AMERICAN IMMIGRATION **POSITION PAPER** *LAWYERS ASSOCIATION*

IMMIGRATION REFORM

The Issue: Our current immigration system is badly broken and in dire need of a top-to-bottom overhaul. Immigration laws that are out of sync with 21st century economic realities and demographics have given rise to a vast underground economy characterized by criminal smugglers, fake documents, and millions of undocumented immigrants who are vulnerable to exploitation. Our borders are unmanageable, and we are unable to focus our enforcement resources on those who mean us harm. Moreover, our immigration system is plagued by backlogs, delays, and dysfunction: close family members are separated for years and even decades; businesses lack access to the workers they need to grow or remain open; U.S. and immigrant workers are exposed to mistreatment; and immigration raids and mass detention are now part of the landscape.

AILA's Position: We believe that any cogent plan to realistically reform our immigration laws must consider the entirety of the system's problems and must approach the issue through the lens of national self-interest. The failings of our current model run deep and long so we begin by articulating the necessary changes at the most general level. Any plan to restore the integrity of our system must: 1) require the undocumented population to come out of the shadows and *earn* legal status; 2) provide fair and lawful ways for American businesses to hire much-needed immigrant workers who help grow our economy while protecting U.S. workers from unfair competition; 3) reduce the unreasonable and counterproductive backlogs in family-based and employment-based immigration by reforming the permanent immigration system; and 4) protect our national security and the rule of law while preserving and restoring fundamental principles of due process and equal protection.

Specifically, AILA believes that a practical solution to our immigration crisis must:

1. Address the Situation of People Living and Working Here: Most undocumented workers are law-abiding, hardworking individuals who pay their taxes and contribute to our society. They are essential to many sectors of our economy. By requiring these people to come out of the shadows, register with the government, pay a hefty fine, go through security checks, and earn the privilege of permanent legal status, we can restore the rule of law in our workplaces and communities.

2. Enhance Channels for Legal Workers: Current immigration laws do not meet the needs of our economy or workers. In the current regime, there is *no* visa category authorizing essential workers in low- or semi-skilled occupations to work in the U.S., except on a seasonal basis. That seasonal, employment-based visa—the H-2B program—is wholly inadequate to meet labor needs in a broad range of industries, from landscaping to hospitality to health care. Moreover, even as a seasonal visa, the H-2B program is inadequate, flawed, and in need of reform. A "break-the-mold" program would provide visas, full labor rights, job portability, and a path to permanent residence over time for those who would not displace U.S. workers. It would thereby significantly diminish illegal immigration by creating a legal avenue for people to enter the U.S. and return, as many wish, to their countries, communities, and families.

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Comprehensive reform also must expand legal channels for temporary workers in high-skilled professions. Despite overwhelming evidence of the number of high-tech workers that American businesses require, and the shortage of U.S. workers available to fill these positions, Congress has maintained arbitrarily low caps on the number of visas available for high-skilled foreign workers. An expanded H-1B visa program would allow American businesses to hire the workers they need and enable the U.S. to maintain its competitive edge in the global economy.

3. Reform the Family-Based and Employment-Based Permanent-Residency Preference Systems: U.S. citizens and legal permanent residents are regularly required to wait 7-10 years (and sometimes up to 20 years) to reunite with their close family members. Such long separations make no sense in our pro-family nation and undermine one of the central goals of our immigration system: family unity. Relatedly, backlogs for employment-based immigrant visas have increased dramatically for workers with certain high-demand skill sets from certain countries. These backlogs make it difficult for employers to attract and retain the best and brightest talent from around the world, thus undermining our competitiveness in the global economy. Any workable comprehensive immigration reform proposal must eliminate our family-based and employment-based immigrant visa backlogs and reform our preference systems to adjust to 21st century realities.

4. Restore the Rule of Law and Enhance Security: By encouraging those who are already here to come out of the shadows, and by creating legal channels to provide for the future flow of workers, we can restore the rule of law in our workplaces and communities and focus our enforcement resources on those who mean us harm. We need smart enforcement that includes effective inspections and screening practices, fair proceedings, efficient processing, and strategies that crack down on criminal smugglers and lawbreaking employers. At the same time, our border security practices must facilitate the cross-border flow of goods and people that is essential to our economy. A vibrant economy is essential to fund our security needs.

Recent Legislation: The only bill in the 110th Congress that addresses the enormous challenges ahead of us in a realistic and comprehensive manner is H.R. 1645, the Security Through Regularized Immigration and Vibrant Economy (STRIVE) Act of 2007. Building a strong foundation for reform with a balanced approach and pragmatic policy specifics, the STRIVE Act provides the blueprint for a workable, humane, enforceable immigration system. Although it is highly unlikely that this bill will be enacted this Congress, it contains the component pieces for a lasting reform that must be revisited in the 111th Congress.

As the bar association for immigration attorneys and professors, we believe our collective expertise provides a unique vantage from which to assess the failures and successes of nearly every aspect of immigration policy. We have a multitude of detailed suggestions for reforming the myriad failings in our immigration system and stand ready to engage Congress and the Administration in pursuing reforms that will advance our national interest.

AMERICAN IMMIGRATION **POSITION PAPER** *LAWYERS ASSOCIATION*

Deportation-Only Approaches such as the SAVE Act are Doomed to Fail

The Issue: For the past twenty years, this country has been steadily increasing immigration enforcement at the border and in the interior, and the effort has not only failed, but backfired. Members of Congress continue to introduce deportation-only measures such as the Secure America through Verification and Enforcement (SAVE) Act (H.R. 4088/ S. 2368), introduced by Reps. Heath Shuler (D-NC) and Tom Tancredo (R-CO); and the New Employee Verification Act (H.R. 5515), another deportation-only bill recently introduced by Rep. Sam Johnson (R- TX).

The "SAVE Act" is an immigration deportation-only package that would dramatically expand the error-ridden Basic Pilot electronic employment verification system and make a number of harsh and unnecessary changes to current law. The bill would also increase the number of Border Patrol agents and spend more resources on the southern border, funding and personnel for programs that involve local police in the enforcement of federal immigration laws, and a number of other enforcement provisions that just throw more money toward ineffective measures.

The problem with deportation-only strategies like the SAVE Act is that they ignore the basic reasons that people come to the U.S. in the first place. Bills that throw more money at the border will not end undocumented immigration because they fail to respond to the reason immigrants come here without documents or overstay their visas. The real reason that people migrate illegally is the enormous disconnect between the broad availability of jobs and the absence of legal channels enabling immigrants to come fill those jobs. We have an integrated North-American labor market but it is unregulated because we have failed to create the legal mechanisms that would allow individuals to come in a controlled, orderly fashion.

Long-term relief: Only through a realistic, long-term solution for the undocumented population living in the U.S., and targeted, effective enforcement of realistic laws will we restore legality and legitimacy to our immigration system. We must have sensible solutions that address the twelve million undocumented workers who are already here, address the need for a short and long-term workforce through reforms to our legal immigration system, and ensure that unscrupulous employers are not exploiting workers—Americans, legal immigrants, or the undocumented. The SAVE Act will not address any of these problems, and will only cause a more serious crisis in our system. The fallacies of a deportation-only approach are highlighted below:

- **Unprecedented increases in funding for the Department of Homeland Security to secure the border have thus far failed to stop illegal immigration.** For example, according to DHS, the number of Border Patrol agents has gone from approximately 9,000 in 2001 to nearly 15,000 in 2007. Over 300,000 immigrants are now detained every year. Congress has already appropriated 2.7 billion dollars for FY 2008 for emergency border security funding, including an additional increase of 3,000 Border Patrol officers. Congress is simply giving DHS a blank check to spend on border enforcement, because it is easier to spend money than offer real solutions.

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- **Deporting the entire undocumented population is not a reasonable or practical solution to our immigration crisis.** Deporting just 8 or 9 million undocumented immigrants (out of the current population of 12 million) would cost more than $200 billion over five years—more than double the annual budget of the entire Homeland Security Department. It would take 200,000 buses, bumper-to-bumper, in a convoy 1,700 miles long, to transport our undocumented immigrants to the border. It is not possible or desirable to deport all of these people including all those who are contributing to our society and who want to become citizens.

- **Deportation-only approaches to immigration reform are doomed to fail.** More than 5% of the current workforce is undocumented. It is not practical to deport them and most will not simply leave the country on their own. Undocumented immigrants will remain in the U.S. and employers who simply cannot locate U.S. workers to fill low-skilled positions will be forced to close shop, take their operations "off the books" and into the underground economy, or move off-shore. The result will be a deepening of the underground economy where U.S. workers can't compete in today's global market and undocumented workers are even more exposed to exploitation.

- **The employment verification system in the SAVE Act will hurt American and legal resident workers.** The SAVE Act expands the existing Basic Pilot employment verification system (now known as E-Verify) to cover all employers and all workers in just four short years, without addressing the well-documented flaws of the current system. The proposed system is based on deeply flawed databases containing erroneous or outdated information on individuals, resulting in an unacceptably high number of false positive "hits" when put into use. Common reasons for these hits include name changes due to marriage, simple typos, and other related, otherwise innocuous, mistakes. Numerous studies show, for example, that naturalized U.S. citizens are disproportionately affected by a near 10% false positive rate, and that employees who receive tentative non-confirmation "No-Match" notices, automatically generated by a hit, are subsequently subjected to a presumption of guilt and are almost invariably discriminated against, even before being given enough time to properly challenge the finding. The SAVE Act does not address the E-verify system's design problems and the database inaccuracies, and will have a crippling effect on the U.S. workforce. Suddenly, American workers will find their ability to earn money and support their families is subject to an error-prone, technologically inadequate government database.

- **Mandatory implementation of an error-riddled, unreliable electronic verification program would exacerbate the very problems it purports to solve.** Far from a silver bullet, mandates along the lines proposed will lead to erroneous firings, discrimination by employers, and exploitation of millions of workers, including U.S. citizens and legal immigrants ensnared by the system's errors and lack of safeguards. Unless and until we address root problems in our system and provide a mechanism for undocumented workers to gain legal status, layering mandatory electronic employment verification on our economy at this time will cause more dislocation in our economy and our communities.

- **Implementing a mandatory electronic verification program as a means of curbing illegal immigration simply ignores the true nature of the problem.** The U.S. should not mandate implementation of an employment-eligibility verification system without requiring the government to meet accuracy benchmarks prior to implementation and provide safeguards for workers and employers. Moreover,

moving forward on mandatory, across-the-board employment authorization verification, without dealing with the 5% of our workforce that is undocumented, is a recipe for disaster. Undocumented workers who are currently working above-board and paying taxes will not leave the country *en masse* if the SAVE Act becomes law. They will simply go further underground and find employment in the cash economy. This will lead to greater exploitation of immigrant workers and lower tax revenues, and will undermine wages and working conditions for all.

- **In the hysteria to show the public that Congress is 'tough' on immigration, many of the recent deportation-only proposals do not respect due process and would increase the climate of suspicion and fear in immigrant communities.** The Senate has introduced a flurry of deportation-only bills that would greatly expand state and local enforcement of immigration law, dramatically increase immigration detention and erode due process, among other harmful measures. In the House, the SAVE Act would expand police assistance in immigration enforcement which would further burden already overstretched local police departments and harm public safety by eroding the trust between police and immigrant communities. In another example, the SAVE Act fails to safeguard our privacy while expanding information-sharing among federal databases and in yet another example, the bill would expand our current detention system which has been widely criticized for its inhumanity without mandating the creation of enforceable detention standards.

We need long-term solutions and in the interim, we should do no harm:

- Only through a realistic, long-term solution for the undocumented population living in the U.S., and targeted, effective enforcement of realistic laws will we gain control over our immigration system. In the interim, we must strenuously avoid half-baked measures that will do lasting damage to our country such as the SAVE Act.

- We should enact a short-term package that provides immediate relief to businesses and communities that currently have no safety valve to allow deserving immigrants to remain in our country. Judges and agency officials should be given the discretion to evaluate the facts of each individual case.

- Congress must ensure that individuals encountered through raids and those placed in detention are treated humanely through codification of standards on interrogation and detention conditions.

Related Legislation: In the absence of comprehensive immigration reform, AILA opposes deportation-only legislation including: the Secure America through Verification and Enforcement (SAVE) Act (H.R. 4088), introduced by Reps. Heath Shuler (D-NC), and Tom Tancredo (R-CO); and the New Employee Verification Act (H.R. 5515) introduced by Rep. Sam Johnson (R- TX). AILA also opposes the package of immigration deportation-only bills introduced in the Senate by the members of the new Border Security and Enforcement First Caucus.

Thank you to the National Immigration Forum who provided information for this issue paper.

AMERICAN IMMIGRATION POSITION PAPER *LAWYERS ASSOCIATION*

HIGHLY EDUCATED FOREIGN PROFESSIONALS:

VITAL TO AMERICA'S ECONOMIC COMPETITIVENESS

THE ISSUE: The numerical cap limiting the H-1B visa program for FY2009 has again been reached on the first day, April 1, 2008 that they were available. This marks the 5th consecutive year that this arbitrary numerical limit, set more than a decade ago, has been triggered prior to the end of the fiscal year. Congress has allowed this to occur despite overwhelming evidence of the number of high-tech jobs that need to be filled in the U.S., and the shortage of U.S. workers available to fill them. Yet, as President Bush and many others have stated, a solution to this problem is clear and readily available: bring more highly educated foreign professionals into this country, by way of the H-1B visa. Simply put, without more access to H-1Bs, our businesses suffer, and the U.S. stands to rapidly lose not only the competitive economic edge generations of Americans have worked so hard to achieve, but also its preeminence in a variety of scientific and technical fields—areas vital to our prosperity and national security.

The H-1B visa is a vital tool necessary to keep the U.S. economy competitive in the world market and to keep jobs in America. Far from harming U.S. workers and the U.S. economy, highly educated foreign professionals benefit our country by allowing U.S. employers to develop new products, undertake groundbreaking research, implement new projects, expand operations, create additional new jobs, and compete in the global marketplace.

HOW THE H-1B VISA PROGRAM WORKS: Through the H-1B program, U.S. employers are able to hire, on a temporary basis, highly educated foreign professionals for "specialty occupations"-- jobs that require at least a bachelor's degree or the equivalent in the field of specialty. Examples include doctors, engineers, teachers and researchers in a wide variety of fields, accountants, medical personnel, and computer scientists. Besides using these foreign professionals to obtain unique skills and knowledge in short supply in this country, U.S. businesses use the program to alleviate temporary shortages of U.S. professionals in specific occupations, and to acquire special expertise in overseas economic trends and issues, thereby allowing U.S. businesses to compete in global markets.

U.S. employers also turn to H-1B professionals when they recruit post-graduates from U.S. universities. Foreign students represent half of all U.S. graduate enrollments in engineering, math, and computer science. There still are not enough U.S. students graduating with advanced degrees in these fields to fill highly specialized positions, and, according to the Bureau of Labor Statistics (BLS), the demand for such graduates will increase substantially in the next ten years. It is therefore imperative that U.S. businesses have access to foreign professionals who have graduated from U.S. master's and Ph.D. programs.

THE H-1B PROGRAM AND U.S. WORKERS: The H-1B program has built-in safeguards to help prevent highly educated foreign professionals from undercutting the wages offered to U.S. workers. Employers must

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offer the foreign professional a wage that is the higher of either the typical wage in the region for that type of work ("prevailing wage"), or what the employer actually pays existing employees with similar experience and duties. A U.S. employer using this program must also guarantee that:

- the foreign professional will not adversely affect the working conditions of U.S. colleagues
- U.S. colleagues will be given notice of the professional's presence among them
- there is no strike or lockout at the worksite
- the position requires a professional in a specialty occupation and the intended employee has the required qualifications

SHORT-TERM RELIEF:

- recapture unused H-1B visas from previous fiscal years
- exempt U.S.-educated workers with advanced degrees from the H-1B cap
- permit work authorization for spouses of H-1B workers

CURRENT LEGISLATION: The main piece of legislation reforming the H-1B program in a manner that will help the U.S. economy is **the SKIL Bill** (HR 1930/S 1083). This measure would:

- raise the H-1B cap to 115,000 and provides for a market-based escalator if the cap is reached during the previous fiscal year
- provide an exemption for professionals who have earned a U.S. master's or higher degree AND those who have been awarded a medical specialty certification based on post-doctoral U.S. training and experience
- modify the existing advanced degree cap of 20,000 to apply to those with a master's or higher degree from an institution of higher education in a foreign country

There is also the **STRIVE Act of 2007** (H.R. 1645), the most complete reform of our current immigration system. The STRIVE Act has similar provisions related to the H-1B program as contained in the SKIL bill.

Recently, two new bills have been introduced to help alleviate the shortage of H-1B visas that are available. Rep. Giffords (D-AZ) introduced H.R. 5630 which would increase the cap to 130,000 and includes a market escalator if the new cap is reached during the prior fiscal year. H.R. 5630 also includes added labor protections for U.S. workers. Rep. Smith (R-TX) introduced H.R. 5642 which would increase the numerical limitation to 195,000 for fiscal years 2008 and 2009.

AMERICAN IMMIGRATION **POSITION PAPER** *LAWYERS ASSOCIATION*

REPEAL THE HIV BAN

The Issue: The United States currently has one of the world's harshest immigration policies for individuals who are HIV-positive. Under section 212(a)(1)(A)(i) of the Immigration and Nationality Act ("INA"), foreign nationals who are HIV-positive are statutorily inadmissible, preventing them from obtaining lawful permanent residence, or even visiting the United States unless they meet strict rules for an HIV waiver. The result of this policy has been to needlessly deny applications for lawful permanent residence for applicants with established lives in the U.S., to prevent employers from retaining qualified workers, and to harm business without serving any legitimate government interest.

AILA's Position: AILA strongly supports amending the INA to remove the statutory conclusion that HIV is a "communicable disease of public health significance." Prior to 1993, and continuing today for all illnesses other than HIV, the determination of what diseases should affect a foreign national's admissibility to the United States has been a question of public health which is legitimately left to the realm of the Department of Health and Human Services ("HHS"). Singling out HIV as the only statutory medical ground of inadmissibility serves no legitimate purpose, stigmatizes those who are living with this treatable disease, and diminishes the international legitimacy of the United States as it leads the global fight against HIV/AIDS.

The HIV ban does not protect public health. At the time the HIV ban was codified in 1993, the general public still did not understand how HIV was transmitted, and there were virtually no treatment options. The situation is much different today.

- Now that it is clear that HIV is not spread by casual contact and that it can be a treatable, chronic illness, there is no reason to treat it differently under immigration law from all other medical conditions.

- While the INA technically excludes even visitors who are HIV-positive from entering the U.S., as a practical matter, it is likely that hundreds if not thousands of HIV-positive individuals enter the U.S. every year because Department of Homeland Security or Department of State officials generally learn that a prospective visitor is HIV-positive only if he or she self-discloses. There is no evidence that these HIV-positive visitors have created any danger to U.S. public health.

- Many HIV-positive foreign nationals who are now in the United States as permanent residents or citizens of the United States were HIV-negative when they first came to the United States. Their contributions to this country's economic, scientific and cultural welfare have in no way been minimized by their medical condition. Similarly, many non-immigrants contract the virus after their arrival in the United States. To deprive them, when they are otherwise eligible, from filing for adjustment of status to permanent residence simply because they are now HIV-positive has no rational basis given that they are already here

The HIV ban does not protect the American public against high public health expenditures on behalf of foreign nationals. Another primary argument used to justify the HIV ban is the high cost associated with HIV medication but this argument is not supported by the facts.

- With very limited exceptions, foreign nationals who are visiting the United States on short term visas or under the Visa Waiver Program are not eligible for publicly-funded health benefits.

- Virtually all applicants for lawful permanent residence must prove that they are not likely to become a public

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charge. Likewise, an adjudicating officer already has the power to deny an application for admission as a non-immigrant if the officer believes the applicant could pose a financial burden on the United States.

Requiring that applicants for lawful permanent residence have close relatives to apply for an HIV waiver bears no relationship to protecting public health.

- Under current law, only applicants who are the spouse or unmarried son or daughter of a U.S. citizen or lawful permanent resident; the minor unmarried lawfully adopted child of a U.S. citizen; the parent of a son or daughter who is a U.S. citizen or lawful permanent resident; or certain humanitarian applicants (such as refugees, asylees, and those eligible for VAWA) are even eligible to apply for an HIV waiver.

- This requirement bears no relationship to any possible public health justifications for the HIV ban and disqualifies many highly skilled, fully insured workers from ever obtaining residence in the United States.

Current Legislation: The "HIV Nondiscrimination in Travel and Immigration Act of 2007" (H.R. 3337 /S.2486) was introduced in the House by Representative Barbara Lee (D-CA) in August 2007 and by Senators John Kerry (D-MA) and Gordon Smith (R-OR) in December 2007. The bill would amend the INA to remove HIV as a statutory ground of inadmissibility, leaving the determination of whether or not HIV is a "communicable disease of public health significance" to be made by HHS, as it is for all other illnesses. HIV is currently on the HHS list, so passing the bill would not immediately end the HIV ban, but it is an important first step in doing so. AILA strongly supports passage of this bill, and the removal of HIV from the HHS list.

AMERICAN IMMIGRATION **POSITION PAPER** *LAWYERS ASSOCIATION*

RESTORE FAIRNESS AND DUE PROCESS TO OUR IMMIGRATION SYSTEM

Issue: Current reactionary laws against immigrants go too far and deny basic due process to millions of people who live in the U.S. Inadequate due process protections in our current law and a failure by the federal government to guarantee due process protections have led to the following crisis:

- Low-level immigration officials act as judge and jury, and the federal courts have been denied the power to review most agency decisions.

- Long-time residents with strong ties to the community who pay taxes are subject to deportation and judges have little ability to weigh the individual circumstances of the case.

- U.S. citizens, the mentally ill, children and other vulnerable individuals who should not be in ICE custody have been mistakenly detained.

- ICE officials have entered private homes in some residential raids without a warrant and questioned individuals about their immigration status.

- Mothers responsible for caring for their small children have been detained and transferred to detention facilities thousands of miles away from their families and attorneys, making it difficult to defend themselves in court.

Long-term relief: Restoring basic due process protections must be among our government's paramount priorities. When we let the government deny due process for some in our nation, all of our freedoms are at risk. Moreover, when our immigration system fails to reflect core values of fairness and transparency, it undermines respect for the rule of law. AILA believes that our laws must embody the following principles:

1. **Provide a safety valve by giving judges the discretion to evaluate the circumstances in individual cases.** Current law strips immigration judges of the discretion they should have to evaluate cases on an individual basis and grant relief to deserving immigrants and their families. Immigration judges don't have the discretion to consider the facts of a case, the length of time the person has lived in the U.S., or the individual's contributions to the community. Judges should have the authority to consider all the facts of a case before making a decision to deport a legal resident or undocumented immigrant, and they should have the discretion to grant relief in deserving cases.

2. **Don't put the law in the hands of agency clerks: empower federal judges to review agency decisions.** The decision to deport is momentous, especially for refugees fleeing persecution and for those legal immigrants who have lived most of their lives in this country. Under current law, the federal courts have been stripped of their jurisdiction to review most deportation and agency decisions. Important issues of fairness and justice are at stake, and we should ensure that there is adequate judicial review of immigration orders and decisions. Our judicial system is one of checks and balances, and immigrants deserve their day in court.

3. **Immigrants should have a fair day in court and immigration appeals should receive the attention they require.** Currently, immigration judges are under pressure to make difficult, life altering decisions from the bench with little or no staff and overflowing dockets, resulting in sloppy, sometimes arbitrary decisions. Immigration judges' decisions are frequently affirmed without opinion by a single Board of Immigration

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Appeals member, thus depriving noncitizens of redress when those decisions are not supported by the law or facts in a case. The Board of Immigration Appeals (BIA) must have a sufficient number of judges to do its job fairly and efficiently and the BIA should end its practice of issuing one or two-sentence summary opinions. The immigration court system should be reformed to promote independence, fairness and accountability.

4. **The detention of individuals is an extraordinary power that should only be used in extraordinary circumstances.** Current law requires Immigration and Customs Enforcement (ICE) to put immigrants in jail even when they pose no danger to the community or flight risk. AILA supports reforms that would require the Attorney General to release an immigrant from detention if he or she does not pose a danger to the community and is likely to appear for any scheduled proceeding. To ensure that detention is not used to separate American families needlessly, ICE should utilize cost-saving community-based alternatives to detention programs that require immigrants to show up for their court proceedings. We need to focus enforcement operations on people who mean to do us harm, not legal permanent residents who have jobs and families here, contribute to their communities, and share the same security concerns as the rest of us. Most importantly, Congress should ensure that detention conditions are humane and safe- too many detainees have died in detention as a result of inadequate medical care and poor treatment.

5. **Give the government the discretion to recognize immigrants' strong ties to their American families and communities.** Under current law, the "three and ten year bars" and the "permanent bar" prevent U.S. citizens, lawful permanent residents and employers from successfully sponsoring many qualified immigrants for permanent residence. Because of these provisions in our immigration law, we are not fully utilizing our current legal immigration system. Congress should provide discretionary relief and allow DHS to consider factors such as the immigrant's length of residence in the United States; history of employment and business ties; family ties in the United States; military service; community contributions; any adverse impact on U.S. employers or the local community; or other national or local interests in the event of the immigrant's deportation from the U.S.

6. **Make the punishment fit the crime.** In America, the punishment should fit the crime. Not allowing judges to consider the circumstances of a case violates this principle and does not solve the problem of undocumented immigration. In many cases, our current laws require the deportation of long-term residents based on minor crimes and judges are given little to no discretion to forego their deportation. We need to allow judges to consider the circumstances of each individual case including the severity of the crime and decide what is best for that situation.

7. **Don't change the rules in the middle of the game.** Currently, thousands of legal immigrants face removal for offenses that occurred many years ago, some of which were not offenses that would result in deportation at the time they occurred. Making laws retroactive is unconstitutional in criminal law, and Congress should eliminate retroactive laws in the immigration context as well.

8. **ICE raids should respect due process and other Constitutional protections.** In recent months, immigrant communities have reported the use of warrantless raids by ICE, racial profiling during ICE operations and situations in which detainees have been transferred far from their legal counsel and their families following a raid. Congress should ensure that individuals encountered during raids are treated fairly through enhanced training requirements and internal guidance about the use of warrants and interrogation techniques and codification of procedures related to the treatment of detainees. Most importantly, ICE should ensure that the rights of immigrant workers are protected, and that appropriate attention is paid to the safety and welfare of children and their families.

9. **Any national employment eligibility verification system should respect due process**: Members of Congress are currently proposing mandatory verification systems that are based on deeply flawed databases containing erroneous information, resulting in an unacceptably high number of false positive "hits" when put into use. The U.S. should not mandate implementation of an employment-eligibility verification system without requiring the government to meet accuracy benchmarks prior to implementation or without providing safeguards for workers and employers. Mandating an eligibility verification program without providing a path to legal status for undocumented workers will only intensify our current crisis.

While we believe a long-term solution is vital, Congress should take immediate steps to provide short term relief:

- Only through a realistic, long-term solution for the undocumented population living in the U.S., and targeted, effective enforcement of realistic laws will we gain control over our immigration system. In the interim, we should strenuously avoid half-baked measures that will do lasting damage to our country such as the SAVE Act.

- We should enact a short-term package that provides immediate relief to businesses and communities that currently have no safety valve to allow deserving immigrants to remain in our country. Judges and agency officials should be given the discretion to evaluate the facts of each individual case.

- Congress should ensure that individuals encountered through raids and those placed in detention are treated humanely through codification of standards on interrogation and detention conditions.

Current Legislation: Several bills have been introduced this Congress to help restore due process to our system and while we welcome these efforts, these bills provide much-needed relief for too few people. AILA supports these bills as first steps toward a solution:

The Families First Immigration Enforcement Act (S. 2074/H.R. 3980), introduced by Sen. John Kerry (D-MA) in the Senate and Rep. Hilda Solis (D-CA) in the House, would require ICE to afford access to state social service agencies to screen and interview detainees following a raid. Where it is determined that an individual has humanitarian grounds for release, ICE would be required to prioritize that individual for detention in the local area. ICE would be required to provide a toll free number for families to use after a raid to determine the location of their loved ones.

The Child Citizen Protection Act (H.R. 1176) introduced by Congressman Jose Serrano (D-NY), Jerrold Nadler (D-NY), Gary Ackerman (D-NY), and Ed Towns (D-NY), would allow an immigration judge to consider the best interest of U.S. citizen children before deporting a parent.

AMERICAN IMMIGRATION **POSITION PAPER** *LAWYERS ASSOCIATION*

RELIEF FOR THE FAMILIES OF U.S. CITIZENS AND LEGAL RESIDENTS: ALLEVIATE THE BACKLOGS

The Issue: Our permanent immigration system is in dire need of serious repair. Unreasonable and unnecessary backlogs for family-based visas now exist, as a result of arbitrary limits, outdated information, and administrative delays. These arbitrary limits and backlogs have led to the following crisis:

- Many families have been kept apart for years, even decades, while waiting for green cards to become available and be processed.
- Even spouses of permanent residents must wait 7-10 years to come to the U.S. legally, while most others, including adult sons and daughters of U.S. citizens, are forced to wait between 4-22 years.
- As a result of these long waits, many family members who apply for visas in the prime of their lives are not granted admission until they reach retirement age, undermining their economic contribution to our country and encouraging some frustrated relatives to resort to illegal migration.
- Because of current 'bars' to relief in our immigration law, many hard-working immigrants who pay taxes, speak English, and desperately want to become full-fledged members of our community are unable to legally immigrate even if there is an employer or family member who is willing to sponsor them. For example, the "three and ten year bar" is one of the biggest obstacles preventing individuals hoping to legally immigrate through the family-based immigration system.

This unreasonable and untenable situation destroys families and unravels the unique social fabric which has helped to make our country so strong and prosperous.

Long-term relief: Legal, family-based immigration furthers America's economic and security interests while advancing core American values. Family immigration within a highly regulated and tightly controlled system fosters economic growth. Families tend to pool their resources to start businesses, purchase homes, and send family members to college. When the legal system keeps families separated for years and sometimes decades, it creates an incentive for family members to enter the country or remain in the country unlawfully. Creating a rationale, orderly system that comports with 21st century realities will obviate this incentive and strengthen respect for the rule of law. Moreover, our country values family unity as a cornerstone of our society. Reforming our family-based system will reunite loved ones and promote stability within families.

The following proposals would alleviate the current crisis in our family immigration system:

Eliminate arbitrary limits on family-based immigration.

Under current law there are 480,000 family-sponsored immigrant visas available annually. However, this number is reduced by the amount of immediate relative visas and humanitarian paroles granted the previous year. The law provides for a floor of 226,000 family-based visas and in recent years, our system has become so overtaxed that only the minimum number of visas has been available for legal immigration through the family-based visa categories. Because this arbitrary limit has not kept pace with current demand for family-based visas, lengthy backlogs have kept U.S. citizen family members waiting to immigrate for many years. The following include several possibilities for altering this system to help decrease the backlogs:

- **Don't count visas for immediate relatives of U.S. citizens against the total number of available visas:** Based on the framework of our current law, the number of available visas could be increased by not

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deducting immediate relatives and humanitarian paroles from the overall cap. The numbers that remain would then flow through the rest of the family-based immigration preference system.

- **Treat spouses and minor children of lawful permanent residents as 'immediate relatives'**: Currently, the immediate family members of lawful permanent residents are forced to wait from over 5 years to 8 years for a visa. If the spouses and minor children of legal permanent residents were included in the definition of immediate relative, fewer people would be forced to share the 226,000 visas that are left over for the rest of the family visa categories and nuclear family members would be united within a more humane time frame.
- **Increase the number of visas allotted for countries with high backlogs:** Under current law, there are per-country limits on the number of available visas. Because of high demand for visas and the arbitrary limits on the number of visas per country, certain countries have extremely long backlogs. An increase in the 'per country limits,' especially for countries with unusually high backlogs could significantly reduce these delays.
- **Expand derivative eligibility to include immediate relatives so that a separate petition and visa number is not required:** Currently, immigrants who fall under the 'immediate relative' category cannot bring their spouses and unmarried children as 'derivatives' on their application even though immigrants in the other family-based immigration categories are permitted to do so. An advantage of derivative status is that a child or spouse does not require a separate petition which promotes efficiency and allows more people to immigrate.

Give the government the discretion to allow hard-working immigrants who are currently barred from relief to utilize the legal immigration system.

Under current law, several bars to immigration relief including the 'three and ten year bar' and the 'permanent bar' prevent many undocumented immigrants from immigrating through the family-based system. In considering whether an undocumented immigrant with close family ties in the U.S. should be permitted to cure their unlawful status, the government should consider factors such as the immigrant's length of residence in the United States; history of employment and business ties; family ties in the United States; military service; community contributions; and any adverse impact on U.S. employers, businesses, organizations, the local community, or other national or local interests in the event of the immigrant's deportation from the U.S. Expanding the government's discretion to weigh the circumstances of each case will allow more deserving immigrants to reunite with their families. In addition to providing a more expansive waiver for the 'three and ten year bar' and the 'permanent bar,' Congress should also give the agency and immigration judges enhanced discretion to waive other bars to admission or relief that exist under current law such as the bar to admission based on a 'false claim to citizenship.'

Congress can and must provide short-term relief to alleviate the crisis in our legal immigration system:

- We should give the government the discretion to allow hard-working immigrants who are currently barred from relief to utilize the legal immigration system and reunite with their families by providing an expanded waiver to the 'three and ten year bar' and the 'permanent bar.'
- Current backlogs should be reduced by increasing the number of visas allotted per country and changing the way we count visas against our current caps.

AMERICAN IMMIGRATION **POSITION PAPER** *LAWYERS ASSOCIATION*

ELIMINATING THE EMPLOYMENT-BASED (EB) GREEN CARD BACKLOG: VITAL TO AMERICA'S ECONOMIC COMPETITIVENESS

THE ISSUE: Reform of the permanent employment-based green card program is urgently needed in order for U.S. employers to hire the foreign talent necessary for the American economy to remain vibrant and competitive. Over half of all science, technology, engineering, and mathematics graduates of American universities are foreign born. We are also facing a severe shortage of registered nurses as the tidal wave of retiring baby boomers is upon us. At a time when our economy needs high-skilled workers more than ever, our current system forces most of these graduates to leave the U.S. and apply their valuable skills in other countries, a scenario that is beneficial to all but the U.S. Needless to say, foreign countries are not complaining, but are instead poised to take advantage in their increasingly successful attempts to surpass us. Simply put, if the problem isn't solved soon, the U.S. stands to rapidly lose not only the competitive economic edge generations of Americans have worked so hard to achieve, but also its global preeminence in science and technology—areas vital to our prosperity and national security.

HOW THE EMPLOYMENT-BASED GREEN CARD SYSTEM WORKS: Each year, 140,000 EB green cards, spread across five preference categories based on credentials, are allotted for foreign nationals seeking permanent residence and who are sponsored by their employers to work in this country. The spouses and children of these foreign nationals also count against the 140,000 green card cap, accounting for over half the allotted number. However, because these green cards are distributed equally among all countries, with a quota set for each country, backlogs have resulted for individuals coming from high-demand countries, even when the overall cap has not been reached. Once the quota is met for nationals of a given country, only those who applied before a set cut-off date are able to get green cards.

EB RETROGRESSION AND THE UNAVAILABILITY OF GREEN CARDS: The current problems with the EB system are attributable to two things: administrative delays in processing green card applications; and, as mentioned above, the statutory limits, regulated by the U.S. Department of State (DOS), putting a cap on the number of EB green cards issued each year. When DOS believes that either the overall or per country cap is about to be reached, it imposes a "cut off" date, and only applications received before this date are processed. In October 2005 (and many times since), DOS moved this cut-off date backward, in an effort to ration available green cards. As a result, thousands of foreign professionals, many of whom have been in the U.S. legally for nearly a decade on student or work visas, have been forced to wait, essentially in a legal purgatory, up to seven years to get a green card and enjoy the rights and benefits of legal permanent residence. This means up to seven years spent waiting and worrying unnecessarily, with spouses unauthorized to work at all. Not surprisingly, these talented professionals often tire of waiting, and leave the U.S. entirely to put their knowledge and skills to use in other countries eager to compete with and surpass the U.S.

SHORT-TERM RELIEF Congress must reform the EB green card system. These reforms should include:

- recapture of unused EB green cards from prior years
- exemption of spouses and children from EB green card quotas
- exemption for graduates from U.S. institutions in the fields of science, technology, engineering and math

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- a market-based EB green card cap, responsive to the needs of U.S. employers

Without these reforms, we will continue to make it more and more difficult for talented foreign professionals to work in this country and fill the positions U.S. employers desperately need to fill. As a result, these talented professionals will simply go elsewhere, resulting in devastating long-term consequences for the U.S. economy.

CURRENT LEGISLATION: There are currently two main pieces of legislation that attempt to reform the EB green card program. **The SKIL Bill** (S 1083/HR 1930) introduced by Senator Cornyn and Rep. Shadegg would:

- raise the cap from 140,000 to 290,000 green cards a year and allows unused green cards to fall forward annually, while recapturing unused green cards from previous fiscal years
- exempt from the EB cap professionals who have earned a U.S. master's or higher degree and those awarded a medical specialty certification based on post-doctoral U.S. training and experience
- exempt those who have earned a science, technology, engineering or math (STEM) master's or higher degree who have worked 3 years in the U.S.
- exempt those who will perform labor in shortage occupations designated by the Secretary of Labor
- exempt spouse and minor children of employment-based professionals

There is also **the STRIVE Act of 2007** (H.R. 1645), introduced by Rep. Gutierrez which proposes the most complete reform of our current immigration system. Regarding EB green cards, the STRIVE Act would:

- increase EB green cards from 140,000 to 290,000 per fiscal year
- exempt spouse and minor children of employment-based professionals
- allow unused employment-based immigrant green cards from previous fiscal years are recaptured and made available for employment-based immigrant green cards for future fiscal years
- make slight increases to the per-country limits for employment based green cards

AMERICAN IMMIGRATION **POSITION PAPER** *LAWYERS ASSOCIATION*

H-2B Seasonal & Temporary Workers Vital to America's Small & Seasonal Businesses

The Issue: The H-2B visa program is vital to America's small businesses.

- The H-2B program is capped at 66,000 visas per year. This is the same arbitrary number set by Congress in 1990. The visa allotment is split equally between the winter and summer seasons.
- Small business owners rely on the H-2B program because it is the only way they can legally hire workers for temporary and seasonal positions when they cannot find Americans to hire.
- Small and seasonal businesses prefer to hire American workers, and they do hire every qualified American who applies for a seasonal or temporary short-term position. Nevertheless, many positions remain unfilled, leaving these businesses desperately in need of workers. This is not surprising, since many Americans are unwilling to engage in low-skilled and semi-skilled labor, or to relocate for several months to remote locations, to fill available seasonal and short-term positions.
- Unlike the hiring of American workers, small business owners must go through a tough application process to hire foreign workers through the H-2B program. Employers must prove to State and US Departments of Labor that there are no available U.S. workers to fill vacant short-term positions.
- H-2B workers go home at the end of the season. They cannot, and do not, stay in the US permanently through this program.

Congress Must Act Now: Without immediate relief, small businesses across the US will suffer permanent harm.

- This year, the cap for the summer season was hit on January 2, 2008, meaning there are no more available H-2B visas for the rest of the fiscal year without a Congressional fix, putting America's small and seasonal businesses in dire straits.
- Hitting the cap so early in the year hurts all businesses with short-term needs, especially summer resorts throughout the US, the timber industry in the Northeast, fish and crab processors in the Southeast and Mid-Atlantic, and recreational facilities and tourism across the nation.
- Congress must provide H-2B relief now so that America's employers can get the seasonal temporary workers they need in time for this summer in order to become fully staffed and provide quality service.
- Without immediate access to more temporary H-2B workers, many small businesses will be extremely short-staffed this year and could be forced to close. For small businesses, relief must come now so that America's employers can get the seasonal temporary workers they need in time for this spring and summer.

Congress can and must provide short-term relief:

- **Small businesses need urgent Congressional action NOW**
- Given the failure to provide a permanent solution last year, Congress must pass short-term relief as soon as possible to save small businesses.
- An H-2B visa returning worker extension will go a long way in helping small and seasonal businesses survive in the short term. The extension would provide emergency relief by exempting from the cap H-2B returning workers who already have successfully participated in the program in one of the previous 3 years.

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- Time is of the essence. Without Congressional relief soon, many U.S. businesses will be forced to limit their services or close their doors permanently.
- Congress must therefore pass an H-2B returning worker exemption immediately.

Current Legislation:

- Short-term H-2B relief has been introduced in the House by Rep. Stupak (D-MI), and in the Senate by Sen. Mikulski (D-MD), as the **Save Our Small and Seasonal Businesses Act of 2007** (H.R. 1843/S. 988).
- Both of these bills would extend the exemption of returning temporary workers essential to small and seasonal businesses from the arbitrary numerical cap.