AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Statement of the American Immigration Lawyers Association

Submitted to the Senate Committee on Homeland Security and Governmental Affairs Hearing: "The 2014 Humanitarian Crisis at Our Border: A Review of the Government's Response to Unaccompanied Minors One Year Later"

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As the national bar association of more than 14,000 immigration lawyers and law professors, the American Immigration Lawyers Association (AILA) respectfully submits this statement for the record.

During the summer of 2014, the United States experienced a peak in the number of unaccompanied children and families from El Salvador, Guatemala and Honduras apprehended at our southwestern borders. Today, the life threatening dangers these refugees face in these Northern Triangle countries of Central America have not diminished. Recent United Nations High Commissioner for Refugees (UNHCR) statistics show a 1,185 percent increase since 2008 in asylum applications by Central Americans to countries in regions other than the U.S.

Despite initially calling the situation "an urgent humanitarian crisis" in early June 2014, the Obama Administration's response to the regional refugee situation quickly turned toward dramatic enforcement measures such as the massive expansion of family detention. The Administration also began exploring ways to circumvent U.S. protection standards and to expedite the processing and removal of unaccompanied alien children (UACs).[1] Since that summer, several legislative proposals that would roll back critical legal protections for unaccompanied alien children – such as the misnamed "Protection of Children Act" (H.R. 5143) introduced in 2015 by Representative John Carter (TX-31) – have been introduced but have not passed.

Existing U.S. legal standards protecting unaccompanied children, principally embodied in the 2008 Trafficking Victims Protection Reauthorization Act (TVPRA) and the *Flores Settlement Agreement*, are among the most carefully developed in the world. Compromising these protections would harm vulnerable child victims of violence. It would result in children who are eligible for, and desperately need, humanitarian protection in the United States being sent back to the violence they escaped. Our nation should not scale back its protections for vulnerable

[1] June 30, 2014 Letter from President Obama to Congress, available at www.aila.org/uac.

children. The situation in the Northern Triangle presents an opportunity for the United States to demonstrate its leadership and affirm its commitment to humanitarian and child protection.

That historical commitment is being shaken to its core by the Obama Administration's family detention policies. The government's own data show that 88 percent of families are demonstrating that they are likely to succeed on their asylum claims based on the extreme violence and persecution they have personally endured. The detention of traumatized children and mothers profoundly impacts their emotional and physical well-being, with enduring consequences. Family detention is not consistent with our nation's most fundamental values and must end. There is no justification for it, and there is no excuse.

AILA's Recommendations on Legal Standards and Protections for Unaccompanied Children

- Neither Congress nor the administration should extend the "contiguous country" process currently used for Mexican children to children from non-contiguous countries. Applying the contiguous country process, or elements of it, to children from other countries would compromise the important protections the TVPRA provides to ensure physical safety and proper screening for humanitarian protection.

- As specified in statute, every unaccompanied child should have the opportunity to consult with legal counsel and appear before an immigration judge in removal proceedings before he or she is deported. Summary removal procedures, such as expedited removal or pre-hearing voluntary departure, should never be used for children.

- The Department of Justice Executive Office for Immigration Review (EOIR) should be funded to hire enough judges and staff so it can provide prompt hearings for unaccompanied children without compromising standards of due process and fairness. With about 350,000 cases in the current EOIR backlog, scheduling delays are a leading reason cases cannot move forward promptly. Under no circumstances should pressure be placed on immigration judges to handle cases at a faster rate by denying legitimate requests for continuances.

- No child should face deportation alone. But unfortunately, most still do. The government should provide counsel for children in removal proceedings when they cannot afford a private attorney. The lack of counsel compounds the vulnerability of children as they move through our nation's complicated removal system. Even children who have survived trauma or persecution or live in fear of return are often left to navigate the laws on their own and present their claims without any legal assistance.

- Know-your-rights and legal screenings should be sufficiently funded to ensure that every child and adult receives the benefits of these programs. Although not a substitute for legal representation, these programs are the only opportunity for most individuals – including children – to obtain information about their rights and responsibilities under the law, information vital for them to be able to make informed decisions about how to proceed. Research shows that EOIR's Legal Orientation Program (LOP) participants move through the immigration court process an average of 12 days faster than detainees who do not have access to LOP, resulting in significant savings for both the immigration court and the Department of Homeland Security (DHS) immigration detention system.

- The Asylum Division of the United States Citizenship and Immigration Services (USCIS) should be funded to hire more asylum officers to promptly adjudicate asylum applications. Asylum officers have better training than CBP and Immigration and Customs Enforcement (ICE) officers in reviewing the petitions of vulnerable individuals. Currently, the Asylum Division has a substantial backlog in asylum applications, and increasing its capacity would improve overall efficiency in the process.

- Care, screening and protection for Mexican children should be brought on par with all other unaccompanied children. Mexican children are treated differently under the TVPRA and face nearly automatic repatriation, with limited screening for relief, without the advice of counsel. Their deportation decisions are not made by immigration judges, but by CBP officers and agents. All unaccompanied children should be screened by a professional with training in child welfare, trauma, counseling, and international humanitarian and immigration law, and should appear in removal proceedings before an immigration judge.

- Although the administration is facing enormous operational pressures, it should ensure that pressure is not placed on these vulnerable children to make quick decisions that may jeopardize their well-being. Many of the unaccompanied children who come to the border have been trafficked, persecuted in their home countries, or subjected to domestic violence, abuse, and neglect. These traumatized children may require medical care and even counseling before they can share intimate details of their suffering and appear before a judge.

- Unaccompanied children should be cared for and housed in the least restrictive environment, as mandated by law. They should be separated from non-relative adults while in the government's physical custody. An unaccompanied child should not be held in secure facilities unless a determination is made that he or she poses a danger to himself, herself or others.

Legislative Proposals to Downgrade Due Process for Child Victims

Since last summer, several bills have been introduced that would subject all unaccompanied children to the same expedited screening that is currently applied to those unaccompanied children who come from "contiguous countries" (Mexico/Canada). A fundamental flaw in this mechanism is the reliance on Border Patrol officials to identify trafficking, persecution and other refugee claims. UNHCR has concluded that this screening mechanism--as is currently applied to Mexican children--is ineffective and often results in the return of children to situations of trafficking and persecution.

Currently, the TVPRA requires that unaccompanied children from non-contiguous countries be transferred out of the custody of the Department of Homeland Security (DHS) and into the custody of the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services (HHS) within 72 hours of identification. ORR screens the children for medical and other immediate needs as well as for vulnerability factors such as trafficking or fear of persecution.

By contrast, under current law Mexican children face nearly automatic repatriation, with limited screening for relief that takes place within 48 hours (but typically 12 hours) of apprehension, and without the advice of counsel. Their deportation decisions are not made by immigration judges, but by Customs and Border Protection (CBP) officers and agents. No matter their country of origin, traumatized children cannot be expected to express to an armed Border Patrol agent the details of their trafficking experiences. For any unaccompanied child, CBP facilities are not a suitable environment for interviewing minors, nor are CBP officers and agents the best officials to conduct interviews about sensitive topics such as persecution, trafficking, and other possible trauma.

Research demonstrates that Border Patrol screenings fail to protect even *adults* who have legitimate fears of returning home. In 2005, the bipartisan United States Commission on International Religious Freedom (USCIRF) conducted an extensive study of Border Patrol's use of expedited removal and found serious flaws in the protections afforded to legitimate asylum seekers through the expedited removal process.[2] In particular, it found that Border Patrol was not following proper procedures in screening and referring individuals for credible fear interviews. In 2014, AILA and other organizations submitted a complaint to the DHS Office for Civil Rights and Civil Liberties (CRCL) citing many case examples of individuals in whose cases CBP never asked about fear of return in the first place or ignored statements of fear.[3] In response, CRCL has opened an investigation.

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[2] United States Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal* (February 8, 2005), *available at* http://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal.

[3] National Immigrant Justice Center et al., *Complaint re: inadequate U.S. Customs and Border Protection (CBP) screening practices block individuals fleeing persecution from access to the asylum process*, *available at* http://www.aila.org/infonet/aila-nijc-and-others-file-crcl-complaint.

New findings published in May 2015 by the Office of the Inspector General (OIG) for the Department of Homeland Security (DHS) found that CBP uses Operation Streamline to refer people who are known to have a fear of persecution and are seeking asylum to the Department of Justice (DOJ) for criminal prosecution for illegal entry and reentry—a practice that is in gross violation of asylum law.[4]

Instead of lowering standards for children from noncontiguous countries, AILA recommends that Congress raise the standards for screening and protection for all unaccompanied children.

- All unaccompanied children should be screened by a professional with training in child welfare, trauma, counseling, and international humanitarian and immigration law.

- Protocols for screening unaccompanied children could be improved upon by adopting best practices from the criminal justice and child welfare fields which have developed comprehensive protocols for rape, sexual assault and child abuse cases. These criminal justice and child abuse practices are designed to ensure that complainant victims are given adequate time to report such incidents given the trauma victims suffer and the need for time to recover emotionally and physically. Interviews should be done in a safe setting and manner that minimizes the likelihood of re-traumatizing the victim.

- All children should be given the opportunity to tell their story in an environment where the full and fair adjudication of their protection claims can take place before a neutral, trained adjudicator.

- All children should be provided counsel in removal proceedings when they cannot afford a private attorney or obtain pro bono counsel. Children who have survived trauma or persecution or live in fear of return should not be left to navigate the laws on their own. The lack of counsel compounds the vulnerability of children as they move through our nation's complicated removal system.

Expedited Court Hearings and *In Absentia* Removals of UACs

In the summer of 2014, the Department of Justice Executive Office for Immigration Review, which has jurisdiction over the immigration courts and immigration judges, announced that it would begin to prioritize hearings for recent border crossers, including unaccompanied children.[5] Immigration courts were directed to ensure that recently-arrived children have their first master

[4] DHS OIG, Streamline: Measuring Its Effect on Illegal Border Crossing (May 15, 2015), *available at* http://www.aila.org/infonet/dhs-oig-report-cbp-effect-illegal-border-crossing.

[5] Department of Justice, *Department of Justice Actions to Address the Influx of Migrants Crossing the Southwest Border in the United States* (undated), *available at* http://www.aila.org/infonet/eoir-fact-sheet-priorities-addressing-border-surge

calendar hearing date within 21 days of the date that their notice to appear (NTA) is filed with the immigration court.[6] Many immigration courts, including those with the highest volumes of cases, have responded to these directives by establishing specialized, fast-track dockets for handling children's cases.

The expedited processing of unaccompanied children's legal cases has had serious consequences. Legal service providers have observed significant numbers of children who have either received defective notice of their removal proceedings and upcoming hearing dates, or who have received no notice at all. As a result, immigration judges have issued numerous removal orders against children without their presence or knowledge ("*in absentia*").

In absentia orders should not be issued in children's cases when they have not received adequate notice of their immigration proceedings. Counsel should be provided to all children and families in removal proceedings; mechanisms to ensure adequate notice in each case should be put in place; faulty *in absentia orders* that have been issued against children should be reopened; and Congress should fully fund the immigration court system so that hearings for all respondents can be held in a timely manner.

While some have claimed that upwards of 90 percent of these children have not shown up for their hearings, this is far from accurate. The fact is that the majority of children continue to show up for court proceedings–almost 80 percent.[7] Historically, that number jumps substantially for children who have legal counsel—92.5 percent in cases completed from fiscal year 2005 through June 2014.[8]

Conclusion

The current legal standards protecting unaccompanied children are among the most carefully developed in the world. Our nation should not scale back its protections for vulnerable children. The situation in the Northern Triangle presents an opportunity for the United States to demonstrate its leadership and affirm its commitment to humanitarian and child protection.

Thank you for your attention to this important matter. If you have questions or concerns, feel free to contact Gregory Chen, AILA's Director of Advocacy, gchen@aila.org, 202/507-7615.

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[6] *See* David Rogers, *Migrants' right to counsel argued*, Politico (Sept. 3, 2014) (quoting counsel for the government at oral argument in *J.E.F.M. v. Holder* as stating existence of 21-day policy).

[7] EOIR data from July 18, 2014 through May 26, 2015, obtained by the American Immigration Council, indicates that 78.8 percent of unaccompanied children, or 20,324 children out of 25,777, have likely appeared for their first hearing. This number is calculated by subtracting the number of *in absentia* orders issued (5,453) from the total number of master calendar hearings scheduled for unaccompanied children, where the date has passed (25,777).

[8] See http://immigrationpolicy.org/just-facts/taking-attendance-new-data-finds-majority-children-appear-immigration-court.