The REAL ID Act of 2005: Summary and Selected Analysis of Provisions Included in the Emergency Supplemental Appropriations Package (H.R. 1268)

TITLE I: AMENDMENTS TO FEDERAL LAWS TO PROTECT AGAINST TERRORIST ENTRY

Section 101—Preventing Terrorists from Obtaining Relief from Removal: This provision alters the standards and evidentiary burdens governing asylum applications, applications for withholding of removal, and other discretionary grants of relief from removal. Specifically, this section:

- Requires asylum applicants to demonstrate that one of the enumerated grounds was or will be "at least one central reason" for their persecution.
- Allows immigration judges to require credible asylum and withholding applicants to obtain ***corroborating evidence*** "unless the applicant does not have the evidence and cannot reasonably obtain the evidence". It makes the immigration judge's decision regarding the availability of corroborating evidence an administrative finding of fact, thereby limiting the ability of federal judges to reverse such decisions.
- Authorizes adjudicators, after considering the totality of circumstances and all relevant factors, to render adverse credibility determinations based on demeanor, candor, inherent plausibility, consistency of an applicant's written or oral statements (made at any time to any individual, whether or not under oath and whether or not the factor is material to the claim of asylum). However, it does authorize adjudicators to consider the circumstances under which such statements were made.
- Denies a presumption of credibility but, absent an explicit adverse credibility determination, accords the applicant a rebuttable presumption of credibility on appeal.
- Expands the aforementioned corroborating evidence and credibility standards to all other requests for relief from removal, including: applications for withholding or deferral of removal under CAT, cancellation of removal, VAWA cancellation, NACARA, HRIFA, Cuban Adjustment Act, voluntary departure, etc.
- Bars courts from reviewing any discretionary judgments, decisions, or actions, regardless of whether made in the context of removal proceedings.
- Repeals the provision enacted in the intelligence reform legislation mandating a study of vulnerabilities in our asylum system.
- Eliminates the annual cap on the number of asylees who are eligible to adjust their status to permanent residence and eliminates the annual cap on the number of

AMERICAN IMMIGRATION LAWYERS ASSOCIATION
918 F Street, NW Washington, DC 20004
Phone: (202) 216-2400 Fax: (202) 783-7853

AILA InfoNet Doc. No. 05050420. (Posted 05/04/05)

persons who can be granted asylum because they were subjected to coercive population controls.

Effective Dates: The provisions affecting the standard and burden of proof apply to applications made on or after the date of enactment. The provision affecting judicial review of decisions related to the availability of corroborating evidence applies to all cases in which the final removal order was issued before, on, or after the date of enactment. The provision affecting judicial review of discretionary administrative decisions applies to all cases pending before any court on, before, or after date of enactment.

Analysis: Terrorists, people who have persecuted others, people who have committed serious non-political crimes abroad, and people who pose a danger to the security of our country are already ineligible for both asylum and withholding of removal. This proposal therefore does nothing to enhance our security. It simply denies asylum to people who cannot prove one of the central motives of their persecutor.

It requires adjudicators making credibility determinations to consider the totality of circumstances and relevant factors but allows immigration judges to consider unreliable indicators such as demeanor and immaterial statements not made under oath. The "demeanor" of a person who has suffered torture or persecution has repeatedly been found to be a poor indicator of credibility. Victims of trauma often have a "flat" effect, and find it difficult to make eye contact or discuss the details of abuse. Demeanor is also culture-specific: in many cultures, avoiding looking one's interlocutor in the eye, particularly if the interlocutor is an authority figure, is a sign of respect. Moreover, in light of the trauma asylum applicants have experienced, inaccurate or inconsistent statements about minor details or dates unrelated to their claim for relief would be expected and should not serve as a basis for an adverse credibility determination.

Elimination of the annual cap on adjustment of status for asylees is a welcome and long overdue change. This measure also lifts the annual cap on the number of people who can be granted asylum as a result of having been subjected to coercive population control measures.

Section 102—Waiver of Laws Necessary for Improvement of Barriers at Borders: This provision amends the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) to provide the Secretary of Homeland Security with authority to waive ***all*** legal requirements the Secretary deems necessary, in his sole discretion, to expedite construction of security fences and barriers at the borders. Such decisions become effective upon publication in the Federal Register. Federal district courts are granted exclusive jurisdiction to hear claims arising from decisions by the Secretary to waive legal requirements. However, only claims or causes of action alleging constitutional violations will be entertained and only if such claims are filed within 60 days of the action or decision by the Secretary.

AILA InfoNet Doc. No. 05050420. (Posted 05/04/05)

Section 103—Inadmissibility Due to Terrorist and Terrorist-Related Activities: This provision significantly expands the terrorism-related grounds of inadmissibility. Specifically, this provision:

- Broadens the INA's definitions of "terrorist organization" and "engage in terrorist activity";
- Expands the grounds of inadmissibility based on endorsement of or support for terror-related activity, "terrorist organizations" or members of a terrorist organization;
- Establishes a new ground of inadmissibility based on receipt of military-type training.

Effective Date: These amendments apply retroactively.

Analysis: See Section 105 below.

Section 104—Waiver for Certain Grounds of Inadmissibility: This provision accords the Secretary of State and Secretary of Homeland Security sole discretionary authority to waive the terrorist-related grounds of inadmissibility for an alien who:

- Is a representative of a political, social, or other group that endorses or espouses terrorist activity;
- Endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;
- Affords material support to an organization or individual who has engaged in terrorist activity; or
- Is a member of a group that has a subgroup which engages in certain enumerated activities.

Section 105—Removal of Terrorists: This provision makes all of the terrorism-related grounds for removal coextensive with the grounds for inadmissibility, as newly expanded by Section 103.

Effective Date: This expansion of the grounds of removal applies retroactively.

Analysis: Taken together, Sections 103 and 105 make it a deportable offense to:

- Endorse "terrorist activity," broadly defined as virtually any use of a weapon or threat to use a weapon against person or property.
- Urge support for or endorse a "terrorist organization," even more broadly defined as any two or more people who have ever engaged in such activity.
- Support any "terrorist organization" or a member of any terrorist organization even where the individual can prove that his activities did not further any terrorist activity whatsoever.

AILA InfoNet Doc. No. 05050420. (Posted 05/04/05)

- Be the spouse or minor child of an individual meeting the above criteria (with some temporal limitations), even if the spouse or child had no knowledge of the association or activity.

These provisions impose "guilt by association," rendering people deportable for wholly lawful and peaceful activity if such activity supports any group that has engaged in the use of weapons or has threatened to use weapons. Anyone who has given money to entities such as a hospital or school that has an association in any way with a group that uses guns (or threatens to use guns) would be deportable. The proposed measures apply retroactively and would render deportable individuals who provided support to a group or a member thereof, whether or not the group was a designated terrorist organization.

Elimination of the requirement that the group be a "designated" terrorist organization vitiates an agreement brokered during PATRIOT Act debate. Under the PATRIOT Act, a foreign national who supports a designated terrorist group already is automatically deportable. A foreign national who supports a non-designated group that has engaged in 'terrorism' (including any use or threat to use a weapon) also is deportable but ONLY if he supported the group's "terrorist activity." Under the REAL ID Act, the individual is deportable unless he can prove by clear and convincing evidence that he neither knew nor should have known that the organization is a "terrorist organization."

Section 106—Judicial Review of Orders of Removal: This provision, among other things, significantly expands the current restrictions on judicial review contained in the Immigration and Nationality Act (INA). Specifically, this section:

- Eliminates statutory and non-statutory habeas corpus review wherever judicial review is eliminated throughout the INA.
- Excepts from the bars on judicial review "constitutional claims or questions of law," but only when such review is sought pursuant to a petition for review before the U.S. Court of Appeals.
- Makes petitions for review before a U.S. Court of Appeals the sole and exclusive means for judicial review of claims under the Convention Against Torture (CAT).
- Mandates transfer to the various U.S. Courts of Appeals all cases challenging final orders of removal that are pending in the Federal District Courts on the date of enactment.

Effective Date: The amendments to the judicial review provisions take effect on the date of enactment and apply to cases in which the final administrative order was issued before, on, or after the date of enactment.

Analysis: Further impediments to meaningful judicial review are controversial, have not been subject to any hearings, and will not make us safer. This provision eliminates the critical role of habeas corpus review as the ultimate safeguard to correct unlawful government actions. The changes effected by this provision may be

AILA InfoNet Doc. No. 05050420. (Posted 05/04/05)

unconstitutional and will certainly be challenged in the federal courts triggering years of unnecessary litigation.

Habeas review is the only lifeline for thousands of immigrants who must turn to the courts when the immigration agency acts illegally and overzealously to deport and detain them. Without habeas, the courts will no longer be empowered to prevent illegal detentions and removals. Habeas remains as necessary as it has always been to safeguard real access to the courts. By eliminating habeas, this provision gives the immigration agency unchecked power to deport and detain many longtime residents of this country. Such draconian measures have nothing to do with enhancing our security and needlessly undermine our commitment to core principles of fairness.

TITLE II: IMPROVED SECURITY FOR DRIVER'S LICENSES AND PERSONAL IDENTIFICATION CARDS

Section 201—Definitions: This section provides definitions of terminology used throughout Title II.

Section 202—Minimum Document Requirements and Issuance Standards for Federal Recognition: This provision prohibits federal agencies from accepting for any official purpose a state-issued identification card or driver's license that does not meet numerous minimum document requirements and issuance standards, including verification of immigration status. Official purpose includes, but is not limited to, accessing federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and any other purposes designated by DHS.

Applicants must prove that they are citizens, nationals or have lawful immigration status in the U.S. Not every immigration status is included in the list of immigration statuses that establish eligibility for a license.

Citizens, nationals, aliens lawfully admitted for permanent or temporary residence, conditional permanent residents, asylees and refugees may receive a driver's license. The following categories of persons may only receive a temporary driver's license: those with a valid, unexpired non-immigrant visa or nonimmigrant visa status, a pending application for asylum, a pending or approved application for temporary protected status, approved deferred action status, or a pending application for adjustment of status to lawful permanent residence or conditional resident status.

The validity period of a temporary driver's license or identification card may not exceed the period of authorized stay. For others eligible for a temporary license but whose stay does not have an expiration date, the validity period of driver's licenses and identification cards shall not exceed one year.

Among other things, this provision requires states to verify with the issuing agency the issuance, validity, and completeness of each document required to be presented. States may not accept foreign documents other than passports to satisfy the minimum issuance

AILA InfoNet Doc. No. 05050420. (Posted 05/04/05)

standards, including proof of identity, legal name, and date of birth. In addition, states must enter into a Memorandum of Understanding with DHS under the SAVE Program no later than September 11, 2005 to verify the legal presence of all noncitizen driver's license applicants.

The measure provides that if States issue alternative identification documents that do not comport with the requirements, these cards must use a unique design or color indicator and clearly state that the cards may not be accepted by any federal agency.

DHS is assigned responsibility for issuing implementing regulations in consultation with the Department of Transportation and the states. States will be required to provide all other States with electronic access to information contained in their respective motor vehicle databases.

Effective Date: These provisions become effective three years after the date of enactment.

Analysis: This set of provisions usurps the states' authority to set eligibility requirements and imposes a long list of "minimum" federal standards, including restrictions on immigrants' access to driver's licenses. Not every lawfully present immigrant will be eligible for a driver's license. In addition, many lawfully present immigrants will be unable to obtain a license because they will be prevented from presenting foreign documents other than a passport to prove identity, legal name, and date of birth. Untrained DMV employees will be required to interpret immigration law Errors and delays in entering data in immigration records, and lack of staffing and resources required by DHS to verify data will result in denials of licenses to many.

Preventing immigrants from obtaining driver's licenses undermines national security by pushing people into the shadows and fueling the black market for fraudulent identification documents. Moreover, it undermines the law enforcement utility of Department of Motor Vehicle databases by limiting rather than expanding the data on individuals residing in a particular state. Perhaps more to the point, it is clear from the 9/11 and Terrorist Travel staff report that the proposed restrictions would not have prevented a single hijacker from obtaining a driver's license or boarding a plane.

The staff report correctly points out that some of the hijackers were mistakenly issued valid visas or lawfully admitted to the U.S. The rest were here legally. All, therefore, had the immigration documents necessary to prove legal immigration status and that status would have been verified by federal authorities if checked. Indeed, five of the terrorists fraudulently obtained their licenses by falsely claiming state residency, which is different from legal residency for immigration purposes. States have since tightened requirements for proof of state residency to correct this deficiency in their laws. Moreover, the terrorists did not need U.S.-issued driver's licenses to board the planes on September 11; they had foreign passports that allowed them to board

AILA InfoNet Doc. No. 05050420. (Posted 05/04/05)

airplanes. Use of foreign passports to board airplanes would still be permitted under this provision.

Section 203—Trafficking in Authentication Features for Use in False Identification Documents: This provision modifies federal criminal code provisions related to trafficking in authentication features. It also requires DHS to enter into the appropriate aviation security screening database the background information of any person convicted of using a false driver's license for the purpose of boarding an airplane.

Section 204—Grants to States: This provision authorizes the Secretary of Homeland Security to make grants to states complying with the provisions of this title and authorizes appropriations necessary for such grants for fiscal years 2005 through 2009.

Section 205—Authority: This provision accords the Secretary of Homeland Security, in consultation with the Secretary of Transportation and the States, the authority to issue regulations, certify compliance, and issue grants pursuant to this title.

Section 206—Repeal: This section repeals Section 7212 (the driver's license and personal identification provisions) of the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458).

Section 207—Limitation on Statutory Construction: This provision clarifies that nothing in this title affects the authorities or responsibilities of the Secretary of Transportation under Title 49 of the U.S. Code.

TITLE III: BORDER INFRASTRUCTURE AND TECHNOLOGY INTEGRATION

Section 301—Vulnerability and Threat Assessment: This section requires DHS to study (and report to Congress on) the technology, equipment and personnel needed to address security vulnerabilities for each CBP field office with responsibility over any stretch of U.S. borders with Canada and Mexico. It also authorizes appropriations necessary to carry out recommendations made in the report for fiscal years 2006-2011.

Section 302—Use of Ground Surveillance Technologies for Border Security: This section requires DHS, within 180 days of enactment, to develop a pilot program to utilize or increase utilization of ground surveillance technologies for border security. One year after implementation of the program, DHS is required to submit a report to Congress.

Section 303—Enhancement of Communications Integration and Information Sharing on Border Security: This section requires DHS and other appropriate agencies to develop and implement, within 180 days of enactment, a plan to improve communications systems between and among the departments and agencies of the federal, state, and local governments.

AILA InfoNet Doc. No. 05050420. (Posted 05/04/05)

AILA InfoNet Doc. No. 05050420. (Posted 05/04/05)