OBAMA-BIDEN TRANSITION PROJECT

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IMMIGRATION POLICY: TRANSITION BLUEPRINT

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An informal coalition of legal aid providers, immigrant and refugee rights organizations, research institutions, and other non-governmental associations contributed to the following recommendations. These recommendations focus on policy issues and modifications to administrative regulations that we believe are practical and feasible. They should be addressed early in the new Administration in order to achieve tangible improvements, implement cost-effective reforms, further the fair and efficient functioning of our immigration system, and build support for more systematic reforms.

I. DUE PROCESS

A. Restore Checks and Balances and Improve Quality and Efficiency of the Executive Office of Immigration Review.

Generally, immigration cases involving challenges to removal orders are heard first by an immigration judge in an administrative court, and then heard on appeal by the Board of Immigration Appeals (BIA). Both the immigration courts and the BIA are institutionally housed in the Executive Office for Immigration Review (EOIR), which is housed in the Department of Justice (DOJ). Further appeals are heard by the Federal Circuit Courts of Appeal and by petition for certiorari to the U.S. Supreme Court.

In 2002, Attorney General Ashcroft issued "streamlining" regulations for BIA review of immigration court decisions in a purported effort to reduce growing case backlogs. The Ashcroft policy reduced the number of members of the BIA from 23 to 11. Many viewed the reduction in BIA members as an expedient way to remove those believed to harbor pro-immigrant leanings. The Ashcroft streamlining also curtailed the use of three-member review panels, and encouraged the issuance of single-BIA-member decisions, called "affirmances without opinion" or "AWOs."

The surge in AWOs pushed appeals up to the Circuit Courts at an exponential pace, placing significant burdens on the courts, with the largest spikes in the Second and Ninth Circuits. Highly respected Court of Appeals judges issued opinions that excoriated the quality of justice meted out by immigration judges. These opinions generated significant media attention and led then-Attorney General Gonzales to call for limited reforms in late 2006.

Attorney General Gonzales's proposed reforms included an increase in the number of BIA members from 11 to 15, but many of the additional modifications he called for—including increased three-member BIA review of immigration court decisions and increased staff and training—have not been fully implemented, as evidenced in a September 2008 report by the Transactional Records Access Clearinghouse.[1] Meanwhile, the DOJ's Inspector General found that hiring for open immigration judge positions was tainted by political and ideological considerations under the Bush Administration.

[1] *See* Transactional Records Access Clearinghouse; Bush Administration Plan to Improve Immigration Courts Lags; (September 8, 2008) at http://trac.syr.edu/immigration/reports/194/.

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Unquestionably, some of EOIR's challenges stem from chronic underfunding, resulting in staff shortages, antiquated equipment, and insufficient training. Congress and the Bush Administration have not fully funded the legitimate resource needs of EOIR.

Guarantee meaningful appellate review:

- Reverse the Ashcroft "streamlining" policies and revert to a Board composed of more than 20 permanent members.[2]
- Rescind regulations that limit three-member BIA review of all but a limited number of frivolous or facially invalid cases.[3]
- Restore decision-making by three-member panels, composed of permanent members of the BIA, especially for cases involving asylum, withholding of removal, and relief under the Convention Against Torture.
- Reinstate the requirement that the BIA decide precedent decisions by the full Board, and rescind the directive that such decisions can be issued by a panel, and in no case permit the issuance of precedent opinions decided by a panel made up of non-permanent members of the BIA.[4]
- Require Board members to issue decisions that provide the legal basis for their decisions and address the arguments made by the parties by restricting boilerplate affirmances without opinion, and banning affirmances that do not indicate the basis for affirmance of the immigration judge's decision.
- Restrict the ex parte participation of government attorneys from DOJ's Office of Immigration Litigation (OIL) from formal or informal involvement, in an advisory or any other capacity, in the appellate review and decision-making process in cases for which BIA members are responsible.
- Support statutory codification of the positions of immigration judges and BIA members, along with the scope of authority of both immigration judges and BIA members, including the matters within their exclusive jurisdiction and the range and enforceability of their decisions.

Reform personnel practices:

- Increase the number of immigration judges, members of the BIA, staff attorneys, and law clerks; require participation of all judges and legal staff in ongoing biannual judicial education and training conferences structured to emphasize best practices and maintain judges' and legal staffs' knowledge of the controlling immigration law and relevant legal developments.
- To ensure that there is no politicization of hiring selections or subsequent assessments of job performance, and that immigration judges and Board members are qualified and able to carry out their duties with independence and impartiality,

  (1) Develop and institutionalize a cooperative vetting and hiring process that incorporates recommendations and input from immigration and other legal experts in academia, nonprofit and pro bono groups, private bar organizations, and the federal judiciary.

  (2) Reject the internally proposed agency reclassification of immigration judges as "agency adjudicators," and clarify their independence as quasi-judicial administrative judges and administrative appellate judges.

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[2] *See* BIA; Procedural Rules to Improve Case Management; Final Rule, 67 Fed. Reg. 54877-54905 (August 26, 2002).
[3] *See id.*
[4] *See id.*

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(3) Prohibit the "reassignment" or transfer of immigration judges or BIA members, other than for misconduct.
(4) Eliminate "performance work plans" currently being proposed by agency management, and other impediments to impartial and independent judicial functions.

- To ensure legally competent, consistent, and judicious performance by immigration judges and BIA members in carrying out their judicial responsibilities,
  (1) Establish and regularly convene a representative peer-evaluation circle, composed of sitting immigration judges and Board members, to serve on a rotating basis for six-month terms, and empower that body to evaluate any reported shortcomings, complaints, or other concerns from internal or external sources regarding less-than-optimal performance of any sitting immigration judges or BIA members, and offer remedies for improvement to address the issue.
  (2) At the end of each term, authorize submission of the peer evaluation circle's findings and resolutions, and any other recommendations for acceptance by the Chief Immigration Judge and Chairman of the BIA.

Require accountability and quality adjudication:

- Ensure that immigration judges and BIA members are encouraged and given the latitude to conduct professional and impartial hearings, with adequate interpretation, adequate access to counsel, and proper compliance by both parties with procedural rules, and to produce authoritative decisions that reflect the judges' and BIA members' knowledge and understanding of the laws and their applicability in each case.
- Promulgate through notice and comment rulemaking a "code of conduct" for immigration judges and BIA members, and make the existing practice rules applicable equally to counsel for each party appearing before an immigration judge or BIA member.
- Allow more flexibility in the EOIR "case completion deadlines" so that judges have broader discretion and may exercise independent judgment to allow continuances or expedite cases when requested by counsel or the respondent or when legally necessary; control their calendars and reschedule complex or lengthy cases requiring additional hearing time; and ensure that each individual has access to a full and fair hearing, as determined by the immigration judge on a case-by-case basis.
- Ensure that immigration judges and BIA members have dedicated law clerks of their choosing to assist in pre-hearing preparation, research, and post-hearing decision-making, and provide access to additional legal support staff on an as-needed basis.
- Disengage the running of the "asylum clock," affecting access to employment authorization, so that it has no effect on the appropriate and necessary adjournments for counsel, witnesses, or other reasonable choices made by a litigant in the course of a removal hearing.

Protect independent judgment:

- Promulgate regulations that prevent the removal or transfer of immigration judges and Board members from their positions as retaliation for the exercise of independent discretion and reasoned judgment.
- In the interim, promote policies that clarify the proper separation of administrative management of judicial operations from the substantive policies and procedures employed by the immigration judges and BIA members in the course of their work; reallocate the supervision of legal and other support staff from EOIR operations management directly to the immigration judges and BIA members.

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Provide resources and training:

- Increase funding to EOIR for support staff, training, interpretation, transcription services, and other needs.
- Improve the quality and increase the amount of training that is provided to new and serving judges and BIA members, and to the law clerks and legal staff assisting them.
- Upgrade recording and other equipment necessary for the efficient functioning of the courts and the immigration judges' ability to conduct full and fair hearings.
- Update reference materials and manuals.
- Provide an adequate number of individually assigned law clerks and other legal support staff capable of assisting individual immigration judges and BIA members to prepare for hearings, conduct review, and facilitate the issuance of well-researched and accurately documented decisions.

B. Require Immigration Officers to Respect the Rule of the Law

During the course of immigration raids, U.S Immigration and Customs Enforcement (ICE) officers have falsely identified themselves as "police," entered homes without warrants, and detained U.S. citizens. Meanwhile, Customs and Border Patrol has a record of aggressive tactics, such as relying upon questionable information to enter homes or set up checkpoints. The new Administration must ensure that immigration officers respect the rule of law.

Immigration officials should respect the rule of law and promote healthy communities.

- Create the position of "ICE Ombudsman" and allow that official to investigate complaints, monitor ICE enforcement strategies, and recommend personnel actions in response to complaints.
- Institute a robust training program regarding immigration law and proper, legal enforcement strategies.
- Require ICE officers to identify themselves as "immigration officers" and state the purpose of any interaction; present individualized warrants before seeking to enter a private residence; respect a potential arrestee's decision to contact counsel before permitting entry or answering questions; refrain from making collateral arrests absent probable cause; advise arrestees that statements they make may be used against them; and respect an arrestee's decision not to respond in the absence of counsel.

Ensure access to counsel: Under the immigration code, noncitizens who are placed in removal proceedings are entitled to obtain counsel at their own expense. However, noncitizens are often unable to access counsel due to a dearth of legal resources near their detention facility or local area; a lack of available pro bono assistance; and a lack of information about available resources.
Recommendations:

- Uphold a right to effective counsel in removal hearings consistent with the statute and the guarantee of a fundamentally fair proceeding under the Fifth Amendment.
- Adopt policy that requires all noncitizens in custody to be advised of their rights, including the right to obtain counsel. Immigration officials must promptly notify a noncitizen of the charges against him or her in a language that he or she can understand.
- Adopt policy guidance that permits immigration judges to appoint counsel for minors, any individual who claims that he is a United States citizen, mentally incompetent individuals, and individuals who were admitted as lawful permanent residents or refugees.

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Prioritize prosecutorial discretion: Since 9/11, the government has significantly curtailed the exercise of prosecutorial discretion to defer or refrain from instituting removal proceedings in compelling cases. Immigration officers have often failed to consider individual equities, such as family or business ties to the U.S. Officials have also failed to consider agency resources in determining appropriate action, such as whether to make an arrest, place a person in removal proceedings, or detain that individual.
Recommendations:

- Reaffirm and expand upon the prosecutorial discretion guidance issued in a November 17, 2000 memorandum by former INS Commissioner Doris Meissner requiring immigration officers to exercise discretion in a judicious manner at all stages of the enforcement process. The guidance should require immigration officials to make use of available discretion for noncitizens with strong equities, humanitarian factors, and juvenile status.
- Refrain from automatically issuing a Notice to Appear when an individual may have relief available before an immigration judge or the individual is willing to accept an offer of voluntary departure from ICE.
- Adopt policy that avoids the use of immigration enforcement during and after a man-made or national disaster.

C. Restore Core American Values to the Immigration System

In the post-9/11 environment, overly aggressive enforcement tactics have undermined core American values. Policies that led to the arrest, interrogation, and mandatory registration of individuals from Middle Eastern and South Asian nations failed to make the nation safer, created extreme hardship for many individuals and families, and diminished America's moral standing in the international community.

Prohibit selective enforcement: Initiated soon after 9/11, the National Security Entry and Exit Registration (NSEERs) program required noncitizens from "countries of interest" (a list comprised almost exclusively of Middle Eastern nations or those with a majority-Muslim population) to register with the then-INS. The NSEERs program provided little to no information in identifying terrorists and the program hindered law enforcement in some cases by alienating communities that have a strong interest in preventing terrorist acts and solving crimes.
Recommendations:

- Rescind the NSEERS regulations and prohibit similar tracking schemes that encourage selective targeting on the basis of race, ethnicity, national origin, religion, political association, or ideology.
- Ensure that those who did not register or did not register properly under NSEERS are not denied the opportunity to apply for immigration status or relief from removal solely on the basis that they failed to register.

Open immigration hearings: Prior to 9/11, immigration court hearings, like most hearings in the American judicial system, were presumptively open to the public and the press. Closures were allowed on a limited basis, typically approved only in cases involving classified information or to protect the privacy of particularly vulnerable noncitizens, such as asylum seekers or children. Ten days after 9/11, the Bush Administration ordered the immigration hearings of any "special interest" detainees to be closed. The result was that both the hearings and any information about them,

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including even the noncitizens' names, were hidden from the public and the press. Despite the government's assumptions, the individuals subject to closed hearings were not found to have terrorism ties. The immigration courts, like all other adjudicatory bodies in the American justice system, must operate with transparency and accountability.

Recommendation:

- Issue a memorandum stating that the September 21, 2001 memo by Michael Creppy, then-Chief Immigration Judge, titled, "Cases Requiring Special Procedures" is no longer in force.[5]

III. Enforcement

With the creation of the Department of Homeland Security (DHS) in 2003, the implementation of immigration policy was effectively transformed from what was previously a multi-faceted agency effort to provide a flexible source of benefits and protections under civil law, into a singularly focused, blunt, anti-terrorism enforcement tool. Effective immigration enforcement at the border and in the workplace has its place in a rational immigration system. But enforcement has a clear purpose: to protect the integrity of an immigration system that has been established for the common good.

By failing to reform our failing immigration laws and attempting to enforce our way to a solution, immigration enforcement efforts have become an end in themselves, rather than a means to an end. The escalating initiatives undertaken by DHS in the name of enforcement are alienating and ineffective, violating the public's sense of justice. These policies transform local police into immigration agents, diverting them from their mission of protecting the public and community policing. They have led to massive, SWAT-team style raids on businesses and pre-dawn raids on family homes, which are the hallmark of totalitarian regimes. DHS's aggressive tactics abandon the guarantee of individual justice in favor of group prosecutions. Such actions threaten to institutionalize a new paradigm in the United States, in which hard-working families are being torn apart for the crime of trying to put food on the table, employers are threatened and penalized, and municipalities are stripped of their populations. This is unacceptable under any circumstances and contrary to the immediate needs of our communities in the current economic climate.

A. Raids

Over the last several years, DHS has spent billions of dollars on worksite and residential raids designed to net large numbers of undocumented immigrants, but these actions have too often swept up U.S. citizens and other lawfully present individuals. With their rapid proliferation in communities across the country, these raids are changing the face and threatening the identity of our country. Families have been ripped apart, children have been separated from their parents, hard-working and otherwise innocent individuals have been criminally prosecuted, and massive detention operations have precipitated a crisis in jails across the country. Raids have frequently been conducted without basic safeguards. During the course of these raids, ICE officers have denied individuals access to counsel, entered homes without warrants, and mistakenly detained U.S. citizens.

[5] Michael Creppy, Internal Memorandum, Executive Office for Immigration Review; Cases Requiring Special Procedure; September 21, 2001, *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf.

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Terminate raids that violate basic rights: The Administration immediately must take forceful steps to guarantee that due process rights and basic humanitarian protections are respected in any future ICE enforcement actions.

Recommendations:

- Require ICE officials to use targeted enforcement strategies by requiring officers to present individualized warrants before seeking to enter a private residence or worksite, and to refrain from making collateral arrests absent probable cause.
- Advise noncitizens, at the time of arrest (whether with or without a warrant), of their rights, including the right to remain silent; to receive notice of the pending charges and that statements may be used against them; to be informed of the possibility to request bond; to receive a redetermination hearing before an immigration judge; and to be represented by counsel at the individual's own expense.
- Permit attorneys, including nonprofit and pro bono attorneys seeking to do group rights presentations, to access clients who are being questioned after a raid.
- Require ICE to identify themselves as "immigration officers."
- Require ICE to verify the identity of an individual before issuing a detainer to determine if the person is not a citizen or otherwise lawfully present.
- Ensure that criminal defense attorneys with immigration expertise be appointed for noncitizen defendants who may be eligible for relief from removal or, alternatively, ensure that defense counsel be provided adequate time to associate with immigration attorneys to assess potential relief from removal for those charged.
- Issue regulations regarding humanitarian and medical screening of individuals encountered during raids, and engage state and local social service agencies and non-governmental organizations in the provision of assistance, including legal services and humanitarian screening in all raids regardless of size.
- Ensure that all detainees encountered during a raid are provided with an opportunity to seek release on bond and remain in the geographic area where they were arrested until their cases are adjudicated.
- Ensure that defendants are provided with a full and fair immigration court hearing to determine their eligibility for statutory and discretionary relief by restricting the use of expedited procedures that lack appropriate safeguards, including stipulated judicial orders of deportation, during raids.
- Restrict overall the use of expedited procedures that lack appropriate safeguards, including stipulated judicial orders of deportation.

Conduct thorough review of the impact of raids: The current enforcement paradigm has evolved without meaningful consideration of the costs and benefits of such a blunt approach. The costs, however, are now coming into sharper focus, and the new Administration must conduct a wide-ranging review and assessment of the impact of these raids.

Recommendation:

- Form a high-level interagency taskforce to review the economic and humanitarian impact of worksite and residential raids and their utility as an enforcement tool.

Ensure that workers involved in labor law disputes are not unfairly targeted: Current law fails to protect immigrant workers involved in labor law disputes by allowing employers to retaliate against workers by reporting them to immigration authorities. The following provisions should be adopted to protect workers from employers who retaliate, or threaten to retaliate, against them in an effort to inhibit union organizing or punish workers who file labor complaints.

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Recommendations:

- Direct DHS to promulgate regulations stating that ICE officials will not allow employers to use the threat of immigration enforcement or a worksite raid to influence the outcome of labor law negotiations or a labor dispute at the workplace. The regulations must establish common-sense rules of conduct for ICE agents investigating a worksite during an ongoing labor dispute.
- Direct DHS not to remove workers from the country before labor law enforcement agencies have an opportunity to interview them and investigate the case when labor law violations are discovered during an immigration enforcement action.
- Help reduce the fear of immigration consequences for reporting labor law violations by requiring federal labor law enforcement agencies to keep information about workers' immigration status confidential if the information is discovered in the course of their investigations.
- Prohibit ICE agents from posing as health and occupational safety workers, or as emergency services, public safety, or domestic violence services personnel.

Ensure that race or ethnicity is not the sole trigger for detaining immigrants during raids: In recent worksite raids, ICE officers have detained entire workforces without the required reasonable suspicion that individual detained workers are in violation of immigration law. Persons of color have been detained first, and questioned second, in order to obtain the "reasonable suspicion" necessary to justify their detention and arrest. In recent home raids, ICE agents have inappropriately been encouraged to bring in collateral arrests whenever the targeted individual is not located. These practices are nothing more than racial or ethnic profiling, which is an inappropriate basis upon which to justify suspicion of immigration violations. Disclosure of violations of these rights and policies will be an effective means to deter such racial or ethnic profiling.

Recommendations:

- Adopt procedures requiring individualized suspicion of unlawful presence *before* the detention or questioning of workers by ICE.
- Promulgate regulations to ensure that ICE agents do not use race or ethnicity as the sole or primary trigger for suspicion of immigration violations. Educate ICE officials and the public about proper enforcement procedures that require an ICE officer's individualized, articulable suspicion of unlawful presence prior to arrest.
- Provide a mechanism to receive and process complaints regarding racial profiling or the use of other improper or illegal enforcement tactics, and make such information available to the arrestee, his or her attorney, if any, and the immigration judge, if applicable, so that such information may be used in determining detention and removal issues related to the case.
- Prohibit the practice of asking workers to self-segregate according to race or immigration status during worksite raids.
- Direct the DHS Office of Inspector General to conduct periodic, systemic reviews of ICE's conduct during raids to determine whether racial or ethnic profiling has taken place and to take broad institutional corrective action, in addition to the corrective action to be taken at the time of any individual incidents that violate these policies.

End raids that lack a particularized focus on serious criminal activity and redirect enforcement resources to real security threats: The Bush Administration has used large-scale raids as media opportunities to show that they are cracking down on employers. In fact, the vast majority of individuals swept up in these raids have been undocumented workers who have committed no crimes other than working with false documentation. The raids have destroyed

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communities and local economies by removing workers who contribute to the economy, culture, and social fabric of our nation. The new Administration must abandon these counterproductive tactics and focus on apprehending serious criminals and punishing unscrupulous employers.

B. Discretion and Prioritization.

Despite an exponential increase in enforcement actions, the Bush administration has failed meaningfully to address due process violations including racial profiling, failed to provide medical care for immigration detainees, and failed to stem other abuses. These practices dilute our constitutional guarantees, endanger public safety, and draw us further away from an ordered system of justice.

Redirect resources away from prosecutorial initiatives that have failed to focus on serious criminal activity and continue to violate civil rights: To support its political crackdown on immigration, the Bush Administration launched several high-profile initiatives that cost too much, destroyed communities, and have failed to meet their goals. ICE sweeps, led by the Fugitive Operations teams, frequently target noncriminal immigration violators and apprehend bystanders instead of focusing on those with serious criminal histories. A widely-criticized Bush Administration program called Operation Streamline diverts resources away from addressing human trafficking, drug smuggling, and other major criminal activities, and hinders the efficient operation of courts by mandating the prosecution of minor offenses. In worksite raids, ICE has used a highly aggressive legal process designed to elicit mass guilty pleas from immigrant workers.
Recommendations:

- Reaffirm guidance regarding the use of prosecutorial discretion in immigration enforcement (as described above in Section IIB).
- End Operation Streamline.
- Rather than sweeping in bystanders and collateral arrestees, prioritize the actions of the National Fugitive Operation Program to target those with serious criminal histories or who pose a threat to community safety.
- Suspend the use of removal procedures such as "stipulated orders" that do not allow for a full and fair immigration hearing.

Create regulatory mechanisms to address civil rights violations during enforcement actions: The Administration should ensure that allegations of abuse and mistreatment of noncitizens by DHS immigration personnel and contractors are handled in an effective, meaningful, and transparent manner. The system works too slowly; victims and the public often learn little about what corrective action, if any, is taken.
Recommendations:

- Improve coordination between ICE, CBP, and other relevant DHS offices, and ensure that they have the authority and resources to investigate allegations of abuse and take corrective action.
- Ensure that these regulatory checks on rights violations are enforceable.

Repeal the expansion of expedited removal: In 2004, the Secretary of Homeland Security authorized "expedited removal" against persons arrested inside the United States. *See* 69 Fed. Reg. 48877 (Aug. 11, 2004). This action authorized application of expedited removal to persons within the United States who are allegedly apprehended within 100 miles of the border and who are unable

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to demonstrate that they have been continuously physically present in the country for 14 days. The application of this summary process to individuals in the United States results in the expedited removal of individuals who may have valid claims to immigration status, such as those with citizen or resident relatives, trafficking victims, or individuals with asylum claims.

Recommendations:

- Repeal the 2004 modification of the "expedited removal" policy, which expanded the scope to include persons arrested inside the United States. Individuals suspected of being undocumented immigrants who are present inside the United States should not be removed without meaningful administrative review.
- End the use of "expedited removal" for children in immigration proceedings.

C. Employment Verification Issues

The front lines of the government's undocumented immigration enforcement efforts have shifted over the last several years to the workplace. In addition to the large-scale worksite raids, the Bush Administration has initiated a number of regulatory actions designed to force employers to serve as proxies for immigration enforcement agents. The ability to effectively enforce our immigration laws in the workplace is a central goal of just and humane immigration reform. But efforts to turn employers into immigration agents under our current system are certain to hurt both U.S. and immigrant workers. In the absence of comprehensive immigration reform, workers are likely to hide in the shadows, expanding the underground economy. Even those workers who are legally authorized to accept employment may face discrimination or improper determinations about their immigration status by employers using faulty databases to research prospective employees. The Administration must take a number of crucial steps to diminish the gratuitous harm inflicted on employers and workers who labor under a broken system.

Social Security No-Match regulations: This effort to redirect the Social Security Administration (SSA) from its core mission of providing benefits and turn it into an agent of DHS is deeply misguided. If implemented, the No-Match initiative will create untold chaos in the workplace at a time when companies are struggling to survive in the weak economy.

Recommendations:

- Rescind Final Rule 8 CFR Part 274a (ICE 2377-06; DHS Docket No. ICEB-2006-0004): Safe-Harbor Procedures for Employers Who Receive No-Match Letter.
- Withdraw the Supplemental Proposed Rule published on March 26, 2008, Docket number ICEB-2006-004.
- Amend the current SSA "Social Security Statement" to highlight the importance of updating name changes due to marriage, divorce, naturalization, etc., and correcting Social Security number errors.

Basic Pilot program: Instead of racing to expand a flawed program, this Administration must focus on fixing the inherent flaws in the program. There are a variety of important database integrity initiatives that the Administration should pursue to create the foundation for an employment verification system that works, properly protects the rights of all workers, and is implemented in conjunction with just and humane immigration reform.

Recommendations:

- Withdraw FAR Proposed Rule; Case 2007-013, June 12, 2008.
- Reverse Executive Order 13465, June 6, 2008.

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- Shift the burden to the government to prove that an individual is ineligible to work rather than requiring an individual challenging a tentative non-confirmation to disprove the non-confirmation.
- Conduct a comprehensive audit of the accuracy, data errors, and/or omissions in all records systems and databases, whether paper-based, electronic, or both, that are used to verify whether an individual is authorized to work in the U.S.

Employment Verification Commission: The titanic impact of this issue on workers and employers requires analysis and input from a high-level public/private commission that would be charged with making recommendations to ensure that the highest database accuracy standards are met. Participants on the Employment Verification Commission should include representatives from DHS, SSA, National Institute of Standards and Technology, organizations with technological and operational expertise in database accuracy, and other stakeholders who represent the interests of persons and entities affected by database inaccuracies, including business, labor unions, privacy advocates, and immigration organizations.
Recommendation:

- Establish a high-level public/private commission charged with making recommendations related to the costs associated and staffing associated with database improvement; the technology needed for database improvement; the quality assurance necessary for improved data entry; how existing mechanisms and programs used to fix database errors can be improved; and privacy protections.

Oversight and discrimination: Misuse of E-Verify has been a problem since the program was implemented in 1997. In the latest evaluation of the program, researchers found that "the rate of employer noncompliance with the program rules is still unacceptably high."[6]
Recommendation:

- Require DHS Office for Civil Rights and Civil Liberties to conduct annual civil liberties impact assessments of the program that include, but are not limited to, a review of employer compliance with E-Verify system requirements; a review of the adequacy of E-Verify rules and procedures to protect authorized workers; a review of whether the program is being managed in a manner that appropriately addresses and anticipates civil rights and civil liberties concerns; and recommendations for additional actions needed to address civil rights and civil liberties concerns.

D. State and Local Enforcement

The Federal government has shifted its responsibility for enforcement of civil immigration laws to state and local police and other state and local agencies. It has— without meaningful oversight, review, or statutory authority— encouraged do-it-yourself immigration enforcement at the local level that inevitably results in racial and ethnic profiling and undermines community policing.

At the same time, states and localities have taken it upon themselves to pass their own immigration laws and are presuming to decide when and how federal immigration laws should be enforced. They

[6] "Interim Findings of the Web-Based Basic Pilot Evaluation; Report Submitted to the Department of Homeland Security" Westat, Dec. 2006, at x, *available at* http://www.nilc.org/immsemplymnt/ircaempverif/westatinterimreport_webbasicpilot_2006-12.pdf

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have mandated that businesses verify employment authorization through the voluntary Basic Pilot/E-Verify system; turned state and local police, as well as other state agencies and private employers and landlords, into immigration enforcement agents; passed laws that allow states to interpret immigration status and policies; and created licensing laws that mask their real purpose—enforcement of federal immigration laws.

Return immigration enforcement responsibility to the federal government: In 2002, the DOJ Office of Legal Counsel (OLC) overturned a 1996 OLC opinion and concluded that police have "inherent authority" to enforce civil immigration violations. Without statutory authority for any program beyond the memoranda of understanding envisaged by INA §287(g), DHS has marshaled an array of state and local immigration law enforcement programs, many of which lack statutory authority, under ICE ACCESS (ICE Agreements of Cooperation in Communities to Enhance Safety and Security). Involvement of state and local police in immigration enforcement under INA §287(g) and other ICE ACCESS programs occurs without adequate oversight or review. These programs are not an effective, efficient way to enforce federal immigration laws; do not respect the rights of citizens and immigrants; and undermine community policing and public safety.
Recommendations:

- Mandate a thorough independent review of current agreements and similar programs during which time no new INA §287(g) agreements should be entered into.
- Actively enforce civil rights protections and implement policies and funding that support community policing and effective law enforcement.
- Re-assert federal authority over national immigration laws and policies and reject the authority of states and localities to adopt these federal responsibilities.
- Train state and local officials about their proper role in the enforcement of criminal laws related to immigration rather than civil immigration enforcement.
- Direct DOJ to restore the 1996 OLC opinion.

Enhance the ability of law enforcement to target criminals and terrorist threats effectively: In 2002, DOJ began to add *civil* immigration information to the National Crime Information Center criminal database. In 2004, DOJ ruled that data in the NCIC do not have to be accurate. Putting civil immigration information into a criminal database undermines the effectiveness of the database and diverts scarce law enforcement resources to protect our community from crime and terrorism.
Recommendation:

- Remove civil immigration information from the NCIC and restore the accuracy requirement for NCIC data.

E. Border Security

Over the past eight years, the Bush Administration has spent billions of dollars to build barriers, doubled the number of border patrol agents, and put in place other border enforcement controls, with little evidence of success. Efforts to secure the border which fail to incorporate considerations about the practical effects on border communities do not enhance community safety or national security, while they carry an exorbitant price tag. This Administration must pursue smart, fiscally responsible border policies that enhance security and reflect an understanding of the vitality and dynamism of our massive border.

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Recognize the border as a dynamic locale that serves our nation through enhanced commerce and mobility: In the current deportation-only climate, border enforcement has received significant attention. Yet Congress has appropriated billions to "secure" the border without fully recognizing the important role that cross-border commerce and travel play in enhancing our security. A priority must be placed on developing better, mutually enhancing relationships with Canada, Mexico, and the Central American governments.
Recommendations:

- Improve the infrastructure at ports of entry to ensure ease of access, minimize costly and unnecessary delays, and provide a better and safer atmosphere in which CBP inspectors can complete the necessary screening and inspections of visitors.
- Develop a new North American strategy to enhance intelligence-sharing, manage our borders, combat human trafficking and drug smuggling, and protect us against other threats.
- Develop enhanced interstate and international agreements that ensure that repatriated unaccompanied alien children who are nationals of contiguous countries are returned to stable and appropriate settings.

Reevaluate existing border strategy: The Administration should fully assess its border strategy, including all border construction projects, to determine whether they are feasible, environmentally sound, cost effective, and offer the best solution for a given section of the border. The need to revisit current border policy is a fiscal imperative. The expansion of 700 miles of barriers along our borders has been, and will continue to be, costly, with estimates varying as high as $21 million per mile. Many security experts have questioned the effectiveness of fencing—including Secretary Chertoff, who has said that what we need is "a 21st-century virtual fence … not . . . old-fashioned fencing…" Barrier placement in border towns has profoundly affected area residents and increased border deaths, as undocumented migrants now cross through treacherous deserts and mountains. Two of America's closest allies—Mexico and Canada—have voiced grave concerns about these barriers, comparing them to the Berlin Wall.
Recommendations:

- Review current border fencing construction and consider the use of "smart border technology" rather than expensive fencing projects.
- Conduct an audit and revise border watch lists to ensure that the lists are accurate and effective.
- Review the establishment of Zero Tolerance Zone policies along the border that require all undocumented migrants to be criminally prosecuted.

Modify excessive waiver authority: Section 102 of the REAL ID Act of 2005 gave the Secretary of Homeland Security authority to waive all legal requirements related to the construction of fences. This authority has been interpreted by the Bush Administration in its broadest terms—to apply not only to all statutes, but also regulations and requirements under those statutes. This sweeping and unprecedented authority should be repealed or substantially modified.
Recommendation:

- To signal a more tempered and respectful approach to border community issues, rescind or modify existing assertions of waiver authority by giving notice in the Federal Register.

Establish an independent Border Enforcement Review Commission: The Bush Administration has implemented extensive border security policies and programs with limited involvement by border communities that have endured hardships ranging from racial profiling to

excessive delays at port of entry to intrusive lights and other technology that have diminished quality of life.

Recommendation:

- Establish an independent commission to study border security programs and policies composed of Administration officials and members of the community and civil society. The issues that the commission should review include the protection of human and civil rights of border community residents and migrants; the adequacy and effectiveness of training for border personnel; the adequacy of DHS complaint procedures; the effects of operations, technology, and enforcement infrastructure on the environment; cross-border traffic and commerce; quality of life of border communities; and local enforcement of federal immigration laws.

Commit to improved training for Border Patrol: A new Administration must also ensure that the DHS hire, train, and retain highly qualified agents who receive adequate training in immigration law, civil and human rights, and community relations, to ensure that all individuals be treated with respect and their rights respected.

Recommendation:

- Direct CBP to provide more humane treatment to the border-crossers it apprehends by improving detention conditions, including providing adequate food, medical care, religious counsel, and legal assistance.

III. DETENTION

A. Secure, Community-Based Alternatives to Detention.

Pursuant to human rights principles, immigration detention should be used as a last resort and only when custody is necessary to meet the legal objectives for which it is intended. Alternatives to detention (ATDs) allow DHS to enforce immigration laws in a more responsible, cost-effective, and humane manner than traditional detention. ATD programs release individuals from custody and, through monitoring and the delivery of services, ensure compliance with the immigration laws.

In many cases, ICE has discretionary authority to determine whether to release a noncitizen from detention. Rather than detain tens of thousands of noncitizens at the cost of approximately $95 per person per day, ICE should expand the use of community-based ATD programs, which cost as little as $12 per day on average[7]. In 2007, the government spent $1.2 billion dollars on detention. Meanwhile, DHS has not implemented any cost-saving community-based ATD programs despite having $43.6 million appropriated for such programs.[8]

Rather than using funds appropriated for ATDs to create community-based programs, ICE uses this funding for custodial programs that use electronic ankle bracelets or impose intrusive, burdensome

[7] "An Evaluation of the Appearance Assistance Program," Vera Institute of Justice, Aug. 1, 2000, available at http://www.vera.org/publication_pdf/aapfinal.pdf

[8] In April 2006, the DHS Office of the Inspector General recommended that DHS, "Intensify efforts to obtain the resources needed to expedite the development of alternatives to detention to minimize required detention bed space levels," however ICE has not increased such programs. *See* "Detention and Removal of Illegal Aliens," Office of Inspector General, Department of Homeland Security, OIG-06-33, April 2006, at 23; available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_06-33_Apr06.pdf.

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monitoring requirements. ICE has the discretionary authority to release noncitizens on recognizance, on an order of supervision, or bond; however, ICE currently uses such options in extremely limited circumstances. Individuals who are otherwise eligible for release on their own recognizance are instead placed on electronic bracelets making it difficult for them to work and pursue other daily activities.

ICE has generally resisted using alternative programs that connect individuals with community-based services, including legal assistance, despite evidence that community-based services help improve court appearance rates. Pilot community-based alternative programs have proven successful and cost-efficient. Between 1997 and 2000, the Vera Institute of Justice coordinated a highly successful alternative program through a contract with legacy INS.[9] Participants were required to report to the Vera Institute and were provided with legal information, referrals and court date reminders. The Vera Institute reported a 93% appearance rate for the asylum seekers in its program. These programs also help ensure that noncitizens in proceedings have meaningful access to counsel, in contrast to individuals in detention, among whom only approximately 10% obtain counsel.[10] The main alternative program used by ICE over the last few years did not go as far as the Vera program in its efforts to connect individuals with community-based organizations and legal counsel, and ICE officials have stated that they plan to discontinue this aspect of the program in order to save money.

Recommendations:

- Direct ICE to create a nationwide community-based alternatives program implemented in partnership with reputable and experienced not-for-profit organizations which have as a component the facilitation of access to legal counsel and social services.
- Direct ICE to establish protocols for maximizing the use of Release on Recognizance (ROR) and orders of supervision, complemented by appearance assistance services through reputable community-based organizations.
- Direct DHS to develop related written guidance on ATDs and ROR for dissemination to all ICE field offices.
- Direct DHS to restore the asylum pre-hearing release program—which favored the release of asylum seekers who passed the "credible fear" screening process and could satisfy several other criteria—and provide ROR or ATDs for all other detained asylum seekers in removal proceedings who do not pose a threat to our communities.
- Direct ICE to provide detailed analysis of current detention bed space needs, assess cost savings for shifting to alternatives programs, and analyze and reject future calls for additional detention bed space funding from Congress.

B. Limit the Detention of Vulnerable Populations

The Administration should avoid the correctional custody model for vulnerable immigrant populations—including families, children, asylum seekers, victims of crime, and the mentally and

[9] "An Evaluation of the Appearance Assistance Program," Vera Institute of Justice, Aug. 1, 2000, available at http://www.vera.org/publication_pdf/aapfinal.pdf

[10] According to the *Washington Post's* recent series on health care in immigration detention, only one in ten detained immigrants have legal representation. Dana Priest and Amy Goldstein, "As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost," *Washington Post*, May 11, 2008. In fiscal year 2006, only 48% of *all* non-citizens were represented by counsel in immigration court proceedings. *See* United States Department of Justice, Executive Office for Immigration Review, FY 2006 Statistical Year Book, G1 (2007).

physically ill—unless the Administration shows that such custody is necessary for public safety or national security. Currently, families are frequently subject to detention while in deportation proceedings. Children face long stints in juvenile facilities or shelters while protection in the U.S. is being sought on their behalf. The vast majority of these individuals do not pose a threat to our communities or our national security. Nonetheless, decisions over their continued detention are subject to strict, punitive laws that offer little flexibility, or, in some cases, are left to the discretion of immigration officials who often have little incentive to release eligible immigrants.

Parole for vulnerable populations: The U.S. has increasingly focused on detaining as many migrants as possible, irrespective of their health, age, family situation, or claim to lawful status. Immigration detention should be used only when necessary after considering non-custodial alternatives.

Recommendations:

- Direct DHS to use detention only when absolutely necessary; to detain the individual in the location closest to his or her residence, attorney, or family members, except in rare, documented circumstances; and to move a detained individual only after giving notice to the detainee's attorney or family and the immigration court.
- Parole individuals with serious medical or mental health issues or other humanitarian issues necessitating release.
- End the use of family detention and ensure that families are paroled rather than detained.
- Ensure that children are not separated from their parents.
- End the use of detention for sole caregivers, pregnant women, and nursing mothers, except in rare, documented circumstances.

Parole for eligible asylum seekers: Under current law, asylum seekers who present themselves at our borders or ports of entry seeking protection are detained as "arriving aliens." This classification subsumes the legitimacy of their appearance at U.S. borders and ports of entry, which is contemplated in the statute designed to ensure the United States' own compliance with the United Nations Protocol on the Status of Refugees. They must meet strict requirements to win release or parole, including demonstrating to ICE that their release is in the "public interest," an undefined term that does not encourage immigration officials to grant release. In addition, asylum seekers who apply after entry to the U.S. may be detained while their cases are pending.

Recommendations:

- Rescind the November 2007 ICE parole guidelines and issue new guidelines which use the parole criteria included in the December 30, 1997 parole policy. Require that all arriving asylum-seekers be considered for parole automatically within a reasonable timeframe, and include a mechanism for review of the parole decision. In addition, reinstate the February 9, 2004 Release after Grant Memorandum permitting release for individuals granted asylum or withholding of removal protection.
- Provide asylum seekers access to the immigration courts for custody hearings, rather than subjecting them to detention by default as "arriving aliens," by amending 8 CFR 236.1(c)(11).

Protect unaccompanied children: Under the Homeland Security Act, all children under the age of 18 who are not in the physical custody of a parent or legal guardian at the time of apprehension should be considered "unaccompanied alien children." When federal authorities take unaccompanied immigrant children into custody, they are required by law to transfer those minors to the care and custody of the Office of Refugee Resettlement (ORR) of the Department of Health

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and Human Services. Nonetheless, some unaccompanied minors are held in ICE or Customs and Border Patrol custody for long periods of time, even though it is prohibited by law, in part because of a lack of clarity over the definition of the term "unaccompanied," among other reasons.

A settlement in a landmark legal case, *Flores v. Reno*, 507 U.S. 292 (1993), requires that unaccompanied immigrant children be held in the least restrictive setting possible. The *Flores* settlement also requires that children be released from detention, whenever possible, to an individual or entity able and willing to ensure both the child's safety and his or her timely appearance in immigration court. The Administration should ensure compliance with all of the above legal requirements.

Recommendations:

- Direct federal agencies to comply strictly with legal requirements that all children not in the physical custody of a parent or legal guardian at the time of apprehension be transferred to ORR within 72 hours, or be reunified with family (so that they are not rendered unaccompanied).
- Direct ORR carefully to evaluate and place the children, according to their "best interests," with family, foster care, or a home-like facility, and to coordinate actively and effectively with caretakers to ensure each minor's access to counsel and compliance with the requirements for immigration court proceedings.
- Direct the agency to codify the *Flores* settlement in regulation.

C. Respect Due Process and Guarantee Basic Standards of Decency and Fairness for Detainees.

Immigration detention has expanded at an extraordinary rate in recent years as ICE has ramped up its enforcement efforts and Congress has authorized more and more detention beds. Currently, ICE holds over 32,000 immigrants in detention on a daily basis in facilities operated by ICE or private contractors, or in county jails under contract to ICE, representing more than a three-fold increase in beds since 1996. Many facilities are located in remote or rural areas with few legal aid providers or pro bono resources available.

Those detained include thousands who entered the United States looking for work or overstayed a visa. Others are asylum seekers or torture survivors who came in search of protection and found themselves behind bars, even though many of them have a claim to lawful status in this country. And still others are long-time lawful permanent residents with extensive family, employment, and community ties in the United States, who have committed crimes—many minor or nonviolent—that render them deportable and subject to removal. While there are some noncitizens who are detained for appropriate reasons concerning public safety, the vast majority of the noncitizens in ICE custody today are being held at great public expense for the sole reason that it makes it more convenient for ICE to deport them, in the event that they are ultimately ordered deported. Conditions of detention are very often substandard, with ICE and its contractors failing to adhere to ICE's own detention standards. More than 80 immigrants have died in ICE custody since ICE was established in 2002. The new Administration must consider more humane and cost-effective ways of addressing enforcement.

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Adopt least restrictive means:

- Require the agency to issue guidance encouraging the release of individuals who pose no threat to the community and are not a flight risk under the standards articulated by the BIA precedent decision in *Matter of Patel,* 15 I & N Dec. 666 (BIA 1976).
- Require detention facilities to adopt, where custody is necessary, an environment appropriate for civil detention, favoring non-restrictive settings to the greatest extent possible, and to require contract facilities to follow the same non-restrictive policies as a condition of maintaining the contract.
- Release individuals who are deemed to have, or who can demonstrate, meritorious challenges to charges of deportability, or eligibility for relief from removal. Release individuals who have been granted withholding of removal, deferral of removal, or other forms of relief from removal, and release individuals who have been ordered removed but whom the agency cannot remove within the three-month removal period under the supervisory provision in 8 U.S.C. 1231(a)(3).
- Require the agency scrupulously to follow custody and bond provisions under 8 C.F.R. 1003.19(g), and immediately inform the Immigration Court having administrative control over the Record of Proceeding of any change in custody location or of release from ICE custody, or subsequent taking into ICE custody, of a respondent or applicant in removal proceedings before the Executive Office for Immigration Review (EOIR).

Promulgate detention standards regulations: Detention facilities that hold immigrants in deportation proceedings are governed by detention standards. However, ICE has steadfastly refused to codify the standards in law. The standards are routinely violated and, because they are not legally enforceable, there is little accountability in the system. In addition to codifying these standards, detention facilities should treat those in custody humanely and ensure access to legal representation (including access to telephones and legal information), medical and mental health care, social services, pastoral visitation, and counseling.

Recommendations:

- Promulgate enforceable detention standards through notice and comment rulemaking.
- Through meaningful inspections and oversight, ensure that all detention facilities follow and abide by the immigration detention standards.
- Improve complaint procedures and ensure that adequate interpretation and translation services are available; investigate all allegations of ill-treatment, sexual abuse and other abuses; and penalize those responsible.
- Refrain from transferring detainees away from their counsel and family, and refrain from transferring detainees without their belongings, including personal and legal papers.
- Ensure that lesbian, gay, bisexual, and transgendered detainees are treated appropriately and humanely by providing appropriate health care and housing; implementing training to counter discrimination based on sexual orientation and gender identity; preventing discrimination; and ensuring adequate care of individuals with HIV/AIDS.

Expand Legal Orientation Programs (LOP): Legal Orientation Programs coordinated by DOJ and implemented by nongovernmental organizations help to ensure that all ICE detainees and unaccompanied children in the custody of ORR have access to information regarding their legal rights and potential for relief under immigration law. LOP programs enable detainees to make timely decisions about their cases, enhance the efficient operation of the immigration courts, and help detainees to access pro bono legal services.

Recommendations:

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- Direct DOJ to expand LOP programs nationwide.
- Require LOPs to be in place before using or opening an immigration detention facility or Division of Unaccompanied Children's Services (DUCS) program.

Guarantee individualized determinations: As in all situations in which the state deprives an individual of his or her liberty, the burden of showing that detention is necessary and proportional to a compelling public interest should fall on the government. Yet, in many cases, detained noncitizens are not eligible to request release, because the law prohibits the release of certain categories of individuals.
Recommendation:

- Require DHS to make individualized custody determinations for noncitizens, affording each individual an opportunity to apply for release before an immigration judge, with determinations and conditions of release based upon risk of flight, public safety, or national security.

Restrict "automatic stays": The Administration should respect decisions made by an immigration judge to release a noncitizen on bond or other conditions, and should reject any regulations or policies that allow a government attorney to override a judge's determination on custody through an "automatic stay."
Recommendations:

- Direct the agency to repeal the October 17, 2001 regulation 8 C.F.R. §1003.19(i)(2), authorizing such stays.
- In the interim, direct the agency *not* to exercise the Secretary's discretion to seek such an automatic stay; but rather to pursue any stay of the custody order it may deem necessary or appropriate in connection with filing an actual appeal, as provided in 8 C.F.R. §1003.19(i)(1).

Ensure timely charges and notice: The Administration must ensure that detained noncitizens receive timely charges and service of notice in a language understood by the detainee. All detainees should be scheduled for court hearings in a timely and reasonable manner.
Recommendations:

- Require by regulation that a noncitizen detainee be charged and issued a charging document within 48 hours of his or her arrest or detention, and that, upon arrest, he or she be provided with oral and written information concerning the right to representation by qualified counsel, and how to schedule a timely custody hearing before an immigration judge, independent of the date of the removal hearing.
- Require that charging documents be filed with the immigration court within 48 hours of arrest or detention and that noncitizens be scheduled for court hearings in a timely manner, consistent with §U.S.C. 1229(b)(1). This time period for scheduling an initial hearing before the immigration judge should be tolled in certain cases for noncitizens who are eligible to pursue immigration benefits affirmatively, before the agency, such as cases in which the noncitizen is able to establish prima facie eligibility for certain immigration benefits before U.S. Citizenship and Immigration Services (USCIS) such as VAWA, T or U visa relief. Once relief is granted, the charges should be withdrawn.
- Allow flexibility in the subsequent scheduling of hearing dates to best facilitate the noncitizen's access to counsel by joining any reasonable request made by a noncitizen for an adjournment and/or change of venue for that purpose, and, where appropriate, to waive the noncitizen's appearance before the court.

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Limit prolonged detention: U.S. Supreme Court decisions in 2001 and 2005[11] require that immigrants who have been ordered removed be detained no longer than reasonably necessary for deportation, typically no longer than 180 days. In recent years, however, the government has frequently violated this rule, forcing detainees who are commonly unrepresented to file petitions for writs of *habeas corpus* to obtain release. Such noncompliance flouts justice, burdens the federal courts, and forces taxpayers to pay the cost of unlawful prolonged detention.
Recommendations:

- Mandate strict compliance with the reasonable limitations on detention established by the Supreme Court.
- Follow the minimum requirements of the statute for post-removal order detention that provide a 90-day "removal period," after which supervised release shall be granted, except in exceptional circumstances that are documented and reviewed by the agency after a second 90-day period.
- Ensure judicial review of post-90 day detention.
- Require a report to Congress on how many people are held longer than 90 days.

IV. FAMILY IMMIGRATION

Family values are the cornerstone of our nation's immigration policy. The next Administration should ensure that these values are upheld not only through our family immigration system but also in the immigration courts, in detention, during enforcement actions, and in the implementation of our immigration laws. Family unity impacts the well-being of our children, communities, and economy, and should be considered when making discretionary decisions regarding humanitarian waivers and bars to re-entry. Family immigration reform requires both legislative and administrative solutions, but DHS can take a number of important administrative steps to enhance family unity.

Resolve general workflow inefficiencies: In a USCIS Ombudsman report released in June 2008,[12] several recommendations were proposed to reduce green card backlogs significantly. In response, USCIS promised to deploy a Background Check System (BCS) to better track all applications stalled by a background check. The report also recommended that USCIS provide a more precise measurement of the current backlogs.
Recommendations:

- Deploy the BCS as soon as possible to ensure that background checks do not drag on for months and years.
- Reformulate its counting procedures to track how long each application has been pending, rather than averaging backlog numbers.

Additional resources for processing of visa applications and petitions: USCIS and the Department of State (DOS) need more resources and staff in order to maximize work flow, so that any new laws that add visas or add to the work load will not cause undue strain on the current work flow and infrastructure.
Recommendation:

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[11] *Zadvydas v. Davis*, 533 U.S. 678 (2001) and *Clark v. Martinez*, 543 U.S. 371 (2005).
[12] USCIS Ombudsman Annual Report to Congress 2008, at vii-ix, 5-7, *available at* http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2008.pdf

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- Include increased funding and staffing increases for USCIS and DOS in the President's budget.

Waivers and Admissibility: USCIS needs to expand its generosity in granting both fee waivers and discretionary waivers, especially in cases in which individuals in proceedings have immediate family members who are citizens.
Recommendation:
- Take a more comprehensive and fair view of the hardship requirement in family waiver cases, especially where the re-entry bars are the only obstacle to family reunification.
- Support proposals to expand USCIS's authority to grant waivers for individuals with pending family-based petitions and/or family members in the United States.
- Ensure that HHS removes HIV from the list of "communicable diseases of public health significance" issued by USCIS, a list which has the effect of severely limiting such immigrants' ability to obtain immigrant or non-immigrant visas or to adjust their status.

Allow separated spouses to receive permanent residency by restoring efficient processing: Legal residents who were sponsored by a spouse are authorized to remain in the United States following a divorce, as long as they can prove to USCIS that the marriage was in good faith. However, in April 2003, USCIS created procedural roadblocks in these cases by requiring a final order of divorce before a person could even ask the agency to determine whether the marriage had been in good faith. As a result, conditional resident spouses who have pending divorce proceedings are being placed in removal proceedings, which are later put on hold after the divorce becomes final. The case then goes back to the same USCIS office that would have made the good-faith marriage determination if the removal proceeding had never been initiated. The current procedure wastes the resources of immigration judges, staff attorneys, and other personnel at ICE and EOIR, when USCIS itself is already authorized to make all necessary determinations. A more efficient approach was in place prior to 2003, which allowed the necessary application to be filed based on a pending divorce, but required that the divorce become final before the case could be approved.
Recommendation:
- Revert to the historical policy of allowing individual to provide divorce decree once divorce is final, and allow them then to amend their petitions accordingly.

Retain priority dates for children aging out: Children who are waiting to immigrate through our legal channels should retain their original visa priority date when they turn 21 years of age so they are not forced into a separate preference category. DHS and DOS need to fully implement Section 3 of the Child Status Protection Act (CSPA) by clarifying that Congress has mandated retention of the original priority dates for cases in which a child has turned 21 and no longer qualifies as a "derivative beneficiary" entitled to accompany his or her parents. At present, instead of crediting the child with the years that he or she has already waited since the original priority date, the agencies are ignoring the Congressional directive by assigning the child a new priority date and placing him or her at the back of a nine-year line.
Recommendations:
- Require DHS and DOS to issue guidelines or regulations clarifying CSPA rules relating to priority date retention.
- Require DHS to issue administrative guidelines allowing the children of K-2 visa recipients who were initially approved for a visa, emigrated to the United States with their parents, and aged out prior to filing for adjustment of status to file an application for status under the new guidelines regarding the age-out provisions in the CSPA.

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Authorize adjustment of status to keep mixed-status families together: DHS should interpret the laws to promote family unity. In one recent case, DHS fought against a court decision designed to promote family reunification. The Ninth Circuit Court of Appeals ruled in *Perez-Gonzalez v. Ashcroft,* 379 F.3d 783 (9th Cir. 2004), that certain individuals who were previously deported may apply for adjustment to permanent resident status; the decision applies only if the person has an immediately available visa based on a petition filed during the validity of INA §245(i) (by April 30, 2001), together with an I-212 application for permission to request admission to the United States after being deported. Under *Perez-Gonzalez,* these individuals must pay a $1,000 fine, plus all regular application fees, in order to request adjustment of status. Provided that they follow these procedures, the ten-year bar to reuniting with their family in the United States can be waived. But DHS and the BIA have refused to follow the court's order to allow waiver applications, and have vigorously fought to keep families apart for the full ten years.
Recommendation:

- Allow individuals to receive a waiver to the ten-year bar if they comply with all requirements, so that they may reunited with their families.

Reunite refugee families: faster processing of Form I-730: Asylees and refugees who have already been granted legal status in the U.S. are given two years to file the Refugee/Asylee Relative Petition (form I-730) with USCIS if they wish for their spouse and unmarried children under the age of 21 to join them in the U.S. It currently takes about 18 months for an I-730 to be approved, and often takes weeks or months for the relative to travel to a U.S. consular post abroad where he or shecan begin the procedure for emigrating to the U.S. Security clearances can also add months to the process. In the meantime, these family members are often experiencing persecution, are in immediate danger of being persecuted, and/or are survivors of trauma. They are among the most at-risk beneficiaries of applications that USCIS is responsible for adjudicating, yet processing times for these petitions have lengthened over time.
Recommendation:

- Refugee and asylee petitions for relatives should be prioritized for quick processing by USCIS, with a goal of three months' processing time.

V. NATURALIZATION

Newcomers who apply for U.S. citizenship are motivated by a desire to demonstrate their commitment to the United States, and naturalization is a critical step that they take on the journey to becoming full participants in America's democracy. In fiscal year 2007, 1.4 million legal permanent residents—a near record number—applied for naturalization. The USCIS did not adequately prepare for this dramatic increase, and the agency has not kept pace with the increased demands on its workload. As a result, many newcomers have been confronted with lengthy processing delays, with the agency initially projecting a 16-18-month waiting time for applicants. While USCIS has made some progress in reducing application delays, according to the agency's most recent projections, there are still great disparities in waiting times in USCIS districts throughout the nation, ranging from five to 16 months.

In addition, a substantial number of applicants are mired in the backlog because of one specific type of delay in the application process—the FBI name check. This name check is one of the many background checks the USCIS requires to ensure that applicants are qualified for naturalization, but

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it is the most time-consuming, and is responsible for a significant portion of the delays in naturalization applications of more than a year. There is widespread consensus that our naturalization process must include effective measures to protect national security and prevent the naturalization of newcomers who do not meet the legal requirements for U.S. citizenship. However, some policymakers, including the USCIS's Ombudsman Office, have questioned whether the FBI name check has security value commensurate to the costs it places on the system.

Immigrants who are confronted with application delays, for whatever reason, do not receive adequate information about the cause of the delay and USCIS's efforts to resolve problems with their application processing. The agency has not established consistent practices throughout each of its district offices that allow those offices effectively to "troubleshoot" problem applications. Similarly, while community-based organizations that are familiar with the needs of immigrants can be important partners with the USCIS in addressing challenges in the naturalization process, the USCIS does not require each district to engage these groups on an ongoing basis.

In addition, the fees to initiate the naturalization process have jumped dramatically several times since the early 1990s; the most recent July 2007 increase brought the fees up to $675. The USCIS has established a process for low-income applicants to obtain a fee waiver, but it is applied in an extremely discretionary manner. Moreover, there is no USCIS fee waiver form, and applicants must decipher on their own how to frame the request, and what supporting documentation to submit. The USCIS policy memorandum on fee waivers does not provide specific guidance on what factors will be taken into account in determining whether an applicant has an "inability to pay" the naturalization fee. This is especially challenging for applicants who are receiving or have recently received a federal means-tested benefit, because they must go through the lengthy and burdensome process of re-establishing their low-income status, when they have already done so with another federal agency.

Additionally, in October 2008 USCIS implemented its re-designed naturalization exam. During the first year of implementation, certain applicants will be able to choose between taking the old test and the re-designed exam. Starting in October 2009, all applicants must take the new exam. In order to ensure that the new test does not become an unfair obstacle for applicants, advocates are currently working with the current Administration to ensure that the USCIS provides adequate training to its staff, and conducts an effective outreach campaign to educate service providers and applicants about the exam.

Finally, members of the military who pursue naturalization face unique bureaucratic challenges. Under the law, certain members of the armed services and veterans can apply for expedited naturalization, and the USCIS must waive their application fees. However, during their military service, some applicants have experienced difficulties in scheduling their interviews or obtaining access to information about the status of their applications. Others have had their applications erroneously rejected because they failed to submit payment for fees from which they actually are exempt.

Promoting naturalization offers the Administration an opportunity to highlight the contributions that immigrants are making to our nation's civic life, their choice to become "new Americans," and their commitment to exercising the rights and responsibilities of U.S. citizenship.

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Create naturalization advisory committees in each district: USCIS should create naturalization advisory committees that meet regularly with USCIS district staff to discuss customer service issues and other challenges facing applicants.
Recommendations:

- Require USCIS to create a naturalization advisory committee in each district comprised of a broad range of naturalization assistance, adult education, and advocacy groups that fully represent the diversity of the immigrant population served by the district.
- Require USCIS to incorporate the implementation of such advisory committees into the performance objectives developed for its district personnel.

Establish "troubleshooting" units in each office for backlogged or problem cases: Naturalization applicants should be able to contact designated personnel to obtain specific information about the reason for the delay in their applications and what actions the agency is taking to resolve it. In order to determine the most effective approaches for operating these units, the agency should undertake an assessment of those offices with the "best practices" for problem-case resolution.
Recommendations:

- Require USCIS to develop managerial and operational models that can be adopted agency-wide.
- Require USCIS to establish a special unit in each district office responsible for "troubleshooting" backlogged or other problem cases.

Assess FBI name check review: Serious questions have been raised about the utility of FBI name checks in promoting national security. Given the clear administrative problems and lengthy delays associated with the name check process, a thorough review of this process is long overdue.
Recommendation:

- Conduct an interagency assessment of the value and efficacy of FBI name checks in protecting natural security and revealing useful information about applicants' eligibility for naturalization. This assessment should examine whether the name checks can provide relevant information that cannot be otherwise obtained from other naturalization background checks.

Streamline fee waiver applications: The problems related to the opaque process for obtaining fee waivers have been compounded by the exorbitant escalation of application fees. The Administration should streamline the waiver application process for certain low-income applicants.
Recommendation:

- Require USCIS to develop and widely disseminate a formal fee waiver application form, including a worksheet that would help applicants evaluate their eligibility.
- Change its fee waiver policy to make applicants automatically eligible if they submit proof that they qualified for or received a federal means-tested benefit within the last 180 days.

Make naturalization exam passage rates transparent: A meaningful review of the new examination will require development and dissemination of statistics about passage rates.
Recommendation:

- Require USCIS to share statistics on a regular basis with naturalization stakeholders which break down the portion(s) of the exam applicants failed and compare the rates of failure between those taking the new and old exams.

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- Require USCIS to collect for dissemination all information related to naturalization denials (including failure for reasons not related to the exam), broken down by district office and national origin of the applicant.

Eliminate bureaucratic obstacles for members of the military: We should take every step to facilitate the naturalization procedures for those who have put their lives on the line to protect this country. Bureaucratic impediments to citizenship for members of the military disrespect their sacrifice.
Recommendation:

- Require USCIS to coordinate with the Department of Defense to implement a system that enables naturalization applicants in the military easily to obtain access to information about their application status while stationed abroad; and implement enhanced scheduling procedures to ensure that interviews for members of the military are scheduled as close as possible to where they are stationed.
- Require USCIS to improve its staff training and quality-control processes to eliminate the erroneous rejection of applications from members of the armed services who qualify for the fee waiver.

VI. IMMIGRANT INTEGRATION AND BENEFITS

As our country continues to diversify and the immigrant population moves to non-traditional regions, it is essential that the federal government play a role in the integration of immigrants. To welcome newcomers fully and make them a part of the larger society, this effort must include civic, economic, and cultural integration. It also must include fair and equitable treatment of immigrants who need basic government assistance.

A. Immigrant Integration

On the federal level, it will be important to secure funding for education programs and assistance to local communities, as well as to review how best federal agencies can contribute to the immigrant integration process. By developing a federal plan for immigrant integration, the new administration can ensure that immigrants remain a part of the American fabric and maximize their social and economic contributions. Though a federal integration effort can and should coincide with a path to citizenship for the millions of undocumented immigrants throughout the country, the following recommendations can take place in the absence of comprehensive immigration reform, and potentially ease some of the tensions currently felt in local communities.

Create a new office in the White House focusing on immigrant integration: Recent legislation (H.R. 6617 and S. 3334) in Congress introduced in July 2008 by Sen. Clinton (D-NY) and Rep. Honda (D-CA) would create an Office of Citizenship and Immigrant Integration within the current Office of Citizenship within USCIS. While such an office is necessary, establishing an office in the White House would facilitate the coordination of federal and state efforts. Given the reality that much of the work of integrating immigrants takes place at the local level, it is critical to have a Federal entity that can reach local communities and provide the necessary resources. Because of the breadth of federal agency activities that affect immigrants, it is preferable to create an office that does not trump these programs but rather facilitates and coordinates programs related to immigrant integration.

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Recommendation:

- Establish an Office of New American Integration in the White House.

Broaden public-private partnerships focused on immigrant workers: The Employment and Training Administration in the Department of Labor assists in a number of partnerships with language acquisition providers and employers.
Recommendation:

- Require the agency to review existing public-private partnerships and evaluate ways to encourage employers to provide language acquisition programs for their employees.

Provide authority for partnerships with the private sector and foundations: Currently, the Office of Citizenship has limited authority to partner with the private sector on distribution of citizenship and civic promotion materials. Without this gift authority, it is difficult for this fiscally constrained entity to carry out its programs.
Recommendation:

- Revise Federal rules to enable the Office of Citizenship to partner more easily with foundations and the private sector in creating and disseminating citizenship toolkits and other materials.

Review the recommendations from President Bush's Task Force on New Americans: On June 7, 2006, President Bush issued an Executive Order creating a Task Force on New Americans. This Task Force consisted of Secretaries and Assistant Secretaries from all of the major Federal agencies. The primary goal of the Task Force was to provide recommendations to the President on immigrant integration initiatives. The report and recommendations are expected to be released before the end of 2008.
Recommendation:

- Review these recommendations and consider launching a follow-on interagency effort to implement or reevaluate some of the proposed actions.

B. Immigrant Public Benefits and Access to Government Services

In 1996, Congress enacted major immigration and welfare reform legislation that imposed harsh new restrictions on immigrant participation in public benefits and services. These restrictions were widely perceived in immigrant communities as mean-spirited and unnecessarily harsh. They have led to suicides among elderly immigrants facing despair and homelessness, as well as increases in hunger and declining health for immigrant children and adults. As a result of this backlash, in 1997 and 1998, the Republican Congress passed mitigating legislation restoring Social Security Insurance (SSI) and food stamps eligibility to some—but not all—lawfully-residing immigrants. It is critical for the new Administration to articulate a coherent policy with respect to participation in safety-net programs. The new policy must recognize the value to all Americans of investing in immigrant communities, and the benefits that accrue to all of us from immigrant integration.

Immigrants pay the same taxes as citizens, so those who are residing lawfully in the U.S. and should have the same ability as others to participate in the federal benefits programs that those taxes support. Restrictions on undocumented immigrants should be balanced by the following considerations:

- Avoidance of harm to citizens and immigrants who are residing lawfully in the U.S.: Restrictions aimed at undocumented immigrants should not prevent U.S. citizens and lawfully residing immigrants from obtaining assistance for which they would otherwise be eligible.
- Burden on agencies: Restrictions should not interfere with the mission of the nonprofit or government agencies providing benefits, e.g., soup kitchens, and elementary school teachers should not be required to check immigration status.
- Humane treatment: Any restrictions should be consistent with humanitarian norms, such as the provision of emergency health care to all persons regardless of circumstances, including immigration status.
- Consistency with other goals: Restrictions should not undermine important goals that are tangential to immigration, such as public health and safety, or the obligation to pay federal taxes.
- Cost-effectiveness: Restrictions should not cost more money than they save in either the short or the longer term.
- Child protection: Children present a special case on humanitarian grounds.

Vigorously enforce Title VI and other civil rights laws: Approximately 24 million Americans, including 19.5 million foreign-born and 4.5 million native-born U.S. residents, speak English less than "very well." Individuals should be encouraged to learn English but should never be discriminated against based on their level of proficiency or their national origin.
Recommendations:

- Resist efforts to limit access to government information and services for limited English proficiency (LEP) individuals, especially for individuals in immigration proceedings or detention.
- Vigorously enforce Title VI of the Civil Rights Act, specifically Executive Order 13166 directing all government agencies to issue LEP guidance. DHS is one of the few remaining agencies that has yet to issue agency guidance on how it will plan for LEP populations, and needs to issue this long-delayed guidance in the first year of the new Administration.
- Commit to federal agency worker training on immigrant eligibility, public charge rules, privacy protections, and other issues affecting immigrant participation in benefits, activities, and services.

Ensure that immigrants receive health care services: All people living in the United States, including immigrants, should receive good-quality, affordable health care and coverage. Immigrants, like all Americans, deserve health care they can afford, and given our current system's reliance on health insurance as the source of payment for costly health care, immigrants need access to affordable, comprehensive health insurance coverage. Racial disparities in health also impact immigrants, and we need to make sure that health care and coverage policies do not increase these disparities. Ensuring access to linguistically and culturally appropriate care is a major step in eliminating such disparities.
Recommendations:

- Strengthen guidance from Centers for Medicare & Medicaid Services (CMS) on reimbursement for language services in Medicaid and State Children's Health Insurance Program (SCHIP).
- Revise the Department of Health and Human Services EO 13166 Limited English Proficiency Guidance to ensure that it meets the standards outlined by DOJ. Begin by restoring EO 13166 to its scope under the Clinton Administration. Direct CMS to develop

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provider and insurer reimbursement mechanisms for communication assistance provided to patients who have SCHIP and Medicaid. Increase the federal government's share of reimbursement for language services in Medicaid and SCHIP, in order to create an incentive for states to take up this funding (increase Federal Medical Assistance Percentages, or FMAP).

- Promulgate regulations requiring collection of data on race, ethnicity, and primary language in all HHS programs.
- Increase federal investment in community clinics and safety-net hospitals to provide non-emergency services to uninsured immigrant populations. For example, provide federal funding for demonstration projects that increase preventive care and case management to uninsured immigrants.
- Require new regulations and policies issued by specific health and social service programs to ensure meaningful access by LEP individuals to the programs, services, and activities they administer.

Facilitate civic participation: At a time when voter turnout and participation is increasingly important, immigrant and minority communities are unduly targeted, sometimes even blocked, at the ballot box. Our policies should eliminate barriers to full participation by protecting the right to vote in order to cultivate a robust democracy.

Recommendation:

- Direct DOJ to ensure that covered jurisdictions are complying with Section 203 of the Voting Rights Act.

Promote education: To address the achievement gaps that exist for English language learners and the high dropout rates for Latino and immigrant youth, adequate funding to teach and support limited English proficient students must be allocated.

Recommendations:

- Re-affirm the protected access to public schools at K-12 levels and explore federal language that protects admission to public higher education.
- Require states to work with public colleges and universities to define undocumented status accurately, so that appropriate access can be offered to all immigrant students, including those who have become undocumented after their visas have expired.
- Revise the Department of Education's handbook and materials to ensure that all eligible categories of immigrants, including all qualified immigrants and trafficking survivors, can secure federal financial aid.

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VII. ASYLUM: Close Gaps in Refugee Protection through Enhanced Quality-Assurance Measures, Eliminating Unnecessary Detention, Restoring Quality Decision-Making, and Removing Barriers to Asylum Eligibility

This country has a long history of providing safe haven to refugees who flee from political, religious, and other persecution in their homelands. The United States has pledged to abide by the protections extended to refugees in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol – including the obligation to ensure that those who face harm in their countries of origin are not returned to face persecution, and that these protections be enshrined in domestic law.

However, in 2005, the bipartisan, congressionally-chartered United States Commission on International Religious Freedom (USCIRF) issued a comprehensive report finding that in a number of areas critical to ensuring refugees are protected, the United States asylum system was woefully inadequate. The next Administration should take a number of crucial steps to restore this country's commitment to protecting victims of persecution and to demand greater coherence, quality, and accountability including:

Reform DHS to ensure improved protection of refugees: USCIRF found that it was exceedingly difficult to resolve inter-agency issues relating to asylum within DHS, and recommended creation of an office, headed by a high-level official, to address and coordinate cross-cutting asylum issues. Instead, DHS appointed a senior refugee coordinator, housed him in the DHS policy office, and then gave him the additional responsibility for broader immigration matters. The creation of this position did not succeed in improving protection for refugees and asylum seekers, nor coordination within DHS. Its existence did not prompt DHS to respond to the USCIRF report despite repeated calls from USCIRF and members of Congress to do so, and frequent promises from the agency that a response was imminent. In fact, DHS has yet to respond to the February 2005 USCIRF report.
Recommendations:

- Create a DHS Refugee Protection Office that reports directly to the DHS Secretary or Deputy Secretary and provide that office with the resources, staffing, and authority to guarantee the protection of asylum seekers and refugees throughout DHS. This office, which should have both policy and operational oversight, should be headed by a political appointee who has extensive experience in refugee issues.
- Strengthen the Deputy Secretary's function or create a new Under Secretary for Immigration and Refugees to increase coordination across bureaus on refugee and asylum matters, and to ensure that the Refugee Protection Office's directives and guidance are followed by the various immigration-related agencies.
- Strengthen White House coordination on refugee protection by increasing the capacity of the National Security Council to coordinate refugee and asylum matters between governmental agencies, including DHS, DOS, and DOJ.

Protect bona fide refugees from overly broad "terrorist" definitions in immigration law: Due to overly broad definitions in immigration law, thousands of refugees have experienced delays or denials on their requests for protection. Many victims of oppression have been unjustly labeled as supporters of "terrorist organizations" and participants in "terrorist activity." The Bush Administration took a piecemeal approach to this problem, slowly pursuing an inefficient exemption process and taking an overly broad view of the definitions themselves.
Recommendations:

- Review the current interpretations of the "terrorism"-related bars.
- Support legislation to amend the definition of "terrorist activity."
- Delegate authority to grant exemptions to USCIS officers in the field.
- Direct DHS to establish a more effective policy for consideration of exemptions in immigration court cases which does not leave the consideration of the exemption until the very end of the process.

Ensure that refugees in the "expedited removal" process are not returned to persecution: USCIRF found serious problems in the implementation of the expedited removal process, including that immigration officers failed to follow key safeguards designed to ensure that bona fide refugees were not deported. DHS expanded the use of this flawed process to Border Patrol interior apprehensions without implementing the critical reforms.
Recommendations:

- Direct DHS to implement the recommendations of USCIRF to ensure that procedures designed to protect asylum seekers from being returned to their persecutors are followed.
- Conduct another USCIRF study on the expanded application of expedited removal to individuals apprehended by the Border Patrol.
- Repeal the 2004 modification of the "expedited removal" policy, which expanded the scope to include persons arrested inside the United States. Individuals suspected of being undocumented immigrants who are present inside the United States should not be removed without meaningful administrative review.
- End the use of "expedited removal" for children in proceedings.

Implement crucial safeguards to prevent unnecessary detention: USCIRF concluded that asylum-seekers are held in jails or jail-like facilities that are inappropriate for them, that these conditions create a serious risk of psychological harm, particularly for torture-survivors, and that parole practices vary widely, with very few asylum-seekers released in certain parts of the country. International standards make clear that asylum-seekers should not be detained, except when absolutely necessary. Instead of putting the parole criteria into regulations, as USCIRF recommended, in November of 2007 DHS issued a new policy directive which added new hurdles to the prior criteria.
Recommendations:

- Rescind the November 2007 ICE parole guidelines and issue new guidelines which use the parole criteria included in the December 30, 1997 parole policy; require that all arriving asylum seekers be considered for parole automatically within a reasonable timeframe; and include a mechanism for review of the parole decision.
- Reinstate the February 9, 2004 Release after Grant Memorandum favoring release for individuals granted asylum or withholding of removal protection.
- Direct DHS to amend 8 CFR 236.1(c)(11) to provide asylum seekers with access to immigration court custody hearings, and make clear that any bond requirements should not be prohibitive.
- Require ICE, ORR, and DOJ to ensure that legal orientation programs are provided in every type of detention facility used by ICE where asylum seekers may be held, and in every program serving unaccompanied alien children.

Support elimination of an arbitrary barrier to bona fide asylum claims—the one-year filing deadline: Asylum officers and immigration judges have increasingly applied the one-year asylum

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filing deadline in ways that are inconsistent with Congressional intent. Many refugees have been denied asylum by the United States because of this arbitrary deadline.
Recommendation:

- The new Administration should support legislation to rescind the one-year filing deadline and, in the interim, direct the Attorney General to issue policy guidelines affirming that the exceptions to the deadline are to be broadly interpreted.

Protect women and children asylum seekers: The U.S. government has recognized and affirmed that gender-based harms could meet the definition of "persecution" for asylum eligibility, and that such claims could be based on the "particular social group" ground of the refugee definition, as well as any of the other statutory grounds. Despite this affirmation, proposed regulations incorporating recognition of these claims were issued in 2000 but never finalized and, despite urgent need, a framework for analyzing gender-based claims has yet to be firmly established, leaving many claims in legal limbo or suffering from widely inconsistent decisions.
Recommendation:

- Direct a review and reassessment of the previously proposed regulations to ensure that gender-based persecution is recognized as a basis for asylum eligibility based on membership in a particular social group defined in whole or in part by gender or on any other statutory ground, and that the existence of a "particular social group" is demonstrated by satisfying the criteria set forth by the BIA in *Matter of Acosta,* 19 I & N Dec. 211 (1985), without additional requirements. The UNHCR International Protection Guidelines addressing gender-related persecution and membership in a particular social group, respectively, should be consulted for guidance and incorporation in this re-drafting process. Further direct that, as soon as the re-drafting is completed, the Attorney General issue the new proposed regulations for notice and comment.
- Ensure that persecution suffered by children, especially those children who do not have the protection of their parents, is recognized as a basis for asylum and that as stated above, the existence of a "particular social group" is demonstrated using the criteria in *Matter of Acosta.*

VIII. FARMWORKERS

In February, 2008, the Department of Labor published proposed regulations which would dramatically weaken the worker protections under the H-2A program. *See* 73 Fed Reg. 8541 (Feb.13, 2008). The statutorily required labor certification would be replaced by an attestation scheme that would essentially make approval of H-2A applications automatic.[] Requirements to recruit and hire U.S. workers would be reduced. The critical wage standard would be lowered in many cases to the federal minimum wage. The requirement to provide free housing would be replaced by a voucher scheme.

Reverse Bush Administration's H-2A regulations: Implementation of these regulations would severely impede any chance of improving the wages and working conditions of American farmworkers. Given the facts that the H-2A program is uncapped and employers need not offer higher wages or other job terms that the H-2A regulations would require, these regulations would not be minimum standards for U.S. workers, but rather would set the "ceiling" for what U.S. farmworkers could ask from their employers. Growers have an unlimited number of foreign guestworkers available under these conditions. The de-regulated H-2A program would grow very rapidly. The public comment period for both the DHS and DOL proposed rules ended April 14, 2008, but as of this writing the final regulations had not yet been issued.

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Recommendation:

- Rescind these regulations by requiring both DOL and DHS immediately to publish a notice postponing the effective date, if the effective date has not already passed.
- Support the use of the Congressional Review Act to overturn these rules if they are final. The administrative process for changing the regulations after they have become final and effective would be cumbersome, time-consuming and waste agency resources at a critical moment.

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IV. CONTRIBUTORS

This blueprint sets forth recommendations in numerous immigration policy areas and reflects input from a diverse group of organizations and individuals. The following organizations contributed to the development of recommendations included in this compilation:

Asian American Justice Center
American Civil Liberties Union
American Immigration Lawyers Association
Center for American Progress Action Fund
Church World Service, Immigration and Refugee Program
Fair Immigration Reform Movement, a project of the Center for Community Change
Hebrew Immigrant Aid Society
Human Rights First
Immigration Equality
Immigration Policy Center
Lutheran Immigration and Refugee Service
Mexican American Legal Defense and Education Fund
National Association of Latino Elected and Appointed Officials Educational Fund
National Council of La Raza
National Immigrant Justice Center
National Immigration Forum
National Immigration Project of the National Lawyers Guild
National Immigration Law Center
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