SUMMARY AND ANALYSIS OF DHS MEMORANDUM
"Implementing the President's Border Security and Immigration Enforcement Improvements Policies"

For questions, please contact: Greg Chen, gchen@aila.org

INTRODUCTION:

On February 17, 2017, DHS Secretary John Kelly issued a memorandum, "Implementing the President's Border Security and Immigration Enforcement Improvements Policies" (Memorandum). The Memorandum outlines an implementation plan for President Trump's January 25, 2017 Executive Order, "Border Security and Immigration Enforcement Improvements." The Memorandum states that it is intended to serve as "guidance to all Department personnel, and supersede all existing conflicting policy, directives, memoranda, and other guidance regarding this subject matter — to the extent of the conflict — except as otherwise expressly stated."

A. POLICIES REGARDING THE APPREHENSION AND DETENTION OF ALIENS DESCRIBED IN SECTION 235 OF THE IMMIGRATION AND NATIONALITY ACT

The Memorandum calls for a massive expansion in detention by requiring DHS to detain nearly everyone it apprehends including those with no criminal convictions, until they:

- are removed from the United States;
- are required to be released by statute or because of a binding settlement agreement or judicial order;
- become a U.S. citizen or hold other valid immigration status;
- are around found to have a credible fear of persecution by an asylum officer or IJ and agree to comply with any conditions imposed by ICE upon release; or
- are paroled into the United States.

To be paroled, the Deputy Director of ICE or the Deputy Commissioner of CBP must provide written concurrence of the decision to the head of the agency that initiated the parole request (concurrence is not needed in "exigent circumstances such as medical emergencies"). This increase in detention will begin once Secretary Kelly determines that there are enough immigration judges and asylum officers at the border to interview and adjudicate claims. The Memorandum acknowledges that expansion of detention to this scale may not be possible immediately, and as such, detention must be prioritized based on an individual's dangerousness and flight risk potential. Any regulations that are inconsistent with this implementation plan will be modified, but until then DHS must continue to operate according to the regulations currently in place.

Analysis:

- DHS does not currently have enough detention capacity to detain the number of individuals anticipated by the Memorandum—which will increase by about 170,000 people each year to a total of over 500,000 detained. The Memorandum does not address appropriations or how it will obtain the necessary funding from Congress. The federal government is operating under a Continuing Resolution until April 28, 2017.

- Construction and maintenance for ICE's current capacity of 34,000 detention beds cost taxpayers more than $2 billion each year. ICE currently detains between 40,000 to 50,000 people each day far in excess of its funding and capacity.
- Additional hiring of asylum officers will likely be necessary as most asylum officers are already assigned to border regions to conduct asylum screenings for apprehended individuals.
- To date, EOIR has been unable to hire the number of immigration judges it was funded to hire through appropriations in FY2017.
- It is unclear whether asylum officers or immigration judges would be deemed exempt from the recent executive order authorizing a government-wide hiring freeze.
- The planned expansion of detention will erode due process and humanitarian protection for thousands of people. The Memorandum does not exempt the disabled, children, elderly, or pregnant women from detention.

B. HIRING MORE CBP AGENTS/OFFICERS

The Memorandum calls for the immediate hiring of 5,000 additional border patrol agents and 500 Air and Marine Agents/Officers to "ensure operational control of the border" – "subject to the availability of resources."

Analysis:

- The Memorandum requires "complete operational control of the border" -- this is an unattainable goal requiring 100 percent control that allows no one to pass undetected into the United States.
- CBP is currently required to have 21,370 agents, but has been unable to meet this requirement.

C. IDENTIFYING AND QUANTIFYING SOURCES OF AID TO MEXICO

The Memorandum requires all heads of executive departments to identify and quantify all sources of direct and indirect aid and assistance, excluding intelligence activities, to the Mexican government.

D. EXPANSION OF THE 287(g) PROGRAM IN THE BORDER REGION

The ICE Director is directed to engage with all willing and qualified law enforcement jurisdictions for the purpose of entering into 287(g) agreements, which empower state and local law enforcement to enforce federal immigration laws. CBP and ICE are directed to engage immediately with all "willing and qualified law enforcement jurisdictions that meet all program requirements for the purpose of entering into [287(g)] agreements" near the southern border. In addition to the task force model, jail model, and joint task force/jail models – the Memorandum directs the CBP Commissioner and ICE Director to accept other state services offered to carry out immigration enforcement.

Analysis:

- The Memorandum calls for a dramatic increase in the use of local law enforcement to act as immigration agents in the enforcement of immigration law under. Until now, only ICE used 287(g); the Memorandum directs CBP to begin entering into such agreements.
- The 287(g) program has been proven to undermine the trust between law enforcement and immigrant communities.
- The Memorandum does not mention any oversight or input by DHS Office for Civil Rights and Civil Liberties. Currently, DHS OCRCL is part of an Internal Advisory Committee that is evaluating ICE field office recommendations about pending 287(g) applications.

- The Memorandum does not specify what other state forces could be used to carry out immigration enforcement, but this could include nation guard or state militia. A prior unofficial draft of the Memorandum (dated January 25) called for widespread mobilization of the national guard in southern border regions to enforce immigration law.

E. COMMISSIONING A COMPREHENSIVE STUDY OF BORDER SECURITY

The Memorandum requires an immediate and comprehensive study of the southern border to identify vulnerabilities and a follow up report of recommendations to achieve operational control, including how federal and state resources would help enhance border security.

F. BORDER WALL CONSTRUCTION AND FUNDING

The Memorandum directs the planning, design, construction, and maintenance of a wall along the land border with Mexico to begin immediately, in the most appropriate locations, "as is consistent with the will of Congress and the need to secure the border in the national interest." Lighting, technology, patrol and access roads are also to be used to achieve "operational control" of the border. The Memorandum directs any available funding to be immediately used to pay for such infrastructure and security, and any supplemental budget requests for the current fiscal year must be prepared.

Analysis:

- DHS will need significant additional appropriations from Congress to complete these requirements.
- DHS has estimated that it will cost $21 billion to build an additional 1250 miles of fencing and other physical barriers by 2020.

G. EXPANDING EXPEDITED REMOVAL PURSUANT TO SECTION 235(b)(1)(A)(iii)(I) OF THE INA

The Memorandum calls for a significant expansion of expedited removal and directs the agency to publish notice in the *Federal Register*. The Memorandum states that DHS is authorized to apply ER to anyone who has not been continuously present in the country for the two years before apprehension and to individuals encountered ***anywhere*** in the United States, and suggests DHS intends to apply ER to maximum degree the law allows. It states that the current policy applies ER to aliens encountered within 100 air miles of the border and 14 days of entry, and aliens who arrived in the United States by sea other than at a port of entry.

Analysis:

- The expansion of ER has the potential to broadly sweep in individuals who have been here for years but who cannot provide the necessary paperwork or other evidence at the time of their apprehension to prove the required period of continuous presence. As a result, those who fail to carry enough documentation to satisfy officers will be subject to ER.
- Expedited removal allows DHS to deport individuals in as little as 24 hours without the opportunity to appear before an immigration judge or to consult with legal counsel. The implementation of ER to cover the entire country would eviscerate due process for tens of thousands of noncitizens in the U.S., including those with family ties and deep roots in our communities.

H. IMPLEMENTING THE PROVISIONS OF SECTION 235(b)(2)(C) OF THE INA TO RETURN ALIENS TO CONTIGUOUS COUNTRIES

The Memorandum instructs DHS to return noncitizens arriving on land from Mexico or Canada, to the territory from which they arrived, pending formal removal proceedings. DHS states that this will save resources towards detention and adjudication. In order to ensure that removal proceedings can be completed for those waiting in Mexico or Canada, the Memorandum requires that facilities be made available for noncitizens to appear via video teleconference. The Memorandum suggests that once the person is returned to Mexico or Canada, they will be detained until a removal hearing can be completed by teleconference. The Memorandum does not explain the process by which this would be accomplished or how the United States will maintain detention centers in Mexico and Canada.

Analysis:

- U.S. law and international treaty obligations require DHS to ensure that persons arriving at or who are apprehended within our borders have a meaningful opportunity to request asylum and other humanitarian protection. By calling for such border arrivals to be returned to Mexico and Canada and processed in those countries, the Memorandum will violate these legal obligations and place women, children, and other vulnerable individuals at risk of immediate violence and other harm in Mexican border regions as well as increased likelihood of deportation without due process by the Mexican authorities.

I. ENHANCING ASYLUM REFERRALS AND CREDIBLE FEAR DETERMINATIONS PURSUANT TO SECTION 235(b)(1) OF THE INA

The Memorandum explains the current law and policy regarding credible fear determinations. Though it does not expressly change the standard for establishing credible fear it clearly anticipates that procedures and standards for establishing credible fear will be made more restrictive. The Memorandum also asserts that fraud is rampant in the credible fear process and increases resources for detecting and preventing fraud in the asylum and benefits adjudication processes.

J. ALLOCATION OF RESOURCES AND PERSONNEL TO THE SOUTHERN BORDER FOR DETENTION OF ALIENS AND ADJUDICATION OF CLAIMS

The Memorandum directs ICE and CBP to take "all necessary action" and "allocate all available resources" to expand detention capabilities at or near the border with Mexico. This includes:

- Expansion of CBP's "short-term detention" facilities (defined as 72 hours or less under 6 USC §211(m));
- Expansions of all of ICE detention capabilities; and
- Exploring options for ICE/CBP "joint temporary structures."

The screening of credible fear claims by USCIS and adjudication of asylum claims by EOIR will be implemented in detention facilities at or near the points of apprehension on the border. USCIS is directed to increase the number of asylum officers and fraud detection officers at or near the border with Mexico.

Analysis:

- The Memorandum emphasizes that detention is critical for individuals apprehended near the border and asserts without offering evidence that those who are released from custody pending a removal hearing "are highly likely to abscond and fail to attend their removal hearings."
- To meet the Memorandum's requirements, immigration judge and asylum officer hiring will need to increase significantly. To date, EOIR has not completed the hiring of immigration judges funded by Congress for FY2017.

K. PROPER USE OF PAROLE AUTHORITY PURSUANT TO SECTION 212(D)(5) OF THE INA

The heads of USCIS, CBP and ICE are directed to ensure that, until final regulations are issued clarifying the appropriate use of parole power, written policy guidance and training is to be given to employees of each agency to exercise parole authority as instructed under INA §212(d)(5) only on a case by case basis, and should be "exercised sparingly." The ICE policy directive on parole for certain arriving aliens with a positive credible fear determination remains valid. Under the ICE directive, ICE has the discretion to grant parole once the individual establishes a credible fear as long as the individual demonstrates that he or she would not a pose a danger to the community and is not a flight risk. The Memorandum states that the practice of granting parole to "pre-designated categories" has contributed to a "border security crisis, undermined the integrity of immigration laws and the parole process, and created an incentive for illegal immigration."

Analysis:

- Section K and Section A of the Memorandum (requiring nearly all grants of parole for those apprehended to be approved by the Deputy Director of ICE or the Deputy Commissioner of CBP) demonstrate an intention to all but eliminate the practice of parole in the most limited circumstances.
- The Memorandum is highly critical of the current parole policies particularly the exercise of parole based on "pre-designated categories" and indicates that parole programs protecting vulnerable individuals will likely be restricted or terminated.
- Under the current military parole in place program, DHS exercises discretion to grant parole to the spouse, sons or daughters, or parent of an active-duty or Selected Reserve military member or member who previously served in the U.S. military, as well as to the family members of military enlistees in the Delayed Entry Program.[1] Other parole programs protect family members of Haitian, Cuban, and Filipino nationality.

L. PROPER PROCESSING AND TREATMENT OF UNACCOMPANIED ALIEN MINORS ENCOUNTERED AT THE BORDER

USCIS, CBP and ICE are directed to develop written guidance and training for all employees and contractors regarding:

- The "proper processing" of UACs;
- The "timely and fair" adjudication of claims for relief from removal; and
- Where "appropriate," the "safe" repatriation of the child after removal proceedings are over.

[1] U.S. Citizenship and Immigration Services, Policy Memorandum (Nov. 23, 2016), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2016/PIP-DA_Military_Final_112316.pdf.

The Memorandum also requires guidance to be implemented regarding following-up on children who were originally designated as UACs, to ensure that they still meet the definition as they go through the removal process. The Memorandum asserts that the policy of the previous administration allowed individuals to remain designated as UACs even after they no longer qualified under law and that "exploitation" and "abuses" of the program were committed by parents and guardians of the children that delayed removal procedures.

Analysis:

- The Memorandum will deny many children vital protections currently provided under the Trafficking Victim Protection and Reauthorization Act and the Homeland Security Act. The Memorandum calls for restricting the interpretation of "unaccompanied alien child," mostly likely to those children who arrive at the border alone and do not have any parent or guardian in the United States. Those who do not fit the definition and who do not claim asylum will likely be subject to expedited removal proceedings.
- Reinterpreting the definition of UAC will leave many children without protections such as placement in a care facility suitable to their needs, and access to social services. Furthermore, such children will not have the opportunity to appear before an immigration judge before being ordered removed.

M. ACCOUNTABILITY MEASURES TO PROTECT ALIEN CHILDREN FROM EXPLOITATION AND PREVENT ABUSES OF OUR IMMIGRATION LAWS

The Memorandum directs ICE and CBP to "ensure the proper enforcement" of our immigration laws against people who "directly or indirectly" facilitate the smuggling or trafficking of children into the United States, including placing individuals into removal proceedings or referring them for criminal prosecution. The Memorandum states that undocumented parents and family members of UACs hire smugglers, and by doing so "conspire to violate our immigration laws." The Memorandum does not take into account the dangerous and violent country conditions that drive children to reunify with their families in the United States.

N. PRIORITIZING CRIMINAL PROSECUTIONS FOR IMMIGRATION OFFENSES COMMITTED AT THE BORDER

Directors of Joint Task Forces, and ICE-led Border Enforcement Security Task Forces (BESTs) are directed to implement counter network operations directed at disrupting transnational criminal organizations, especially those involved in human smuggling. The Task Forces should include people from other federal, state, and local agencies, and should target people and organizations whose criminal conduct undermines border security or the integrity of the immigration system, specifically offenses related to:

- Smuggling or trafficking
- Drug trafficking
- Illegal entry or reentry
- Visa fraud
- Identity theft
- Unlawful possession or use of official documents
- Acts of violence against persons or property at or near the borders

The ICE Director must increase the number of vetted Transnational Criminal Investigative Unit international partners and the number of special agents and analysts in the Northern Triangle ICE Attaché Offices to assist in this effort.

O. PUBLIC REPORTING OF BORDER APPREHENSIONS

The Memorandum directs CBP and ICE to develop a standardized way to report data publicly using uniform terminology and an easy-to-understand format. The reported data must include:

- Number of convicted criminals and nature of their offenses;
- Prevalence of gang members "and prior immigration violators;"
- Custody status of aliens, and – if released – the reason for release and location of release;
- Number of aliens ordered removed; and
- Number physically removed.

P. NO PRIVATE RIGHT OF ACTION

The guidance contained in the Memorandum may be modified, rescinded or superseded at any time without notice. The guidance does not create any enforceable right or benefit.