly supports the introduction and passage of the Permanent Partners Immigration Act (H.R. 832/S.1510), which will continue our heritage of granting legal status to the loved ones of U.S. citizens and legal permanent residents.

34IP4002 2/18/04

AILA Hot Bills

108th CONGRESS

Below is a list of immigration-related bills introduced thus far during the 108th Congress that reflect AILA's legislative priorities. (The list, which is updated regularly, is organized by topic, with Senate bills listed first.) For the status of these bills, or for more information, please contact the AILA Advocacy Department (Phone 202-216-2400; Fax 202-783-7853) or visit the Advocacy Center on InfoNet. To view a complete listing of immigration-related legislation introduced during the 108th Congress, visit the "Track Legislation" section in the Advocacy Center on InfoNet and click on "Immigration-Related Legislation."

If you are unable to link from this document to the respective bill text and bill summary, information on the legislation listed below may be found at: http://thomas.loc.gov/. Simply insert the bill number in the search box and click on the "SEARCH" tab.

Adjustment of Status/Family Unification

S. 1545 **Support**	**The Development, Relief, and Education for Alien Minors (DREAM) Act of 2003**: Introduced on July 31 by Senators Orrin Hatch (R-UT) and Richard Durbin (D-IL), S. 1545 would amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to again permit states to determine residency for in-state tuition purposes. The DREAM Act also would grant conditional permanent resident status to young people who came to the U.S. before the age of 16, have good moral character, have lived in the U.S. at least five years at the time of enactment, and have graduated from high school.
S. 1510 **Support**	**The Permanent Partners Immigration Act of 2003**: Introduced on July 31 by Senator Patrick Leahy (D-VT), would provide a mechanism for U.S. citizens and lawful permanent residents to sponsor their permanent partners for residence in the United States. Like H.R. 823, below, S. 1510 defines the term "permanent partner" to mean an individual 18 years of age or older who: (a) is in a committed, intimate relationship with another individual 18 years of age or older in which both parties intend a lifelong commitment; (b) is financially interdependent with that other individual; (c) is not married to or in a permanent partnership with anyone other than that other individual; (d) is unable to contract with that other individual a marriage cognizable under the INA; and (e) is not a first, second, or third degree blood relation of that other individual.
H.R. 2585 **Support**	**The Family Reunification Act of 2003**: Introduced on June 24 by Representative Barney Frank (D-MA), H.R. 2585 would amend the INA to permit certain long-term permanent residents to seek cancellation of removal.
H.R. 1684 **Support**	**The Student Adjustment Act of 2003**: Introduced on April 9 by Representatives Chris Cannon (R-UT), Howard Berman (D-CA), and Lucille Roybal-Allard (D-CA), H.R. 1684 would amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to permit states to determine state residency for in-state tuition purposes and would also provide for the adjustment of status of certain undocumented college-bound students.
H.R. 1300 **Support**	**The Central American Security Act**: Introduced on March 17 by Representative Tom Davis (R-VA), H.R. 1300 would amend § 202 of the Nicaraguan Adjustment and Central American Relief Act (NACARA) to make certain Salvadorans, Guatemalans, and Hondurans eligible for relief under this section, and would give those individuals with

	applications for relief currently pending under § 203 the option of having their applications considered as applications for adjustment under § 202.
H.R. 832 **Support**	**The Permanent Partners Immigration Act of 2003**: Introduced on February 13 by Representative Jerrold Nadler (D-NY) and 107 cosponsors, H.R. 832 would provide a mechanism for U.S. citizens and lawful permanent residents to sponsor their permanent partners for residence in the U.S. The bill defines the term "permanent partner" to mean an individual 18 years of age or older who: (a) is in a committed, intimate relationship with another individual 18 years of age or older in which both parties intend a lifelong commitment; (b) is financially interdependent with that other individual; (c) is not married to or in a permanent partnership with anyone other than that other individual; (d) is unable to contract with that other individual a marriage cognizable under the INA; and (e) is not a first, second, or third degree blood relation of that other individual.
H.R. 440 **Support**	**The Unity, Security, Accountability, and Family (USA Family) Act**: Introduced by Representative Luis Gutierrez (D-IL) on January 29, H.R. 440 would: provide legal permanent residence to immigrants who have been living in the U.S. for 5 years or more; grant conditional legal status and work authorization to all law-abiding immigrants living in the U.S. for less than 5 years; repeal the 3- and 10-year bars to admissibility and the provisions that render aliens removable from the U.S. for having committed certain minor nonviolent offenses; and create an improved system of accountability that allows critical resources and manpower to be redirected to fight the war on terror.

Asylum/Special Immigrants

S.1129 **Support**	**The Unaccompanied Alien Child Protection Act of 2003**: Introduced on May 22 by Senator Dianne Feinstein (D-CA), S. 1129 would build upon the Homeland Security Act, which transferred the care and custody of unaccompanied alien children from the former INS to the Department of Health and Human Services' Office of Refugee Resettlement (ORR). Among other things, the bill would: ensure that unaccompanied alien children have access to counsel; give ORR with the authority to provide guardians ad litem to such children; establish minimum standards for the care and custody of unaccompanied alien minors; and strengthen policies for permanent protection of unaccompanied alien children.
H.R. 3361 **Support**	**The Unaccompanied Alien Child Protection Act of 2003**: Introduced on October 21 by Representative Zoe Lofgren (D-CA), H.R. 3361 would build upon § 462 of the Homeland Security Act, which transferred the care, custody and placement of unaccompanied alien children from the Department of Justice to the Department of Health and Human Service's Office of Refugee Resettlement (ORR). H.R. 3361 would ensure that the transfer of responsibilities from the DHS to the ORR occurs in an orderly manner, that the children have access to counsel during immigration proceedings, and would provide the ORR with the authority to appoint guardians ad litem where appropriate. The legislation would also establish minimum standards for the care and custody of unaccompanied alien children and reform procedures for abused, abandoned, or neglected children to access permanent protection when such protection is warranted.

Driver's Licenses/ID Documents

H.R. 3674 **Oppose**	**The Financial Customer Identification Verification Improvement Act**: Introduced on December 8 by Representative Scott Garrett (R-NJ), H.R. 3674 would amend Title 31 USC § 5318 to prohibit the use of identification issued by foreign governments, other than passports, for purposes of verifying the identity of a person who opens an account at

	a financial institution.
H.R. 3461 **Oppose**	**Restriction on Federal Agencies' Acceptance of Certain Identification Documents**: Introduced on November 6 by Representative Jeff Flake (R-AZ), H.R. 3461 would bar federal agencies from accepting for any identification-related purpose a state-issued driver's license, or other comparable identification document, unless the state has in effect a policy requiring presentation of acceptable forms of identification prior to issuance of the license or document, and the state requires the license or document, if issued to a nonimmigrant alien, to expire upon the expiration of the alien's authorized period of stay in the United States. The legislation requires the Secretary of Homeland Security to make grants to states to assist them in complying with the requirements set forth above.
H.R. 3235 **Oppose**	**The Responsible and Secure ID Act**: Introduced on October 2 by Representative Duncan Hunter (R-CA), H.R. 3235 would amend 23 USC to withhold highway funds from states that issue driver's licenses to undocumented aliens. The bill would provide for a waiver of this provision if the Secretary of Homeland Security issues a written certification that the state's noncompliance does not pose a risk to the security of the United States.
H.R. 1121 **Oppose**	**The Driver's License Integrity Act of 2003**: Introduced on March 6 by Representative Eric I. Cantor (R-VA), H.R. 1121 would limit the period of validity of driver's licenses and state identification cards issued to nonimmigrants to the period of validity of the applicant's nonimmigrant visa.
H.R. 687 **Oppose**	The Identification Integrity Act of 2003**: Introduced on February 11 by Representative Elton Gallegly (R-CA), H.R. 687 would prohibit the federal government from accepting any form of identification issued by a foreign government with the exception of a passport.**
H.R. 655 **Oppose**	**Restriction on States' Acceptance of Certain Identification Documents**: Introduced by Representative Jeff Flake (R-AZ) on January 29, H.R. 655 would bar federal agencies from accepting for any identification-related purpose a state-issued driver's license, or other comparable identification document, unless the state requires such license or comparable document issued to a nonimmigrant alien to expire upon the expiration of the alien's authorized period of stay in the U.S.
H.R. 502 **Oppose**	**Prohibition on Acceptance of Foreign Identification Documents**: Introduced by Representative Tom Tancredo (R-CO) on January 29, H.R. 502 would prohibit the federal government from accepting any foreign identification document, including passports, for use in connection with the provision of federal benefits or services.
H.J. Res. 58 **Oppose**	**Joint Resolution Disapproving Treasury Department Rules on Acceptable Forms of Identification for Noncitizens**: Introduced on May 22 by Representative Tom Tancredo (R-CO), H.J. Res. 58 would provide that Congress disapproves of final rules promulgated by the Treasury Department on April 30 permitting financial institutions to accept certain forms of identification from noncitizens.

Due Process and Civil Liberties

S. 1695 **Support**	**The Bipartisan PATRIOT Oversight Restoration Act:** Introduced on October 1 by Senator Patrick Leahy (D-VT), together with cosponsors Larry Craig (R-ID), Richard Durbin (D-IL), John Sununu (R-NH), and Harry Reid (D-NV), S. 1695 would provide greater congressional oversight over the USA PATRIOT Act by expanding the sunset provision already enacted in the PATRIOT Act to cover a number of additional

	provisions. Specifically, S. 1695 would extend the PATRIOT Act's sunset provision to other enhanced surveillance provisions in title II of the PATRIOT Act, as well as to a handful of provisions in titles IV, V, VIII and X. These provisions include sections 411 and 1006, which expand the Government's authority to declare certain persons inadmissible to the United States, and section 412, which grants the Attorney General authority to "certify" that an alien is engaged in activity that endangers the national security, and to take such an alien into custody.
H.R. 3309 **Support**	**The Keeping Families Together Act of 2003**: Introduced on October 16 by Representative Bob Filner (D-CA), H.R. 3309 would amend the INA to restore certain provisions as they were before the enactment of the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRAIRA). Among its changes, the bill would: restore the pre-IIRAIRA definition of aggravated felony, restore the pre-IIRAIRA detention policy, repeal the stop time provisions, restore § 212(c), and restore the pre-IIRAIRA judicial review provisions.
H.R. 3171 **Support**	**The Benjamin Franklin True Patriot Act**: Introduced on September 24 by Representative Dennis Kucinich (D-OH), H.R. 3171, after noting Congress's finding that, "Federal policies adopted since September 11, 2001, including provisions in the USA PATRIOT Act…and related executive orders, regulations, and actions threaten fundamental rights and liberties, including the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution…," includes a list of provisions from the USA PATRIOT Act, the Aviation Security Act, and the Homeland Security Act, as well as a list of provisions from a variety of federal regulations, all of which would automatically cease to have effect 90 days after the date of the bill's enactment. During that 90-day period, Congress may, at the request of the President, hold hearings to determine whether a particular provision should be removed from the list of provisions set to "expire" at the end of the 90-day period.
H.R. 836 **Support**	**Restoration of Pre-IIRAIRA Avenues of Relief**: Introduced on February 13 by Representative Ed Pastor (D-AZ), H.R. 836 would amend the INA to restore the avenues for relief from removal that existed for aliens lawfully admitted for permanent residence prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.
H.R. 47 **Support**	**The Restoration of Fairness in Immigration Act**: Introduced on January 7 by Representative John Conyers (D-MI), H.R. 47 would restore due process by repealing the retroactivity of the IIRIRA, restore judicial review and discretion, eliminate mandatory detention, and otherwise restore fairness and proportionality.

Immigration Reform

S. 2010 **Support**	**The Immigration Reform Act of 2004: Strengthening America's National Security, Economy, and Families**: Introduced on January 22, 2004, by Senators Chuck Hagel (R-NE) and Tom Daschle (D-SD), S. 2010 is the only immigration reform initiative introduced to date that includes all three components necessary for comprehensive immigration reform: family reunification through family backlog reduction; a new

	temporary worker program; and access to an earned adjustment for eligible people already living and working in the U.S.
S. 1645 Support	The Agricultural Job Opportunity, Benefits, and Security (AgJobs) Act of 2003: Introduced on September 23 by Senators Larry Craig (R-ID) and Edward Kennedy (D-MA), S. 1645 would create an earned adjustment program for undocumented farm workers who would be eligible to apply for temporary immigration status based on their past work experience, and could become permanent residents upon satisfying prospective work requirements. The legislation would also streamline the existing H-2A foreign agricultural worker program while preserving and enhancing key labor protections. Representatives Chris Cannon (R-UT) and Howard Berman (D-CA) introduced a companion measure in the House (H.R. 3142).
S. 1461	The Border Security and Immigration Improvement Act of 2003: Introduced on July 25 by Senator John McCain (R-AZ), S. 1461 would, among other things, establish a program authorizing undocumented workers who entered and were working in the U.S. before August 1, 2003, to adjust their status to a new nonimmigrant visa classification, H-4B. The spouse and children of an H-4B worker who satisfied all but the employment requirements would be eligible for derivative status. In addition to an application fee, individuals eligible to normalize their status under this program would be subject to a steep penalty payment ($1,500). The bill would also create a new temporary worker visa category (H-4A). The worker's employer would initiate the process by filing a petition on the individual's behalf. The petition filing fee would be $1,000 for companies employing more than 500 workers and $500 for companies with fewer employees. Before hiring an H-4A worker, the employer would be required to recruit U.S. workers (citizens and immigrants) exclusively for at least fourteen days through a computerized "job registry" to be established by the Department of Labor. Thereafter, the employer would be obligated to confirm the identity and employment authorization of a foreign worker through an electronic employment eligibility confirmation system.
S. 1387	The Border Security and Immigration Reform Act of 2003: Introduced on July 10 by Senator John Cornyn (R-TX), S. 1387 would authorize the establishment of guest worker programs on both a seasonal and non-seasonal basis, the number of participants in which would be adjusted annually based on changes in U.S. economic conditions.
H.R. 3604 Oppose	The Temporary Agricultural Labor Reform Act of 2003: Introduced on November 21 by Representative Bob Goodlatte (R-VA), H.R. 3604 would revamp the H-2A temporary agricultural worker program and would also establish an H-2A Worker Program Ombudsman within the Office of Agriculture Labor Affairs, Office of the Chief Economist, U.S. Department of Agriculture.
H.R. 3142 Support	The Agricultural Job Opportunity, Benefits, and Security (AgJobs) Act of 2003: Introduced on September 23 by Representatives Chris Cannon (R-UT) and Howard Berman (D-CA), H.R. 3142 would create an earned adjustment program for undocumented farm workers who would be eligible to apply for temporary immigration status based on their past work experience, and could become permanent residents upon satisfying prospective work requirements. The legislation would also streamline the existing H-2A foreign agricultural worker program while preserving and enhancing key labor protections. Senators Larry Craig (R-ID) and Edward Kennedy (D-MA) introduced a companion measure in the Senate (S. 1645).
H.R. 2899	The Border Security and Immigration Improvement Act: Introduced on July 25 by Arizona Republican Representatives Jim Kolbe and Jeff Flake, H.R. 2899 would amend

	the INA to create two new visa categories, one for foreign workers now residing outside the U.S. (H-4A) and one for foreign workers currently residing in the U.S. without authorization (H-4B).

Miscellaneous

S. 2089 **Support**	**Preserving DV Eligibility in the Face of Processing Delays**: Introduced on February 12 by Senator Saxby Chambliss (R-GA), S. 2089 would amend INA § 204(a)(1)(I)(ii) to allow aliens who are eligible for diversity visas to be eligible beyond the fiscal year in which they applied. In addition to providing relief for future diversity applicants, the bill would also authorize qualified diversity applicants who were denied permanent residence as a result of processing backlogs during fiscal years 1998 through 2003 to reopen their cases and continue processing as long as diversity visas for the fiscal year in which they filed remain available.
H.R. 3218 **Oppose**	**The Failure to Depart Act**: Introduced on October 1 by Representative Jeff Flake (R-AZ), H.R. 3218 would amend the INA § 243 to clarify that willful failure to depart from the United States by an alien against whom a final order of removal is outstanding is a continuing criminal offense.
H.R. 2853 **Support**	**The Colombian Temporary Protected Status Act of 2003**: Introduced on July 24 by Representative James McGovern (D-MA), H.R. 2853 would designate Colombia under the temporary protected status (TPS) program.

Naturalization for Noncitizen Soldiers

The conflict in Iraq has brought to public attention an important reality: not only do immigrants make critical contributions to our economy, our culture, and our social fabric; they also put their lives on the line for this country by serving in the Armed Forces. Indeed, several of the first soldiers to die during this conflict were not U.S. citizens, but legal permanent residents. Approximately 37,000 immigrants currently serve in the military and more than 5,000 legal permanent residents have served in Iraq.

Congress has acknowledged these contributions and sacrifices by including in the National Defense Authorization Act for FY 2004 significant provisions facilitating the naturalization of immigrant soldiers and reservists and providing other immigration benefits. The Act, which authorizes appropriations for the Department of Defense, was signed into law on November 24, 2003 (H.R. 1588; Pub. L. No. 108-136). The immigration provisions that were enacted include: permitting lawful permanent residents to naturalize after serving one year in the military during peacetime; authorizing naturalization interviews and oath ceremonies to be performed abroad at U.S. embassies, consulates, and overseas military installations; waiving all naturalization fees; enabling lawful permanent residents who are members of the Selected Reserves of the Ready Reserves, to expedite their naturalization in times of war or hostile military operations; allowing noncitizen spouses, unmarried children, and parents of citizens and noncitizens serving in the U.S. military who are killed as a result of such service to file or preserve already filed applications for lawful permanent residence; and expediting the process for granting posthumous citizenship to fallen soldiers.

Recognizing not only the contributions of immigrant soldiers, but the sacrifices of their families as well, this law accords these servicemen and women the respect and assistance they deserve. A number of Senators and Representatives were instrumental in ensuring that these provisions became law, including Senators Edward Kennedy (D-MA) and Harry Reid (D-NV) and Representatives Hilda Solis (D-CA) and Martin Frost (D-TX).

AILA applauds these Members of Congress and their supportive colleagues for their commitment on this issue.

For information on additional bills introduced during the first session of the 108th Congress that focused on naturalization for noncitizens, visit the "Track Legislation" section in the Advocacy Center on InfoNet and click on "Immigration-Related Legislation."

Nonimmigrants

S. 1635 **Support**	**The L-1 Visa (Intracompany Transferee) Reform Act of 2003**: Introduced on September 17 by Senator Saxby Chambliss (R-GA), S. 1635 would: amend INA § 214(c)(2) to prohibit an L-1B visa holder from being primarily stationed at the worksite of another employer in certain cases; reinstate the one-year work requirement for blanket applicants; and mandate the collection of L-1 program statistical data.
S. 1452 **Oppose**	**The USA Jobs Protection Act of 2003**: Introduced on July 24 by Senator Christopher Dodd (D-CT), S. 1452 would alter substantially the L and H-1B visa programs. The legislation would require labor attestations that include lay-off protections for U.S. workers and a prohibition on the outsourcing of L-1 visa holders. In addition, petitions for an L-1B visa would require an additional application stating that the employer had taken good faith steps to recruit U.S. workers for the position. The proposed legislation would also increase the work experience requirement with the foreign employer from one year to two years and would cut the duration of stay for L visa holders (including permissible extensions) by two years. (Many of these requirements were also included in L visa legislation recently introduced by Representatives John Mica (R-FL) (H.R. 2154) and Rosa De Lauro (D-CT) (H.R. 2702). With regard to the H-1B visa program, the bill would treat all H-1B employers as "H-1B dependant" employers and would attempt to limit the placement of H-1B workers at third party sites for six months before or after the lay-off of a U.S. worker.
H.R. 2849 **Oppose**	**The USA Jobs Protection Act of 2003**: Introduced on July 24 by Representative Nancy Johnson (D-CT), H.R. 2849 would amend the H-1B and L-1 visa programs to increase the monitoring and enforcement authority of the Secretary of Labor over such programs. Among other things, the bill would require L-1 employers to file an attestation with the Department of Labor, and would make the INA's "H-1B-dependent" provisions applicable to all H-1B employers.
H.R. 2702 **Oppose**	**The L-1 Nonimmigrant Reform Act**: Introduced on July 10 by Representative Rosa DeLauro (D-CT), H.R. 2702 would amend the INA by placing restrictive limits on the L-1 visa, including a 35,000 per year visa cap, DOL attestation requirements and an abolishment of blanket Ls.
H.R. 2154 **Oppose**	**Restrictions on L-1 Intracompany Transferees**: Introduced by Representative John Mica (R-FL), H.R. 2154 would amend INA § 214(c)(2) to prevent employers from placing a nonimmigrant intracompany transferee with another employer. Specifically, prospective L-1 employers would be required to file an application with the Secretary of Labor stating that the employer will not place the nonimmigrant with another employer where: (1) the nonimmigrant performs duties at a worksite owned, operated, or controlled by such other employer; and (2) there are indicia of an employment relationship between the nonimmigrant and such other employer. The bill would also require employers to make these "applications" available for public inspection, and the Secretary of Labor would compile and make available for public inspection a list of all such applications, classified by employer and occupation.

Restrictionist Bills

S. 1906 Oppose	The Homeland Security Enhancement Act of 2003: Introduced on November 20 by Senator Jeff Sessions (R-AL), S. 1906 would effectively obligate states and localities to enforce civil immigration laws and would also render all immigration status violations criminal in nature. The Act also contains provisions relating to identification documents and driver's licenses. Specifically, it would: (1) deny funding to states that issue driver's licenses to undocumented immigrants; (2) prohibit the federal government from accepting or recognizing state-issued driver's licenses for aliens unless such licenses expire on the date that immigration status expires; and (3) prohibit the federal government from accepting or recognizing any identification document unless issued by a federal or state authority and subject to verification by federal law enforcement (i.e. prohibition on acceptance of consular identification cards issued by foreign states).
H.R. 3534 Oppose	The Border Enforcement and Revolving Employment to Assist Laborers Act of 2003: Introduced on November 19 by Representative Tom Tancredo (R-CO), H.R. 3534 is an omnibus restrictionist bill that would, among other things: suspend the Visa Waiver Program; authorize the use of the U.S. military to secure the border; increase the number of border patrol agents, immigration inspectors, detention and removal officers and BICE special agents; impose criminal penalties for unlawful presence in the United States; allow consular officers to require certain nonimmigrant visa applicants to obtain visa term compliance bonds as a condition of receiving the visa; set new and stringent requirements on the acceptance of identification documentation by government agencies; impose a mandatory employment eligibility verification system; and do away with the current H visa scheme and substitute in its place a new, highly restrictive catch-all "H" category for both skilled and unskilled workers.
H.R. 3106 Oppose	The Removal of Terrorist Criminal Aliens Act of 2003: Introduced on September 17 by Representative Lamar Smith (R-TX), H.R. 3106 would expand the list of criminal offenses that trigger expedited removal to include possession of controlled substances, firearms offenses, espionage, sabotage, treason, threats against the President, violations of the Trading With the Enemy Act, draft evasion, and certain alien smuggling crimes. The legislation would also give enforcement officials more flexibility with respect to the places to which aliens may be deported. Finally, the bill would authorize the Secretary of Homeland Security and the Attorney General to remove from the United States those individuals they have reason to believe pose a danger to national security.
H.R. 2688 Oppose	Repeal of the H-1B Program: Introduced on July 9 by Representative Tom Tancredo (R-CO), H.R. 2688 would amend the INA to completely repeal the provisions relating to the H–1B visa program for temporary workers.
H.R. 2671 Oppose	The Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2003: Introduced on July 9 by Representative Charles Norwood (R-GA), H.R. 2671 would encourage enhanced federal, state and local enforcement of the immigration laws. The bill attempts to coerce states into passing such legislation by threatening to discontinue federal compensation to states for the costs of incarcerating criminal aliens.
H.R. 2235 Oppose	The Emergency Immigration Workload Reduction and Homeland Security Enhancement Act of 2003: Introduced on May 22 by Representative Sam Graves (R-MO), H.R. 2235 would suspend: the Visa Waiver Program; adjustment of status; extensions of temporary protected status designations; the allocation of immigrant visas to brothers and sisters of citizens; the allocation of immigrant visas to sons and daughters

	of citizens; the allocation of immigrant visas to unmarried sons and daughters of permanent residents; the allocation of immigrant visas to diversity immigrants; and the issuance of all nonimmigrant visas.
H.R. 1631 **Oppose**	**The No Social Security for Illegal Immigrants Act of 2003**: Introduced on April 2 by Representative Dana Rohrabacher (R-CA), H.R. 1631 would amend Title II of the Social Security Act to exclude from creditable wages and self-employment income wages earned for services by aliens performed without work authorization in the United States and self-employment income derived from a trade or business conducted in the United States during any period for which the alien is not authorized to perform such function or service.
H.R. 1567 **Oppose**	**The Citizenship Reform Act of 2003**: Introduced on April 2 by Representative Nathan Deal (R-GA), H.R. 1567 would attempt, via an amendment to the INA, to deny citizenship at birth to children born in the United States of parents who are not citizens or permanent resident aliens.
H.R. 997 **Oppose**	**The English Language Unity Act of 2003**: Introduced on February 27 by Representative Steve King (R-IA), H.R. 997 would: declare English the official language of the U.S.; establish a uniform English language rule for naturalization; and require the official functions of government to be conducted in English.
H.R. 946 **Oppose**	**The Mass Immigration Reduction Act of 2003**: Introduced on February 26 by Representative Tom Tancredo (R-CO), H.R. 946 would establish a moratorium on immigration beginning on October 1, 2003, and ending on September 30 of the first fiscal year after fiscal year 2008 during which the President submits a report to Congress, which is approved by a joint resolution of Congress, that the flow of illegal immigration has been reduced to less than 10,000 aliens per year and that any increase in legal immigration resulting from termination of the moratorium would have no adverse impact on the wages and working conditions of U.S., citizens, federal environmental quality standards, or the capacity of various public institutions to serve their resident population.
H.R. 931 **Oppose**	**The National Language Act of 2003**: Introduced on February 26 by Representative Peter King (R-NY), H.R. 931 would amend Title 4 of the U.S. Code to declare English the official language of the U.S. The bill would also repeal the Bilingual Education Act and § 203 of the Voting Rights Act of 1965 (pertaining to bilingual voting requirements), and would require all naturalization ceremonies and administration of the oath of allegiance to be conducted in English.
H.R. 908 **Oppose**	**Enhanced Penalties for Reentry After Removal**: Introduced on February 25 by Representative Dana Rohrabacher (R-CA), H.R. 908 would amend INA § 276(b) to specify that imprisonment for reentering the United States after removal subsequent to a conviction for a felony shall be under circumstances that stress strenuous work and sparse living conditions, if the alien is convicted of another felony after reentry.
H.R. 775 **Oppose**	**The Security and Fairness Enhancement (SAFE) for America Act of 2003**: Introduced on February 13 by Representative Bob Goodlatte (R-VA), H.R. 775 would amend the INA to eliminate the diversity immigrant program.

Security-Related Bills

H.R. 3651	**The Alien Accountability Act of 2003**: Introduced on December 8 by Representative

Oppose	Darrell Issa (R-CA), H.R. 3651 purports to provide "incentives" for aliens unlawfully present in the United States to register with the Secretary of Homeland Security, and immunity from criminal prosecution for the employers of such aliens if the employer pays all taxes and penalties associated with the unlawful employment.
H.R. 3522 **Oppose**	**The Securing America's Future through Enforcement Reform (SAFER) Act of 2003**: Introduced on November 19 by Representative J. Gresham Barrett (R-SC), H.R. 3522 is a massive, 93-page restrictionist bill that would make a number of egregious changes to the INA under the guise of making America safer. Among other things, the legislation would: authorize the use of the U.S. Army and Air Force to secure the border; require consular officer interviews of all visa applicants; broaden substantially the current grounds of inadmissibility and removability; provide more sweeping authority to track aliens present in the United States; amend INA § 245(c) to do away with the exception for immediate relatives and special immigrants from the bar to adjustment of status for individuals who have fallen out of status or worked without authorization; increase the number of border inspectors and border patrol agents; and further circumscribe judicial review and due process in immigration proceedings.
H.R. 3452 **Oppose**	**The Visitor Information and Security Accountability (VISA) Act**: Introduced on November 6 by Representative Pete Sessions (R-TX), H.R. 3452 would make a number of restrictive changes to our immigration laws. Among other things, the bill would: authorize the use of the U.S. Army and Air Force to secure the border; require consular officer interviews of all visa applicants; provide for the administrative removal of additional classes of aliens; require nonimmigrant visa applicants from certain countries to post maintenance of status/departure bonds as a condition of receiving the visa; and label certain identification documents as "insecure" and prohibit their use for entry into or departure from the United States.
H.R. 3345 **Oppose**	**The Inadmissibility of National Security Aliens Act**: Introduced on October 20 by Representative Jeff Flake (R-AZ), H.R. 3345 would render inadmissible any alien whose entry or proposed activities in the United States the Secretary of State or the Secretary of Homeland Security has reason to believe would pose a danger to the national security, as defined in INA §219(c)(2). The amendments made by this bill seem somewhat redundant, as the government already has broad authority to render aliens inadmissible on security-related grounds.