AMERICAN IMMIGRATION LAWYERS ASSOCIATION

AILA National Office
Suite 300
1331 G Street, NW
Washington, DC
20005-3142

Tel: 202.507.7600
Fax: 202.783.7853

www.aila.org

Crystal Williams
Executive Director

Susan D. Quarles
Deputy Executive Director

Testimony of Laura Lichter

President, American Immigration Lawyers Association

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"The Border Security, Economic Opportunity,
and Immigration Modernization Act, S.744"

I am Laura Lichter, national president of the American Immigration Lawyers Association ("AILA"), and founder and managing partner of Lichter Immigration, a Denver-based law firm. AILA is the national association of immigration lawyers established to promote justice and advocate for fair and reasonable immigration law and policy. AILA has more than 12,500 attorney and law professor members.

For nearly two decades, my immigration practice has focused on complex removal, family and naturalization issues, their related administrative appeals, and related litigation at the Federal level. I have been an elected member of AILA's national leadership for over a decade and previously served as the association's top liaison to the key immigration enforcement bureaus of the Department of Homeland Security and Department of Justice, including Immigration and Customs Enforcement (ICE) and the Executive Office of Immigration Review (EOIR). In 2011, I was appointed by DHS to serve alongside other key stakeholders on the Homeland Security Advisory Council Task Force assessing the agency's Secure Communities program.

I am honored to testify on this subject at a time when overwhelming numbers of Americans support immigration reform. National polls show more than 80 percent support for granting citizenship to the 11 million people who are without status in the U.S. AILA is encouraged by actions already taken in Congress and commends the creativity and perseverance of the eight Senate leaders who introduced the "Border Security, Economic Opportunity, and Immigration Modernization Act." This bill presents a solid framework to fix our broken immigration system and match our laws to the needs and realities of the 21st century.

My testimony will focus on: (1) the importance of ensuring that our immigration laws support and sustain families, including same sex families; (2) the need to protect refugees and asylum seekers; and (3) the critical value of reforms that will preserve due process and maintain the integrity of the immigration system.

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I. Ensuring Family Unity in the Immigration System

Families stand at the center of our American values. Understanding the value of strong families means that keeping them united is a core national interest. Thus, family unification has long been the cornerstone of our legal immigration system.

Current immigration policy, as codified in the Immigration and Nationality Act (INA), reflects those values, but has been undermined by unreasonable and unnecessary backlogs that result in years-long separation of families, not to mention a confounding set of roadblocks that often block or completely bar the path for these very immigrants who have ties to our communities. A properly working family-based immigration system is foundational to ensure that future generations of immigrants continue to maintain family as a core value of our country.

Family-based immigration is about more than advancing fundamental American values. When working properly, family immigration policies further America's economic and social interests, as well. Oftentimes, immigrants who arrive through the family-based system have valuable skills or are business innovators themselves. Moreover, studies have shown that close family relationships facilitate entrepreneurship because family members can support caring for children and working in family-owned businesses.[1]

A popular misconception about the immigration system is that family members who would like to immigrate can simply get into a line to obtain a visa, and then quickly get a green card. This is the furthest thing from the truth. Apart from parents, spouses and unmarried minor children of U.S. citizens, close family members of citizens and legal permanent residents are forced to navigate extremely long delays in the visa application process due to the insufficiency of the numbers of visas available per year—numbers which were last adjusted by Congress a generation ago.

For example, a U.S. citizen parent typically has to wait about seven years to bring an adult child. Due to limits on per country admissions, an adult child from Mexico will wait nearly two decades. Brothers and sisters of U.S. citizens just now eligible to apply for status started the process about a dozen years ago, and if the sibling is coming from the Philippines, the minimum wait would have been more than two decades. For families stuck in these artificial backlogs, important life events whose passing we might take for granted—a college graduation, the birth of a grandchild, a sister's achievement of a lifelong dream, a brother's bout with cancer—are at best a major struggle to be a part of, and most often are missed altogether.

Senate Bill 744 makes several improvements to the legal immigration system that will strengthen families. Recognizing their unique bonds, the bill re-classifies the children and spouses of lawful permanent residents as "immediate relatives." This allows them to immediately qualify for a visa, while the existing system keeps them apart from their spouses and children for two years or more. The drafters also recognized that many visas that Congress authorized by statute have gone and continue to go unused every year solely because of bureaucratic delays. As a result

[1] Chad Moutray, (2009), LOOKING AHEAD: OPPORTUNITIES AND CHALLENGES FOR ENTREPRENEURSHIP AND SMALL BUSINESS OWNERS, 31 W. New Eng. L. Rev. 763

those visas are permanently lost even though there are people who are waiting in backlogs for those visas. The bill ensures that visas will not be lost. Another important change is the "widows and orphans" provision, which allows an orphan, a widow, or a widower to immigrate even if the petitioning parent or spouse dies before the application process is completed.

Unfortunately, S. 744 also includes provisions that would restrict or eliminate existing family categories that enable U.S. citizens to bring siblings or married adult children, also known as the third and fourth family preferences. We are concerned that the "merit-based" point system fails to provide sufficient opportunity for those close family members to immigrate, and may significantly disadvantage women, who are more likely to work in the home or in the informal labor market. AILA urges Congress to ensure U.S. citizens can continue to directly petition for their siblings and married adult children.

In many families the ties that hold together siblings or elderly parents and adult children are as strong as the bonds of marriage or of parent and child. Siblings and adult sons and daughters are in some cases the closest family to a U.S. citizen or lawful permanent resident.

Eliminating or restricting these family-based immigration categories would tear apart families and foster social isolation and disconnection. Furthermore, adult children and siblings have been shown to have a direct impact on immigrant entrepreneurship. They help build family-owned businesses. They also provide critical care for elderly parents and minor children.

America benefits the most when the family- and employment-based systems are each working effectively. A well-functioning family-based system strengthens the employment-based system by allowing workers to maintain their family units in the U.S. Less family-friendly policies may dissuade high-skilled immigrants who also have families, from choosing to invest their talents and resources in America's economy. This is particularly true as LGBT relationships find more acceptance globally, and American companies must be able to offer same an immigration path that includes the entire family. Our immigration system must be flexible and capable of meeting the needs of both American businesses and families.

Family Case Example: Lauren

Lauren, a 21-year old British citizen, came to the U.S. at age 4. Her grandparents had immigrated to the U.S. earlier in 1983 to farm. After an accident where Lauren's grandmother had a stroke and lost her leg, her parents, Ian and Allison, brought their family to the U.S. in 1995. The parents arrived on an E-2 visa to manage a motel and restaurant.

Lauren's grandparents became U.S. citizens, and in September 2003, her grandmother filed a petition for Lauren's mom as an adult married child of a U.S. citizen (Family Third category). (The employment-based system for permanent residence is decidedly hostile to business owners, making the family-based system Lauren's parents' only option.) Lauren was a derivative on that petition. Because of the wait on the Family Third (F3) category, the family is still waiting for visas to be available that would allow them to become lawful permanent residents. From March 2013 to April 2013, the F3 category will only inch forward one week from July 15, 2002 to July 22, 2002. At that rate, it is expected to take five more years to reach their place in the queue.

Lauren's parents' E-2 visa status is only temporary, and E status holders live in constant fear that, at the next renewal point, their extension will be denied. And when Lauren turned 21, she was no longer covered under her parents' current nonimmigrant visa – and was left without a status. Furthermore, she may soon "age-out" of the F3 family-based petition filed in 2003, and the Child Status Protection Act likely does not provide enough protection to save her from aging out. The only reason that Lauren is still here is that she was granted deferred action in 2012, allowing her to stay in the U.S. temporarily. She is currently pursuing dance in New York.

Outside of the extraordinary relief of deferred action there are few options for Lauren to remain with her family. If Lauren ages out, she does not keep her place in line with a different petition. When her parents finally get permanent resident status, either could file a new petition for Lauren as the adult child of a permanent resident (F2B). But Lauren would have to start her wait over again (and would risk being again disqualified if she marries). The wait in the F2B category means that Lauren could wait another decade or longer to get her green card.

Under S.744, Lauren and her mother should be able to complete their petition process. But in the future, anyone in their situation would be permanently separated because Lauren's mother was over 30 years old when the petition was filed.

Family Case Example: "N"
N is the daughter of M and J, from Thailand. After immigrating to the U.S. in the 1990's based on M's skill as a traditional Thai chef, M and J opened their own Thai restaurant. In 2002, they filed a petition for their adult daughter, N, to immigrate and join them. N was over the age of 21 when M and J immigrated initially and, therefore, could not accompany them to the U.S. for M's job.

By the time the petition on N's behalf was approved in 2005, the "priority date" in the category for an unmarried daughter of a lawful permanent resident was backlogged to 1995. M and J considered naturalizing, but between the demands of running their own restaurant and the high cost of the application fees, did not do so until 2010.

In 2009, however, N decided to get married. As a married daughter of permanent residents, her parents' immigrant petitions on her behalf became immediately void, and she lost her place in the immigrant visa quota backlog, with no credit for any of the five years she had been waiting in the backlog.

M and J have now become U.S. citizens and have re-filed immigrant petitions for their married daughter, but their priority date of January 2013 is in a category that is backlogged to July of 2002, meaning that it will be at least a decade or more before their daughter can join them. Under S. 744, N herself will be able to obtain her green card. But once S. 744 is implemented anyone in her situation —as a married child over age 30—would be unable to obtain permanent residence.

Family Case Example: Sudhir
Sudhir is **a** 44 year old Indian national who is developmentally disabled, and has an IQ of 40. Sudhir has always lived with his parents who continue to care for him as if he were a young child. Sudhir is a friendly, docile, and curious person with a strong sense of imagination.

Sudhir and his elderly parents, Raj and Mohan, entered the U.S. in lawful nonimmigrant status in May 2012. Sudhir has a brother, Dinesh, who is a permanent resident on the verge of citizenship and a U.S. citizen sister, Anjali, who has been here for about 14 years and who has 3 U.S. citizen children. Both siblings are married to U.S. citizens and are physicians. Raj and Mohan's age and poor health make it vital that they have the support of Dinesh and Anjali.

Anjali has filed an immediate relative petition for her parents, and a family-based fourth preference petition for her brother Sudhir. As the parents of an adult U.S. citizen, visa numbers are immediately available for Raj and Mohan and they have applied for permanent residency and expect to have their green cards soon. However, because of the long wait in the quota for siblings, it will take approximately twelve years before Sudhir will be able to obtain permanent residency based on his sister's petition.

It is simply impossible for Sudhir to wait twelve years outside of the U.S. without his family. He requires assistance with everyday tasks of life, including shaving, bathing, and dressing. Sudhir requires constant care and cannot be on his own for even one day, much less twelve years. He cannot live on his own, and would be subject to physical abuse and exploitation in his home country because of his disability. Raj and Mohan's own poor health prevents their return to India, and in addition, the family has no relatives in India who can help care for Sudhir.

While a twelve-year wait is untenable, no option at all would be devastating to a family like this. Track two of the merit-based system in S. 744 preserves Sudhir's chances, but the thousands of other Sudhirs who are not fortunate enough to already be the beneficiary of a petition on file would be left with nowhere to turn.

Family Case Example: Nadine
Nadine, originally from Trinidad, came to the U.S. on a student visa in August 1988. She completed a graduate degree and was sponsored for an H-1B visa and later, a green card. In 1998, Nadine became a naturalized citizen.

Though their dad was deceased and their mother was fighting cancer, Nadine's brother was a determined university student. Nadine worked long hours in the U.S. and tried to support her brother and her mother from afar. In February 2006, the family decided that the siblings needed to be together, and Nadine filed a sibling petition (I-130) for the brother, who was 23 years old at the time. Their mother passed away in 2007.

Right now, green cards are available to brothers and sisters of U.S. citizens who began the process in April of 2001, five years before Nadine began the process for her brother. To date, a visa has not been made available and, during the almost decade-long wait, Nadine's brother finished a bachelor's degree.

At age 30, he is currently residing in Barbados, where he attended college and remained after graduation. Nadine and her brother are very close, and given the age difference between them, Nadine has always helped to take care of him. In the past six years, Nadine and her brother have buried their mother, grandmother, and stepfather –it has been a difficult time for them to be apart. They maintain weekly contact through phone calls, Skype, or Facebook. Modern technology has helped them keep their bond, but it is no substitute for actual presence.

Under S.744, Nadine's brother would eventually be able to get his green card under the merit-based track two, because he already is in the queue. But families like theirs would remain permanently apart in the future under S. 744 due to the repeal of the family-based fourth preference.

II. Ensuring Equal Treatment of Same-sex Families in Immigration Law

Under current law, gay or lesbian U.S. citizens or residents cannot sponsor their foreign-born same-sex partners, forcing couples to either live abroad or be separated. Similarly, same-sex partners of immigrants sponsored by U.S. employers are not included in petitions for either nonimmigrant visas or permanent residence. U.S. immigration law does not recognize same-sex relationships, no matter how long same-sex partners have been together or how committed their relationship. According to a UCLA study of the 2010 Census, more than 36,000 couples are affected by this form of discrimination, and nearly half of them are households raising children.

Many gay and lesbian Americans in binational relationships have aging parents and must make difficult decisions between managing their parents' health or remaining with their partners. The median age for Americans in these families is 38 years old. These are mature, committed relationships between couples who have established productive lives within the U.S. These individuals and families are a valuable asset to the market and a resource that businesses want to retain. Many Fortune 500 companies have lost skilled Americans to foreign competitors because of this issue.

In my practice alone, we advise couples facing these very difficult issues on nearly a weekly basis. For many, the limited options mean having to choose between unconscionable separation, a life without lawful immigration status, or relocating the entire family outside the U.S.

Same-Sex Family Case Example: Susanne and Mary

Susanne, a German citizen, always wanted to be a teacher. While pursuing her Ph.D. in German language and literature at U.C. Davis, she met and fell in love with Mary, a U.S. citizen. On October 25, 2008, with their families and friends present, Susanne and Mary married in the back garden of their home.

Susanne is currently employed as a part-time lecturer at City College of San Francisco (CCSF), teaching German language and culture to a cross section of college-aged and older students. In addition to her teaching, Susanne was chosen to act as the CCSF cultural liaison for a group of German students from Hochschule Fresenius, a private university in Cologne that is seeking a

long term partnership with CCSF. Every semester, Susanne exposes these students to American culture, history and ideas.

Susanne donates much of her time to CCSF by giving free tutorials to her students, arriving at class early and staying late to help with homework assignments, and organizing German-themed cultural events for students. She often partners with the Goethe Institut in their cultural events in San Francisco and has students over to the home that she shares with Mary, where she introduces them to German cuisine and music.

The mix of Susanne's teaching, volunteer work and cultural liaison activities makes her a vital part of CCSF, a beloved institution in San Francisco. A measure of how important CCSF is to the economic and cultural life of the city is the fact that voters recently and overwhelmingly approved a parcel tax to keep CCSF open. CCSF is a true jewel in a city that is known for its rich heritage.

Mary is an attorney who has owned her own small law firm in San Francisco for fifteen years. Mary was named Best Lawyers 2012 Lawyer of the Year in White Collar Criminal Defense in San Francisco. In addition to her practice, she and her firm are deeply involved in the local community, volunteering time to the local federal court. Mary has spent almost a quarter of a century building her career as a lawyer. If the laws do not change to allow a U.S. citizen to sponsor the non-U.S. citizen spouse/partner on an equal footing with traditionally-married couples, Mary will have to leave the country, abandoning her business and causing great disruption to her law partner and employees. This would result in at least some of the employees losing their jobs. It would also spell a major financial loss for both Susanne and Mary.

Susanne is present in the U.S. on an academic H-1B visa, which expires in early August, and she has been on this visa for almost six years, the maximum duration. Due to the school's financial situation, she does not have any possibility of obtaining a different visa via her employer, CCSF.

Like most married couples, Susanne and Mary share everything. They have been married for four and a half years and jointly own a house, bank accounts, a car, life insurance, long-term disability insurance, retirement plans, health insurance. In short, they are completely intertwined financially, as well as emotionally. If forced to leave the U.S., all of those things would have to be abandoned, sold off or liquidated, with tax penalties for the liquidation of retirement accounts. They would lose their major source of income with the loss of Mary's law firm income, and would suffer the termination of such financial safeguards as long term care policies that have been paid into for two decades and that are invalid outside of the U.S.

There is also the huge cost of Mary's having to find a new way to make a living. Because Germany does not follow the common law system, Mary would have to start over in a field outside of the law and in a language that is not her native one. The emotional toll of being forced to leave would be even greater. Mary has lived her entire adult life in San Francisco and has deep ties to the community in the form of friends, her business and employees and the home that she shares with Susanne. For her, leaving the country amounts to being forced into exile. Susanne has spent thirteen years in the U.S., first as a Ph.D. student and, for the past six years, as a lecturer giving her energy and talents to her students. Simply put, Susanne and Mary have built a life together that is rooted in their home and community of San Francisco. There is no

valid reason to treat them, or LGBT couples like them, differently from every other committed couple in the country.

III. PROTECTING REFUGEES AND ASYLUM SEEKERS

The United States has a long history and tradition of protecting victims of persecution and torture. The United States is a leader in refugee resettlement and humanitarian protection, and annually resettles thousands of refugees. Since 1975 refugee admissions to the United States have totaled more than 3 million people. Welcoming those fleeing persecution is a deeply rooted American value that has defined our country since its founding.

Our nation's immigration laws and practices, however, too often fall short in protecting refugees and asylum seekers. For example, many asylum seekers are detained upon their arrival in the U.S. In fact, my very first case was a young Somali man who on arrival was detained for months, without bond, waiting for his case to be heard. Arbitrary or harsh rules often prevent bona fide asylum seekers from seeking, much less obtaining the protection they desperately need. AILA has long supported reforms to ensure refugees and asylum seekers are protected by the United States, including those embodied in the proposed Refugee Protection Act of 2013.

AILA is pleased that S. 744 includes several provisions that would improve U.S. refugee and asylum law, increase efficiency in processing, and protect refugees, asylum seekers and stateless persons. Senate Bill 744 eliminates the one-year filing deadline for asylum applications and allows those previously denied asylum because of the deadline the opportunity to reopen their cases. Eliminating the deadline also makes the asylum system more efficient. Currently, the filing deadline leads to the unnecessary expenditure of government resources by pushing the claims of credible refugees into the overburdened immigration courts, diverting limited time and resources that could be more efficiently allocated to assessing the actual merits of asylum applications. Further, because effective anti-fraud measures already exist in the adjudications process, the filing deadline is not needed to counter abuse in the system.

Senate Bill 744 also gives expert, trained asylum officers the authority to review an asylum claim after credible fear is shown by an individual seeking entry into the U.S., rather than referring asylum seekers to a judge for lengthy and costly court proceedings. This approach was recommended by the bipartisan U.S. Commission on International Religious Freedom. This simple, commonsense change in process should result in increased efficiency and cost savings by helping to ease the immigration court backlog, clear busy court dockets, and prevent prolonged and costly detention of bona fide asylees. It also will help decrease the psychological strain on individuals who already have been traumatized by their experiences in their home countries.

Senate Bill 744 also includes a provision allowing certain refugee children to join their parents in the United States and provides protections for the surviving relatives of refugees. Gaps in current law can lead to the permanent separation of vulnerable families. The bill extends and improves the Iraqi and Afghan Special Immigrant Visa program, establishes protections for stateless persons, and enables the designation special groups of humanitarian concern as eligible for resettlement, including religious minorities from Iran. Finally, S. 7.44 encourages the

successful integration of both refugees into their receiving communities through the creation of an Office of Citizenship and New Americans and initiatives that would provide elderly refugees with greater access to naturalization.

AILA strongly supports these reforms included in S. 744 that would improve the lives of asylum seekers, refugees, and the U.S. communities that welcome them, all while making the system more efficient and cost-effective.

Asylum Case Example: Mr. N
A citizen of Venezuela, Mr. N, along with his wife and children, arrived in the United States in June 2002. An opponent of the Chavez regime, and supportive of his brother who was "out" as being homosexual, Mr. N was the victim of repeated threats in Venezuela because of his opinions on the regime and his brother's sexuality. Indeed, his brother has been granted asylum in the U.S. because of these threats.

Admitted under a visitor's visa, Mr. N tried hard to maintain a lawful status in the U.S. Unfortunately, he received bad legal advice, and rather than seeking asylum, pursued extensions of his visitor's status and a petition for another nonimmigrant status for which he was ineligible. He applied for asylum in 2006. Because he had missed the one-year filing deadline, his case was referred to an immigration judge. Plagued by ineffective assistance of counsel (his then-attorney has since been disbarred), Mr. N's case has traveled the judicial system over for years, and is now administratively closed before the immigration courts, pending visa availability through a petition filed by his parents.

What should have been a simple case had a trained asylum officer been able to review the merits has become a costly and trying ordeal for the system and the N family alike. Senate Bill 744's repeal of the one-year filing deadline would have prevented this situation.

Asylum case example: Ms. P
Ms. P is the married mother of two from Nepal. From an early age, she experienced pervasive discrimination, beatings and attempts on her life because of her gender and commitment to women's rights. In addition to the "normal" discrimination she suffered as a child and young wife, Ms. P was subjected to beatings by her in-laws and forced to live in the family's livestock pen after she gave birth to a female child. Eventually, Ms. P decided that she would try to improve the lives of women and girls, and sought out training on birth control, sexually transmitted diseases and sex trafficking.

In her travels as a community educator, Ms. P was subject to threats and harassment for her attempts to inform women of their rights and how to care for and protect themselves. Eventually, her outspokenness on the perils of sex trafficking brought her to the attention of both the local officials and Maoist rebels who were profiting from the trade. Facing attacks on her life and her family, Ms. P fled to the United States.

Traumatized and uncertain about her rights, Ms. P did not understand that she could apply for asylum nor know that there was a time limit. After a few years in the U.S., she presented her case for asylum but was told that the officer would have to deny her case, simply because she

was applying after one year. The case was referred to an immigration judge, and after several years of waiting, Ms. P was able to establish that she met a much higher standard than that required for asylum—that she was more likely than not to suffer persecution if returned to Nepal—and was granted withholding of removal.

While the story should have ended there, it did not. Unlike an individual granted asylum, Ms. P could not bring her daughter to the U.S. and withholding did not provide a path to permanent residence. In fact, for several years, immigration authorities hounded her to make arrangements to leave the U.S. for a third country, all simply because she did not file her case within one year of arrival.

IV. Upholding Fairness and Due Process in America's Immigration System

AILA's mission is "to promote justice, to advocate for fair and reasonable immigration law and policy, [and] to advance the quality of immigration and nationality law and practice." These principles inform AILA's belief that America's immigration laws and the enforcement of our laws should uphold civil and human rights and ensure due process, equal treatment, and fairness. AILA urges Congress to improve the integrity of the immigration judicial system by ensuring that immigration judges have the resources and authority to give thorough and fair review for each case and thereby deliver just outcomes for every person who appears before them. In addition, immigration legislation should reduce the use of institutional detention, ensure that all persons in removal proceedings are represented by counsel, and re-establish the primacy of the federal government in the enforcement of immigration law.

The Immigration Court System

Ensuring the due process rights of immigrants in removal proceedings is of the utmost importance. The immigration court system, however, is struggling to meet the demands of rapidly increasing caseloads. As of March 2013—despite an aggressive attempt by Immigration and Customs Enforcement to review cases on the docket for discretionary closure—there were 327,483 immigration cases pending in a lengthy backlog where the average number of days cases have been waiting has reached 555 days.[2]

Each immigration judge handles, on average, over a thousand cases per year. High caseloads and lack of adequate financial and other resources have resulted in overworked judges and staff, compromising the system's ability to assure proper review of every case. Court statistics show that the grant rates for cases are highly disparate among judges, thus giving rise to criticism that outcomes may turn on who or which court is deciding the case, rather than on established principles and rules of law. Such disparities have made the immigration judiciary vulnerable to perceptions that its ranks are biased and lacking in professionalism.

Immigration reform must address these serious problems with the immigration judicial system or risk eroding the fundamental principles of due process and rule of law. In this regard, AILA is

[2] http://trac.syr.edu/phptools/immigration/court_backlog/
http://trac.syr.edu/whatsnew/email.130411.html

pleased that S. 744 adds immigration judges, law clerks, legal assistants, and appellate review staff to clear the backlog in immigration court and facilitate better adjudication of cases. The bill also codifies the existence of the Board of Immigration Appeals and requires the BIA to issue written decisions, thereby improving the transparency and thoroughness of review in appellate cases.

Access to Legal Counsel

The high numbers of respondents appearing in proceedings without counsel is a major contributing factor to the large backlog of cases before the immigration courts. The Executive Office of Immigration Review (EOIR) has stated that "[n]on-represented cases are more difficult to conduct. They require far more effort on the part of the judge."[3] If noncitizens lack lawyers, immigration judges must guide them through the proceedings, often through an interpreter. Even at that, a Judge, of course, cannot function as counsel for a noncitizen in proceedings, and valuable information which might impact a case may never come to light, thereby necessitating appeals and motions to reopen in order to avoid a miscarriage of justice. Judges frequently continue cases to give noncitizens time to seek counsel, or repeated reset a case to allow a noncitizen to attempt navigate the complex immigration system on his or her own.

The Administrative Conference of the United States recently advised that "funding legal representation for . . . non-citizens in removal proceedings, especially those in detention, will produce efficiencies and net cost savings."[4] The American Bar Association also concluded that in immigration courts "[t]he lack of adequate representation diminishes the prospects of fair adjudication for the noncitizen, delays and raises the costs of proceedings, calls into question the fairness of a convoluted and complicated process, and exposes noncitizens to the risk of abuse and exploitation by 'immigration consultants' and 'notarios.'"[5]

The tremendous cost savings to the government of legal education and services programs has been demonstrated by EOIR's Legal Orientation Program (LOP), which provides general information to immigration detainees about the immigration law and the court system. According to a 2012 EOIR report to the Senate Committee on Appropriations, LOP reduced case processing times by an average of 12 days when compared to individuals who did not receive LOP.[6] Using an average cost per bed day of $112.83,[7] EOIR's analysis determined that LOP led

[3] Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices* (Dec. 2004), 8, available at http://www.uscirf.gov/images/stories/pdf/asylum_seekers/legalAssist.pdf

[4] Administrative Conference Recommendation 2012-3: Immigration Removal Adjudication (adopted June 15, 2012), 3, available at http://www.acus.gov/wp-content/uploads/downloads/2012/06/Recommendation-2012-3-Immigration-Removal-Adjudication.pdf

[5] American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases.* (2010), 5-8.

[6] The April 4, 2012 EOIR report was transmitted on July 2, 2012 by the Department of Justice to the Chairwoman and Ranking Member of the Senate Committee on Appropriations' Subcommittee on Commerce, Justice, Science, and Related Agencies pursuant to the requirements of the Conference Report accompanying the Consolidated and Further Continuing Appropriations Act, 2012 (P.L. 112-55). The report was reviewed by the Office of Management and Budget before being transmitted to Congress, and OMB did not object to its transmittal.

to $677 in detention cost savings for each LOP participant in Fiscal Year 2011. In the aggregate in FY 2011, LOP saved the federal government, specifically Immigration and Customs Enforcement (ICE), more than $19.9 million. After deducting the cost of providing the services (which cost approximately $70 per participant), the net savings to the government in FY 2011 were more than $17.8 million. Attorney General Holder described LOP's incremental assistance as a "great success story" and a "critical tool for saving precious taxpayer dollars" based on its cost savings to both DOJ's immigration courts and the Department of Homeland Security's (DHS) immigration detention system.[8]

Despite the success and cost savings delivered by LOP, the program serves adult detainees at only 25 of the approximately 250 detention facilities used by ICE. The LOP program should be expanded nationwide. This would increase the cost savings, improve efficiencies, and lead to more just outcomes in immigration courts.

The Senate bill would improve the LOP program by codifying the existing Office of Legal Access Programs and ensure that Legal Orientation Programs were administered to detainees within five days of arriving in custody, as well as provide services to detained immigrants in proceedings.

In addition to legal orientation programs, having immigration counsel represent individuals in immigration court proceedings directly correlates to successful outcomes for noncitizens pursuing claims to relief ranging from persecution abroad or family separation from U.S. citizen relatives. Asylum seekers who have legal representation, for example, are three times as likely to be granted asylum.[9] Whether a person is represented by an immigration attorney is the "single most important factor" affecting the result in an asylum case.[10]

A pilot project providing legal representation to asylum seekers found that the rate at which asylum seekers retracted their claims rose by 50 percent, and the number of claims resulting in successful outcomes also increased significantly.[11] Overall, "[t]he two most important variables

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[7] Once DHS personnel and administrative costs are included, the total cost of detention is $164 per person per day. National Immigration Forum, *The Math of Immigration Detention* (Aug. 2012), 2, available at http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf. Using the current of detention, the net annual savings to the government from the LOP are more than $25 million.

[8] Attorney General Eric Holder Addresses the Pro Bono Institute (Mar. 19, 2010); see also Vera Institute of Justice, "Legal Orientation Program: Evaluation and Performance and Outcome Measurement Report, Phase II." (May 2008), available at http://www.usdoj.gov/eoir/reports/LOPEvaluation-final.pdf

[9] Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*. (2009), 8, available at http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-sum-doc.pdf. In a September 2008 report, the Government Accountability Office found the likelihood of an asylum claim being granted by an Immigration Judge increased significantly for those who had representation. GAO, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges*, 30, GAO-08-940 (Sept. 2008), available at http://www.gao.gov/new.items/d08940.pdf

[10] Jaya Ramji-Nogales, Andrew Schoenholtz & Philip Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 340-41 (2007).

[11] Nimrod Pitsker, "Due Process for All: Applying *Eldridge* to Require Appointed Counsel for Asylum Seekers." 95 Cal. L. Rev. 169 (2007).

affecting the ability to secure a successful outcome in a case . . . are having representation and being free from detention."[12]

The absence of court-appointed counsel in immigration court is especially damaging for vulnerable populations such as juveniles and immigrants with mental disabilities. Through the enactment of the Unaccompanied Alien Child Protection Act and the Trafficking Victims Protection Act, Congress has recognized the vulnerability of unaccompanied youth and that they are unlikely to grasp the nature and consequences of immigration court removal proceedings. To ensure the needs of children and youth are protected, Congress has directed EOIR and the Department of Health and Human Services to provide legal orientation services for the released children's caregivers. A guarantee of legal representation for this population is absolutely essential to ensure fairness in the immigration system.

Those with mental disabilities are no less vulnerable when confronting the complexities of the immigration court system. A 2010 report concluded that U.S. citizens with mental disabilities have been erroneously placed into ICE custody, and that "an unknown number of legal permanent residents (LPRs) and asylum seekers with a lawful basis for remaining in the United States may have been unfairly deported from the country because their mental disabilities made it impossible for them to effectively present their claims in court."[13] A 2011 report by the DHS Office of Inspector General concurred that "[s]ome detainees are seriously impaired by mental illness and may be unable to coexist with others in detention or participate in immigration proceedings." In 2010 two individuals with mental disabilities "lost" in ICE custody were identified in immigration detention after they had been forgotten for more than four years, without ever being given a single bond hearing.[14] Their cases were closed because they were incompetent and without counsel to understand proceedings. Incarceration for someone with a mental disability is estimated to cost seven times the average.[15] Legal representation is vital to ensure that immigration courts serve immigrants with mental disabilities and other vulnerable populations, including juveniles, fairly and efficiently.

Importantly, S.744 gives the Attorney General authority to appoint counsel and ensures that for unaccompanied minors, individuals with serious mental disabilities, and other particularly vulnerable populations will be represented by counsel.

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[12] New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* (Dec. 2011), available at http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf; see also Donald Kerwin, *Revisiting the Need for Appointed Counsel* (Migration Policy Institute, 2005).

[13] *Deportation by Default* (Human Rights Watch/ACLU, July 2010), 4, available at http://www.hrw.org/en/reports/2010/07/26/deportation-default-0

[14] "Immigration Officials Announce Release of Detainees with Mental Disabilities Who Were Lost in Detention for Years." (Mar. 31, 2010), available at http://www.aclu-sc.org/releases/view/103017

[15] Texas Appleseed, *Justice for Immigration's Hidden Population: Protecting the Rights of Persons with Mental Disabilities in the Immigration Court and Detention System* (Mar. 2010), 17 (quoting Sen. Russell Feingold), available at http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=313

Restoring Judicial Discretion

The revisions to immigration law enacted in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) restricted the authority and jurisdiction of immigration courts to review removal charges involving many categories of noncitizens. First, Congress widened the scope of summary administrative removal procedures, thereby authorizing DHS to bypass normal removal proceedings before an immigration judge for many noncitizens including those with minor or old criminal convictions. Second, for those noncitizens who do make it into proceedings before an immigration judge, Congress expanded the number and scope of grounds for removal while it limited the opportunities for noncitizens to offer evidence of extenuating circumstances or compelling equities. The impact of IIRAIRA was to categorically deny certain noncitizens – including long-time lawful permanent residents (LPRs) – the opportunity to plead their cases to an immigration judge before they are deported.

Judicial authority to engage in a careful consideration of the specific facts in each case has been curtailed. In its place, immigration officers—essentially, the prosecutors—have been empowered to act as judge and jury, with no meaningful independent oversight. Federal courts have been stripped of the authority to review most discretionary determinations made by these officers. The system as it currently operates is neither equitable nor fair. Every noncitizen should have the opportunity to go before a neutral adjudicator for an individualized, fact-based determination before the extraordinary consequence of deportation is imposed.

Congress can restore fairness and flexibility to our system by expanding the authority of immigration judges to consider an individual's unique circumstances and make case-by-case assessments before deportation. Senate Bill 744 restores limited authority to immigration judges to review the specific facts in an individual case and grant relief where family unity would be served. The bill recognizes the value of keeping families together especially in cases where a U.S. citizen or lawful permanent resident would be separated from their family. The bill expands access to U visas and removes arbitrary, harsh barriers to asylum relief. AILA supports these and other reforms included in S. 744 that restore judicial discretion to grant relief.

But even if S. 744 were enacted, judges would still exercise very limited authority to review the circumstances each individual case to determine whether to grant relief. Some forms of relief, such as Cancellation of Removal have very high standards, for example requiring a showing of "extreme hardship" or "exceptional and extremely unusual hardship." It is critical that judges have the discretion to consider the facts presented by both parties and then to grant relief based on merit. The people in the following examples involving clients currently represented by AILA members would not be eligible for relief if S. 744 became law.

Case Example: Janelle Ngo Chin

Janelle Ngo Chin has lived in the U.S. for over 25 years, since she was 10 years old. She attended elementary, middle, and high school here. She now has three U.S. citizen children. Her only criminal history is a single minor conviction 17 years ago – when at age 19 she was convicted for petty theft, but served no jail time.

As the mother of three and common-law wife to a hardworking noncitizen with Temporary Protected Status (TPS), Janelle now also takes care of her aging and ailing parents (who are both lawful permanent residents), who live with her. Her father has already had two heart attacks and suffers from coronary heart disease and many other health problems that interfere with his ability to accomplish everyday tasks. Janelle's mother has diabetes, a history of cancer, and debilitating psychological problems. All of this was thoroughly documented before the immigration judge, when Janelle was placed in removal proceedings. She requested cancellation of removal, asking the judge to exercise his discretion and allow her to stay in the U.S. with her family.

The immigration judge denied Janelle's request for discretion, finding that her evidence of hardship, though compelling, was insufficient to meet the incredibly high "exceptional and extremely unusual hardship" standard required by the statute. She appealed the judge's decision, but lost. Then her circumstances got much worse. Her parents' health deteriorated, additional familial assistance evaporated, and her children were suffering at school. She asked DHS to exercise Prosecutorial Discretion (PD) to choose not to deport her, given that she is not a high priority for enforcement and has compelling equities. Unfortunately, DHS felt that Janelle's case did not merit PD. Finally, an appeals court intervened. Janelle is now back before the immigration judge, trying desperately to make her case for discretionary relief from deportation.

Senate Bill 744 does not change the criteria for eligibility for Cancellation of Removal, the form of relief that Janelle applied for. If S. 744 were enacted, she would still need to meet the very high standard of "exceptional and extremely unusual hardship."

Case Example: Brenda Gutierrez
Brenda Gutierrez is the mother of three children. Two of her children are U.S. citizens and the third recently qualified for a temporary reprieve from deportation through Deferred Action for Childhood Arrivals (DACA). One of her U.S. citizen children has a rare blood disorder that requires constant medical attention. Ms. Gutierrez and her husband, Jose, have both been trained by their doctors to give their child injections when needed.

Mr. Gutierrez is a lawful permanent resident after having been granted Cancellation of Removal. Ms. Gutierrez was not so fortunate. Many years ago, shortly after she arrived in the U.S., she came out of the shadows to apply for asylum but missed the tight statutory deadline. The government immediately tried to deport her and issued a charging document. She then renewed her asylum claim before the courts and appealed her denial, but that was ultimately unsuccessful.

That charging document, issued so many years ago, now disqualifies Ms. Gutierrez for the same discretionary relief her husband had received. None of the equities she accumulated over the many years she has been living in the U.S. since that document was issued – even with no criminal history whatsoever – can even be considered by the judge. ICE finally granted her a temporary stay of removal that may be renewed, at ICE's discretion, each year. But she never knows whether this year will be the year ICE decides to deport her. She lives in fear of being torn apart from her family and the child who needs her.

If S. 744 were enacted, Brenda would still be unable to obtain her green card because S. 744 would not change the rule that rendered her unable to apply for Cancellation of Removal.

Categorical Bars and Detention Statutes Result in Unfairness and Injustice

The category of "aggravated felonies" was introduced into the immigration law in 1988, and encompassed murder and trafficking in drugs or weapons. However, the roster of offenses that are considered aggravated felonies was expanded tremendously with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and with IIRAIRA. Now, even some misdemeanors fall within the statutory definition of "aggravated felony."

An alien who has been convicted of a crime categorized as an "aggravated felony" must be detained and is deportable and ineligible for any form of relief from deportation. These stringent requirements restrict a judge's ability to look at the totality of circumstances in a case and grant appropriate relief. Tying the hands of immigration judges by denying them the ability to consider all of the facts of a case has led to substantial inequities, especially for individuals with minor or old disqualifying criminal conduct. Expanding judicial discretion to grant relief for those individuals with minor convictions on their record, including minor non-violent drug offenses, would bring fairness back to our immigration system.

Former Immigration Judge Paul Grussendorf, who testified before the Senate Judiciary Committee on March 20, 2013, provided the following example of a woman whose case came before him and who was designated with an aggravated felony for stealing diapers. As a result she was subject to mandatory detention.

> A mother from El Salvador who had received a suspended sentence for shoplifting baby diapers for her U.S. citizen child came before me on the custody docket, and I had to inform her that I could not even consider bond in her case. She chose deportation so as not to be separated from her infant [while she was in detention], although she may even have been eligible for a green card if she were not designated as having committed an aggravated felony.

The Senate bill, S. 744, keeps intact the current definition of "aggravated felony," which has led to patently unfair results and is long overdue for reform.

Immigration Detention

As currently applied by ICE, our mandatory custody or detention laws prevent the release of entire categories of noncitizens charged with immigration violations. The restraint of an individual's liberty is one of the most consequential government powers. No one should be deprived of their liberty except as a last resort. But every day, thousands of people – including asylum seekers and those with no criminal convictions – are detained by Immigration and Customs Enforcement (ICE) though they pose no flight risk or threat to public safety. According to recent ICE data, as of May 2, 2011, 41 percent of immigrants in detention were classified at the lowest possible risk level. Categorical laws that mandate prolonged deprivations of liberty without permitting – or without sufficiently ensuring – the availability of release under the least restrictive conditions run afoul of basic principles of fairness and due process.

In the last several years, Congress has increased funding for ICE detention beds, from 20,800 beds per day in FY 2006 to 34,000 beds per day in FY 2012. The appropriations law has been interpreted by ICE to mandate detention of a minimum average daily number of noncitizens. This "mandate" puts pressure on ICE to detain more people, even if the agency determines that reducing detention is a smarter, more effective approach.

ICE has a range of tools other than institutional detention at its disposal and should be encouraged to use them more often. Spending on detention has increased exponentially from $864 million seven years ago to $2.02 billion today. Spending billions of taxpayer dollars to needlessly detain immigrants who could successfully and safely be released is a poor use of limited resources. Immigration detention costs U.S. taxpayers between $122 and $164 per day; however, proven alternatives to detention cost between 30 cents and $14 per day and have an over 90 percent success rate.[16]

Immigration officers and judges must have the authority in all cases to consider alternatives to detention for individuals who are vulnerable or pose little risk to communities and to consider in each case whether continued detention is necessary and lawful. Further, ICE should be required to place each individual in the least restrictive setting available.

Bond hearings also must occur in a timely fashion. Detainees often languish in detention with no hearings scheduled in their cases because charging documents have not been served on them or filed with the immigration court. Finally, detention conditions fall well below appropriate standards for civil confinement. Clear standards that mandate humane conditions of civil detention under which aliens may be housed must be adopted, and there needs to be meaningful oversight and penalties for non-compliant facilities.

Thank you for the opportunity to address these important issues, and for your efforts to grapple with these difficult questions.

[16] U.S. Immigration and Customs Enforcement Salaries and Expenses, Fiscal Year 2012 Congressional Budget Justification, 43.