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Statement of the American Immigration Lawyers Association

Submitted to the Committee on Appropriations of the U.S. Senate
July 10, 2014 Hearing on the "Review of the President's Emergency Supplemental Request for
Unaccompanied Children and Related Matters"

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The American Immigration Lawyers Association (AILA) submits this statement to the Subcommittee on Immigration and Border Security. AILA is the national association of immigration lawyers established to promote justice and advocate for fair and reasonable immigration law and policy. AILA has over 13,000 attorney and law professor members.

Since 2011, the United States has experienced a dramatic increase in the number of unaccompanied children from El Salvador, Guatemala and Honduras apprehended at our southwestern borders. The escalation in the movement of unaccompanied alien children (UACs) is a regional humanitarian crisis driven primarily by the rapid growth in crime, violence and poverty that has affected the region for many years. The number of unaccompanied children apprehended by U.S. Customs and Border Protection (CBP) jumped from 17,775 in FY2011 to 41,890 in FY2013. Estimates are that more than 90,000 unaccompanied children will enter the United States in the current fiscal year.

What is happening on our southwestern border is not merely an American problem but a humanitarian crisis that affects the entire Central American region. Already the UN High Commissioner for Refugees (UNHCR) reports that Mexico, Panama, Nicaragua, Costa Rica, and Belize have all experienced a spike in migrants coming to their countries to seek asylum. UNHCR reports that from 2008 to 2013 there was a 712 percent increase in asylum applications from nationals of El Salvador, Guatemala and Honduras. By all accounts it is generating such substantial numbers of people fleeing for reasons of violence and fear that it should be deemed a refugee crisis.

On June 2, 2014, calling the situation "an urgent humanitarian crisis," President Obama announced that coordination of the U.S. response to this crisis would be done by the Federal Emergency Management Agency (FEMA). On July 8, the White House released a summary of its emergency supplemental appropriations request to Congress of \$3.7 billion to respond to the regional humanitarian and refugee crisis.

At the outset, AILA strongly recommends that the supplemental request not be used to authorize new authority to erode legal protections for children. That could result in the immediate and tragic reality of children being thrown back into dangerous conditions where the potential for violence and abuse is high. AILA specifically opposes the curtailment of existing statutory protections for unaccompanied children, particularly provisions set forth in the bi-partisan Trafficking Victims Protection and Reauthorization Act of 2008 (TVPRA), which was unanimously approved in the Senate. The standard of care and protection of this vulnerable population, developed over the past two decades, must be safeguarded and should not be undermined during this temporary humanitarian

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crisis. A direct response to the factors driving these children out of their countries would better address and stem the migration of these children.

AILA is pleased to see that the President's request seeks substantial additional funding for the Department of Health and Human Services (HHS) to address the shelter, custody and processing of unaccompanied children. The request also states that it will maintain services for refugees which are served by the same agency within HHS that has responsibility for unaccompanied children, the Office of Refugee Resettlement (ORR). This commitment is critical since ongoing and future services for refugees should not be compromised by diversion of resources to this more recent humanitarian crisis. AILA is concerned that the \$300 million request for funding to address the root causes of the humanitarian crisis appears inadequate considering the overwhelming needs.

Border security and enforcement

The supplemental request includes an additional \$1.5 billion for ICE and CBP to engage in apprehension, detention, and removal activities. While AILA recognizes the importance of combatting smuggling and criminal enterprises, especially for the purpose of maintaining public safety, the amount requested is excessive and unnecessary given the unprecedented level of funding already dedicated to DHS for immigration enforcement and border security which has resulted in a dramatic rise in enforcement. From 2000 to 2012 immigration enforcement funding increased to \$18 billion, more than 350 percent growth over that period.¹ Immigration detention continues to rise and now totals about 430,000 individuals each year, at a cost of \$2 billion annually. Removals are at a record high as are the percentages of removals that are expedited removals. Federal criminal prosecutions of immigration-related status offenses are also at a high, up 468 percent from FY2003. Recognizing these continued investments in border security and enforcement, a substantial "surge" in enforcement resources would be an unwise use of finite taxpayer resources.

Detention and Custody

Federal law requires that unaccompanied children be cared for in the least restrictive setting that is in the child's best interests. Until the number of UAC increased dramatically this year, the federal government had typically placed children in federally contracted shelter facilities and where possible identified suitable relatives to serve as guardians. That practice is the most consistent with national and international child welfare standards and is far less expensive than the federal taxpayer shouldering the cost of institutional care for children.

AILA is deeply concerned about the repeated emphasis in the supplemental request on detention for families. DHS should not expand the use of detention for families as a means to address the humanitarian crisis or to deter future arrivals as the holding of families in detention centers is generally inappropriate, opens the door for abuses and inhumane conditions, and should only be used in extremely rare circumstances. In 2009, Immigration and Customs Enforcement (ICE) was forced to close a Texas family detention facility after being sued for abuses and poor conditions. Family detention is now used only on a limited basis. Detention hinders the ability of children and families to gain access to counsel and compounds trauma which in turn severely impacts their ability to seek and receive protection. The administration should not only expand, but switch completely to, alternatives to detention, which are far more cost-effective and humane.

¹ Migration Policy Institute. "Immigration Enforcement in the United States: The Rise of a Formidable Machinery" January 2013



Screening

Currently law requires that unaccompanied children from non-contiguous countries be transferred to ORR 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. Although the supplemental funding request does not mention changing the screening process for unaccompanied children, some lawmakers have called for authorizing legislation that would apply the process used for children from contiguous countries (primarily Mexico) to children from non-contiguous countries. Such a change raises serious humanitarian and child welfare concerns. Currently, Mexican children are treated differently under the TVPRA and face nearly automatic repatriation, with limited screening for relief that takes place within 48 hours of apprehension, and without the advice of counsel. Their deportation decisions are not made by immigration judges, but by CBP officers and agents.

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. All unaccompanied children should be screened by a professional with training in child welfare, trauma, counseling, and international humanitarian and immigration law. Having USCIS asylum officers conduct the initial screening would be an improvement compared to CBP officers doing screening, but this step would not be sufficient to ensure that children are not forced back to countries where they may experience further victimization and danger.

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. Moreover, such interviews are done in safe setting and manner that minimizes the likelihood of re-traumatizing the victim.

Nearly all unaccompanied children have undergone a lengthy and difficult, likely harrowing, journey to the United States. They very likely have experienced violence, trauma, persecution, or been trafficked. Like sexual assault or child abuse victims, unaccompanied children may require several days or weeks before they are able to adjust to a new environment and speak about their experience. Accordingly, the 48-hour time frame during which CBP interviews these children under the contiguous country processing method will compromise the ability of most if not all children from having meaningful access to legal and humanitarian protection. Efforts to expedite processing should not rush children to explain their situation until their immediate medical and psychosocial needs are met and until they are in a safe environment.

Finally, rather than water down the legal protections for children coming from Central America that were enacted by a bi-partisan and unanimous Senate in 2008, Congress should strengthen the process for screening Mexican children and bring it on par with what is required for children from non-contiguous countries. There is no valid reason for treating vulnerable unaccompanied children differently based on their country of origin. All children should receive careful and robust screening and protection to ensure their safety and well-being.



Ensuring Meaningful Access to Asylum, Humanitarian Relief and Due Process

While the influx of unaccompanied children compels the administration and Congress to act swiftly, consideration should be given to ensure that vulnerable children are not pressured to make quick decisions that may jeopardize their well-being. 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.

The immigration courts have chronically been underfunded especially when compared to the dramatic increase in funding for immigration enforcement in the past decade. As mentioned previously, immigration enforcement funding has increased exponentially in the past decade. By comparison, immigration court funding grew from \$150 million to \$300 million during from fiscal year 2000 to 2012. The disproportionate funding given to enforcement has resulted in such dramatic growth in enforcement that the courts are unable to keep pace and have a backlog of about 350,000 cases. The underfunding of the courts has resulted from decisions made by congressional appropriators and is the principal reason the processing of immigration cases suffers from substantial delays. Congress should make a concerted effort now to correct that resource problem.

The Department of Justice Executive Office for Immigration Review (EOIR) should be adequately funded to hire enough judges and staff to not only provide hearings for children without scheduling delays, but to reduce the existing backlog and to reduce the need for video hearings that can curtail children's rights to properly present their cases. The supplemental funding request for immigration judges, however, is insufficient. If 75 additional judge teams are necessary to adequately respond to the crisis, which appears to be the case from the supplemental request, then 75 teams should be requested instead of repurposing the 35 new teams already requested for Fiscal Year 2015, which could exacerbate the court backlogs already affecting immigrants nationwide.

The Asylum Division of the United States Citizenship and Immigration Services (USCIS) should also be funded to hire more asylum officers to promptly adjudicate asylum applications. However, any proposal to provide children and families with prompt hearings cannot compromise standards of due process and fairness. Summary removal procedures, such as expedited removal or pre-hearing voluntary departure, should never be used for children, and AILA opposes any authorizing legislation that would do so.

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. AILA recommends that all children should be provided counsel in removal proceedings when they cannot afford a private attorney or obtain pro bono counsel. In addition, EOIR's Legal Orientation Program (LOP) and Legal Orientation Program for Custodians of Unaccompanied Alien Children (LOPC) should be sufficiently funded to ensure that every child receives the benefits of these programs. While not a substitute for legal representation, it is the only opportunity for most unaccompanied children to obtain information about their rights and responsibilities under the law, information vital for them in any proceedings. AILA is pleased that the supplemental request acknowledges the need for funding legal counsel and LOPs. However, AILA remains concerned that the requested amount – \$15 million for legal representation and \$2.5 million for LOP – is insufficient to meet the current needs.