

The background of the cover features a large, circular seal of the Department of Homeland Security. The seal is rendered in a light, semi-transparent style, showing an eagle with wings spread, holding arrows, and a shield on its chest. The words "DEPARTMENT OF" are visible at the top and "SECURITY" at the bottom of the seal's border.

# DHS PROGRESS REPORT

## THE CHALLENGE OF REFORM

AN ANALYSIS OF IMMIGRATION POLICY IN  
THE FIRST YEAR OF THE OBAMA ADMINISTRATION

MARCH 2010

# **DHS PROGRESS REPORT: THE CHALLENGE OF REFORM**

## **AN ANALYSIS OF IMMIGRATION POLICY IN THE FIRST YEAR OF THE OBAMA ADMINISTRATION**

MARCH 2010

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### **ABOUT SPECIAL REPORTS ON IMMIGRATION**

The Immigration Policy Center's Special Reports are our most in-depth publication, providing detailed analyses of special topics in U.S. immigration policy.

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# EXECUTIVE SUMMARY

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March 2010 marks the seventh anniversary of the Department of Homeland Security (DHS) and its immigration agencies: Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). It also corresponds to the due date set by Secretary Janet Napolitano for completion of a sweeping internal review of DHS. One way to evaluate the progress that DHS has made on immigration during the past year is to compare its record with the recommendations made to the Obama Transition Team's immigration-policy group. The "Transition Blueprint," submitted to the Transition Team by immigration policy experts, advocates, academics, and community members, focused on administrative improvements that would instill fairness, create efficiencies, and build support for comprehensive immigration reform in several key areas: due process, enforcement, detention, family immigration, naturalization, immigrant integration, and asylum. This comparison reveals that DHS is a department caught between entrenchment on enforcement and the competing priorities of new reforms. While DHS has failed to meet some key expectations in these areas, it has also engaged thoughtfully and strategically on others, and has made some fundamental changes in how it conducts its immigration business.

## **Reform: New Initiatives, But Direct Impact Remains to Be Seen**

- **Emergency Response** – DHS demonstrated its capacity to deliver a pragmatic and compassionate response to a humanitarian emergency following the devastating earthquake that struck Haiti on January 12, 2010. Secretary Napolitano quickly designated Haiti for Temporary Protected Status (TPS), enabling tens of thousands of Haitians who were already present in the United States to remain in the country with temporary employment authorization and without the threat of removal. DHS also granted humanitarian parole to nearly 500 orphans, and has agreed to expedite and give favorable consideration to certain immigration applications by Haitian nationals. USCIS took extra measures to maximize outreach to the Haitian community in the United States.
- **Effective Assistance of Counsel** – In June 2009, Attorney General Eric Holder took a positive step toward advancing an individual's right to effective counsel in a removal hearing when he vacated the order in *Matter of Compean* and overturned the Board of Immigration Appeals (BIA) decision to limit noncitizens' ability to make claims of ineffective assistance of counsel in immigration proceedings. Thus far, however, no regulations implementing the decision have been proposed.
- **Worksite Raids** – DHS announced that ICE will no longer prioritize large-scale worksite raids, and will focus its resources on targeting employers who knowingly hire unauthorized workers rather than on the workers themselves.
- **Asylum and Refugees** – Following a 14-year legal battle, DHS supported a grant of asylum for Rodi Alvarado (*Matter of R-A-*) based on her past experience as a victim of domestic violence, creating a path for women who have suffered domestic violence to establish eligibility for asylum.
- **SSA No-Match Letters** – Effective November 6, 2009, Secretary Napolitano rescinded the "No-Match Rule," a 2007 regulation that would have turned Social Security Administration (SSA) no-match letters into immigration-enforcement tools.

- **Detention** – ICE prioritized detention reform in 2009, specifically addressing issues of oversight, alternatives to detention (ATDs), healthcare, and parole. While advocates have welcomed these initiatives, they continue to look for meaningful changes in the day-to-day management of facilities and decisions to detain.
- **Immigration Benefits** – USCIS created an Office of Public Engagement to provide more meaningful input into policy discussions by stakeholders. It continued to reduce backlogs in many application categories, although others remain unacceptably high.
- **Naturalization and Immigrant Integration** – USCIS awarded \$1.2 million to 13 community-based organizations nationwide, which grantees estimate will provide direct citizenship services to more than 4,400 legal permanent residents and outreach to approximately 50,000 immigrants. USCIS also launched a public service campaign to promote volunteerism and the New Americans Project with foreign-language broadcasts to reach 8 million people.
- **Comprehensive Immigration Reform** – The Obama Administration has consistently reaffirmed its support for comprehensive immigration reform, although not always at the pace or with the urgency demanded by the public. The White House held two key summits—one with Members of Congress and one with stakeholders—in the summer of 2009 and designated Secretary Napolitano to lead a task force aimed at enacting immigration reform legislation.

### **Enforcement: Changing Emphasis without Changing Gears**

- **Due Process** – Due process is an area in which DHS has made little tangible progress. For example, while the registration component of NSEERS, a special registration program targeted at men from predominantly Muslim countries, was suspended in 2003, applicants applying for benefits continue to be plagued by mistakes made during the registration process, affecting their ability to adjust status or naturalize. The immigration court system remains overburdened, access to counsel is limited, and a streamlined appeals process offers inadequate review for many claims.
- **Enforcement Priorities** – While DHS professes to have re-focused its attention on non-compliant employers in the workplace and prosecuting noncitizens with serious criminal convictions, data indicates that employers and violent criminals make up a small percentage of enforcement targets.
- **State and Local Partnerships** – DHS has continued to expand its partnership with state and local law-enforcement agencies, particularly through the Secure Communities and 287(g) programs. DHS claims that these programs target “criminal aliens.” However, people identified by these programs include large numbers of individuals with no criminal history, individuals charged (but not convicted) of crimes, and persons “identified” but not found to be deportable.
- **Border Enforcement** – DHS has continued to make use of Operation Streamline, a zero-tolerance policy along the southern border which requires mandatory criminal prosecution of non-violent border crossers, clogging federal courts and draining resources away from prosecuting more serious criminals involved in drugs, weapons, and organized crime. It remains unclear whether Operation Streamline has any deterrent effect on migrants crossing the border.
- **E-Verify** – Despite the fact that immigrant advocates and others have identified serious problems with the E-Verify electronic employment-verification program, over the past year DHS

has expanded the program. As of September 8, 2009, all federal contractors are required to enroll in and use E-Verify. An independent evaluation of the program found that U.S. citizens and legal immigrants are receiving inaccurate responses from the system, that large numbers of employers are misusing the system, and that E-Verify fails to detect a large percentage of unauthorized workers using false documents. The SSA's Inspector General found that SSA—one of the agencies responsible for administering E-Verify—has failed to use E-Verify correctly for its own employees.

- **Immigration Benefits** – Despite serious efforts to reform the fee-based funding of USCIS, reports of a new fee increase threaten to undermine relationships between USCIS and its stakeholders. Benefits adjudications in both family and employment-based immigration continue to be plagued by inconsistent decision-making, overly burdensome evidentiary requests, and practices that minimize principles of family unity and economic growth.
- **Asylum** – There is no evidence of progress in implementing the U.S. Commission on Religious Freedom's recommendations for improving the expedited removal system for asylum seekers. The resolution of cases involving "material support" continue to face delays that keep legitimate asylum seekers from receiving protection.

#### **Recommendations for 2010:**

- **Due Process** – DHS needs to understand and embrace the importance of due process. DHS should create an ICE Ombudsman to investigate complaints, monitor ICE enforcement strategies, and recommend personnel actions in response to complaints. Greater transparency and oversight are also necessary. ICE and CBP should institutionalize rigorous, comprehensive training on immigration law, civil rights, and due-process protections. DOJ should follow through on regulations protecting access to counsel to ensure that immigration courts provide meaningful review, particularly at the appellate level.
- **Detention** – DHS should continue to press ahead on initiated reforms. ICE should hire a Senior Advisor on Detainee Health, as the agency announced it would do last August, to maximize the effectiveness of the detainee healthcare group meetings and development of a medical classification system. The agency should explore the use of community-based ATDs more fully, and detained noncitizens should receive timely charges and hearings and expanded access to Legal Orientation Programs.
- **E-Verify** – DHS must continue to improve the accuracy of the databases on which E-Verify is dependent. They must place additional emphasis on monitoring and compliance of the system and look for patterns and practices of misuse, discrimination, and fraud.
- **State and Local Partnerships** – DHS should concentrate efforts on serious crimes and criminals. DHS should also expand transparency and oversight of various programs, and must gather additional data so that the true impact of these programs can be assessed.
- **Border Enforcement** – The Administration should suspend Operation Streamline to restore prosecutorial discretion and concentrate border-enforcement efforts on serious crimes and criminals.

- **Immigrant Integration** – The Administration should create a national integration strategy, establish a National Office on Immigrant Integration, and gather data on the impact of government policies on immigrants, and coordinate agency decisions that affect them.
- **Immigration Benefits** – USCIS must clearly articulate the principles it uses to evaluate and adjudicate individual cases, and must address the complaints of recent years that too many people are denied benefits, or subjected to repeated requests for additional evidence, because adjudicators are looking for reasons to deny rather than grant benefits. Fee waivers and discretionary waivers should be applied more broadly, particularly where individuals in proceedings have immediate family members who are U.S. citizens.
- **Asylum** – To improve intra-department decision-making on refugee and asylum issues, the Department should create a Refugee Protection Office that would report directly to the DHS Secretary or Deputy Secretary. Coordinated efforts would increase the ability of DHS to quickly resolve lingering disputes such as resolution on material support and implementation of proposals to improve expedited removal for asylum-seekers.

# INTRODUCTION

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March 2010 marks the seventh anniversary of both the Department of Homeland Security (DHS) and its immigration agencies: Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). This anniversary also corresponds to a due date set by Secretary Janet Napolitano for completion of a sweeping internal review of DHS. While these reviews spanned a wide range of DHS issues, Secretary Napolitano's immediate and direct focus on immigration matters encouraged immigrant advocates to believe that the Administration intended to fulfill its promises to change the immigration system for the better.

In her first full week on the job, Secretary Napolitano issued a directive on immigration and border security, instructing every agency to thoroughly assess its current programs, resources, and efficiencies to identify areas in need of reform.<sup>1</sup> As she told the members of the House Homeland Security Committee on February 25, 2009:

I issued a number of directives related to border security and immigration. Among the directives, I requested an assessment of past border security assistance by National Guard and Department of Defense assets. I issued a directive to measure employer compliance and participation with the Department's E-Verify program and ways that DHS has worked both to reduce false negatives in order to protect the rights of Americans and to strengthen the system against identity fraud. I issued directives to assess the status of the Department's worksite enforcement programs, fugitive alien operations, immigration detention facilities, removal programs, and the 287(g) program. I asked for an assessment of the situation of widows and widowers of U.S. citizens who had petitioned for the alien spouse's immigration, but whose petitions were not adjudicated before the citizen spouse's death. I issued a directive to assess Department programs to combat border violence and drug smuggling, and as a result, DHS is considering ways to better engage partners and increase the effectiveness of these programs.<sup>2</sup>

The results of these reviews have not been made public, so it is impossible to determine whether a rigorous self-assessment took place, but the Department's actions over the following year suggest that tinkering with the immigration enforcement regime rather than genuinely reforming it was the top priority of the Administration. While some progress has been made on enforcement and benefits issues, 2009 was largely about promises and aspirations. Whether DHS can make good on these promises remains to be seen.

But the call for an internal review did reflect pressure from the immigration community, demonstrating an interest in addressing the numerous recommendations gathered by the Administration's immigration policy transition team, one of only seven policy-based working groups operating under the broader Obama-Biden Transition Team auspices. In fact, the submissions from immigration policy experts, advocates, academics, community members, and other interested parties in late 2008 and early 2009 offer a glimpse into the most immediate concerns of this community, reflecting frustrations with the current system, hopes for change, and expectations that the Administration could and would improve the system.



A year later, those submissions provide an opportunity for measuring the progress DHS has made on immigration reform, particularly at the administrative level. We have chosen to use “Immigration Policy: Transition Blueprint,”<sup>3</sup> a document produced collaboratively by twenty immigration policy organizations (including the Immigration Policy Center) as our baseline measurement. By comparing a sampling of the Transition Blueprint’s recommendations to the Department’s actions, a portrait emerges of a Department caught between competing priorities—often giving with one hand, while taking away with the other. The Department’s actions have occasionally signaled genuine positive movement, but have more often than not reflected a commitment to maintaining the status quo, albeit in ways that reflect a more thoughtful approach to immigration enforcement.

## **Reform and Entrenchment—The Year in Review**

The Obama Administration has revisited many of the underlying assumptions guiding immigration policy in recent years, providing opportunities to change the culture of DHS. The selection of Janet Napolitano, a border-state governor who supported comprehensive immigration reform, to serve as Secretary of DHS was welcomed by many as a sign that the President intended to make immigration reform a priority. Napolitano, in turn, appointed established immigration experts to oversee the immigration portfolio within the Department, thus taking some steps towards creating a more unified approach to managing immigration issues, long championed by the immigration community.<sup>4</sup> These appointments included David A. Martin, a former General Counsel of the INS, as DHS Principal Deputy General Counsel, and Esther Olavarria, who spent nearly ten years as Chief Counsel to Senator Edward M. Kennedy and the Senate Judiciary Committee’s Subcommittee on Immigration, Border Security and Refugees, as the DHS Deputy Assistant Secretary for Policy. Secretary Napolitano also selected several Special Advisors to tackle specific problem areas, including naming Dr. Dora Schriro, a noted corrections expert, to head an investigation into the detention practices of ICE.

In addition to improving the Department’s subject-matter expertise on immigration, DHS has revisited its public message on immigration enforcement, although the practical realities for individuals caught up in the system have not necessarily changed. The emphasis today is on employer penalties over worksite raids. As Secretary Napolitano said, “What we have to do is target the real evil-doers in this business, the employers who consistently hire illegal labor; the human traffickers who are exploiting human misery. And yes, when we find illegal workers, yes, appropriate action, some of which is criminal, most of that is civil, because crossing the border is not a crime per se. It is civil.”<sup>5</sup>

Similarly, the Department has begun to rethink its border-security strategy—shifting some resources towards non-immigration-related problems along the border. For example, when speaking about the border, Secretary Napolitano distinguishes between efforts to combat border crime—such as narco-trafficking and gun smuggling—and immigration-enforcement issues at the border. More than a question of semantics, these subtleties marked a change from the previous Administration’s mindset, which had conceptually collapsed border crime and violence with immigration enforcement.<sup>6</sup>

Other changes at DHS include major detention reviews and plans for detention reforms, particularly with respect to conditions of custody and health care.<sup>7</sup> Moreover, the Department followed the Administration’s lead by creating more opportunities for stakeholder involvement, although the ability to influence decisions based on that involvement varied greatly. Greater engagement with the public was particularly noticeable on citizenship and immigration issues. For instance, USCIS and the City of Los Angeles recently announced a new partnership to promote citizenship and integration, a pilot program that USCIS hopes to replicate around the country.<sup>8</sup> Moreover, DHS has finally begun to tackle

the serious issue of immigration fee reform, requesting millions of dollars in appropriated funds to pay for the costs of processing certain military naturalization, refugee, and asylum-related applications (otherwise paid for by fee surcharges placed on other immigration applications and petitions).<sup>9</sup> Finally, DHS's ongoing efforts to use immigration tools to assist Haitians after the January 12 earthquake merit praise.

The Obama Administration also has devoted significant administrative resources to comprehensive immigration reform efforts, although their political engagement on the issue has not necessarily kept pace with the urgency demanded by the public. The White House held two key summits—one with members of Congress, the other with stakeholders—during the summer of 2009, and President Obama appointed Secretary Napolitano to head a task force on immigration legislation. The Administration did not, however, deliver on the promise of legislation within its first year, and many supporters have begun to question the Administration's commitment or ability to influence immigration reform in Congress. During a critical speech on immigration at the Center for American Progress in November 2009, however, Secretary Napolitano restated the Administration's commitment:

Like the Administration's other priorities, when it comes to immigration, we are addressing a status quo that is simply unacceptable. Everybody recognizes that our current system isn't working and that our immigration laws need to change. America's businesses, workers, and faith-based organizations are calling for reform. Law enforcement and government at every level are asking for reform. And at the Department of Homeland Security, we need reform to do our job of enforcing the law and keeping our country secure. Over the past ten months, we've worked to improve immigration enforcement and border security within the current legal framework. But the more work we do, the more it becomes clear that the laws themselves need to be reformed.<sup>10</sup>

Despite these positive developments, the spirit of reform is often stymied by an over-reliance on existing enforcement policies. While advocates have praised DHS initiatives such as the elimination of mass worksite raids and detention reform, they also question whether the policy changes will bring about meaningful changes for those arrested or in custody. Continued reports of deaths in detention, promises of reform without evidence of follow-through, and ever broader definitions of "criminal aliens" leave advocates confused and skeptical regarding real progress. The growth of state and local law-enforcement partnerships that cede federal immigration authority to local law-enforcement agencies and the dramatic rise in criminal prosecutions of unauthorized immigrants for illegal border crossings flies in the face of so many of the changes DHS is attempting to implement. In the same speech in which she committed to immigration reform, Secretary Napolitano also emphasized that enforcement remains the initial priority for the Department—an emphasis which some fear will undermine the good will generated by reform efforts. While there is a policy shift at the top of DHS, it remains to be seen whether that shift will translate into a cultural shift throughout the agency.

In the sections that follow, we address the tension created by the impulses for reform and expanded enforcement—using the Transition Blueprint to chart how this tension plays out on a number of key issues identified by advocates as ripe for change.

## **Back to the Beginning: THE BLUEPRINT—A guide to administrative change**

During the last six months of 2008, immigration service providers, policy experts, advocates, and other non-governmental organizations (NGOs) met to design a blueprint for administrative change. Recognizing that legislative reform would be necessary to fix many of the underlying structural problems within the immigration system, the group chose to focus on administrative policy changes that could be made through the executive branch alone. Thus, the Transition Blueprint's recommendations focused on improvements that would instill fairness, create efficiencies, and build support for comprehensive reform in several key areas: due process, enforcement, detention, family immigration, naturalization, immigrant integration, and asylum.<sup>11</sup>

Given the emphasis on immediate policy change, however, the Transition Blueprint is heavy on enforcement recommendations, offering a significant critique of existing policies relating to border enforcement, detention, worksite raids, and apprehension and removal of unauthorized immigrants. Its critique of due-process issues, for instance, reflects the longstanding frustration with a Department whose policies seemed to consistently conflate national security and immigration, resulting in racial profiling, truncated legal proceedings, and a general disregard for basic due process. While that section contains some concrete recommendations, its most potent assessment is that the culture of DHS requires change.<sup>12</sup>

Similarly, the extended discussion of enforcement practices, while containing many more explicit recommendations, also reflects the mounting frustration with enforcement policies that seem predicated on separation of families, terrorizing unauthorized immigrants, and rapidly hustling them out of the country.<sup>13</sup> In contrast, other recommendations focused on suspending or rescinding regulations that the group believed had been hastily promulgated.<sup>14</sup>

Finally, many of the immigration benefits-related issues—naturalization, asylum, immigrant integration, and family unification—focused on the fact that these issues had been significantly neglected for many years. The Blueprint called for greater transparency and accountability in areas of processing and adjudicating cases, as well as greater flexibility in policy and legal interpretations.<sup>15</sup>

Taken as a whole, the Blueprint—and DHS's subsequent actions—represent a dialogue about the future of immigration in the United States. DHS has failed to meet some key expectations of advocates, but at the same time has made some small but tangible steps forward.

## **DUE PROCESS**

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Due-process issues permeate the Transition Blueprint, both in specific areas such as detention and worksite raids and in more general points of concern. For example the Blueprint, emphasized the need for DHS to support broader prosecutorial discretion, eliminate the controversial National Security Entry-Exit Registration System (NSEERS or special registration) program, create an ICE Ombudsman's office to monitor and respond to ICE actions (similar to the USCIS Ombudsman's office), require the Department of Justice (DOJ) to dramatically reform the immigration court process—from access to counsel to the practice of streamlining appeals before the Board of Immigration Appeals—and restore respect for the law within the culture of DHS.

This has been an area of little tangible progress. For instance, NSEERS, which required non-immigrant males from predominantly Muslim countries to register with the government, continues to exist and hinder the ability of law-abiding individuals to adjust status or become citizens. Although the initial registration component of NSEERS was suspended in 2003 following the implementation of US-VISIT (a broader registration program for visitors to the United States),<sup>16</sup> applicants seeking benefits continue to be plagued by mistakes made during the registration process and are penalized for failing to comply with a program that was neither well understood nor trusted within the affected communities. Critics further argue that recent guidance issued by the Transportation Security Administration (TSA) on criteria for stopping suspicious passengers institutionalizes the kind of ethnic and racial profiling that was supposed to end with the suspension of NSEERS registration.<sup>17</sup>

Some changes have occurred, however. The Administration sought additional funding in Fiscal Year (FY) 2010 and again in FY 2011 for additional immigration court and attorney positions and expanded legal orientation programs;<sup>18</sup> the funding requests, however, were justified based on the expansion of programs such as Secure Communities.<sup>19</sup> And in a striking development, in June 2009, Attorney General Eric Holder took a positive step toward advancing an individual's right to effective counsel in a removal hearing when he vacated the order in *Matter of Compean*<sup>20</sup> and overturned the Board of Immigration Appeals (BIA) decision to limit noncitizens' ability to make claims of ineffective assistance of counsel in immigration proceedings. The Attorney General's decision restored pre-*Compean* standards and ordered the DOJ Executive Office of Immigration Review (EOIR) to initiate rulemaking procedures (including a public comment period) to assess how claims of ineffective assistance of counsel are currently evaluated. At the time of this writing, however, no regulations have been proposed.

Both DOJ and DHS should revisit the Blueprint recommendations on due process. Greater efforts must be made to improve how decisions by the Board are rendered. EOIR should go beyond *Compean* and further guarantee meaningful appellate review by reversing its streamlined adjudication procedures<sup>21</sup> ("streamlining") under which the BIA can issue decisions by a single panel member (rather than a three-member panel), and can affirm cases without opinion.

For DHS to ensure due process and promote the rule of law, its immigration and border-enforcement agencies, ICE and CBP, should institutionalize rigorous, comprehensive training on immigration law, civil rights, and due-process protections. Although CBP has expressed a willingness to engage with communities on how to improve the Border Patrol Academy curriculum, the bureau has not shared details about its current training, nor has it shared any standards for short-term detention in CBP custody. Furthermore, DHS should create an ICE Ombudsman to investigate complaints, monitor ICE enforcement strategies, and recommend personnel actions in response to complaints.<sup>22</sup> Without greater transparency, training, and oversight, stakeholders cannot meaningfully contribute and due process will remain elusive.

## ENFORCEMENT

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The last decade has seen a further ratcheting up of an "enforcement only" strategy—both along the border and in the interior of the United States—that is focused on controlling illegal immigration without addressing underlying structural problems with the immigration laws. The Blueprint expressed serious concerns with this "enforcement only" strategy in the absence of comprehensive immigration reform, as well as with how ICE and CBP set immigration-enforcement priorities, and how immigration

enforcement measures were being implemented. Large, SWAT team-style raids on businesses, and early-morning raids on private homes, had been conducted without basic safeguards and guidelines. These actions frequently resulted in the violation of basic civil rights as individuals were denied access to counsel, homes were entered without warrants, and noncitizens were not advised of their rights. As a result of these raids, families were torn apart, businesses failed, and local economies suffered.

Immigration enforcement over the past year provides a prime example of the clash between reform and entrenchment at DHS. While DHS professes to have re-focused its attention on non-compliant employers in the workplace and prosecuting noncitizens with serious criminal convictions, the reality on the ground is too often dissimilar. In fact, federal immigration prosecutions rose to record levels in FY 2009.<sup>23</sup> In the past, federal court resources were appropriately allocated to pursue immigration-related prosecutions against individuals with criminal backgrounds, but recently, many federal immigration prosecutions focus on non-violent border crossers instead. Under this Administration, the federal government is continuing to spend billions of dollars prosecuting non-violent immigration violators while more serious criminals involved in drugs, weapons, and organized crime face a lower probability of prosecution.<sup>24</sup>

DHS has also expanded its partnerships with state and local law-enforcement agencies, particularly through the Secure Communities program and the 287(g) program. These partnerships have led to large numbers of immigrants being identified for potential deportation, but it remains unclear whether the goal of prioritizing dangerous criminals is being met. These partnerships have also resulted in racial profiling, pretextual arrests, and civil-rights violations by local law-enforcement agencies. Unfortunately, ICE and its local partners have not collected sufficient data regarding implementation of these programs. DHS needs to commit to a wide range of data collection about its current enforcement strategies so that DHS and its stakeholders can better understand the cost-benefit analysis of their controversial tactics.

## **WORKSITE ENFORCEMENT**

### **RAIDS**

The Blueprint was very critical of the large-scale worksite raids that had taken place during the Bush Administration and recommended termination of the raids. Following the February 2009 ICE raid on a manufacturing plant in Bellingham, Washington, that caught Secretary Napolitano unaware, DHS issued worksite-enforcement guidance announcing that ICE will focus its resources on targeting employers who knowingly hire unauthorized workers rather than on the workers themselves.<sup>25</sup> In July 2009, ICE announced that 652 employer audits would be conducted,<sup>26</sup> and in November 2009, additional workplace audits were announced. Overall, the number of employer audits tripled in 2009.<sup>27</sup> According to Assistant Secretary Morton, "We are increasing criminal and civil enforcement of immigration-related employment laws and imposing smart, tough employer sanctions to even the playing field for employers who play by the rules."<sup>28</sup>

DHS has claimed large numbers of investigations and penalties levied against employers.<sup>29</sup> Advocates report, however, that these audits (as well as anticipation of such audits) have generated mass firings of noncitizen workers who cannot readily resolve employment-authorization issues.<sup>30</sup> And despite this shift from "worker raids" to "desk raids," ICE has maintained its authority to apply immigration law to any unauthorized individuals they encounter on site visits, putting these workers at risk of detention and removal.<sup>31</sup>

Furthermore, current law fails to adequately protect immigrant workers from employers who retaliate, or threaten to retaliate, against those who report violations of labor and employment laws. Immigration enforcement must not interfere with ongoing labor disputes or with investigations into labor-law violations, and DHS must have a policy which requires that if ICE discovers employment or labor-law violations in the course of its worksite enforcement actions, those violations are reported to the appropriate government labor or employment-rights agency. Furthermore, employers must be held accountable for employment and labor-law violations. One step is to ensure confidentiality for those who cooperate with employment and labor-law investigations, and to grant visas to workers so that they can cooperate with investigations into workplace-law violations.

### **E-VERIFY**

Despite the fact that immigrant advocates and others have identified serious problems with the program, DHS has expanded E-Verify, its Internet-based electronic employment-verification system. USCIS reported an increase in employer participation in E-Verify from 88,000 companies at the end of FY 2008 to over 177,000 in mid-December 2009.<sup>32</sup> For most of these employers, the use of E-Verify is voluntary and limited to verifying the employment eligibility of new hires.<sup>33</sup> However, as of September 8, 2009, DHS required all federal contractors to enroll in and use the E-Verify system.

A new evaluation of E-Verify by Westat, a research company, was completed in December 2009 and released on January 28, 2010, and provides additional evidence showing that expansion of the program must be slowed.<sup>34</sup> Given the significant error rate—particularly for foreign-born workers—as well as the high incidence of employer non-compliance (such as an employer using tentative non-confirmation results adversely against an employee), this premature expansion was a grave disappointment.<sup>35</sup>

Reports show that the government itself has not used E-Verify correctly. According to a January 2010 report released by the Social Security Administration (SSA) Inspector General, the agency failed to use E-Verify on nearly 20 percent of its new hires.<sup>36</sup> SSA also improperly ran checks on 169 volunteers and individuals who had not yet been hired and violated program rules with respect to the timing of its verifications 49 percent of the time.<sup>37</sup> The fact that one of the two agencies responsible for administering the E-Verify program misused the program in direct violation of the law does not bode well for expanding the program or making it mandatory for all employers.

Furthermore, there is still no formal or structured process for addressing individual case problems with E-Verify. The E-Verify monitoring and compliance unit primarily focuses on enforcing immigration laws rather than preventing adverse actions taken against employees.<sup>38</sup> A more effective tool would be empowering the DHS Office of Civil Rights and Civil Liberties to conduct audits and look for patterns and practice of discrimination in the E-Verify program. It is encouraging that DHS has sought additional funding in its FY 2011 budget request to enhance monitoring and compliance of E-Verify use to detect discrimination and fraud patterns.<sup>39</sup> Secretary Napolitano understands that “E-Verify has been a key component in proposals for comprehensive immigration reform,”<sup>40</sup> but a system lacking informational integrity and critical safeguards against abuse does not increase DHS’ readiness for change.

### **SSA NO-MATCH LETTERS**

Effective November 6, 2009, Secretary Napolitano rescinded the “No-Match Rule,” a late Bush Administration regulation<sup>41</sup> that would have turned SSA no-match letters into immigration-

enforcement tools. These letters are intended to inform the employer that SSA's records do not match information submitted by the employee, with the goal of clearing up the mismatch so that employees can receive full credit for their contributions.<sup>42</sup> In its July 2009 announcement, DHS determined that E-verify does a better, more timely job of resolving data inaccuracies and therefore decided to focus its resources on that program rather than the No-Match Rule.<sup>43</sup> Regardless of its reasons for doing so, DHS's withdrawal of the No-Match Rule was viewed by immigrant advocates as a major accomplishment of 2009.

## **STATE AND LOCAL LAW ENFORCEMENT**

### **SECURE COMMUNITIES**

In an effort to prioritize removal of "criminal aliens," DHS has continued to expand its partnership with state and local law-enforcement agencies. Secure Communities and the 287(g) program are two primary tools DHS uses to build these relationships. The newer of these, Secure Communities, employs technology to identify immigrants who may be deportable by submitting their fingerprints to immigration databases upon arrest. If there is a database "hit," ICE is notified and places a detainer on the immigrant so that the individual may be transferred to ICE custody upon release from jail.<sup>44</sup>

Secretary Napolitano expressed her strong interest in accelerating the program's deployment from the outset.<sup>45</sup> ICE projects that Secure Communities will have a presence in every state by 2011 and will be available to every law-enforcement agency by 2013.<sup>46</sup> These plans are reflected in the DHS FY 2011 budget request.<sup>47</sup> The Department is quick to highlight progress made through Secure Communities: it expanded from 14 to 107 locations in 2009, and in its first year of operation (beginning October 2008) more than 111,000 "criminal aliens" in local custody were identified.<sup>48</sup>

A closer examination of ICE's statistics reveals that the use of the term "criminal alien" is misleading and that those identified by "Secure Communities" include large numbers of individuals with no criminal history, individuals charged with (but not convicted of) crimes, and persons "identified" but not found to be deportable. Fingerprint submission and identification is conducted at time of arrest, rather than conviction, thereby presenting the risk of racial profiling and pretextual arrests of those suspected of being unauthorized in order to determine an arrestee's immigration status.<sup>49</sup> This mischaracterization of Secure Communities' accomplishments is misleading and calls into question whether ICE's resources are being appropriately allocated to the apprehension of serious criminals.

To ensure transparency, any expansion of Security Communities should, at the very least, be accompanied by increased data gathering and oversight of state and local partnerships. Over the past year, ICE has gradually reduced the amount of detailed information about program operations available on its web site and complies with Freedom of Information Act (FOIA) requests in an untimely matter.<sup>50</sup> Procedures must also exist for noncitizens who allege mistreatment through the program to voice complaints.

### **DELEGATION OF IMMIGRATION AUTHORITY UNDER INA §287(G)**

Under section 287(g) of the Immigration and Nationality Act (INA), DHS delegates authority to enforce immigration laws to state and local law-enforcement agencies. The terms of these arrangements are spelled out in a Memorandum of Agreement (MOA) that has historically varied from one jurisdiction to another.<sup>51</sup> Independent reports have found that the program is costly to

localities and diverts resources away from other crime-fighting activities, erodes the trust between local police and immigrant communities, results in costly errors, may lead to racial profiling, pretextual arrests, and civil-rights violations, and often targets unauthorized immigrants or individuals with low-level violations (such as traffic violations) rather than prioritizing immigrants with serious criminal convictions.<sup>52</sup>

A January 2009 Government Accountability Office (GAO) report found that ICE had failed to articulate the 287(g) program's objectives and had not consistently articulated how local partners use their 287(g) authority.<sup>53</sup> While ICE officials have stated that the purpose of the program is to address serious crimes such as narcotics smuggling, the GAO noted that ICE had never documented this objective, and as a result, local police have used their 287(g) authority to detain and deport immigrants for traffic violations and minor crimes.

In response to these criticisms of the program, in October 2009 ICE announced that it had standardized the MOAs to consistently promote its priority of apprehending dangerous criminal aliens.<sup>54</sup> To the disappointment of immigrant advocates, DHS also announced that it had expanded the 287(g) program to include 67 state/local police agencies. The new agreements recommend, but do not require, that cases be pursued to completion to prevent racial profiling as a pretext for arrest. Finally, ICE stated that the new MOAs would improve program oversight by creating mechanisms for data gathering and complaint procedures.<sup>55</sup>

As a separate effort, the DOJ announced in March 2009 that it had commenced an investigation of the Maricopa (Arizona) County Sheriff's Office (MCSO).<sup>56</sup> A DOJ letter to Maricopa County Sheriff Joe Arpaio informed him that, "the investigation will focus on alleged patterns or practices of discriminatory police practices and unconstitutional searches and seizures conducted by the MCSO, and on allegations of national origin discrimination, including failure to provide meaningful access to MCSO services for limited English proficient (LEP) individuals."<sup>57</sup> Sheriff Joe Arpaio has come under a barrage of criticism for his immigration-enforcement measures—much of which is done through a 287(g) agreement—and has been accused of racial profiling and other civil-rights violations. Despite the ongoing DOJ investigation, ICE extended its 287(g) MOA with Maricopa County.

With limited information about the actual signed MOAs on the ICE web site, and given that a number of jurisdictions continue to operate under the old MOA, it is too early to tell if these changes will prove meaningful or yield useful data.<sup>58</sup> In the meantime, immigrant advocates continue to have serious concerns about how the 287(g) program is implemented and will continue to closely monitor implementation for officer misconduct and racial profiling.

## **BORDER ENFORCEMENT**

Despite requests by immigrant advocacy organizations to suspend Operation Streamline—a program which eliminates prosecutorial discretion and mandates federal criminal prosecution of all persons caught crossing the border unlawfully—DHS is moving full steam ahead with the program.<sup>59</sup> Those caught crossing the border for the first time face misdemeanor charges and up to six months in prison, while those who re-enter the United States after deportation face felony charges and up to 20 years in prison.<sup>60</sup> These Zero Tolerance Zone policies are wreaking havoc on courts along the border and causing judges to take procedural shortcuts out of necessity.<sup>61</sup> Due-process challenges abound: hearings are fast-tracked within 48 hours and large groups of migrants are tried on criminal charges en masse, with limited access to legal representation in remote border towns on short notice.<sup>62</sup> When attorneys are available, they may represent large groups of clients with little time to prepare a defense with each



person individually. The Ninth Circuit determined that these expedited group hearings violate federal law, but the Court's decision is not binding outside of that Circuit.<sup>63</sup>

Moreover, it remains unclear whether Operation Streamline has a deterrent effect on migrants coming to the United States, or whether the decrease in migrant crossings can more appropriately be attributed to the increased cost of crossing the border and a poor economy.<sup>64</sup> No significant public education campaigns have been conducted to inform intending migrants in Mexico of the risks of criminal prosecution and many practitioners report that their clients are unaware of the program.<sup>65</sup>

To more effectively direct resources to the prosecution of dangerous criminal enterprises, such as human trafficking or drug smuggling, the Administration should discontinue its use of Operation Streamline, restore prosecutorial discretion, and concentrate border-enforcement efforts on serious criminals.<sup>66</sup>

One humanitarian development of note is CBP's recent willingness to begin to work with border groups to better coordinate search-and-rescue efforts to combat the increasing number of border deaths.<sup>67</sup> This cooperation is particularly necessary; while apprehensions on the border are down, border deaths are at their highest numbers since 2006, as smugglers and migrants seek more dangerous routes across the desert.<sup>68</sup>

## DETENTION

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Advocates welcomed Dora Schriro's investigation into detention practices; the results of her report formed the basis for a series of proposed detention reforms in 2009, specifically addressing issues of oversight, alternatives to detention (ATDs), healthcare, and parole. Assistant Secretary for ICE John Morton endorsed housing ICE detainees in civil detention facilities, rather than excess space in penal institutions.<sup>69</sup> In August, he announced the beginning of a structural overhaul, including the creation of the Office of Detention Policy and Planning (ODPP), tasked with planning and designing a civil detention system, and an Office of Detention Oversight (housed in the Office of Professional Responsibility, an independent office that reports directly to the Assistant Secretary) to inspect facilities and investigate detainee grievances.<sup>70</sup> ICE is also working to improve its oversight capacity by centralizing all contracts under ICE headquarters' supervision rather than ICE field offices, and by increasing the number of federal personnel providing direct oversight.<sup>71</sup> ICE has also increased its outreach to stakeholders through direct meetings with the acting director of ODPP and public advisory groups.<sup>72</sup>

In response to requests for secure, community-based alternatives to detention, ICE announced that it will develop a risk-assessment tool to identify detainees suitable for ATD or an appropriate facility.<sup>73</sup> An implementation plan has been promised to Congress by fall 2010.<sup>74</sup> ICE has pledged to continue working with the Department of Justice to expedite adjudication of ATD cases.<sup>75</sup> The 2009 decision to cease use of the T. Don Hutto Detention Center for family detention appears to be another strong indicator of DHS' commitment to revisit the appropriateness of custodial settings.<sup>76</sup>

Apart from ATDs, the Transition Blueprint identified other ways in which certain vulnerable populations could avoid unnecessary or harmful detention. Immigrant advocates commended ICE for fulfilling their specific request to expand parole for certain asylum seekers who pass through a "credible fear" screening process. These arriving aliens<sup>77</sup> who wish to apply for asylum are subject to mandatory

detention and regulations prevent them from receiving a custody hearing before an immigration judge.<sup>78</sup> The December 2009 parole policy change, however, allows for the release of those individuals who can establish their identity and who are not considered a flight risk or danger to the community. This new policy is a promising step towards a more humane and cost-effective detention strategy and therefore should be broadened to include other vulnerable populations.<sup>79</sup>

Progress on actual standards of detention has been mixed. DHS's denial of a petition for rule-making on custody standards was a profound disappointment because the failure to commit custody standards to regulations makes it more difficult for advocates to challenge abuse. ICE's reliance instead on Performance Based National Detention Standards (PBNSS) implemented in January 2010 has been criticized for continued reliance on penal rather than civil detention standards. And because they are standards, rather than regulations, they are not legally enforceable.<sup>80</sup> Some tools designed to improve the ability to locate and assist detainees may offer some relief for detainees and their families. For instance, ICE has developed an On-Line Detainee Locator System (ODLS) to aid attorneys and family members wishing to track the whereabouts and transfers of detainees; the agency is soliciting stakeholder input prior to planned activation. Other proposals include a medical classification system to improve awareness of detainees' medical and mental health conditions from the commencement of their detention

Despite these announcements, profound concerns about health and safety issues remain unmet. In particular, safety and medical care for detainees must be a priority for the new Administration. Since October 2003, 107 detainees have died while in the custody of ICE. One of the most disturbing revelations in 2009 was that ICE officials attempted to conceal misconduct relating to deaths of detainees.<sup>81</sup> While this misconduct occurred before 2009, many of the officials involved continue to be employed within ICE.<sup>82</sup> In addition, continued trouble with medical care in detention centers has exacerbated the difficulty of relocating nearly 300 detainees from the Varick Detention Center in Greenwich Village to New Jersey.<sup>83</sup> Transfers of many of the detainees have been delayed because of concerns over the poor medical treatment provided by the New Jersey detention center. Given the ongoing problems with medical care, DHS and ICE must redouble efforts to avoid repeating the mistakes of the past.<sup>84</sup>

To ensure that the promise of reform does not slip away, far more work must be done to reform immigration detention. ICE should make good on its promises to hire a Senior Advisor on Detainee Health, as the agency announced it would do last August, to maximize the effectiveness of the detainee healthcare group meetings and development of a medical classification system.<sup>85</sup> The agency should fully explore the use of community-based ATDs, rather than limiting ATDs to ankle-bracelet monitoring or intrusive monitoring requirements. As the Transition Blueprint set forward, detained noncitizens should receive timely charges and hearings and expanded access to Legal Orientation Programs. Custody determinations should be individualized and automatic stays should be restricted by a repeal of regulations and the exercise of discretion. Finally, prolonged detention should be limited to no more than 90 days in strict compliance with the law. Advocates plan to keep a vigilant watch over whether ICE's expressed intentions and broad proposals for change to the detention system, including detainee healthcare, will translate into tangible changes for immigrants.

# LEGAL IMMIGRATION AND BENEFITS ADJUDICATION

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The Transition Blueprint argued for renewing the commitment to the family unit as a cornerstone of immigration. It noted that extreme enforcement actions harm families, and that processing delays and policy choices also unnecessarily keep families apart. Among the recommendations offered were improving workflow inefficiencies, eliminating delays caused by background check backlogs, increasing resources, working with the Department of Health and Human Services (HHS) to remove HIV infection from the list of highly communicable diseases subject to an immigration ban, and revising policies on waivers and the adjustment of spouses in cases where the U.S.-citizen or permanent resident spouse has passed away. Similarly, a separate document submitted by the American Immigration Lawyers Association emphasized the need to improve policies and procedures for both family-based and employment based immigration.<sup>86</sup>

Secretary Napolitano included some of these issues in her initial directive to USCIS, which focused on USCIS backlogs for legal immigration benefits, particularly for naturalization petitions and adjustment-of-status applications.<sup>87</sup> By the end of FY 2009, USCIS reported that it had reduced the backlog of pending applications and petitions by more than 90 percent.<sup>88</sup> Critics, however, question whether the agency is instituting procedures to eliminate future backlogs, noting that much of the success in backlog reduction rests in reduced rates of application rather than improved processing procedures. Certain application backlogs remain unacceptably high, particularly I-601 waiver requests filed in Ciudad Juarez, Mexico, where waits of 13-15 months or more are the norm.<sup>89</sup> In the case of I-601 visa waivers, which are often sought by spouses of U.S. citizens who were in the United States illegally but left the United States to apply for a visa abroad, the growing backlog of cases contributes to the separation of families.

Within benefits adjudication there is clearly a distinction between policy and operational initiatives. On the one hand, since his arrival in August of 2009, Director Alejandro Mayorkas has made great strides in opening up dialogue on how USCIS handles its caseload, meeting with stakeholders across the country. USCIS created an Office of Public Engagement which has organized robust discussions on reform of the agency and improvement for delivery of services. Even critics acknowledge a much greater willingness to discuss and revisit policy decisions on the part of USCIS. Moreover, the agency reports that it is utilizing a Senior Policy Council to vet operational decisions.

On the other hand, immigration practitioners question whether the dialogue creates meaningful change. Immigration practitioners continue to criticize USCIS for widely uneven adjudications, failure to follow established policies by individual adjudicators, and unilateral changes to other programs, such as creating an onerous new requirement for establishing an employer-employee relationship for H-1B high-skilled immigrant petitions, which appears to have little sound basis in policy or law.<sup>90</sup> While the agency has issued revised procedures for medical disability waivers and announced plans to formalize fee-waiver guidance and create a standardized fee-waiver form, the nature and type of guidance issued on such documents is critical. The distinction between public engagement and transparency of operational decisions continues to plague the agency because training and guidance memos are often kept confidential, making it difficult for observers to determine whether real changes are afoot. Many of the underlying criticisms of USCIS operations, set forth in a separate document submitted to the Obama-Biden Transition Team by the American Immigration Lawyer's Association (AILA), remain unresolved.<sup>91</sup>

DHS and USCIS have been praised for more rapid implementation of two changes to the law affecting applicants for immigration benefits: inadmissibility based on HIV infection and the “widow penalty.” Following legislation removing HIV from the list of “communicable diseases of public-health significance” for purposes of barring admission to the United States, USCIS acted quickly to ensure that HIV infection would not pose obstacles in benefit applications.<sup>92</sup> In the family immigration arena, USCIS ended its practice of denying adjustment of status to widows and widowers of U.S. citizens (as well as their unmarried children under 21 years old), placing cases on hold until anticipated legislation resolving the so-called “widow’s penalty” was enacted. Language included in the FY 2010 DHS Appropriations Act authorized USCIS to approve immigrant petitions for these widows and widowers; by the end of the year, DHS had provided training materials to its adjudicators and made information available to prospective applicants.<sup>93</sup>

Despite these advances, chronic problems with inconsistent adjudications must continue to be a key priority for the agency. At a minimum, USCIS should articulate the principles it uses to evaluate and adjudicate individual cases. Adherence to the law, particularly when it is as complicated as immigration law, is meaningless without operating principles guiding its application. The call for transparent adjudication standards that apply the law fairly and equally remains an urgent priority. Going forward, the agency must squarely address the longstanding complaints that too many people are denied benefits, or subjected to repeated requests for additional evidence, because adjudicators are looking for reasons to deny rather than grant benefits.

In order to further transparency and improve customer service, USCIS should follow the principles of family reunification and streamlined access to guide its policy decisions. For example, fee waivers and discretionary waivers should be applied more broadly, particularly where individuals in proceedings have immediate family members who are U.S. citizens. Specifically, the Transition Blueprint advised that USCIS take a more expansive view of the hardship requirement in family-waiver cases, especially where the re-entry bars are the only obstacle to family reunification. The Department should also support efforts to expand USCIS authority to grant waivers for individuals with pending family-based petitions or family members in the United States. Finally, the Blueprint also encourages USCIS to revisit current policies relating to the Child Status Protection Act and to follow case law that would permit mixed-status families to remain together.

These recommendations are equally applicable to employment-based adjudications, where critics have long argued that overly bureaucratic inquiries into applications lead to missed business opportunities and economic growth for the United States. In addition to the ongoing debate over the recent memo redefining employer-employee relationships (in ways that may make it impossible for small business owners to qualify for H-1B status), reports of denials of other business visas based on failure to provide extensive organizational charts, or overly burdensome and repeated requests for more information, and regulatory standards that go far beyond the requirements of the law, all contribute to missed opportunities for American businesses.<sup>94</sup> Because so many of these concerns are ongoing, they require a re-dedication of effort on the part of USCIS to use immigration policy to create economic opportunity rather than thwart it.

# NATURALIZATION AND IMMIGRANT INTEGRATION

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Much like the family-benefits section, the naturalization discussion within the Blueprint focused on improving processing times and reducing background check delays. The Blueprint also discussed at length the impact of dramatic fee increases on applicants for naturalization, as well as the impact of the new naturalization exam and concerns over USCIS analysis of the results of the exam. The Blueprint recommended creating advisory committees on naturalization within each USCIS district, reviewing FBI name-check requirements, creating a more transparent fee-waiver process, providing real-time information about the new naturalization exam, and streamlining applications for military members.

Overall, progress has been made in this area, but looming fee increases threaten this progress. As USCIS Director Mayorkas said last fall, “The challenge for 2010 is to be able to maintain momentum in the face of great fiscal challenges.”<sup>95</sup> In November 2009, he acknowledged that while a fee increase is considered a last resort, it was “probable” due to a drop in immigration benefit applications and a corresponding decrease in revenue.<sup>96</sup> During the last fee increase in July 2007, the cost of applying for naturalization jumped from the \$330 to \$595, plus an \$80 biometrics fee—pricing many applicants out of the process, especially in a down economy. Applications for lawful permanent residence are even more costly, at over \$1,000 (including biometrics). Statistics and anecdotal data indicate that these high fees have already crossed the threshold for many would-be naturalization and permanent residence applicants.<sup>97</sup> DHS has acknowledged the potential crisis, however, and has requested fee reform assistance in both its FY 2010 and 2011 budgets, seeking funds to cover the costs of adjudicating applications currently subsidized by surcharges on other application fees. Congress appropriated only \$55 million of the \$206 million dollar request for FY 2010, which has thus far failed to result in any direct cost savings to applicants, although it may have helped to avoid even greater fee increases.

Processing rates for naturalization cases also shortened significantly. In FY 2009, USCIS completed over 850,000 naturalization applications and reduced processing times by almost half, to 4.5 months.<sup>98</sup> The redesigned naturalization test launched in late 2008 was fully implemented in 2009, with all applicants required to take the new test as of October 1, 2009. USCIS provided extensive information about preparing for the test on its web site, including study materials for the English and civics portions of the exam. The agency responded to calls in the Transition Blueprint to make naturalization exam pass rates transparent, announcing in late September that the pass rate for the new test is 91 percent—allaying some concerns that the revised version was too hard.<sup>99</sup> To ensure that the preliminary pass rate is not uniquely high for those who chose to take the exam (as opposed to the previous version) prior to October 1, and that no particular group of applicants struggles with it more than others, data gathering on the test must continue and be made available to the public. The agency also published a rule to streamline citizenship applications for members of the U.S. military, by reducing from three years to one year the length of time one must serve in the Armed Forces, allowing certain members of the National Reserve to qualify, and eliminating several forms to reduce the burden on applicants as well as processing times.<sup>100</sup>

Immigrant integration has perhaps been one of the most robust areas of engagement—in large part due to a major appropriation of \$11 million to a new Immigrant Integration Program in the USCIS Office of Citizenship in FY 2010, which provides grants to community-based organizations to promote

naturalization and integration efforts, facilitate English language learning online, develop a training certification framework for volunteers, and promote citizenship and volunteerism.<sup>101</sup> In 2009 USCIS awarded \$1.2 million to 13 community-based organizations nationwide, which grantees estimate will provide direct citizenship services to more than 4,400 legal permanent residents and outreach to approximately 50,000 immigrants.<sup>102</sup> USCIS also launched a public service campaign to promote volunteerism and the New Americans Project with foreign-language broadcasts to reach 8 million people.<sup>103</sup>

The Administration's commitment to immigrant integration was also evident in the DHS FY 2011 budget, which sought \$18 million to fund USCIS Office of Citizenship initiatives.<sup>104</sup> USCIS hopes to expand the Citizenship Grant Program to support organizations that prepare immigrants for U.S. citizenship, raise awareness about citizenship rights and responsibilities, and enhance English language learning for legal permanent residents.<sup>105</sup>

Going forward, the Administration should implement the Blueprint recommendation for a national integration strategy,<sup>106</sup> and further explore the creation of a National Office on Immigrant Integration to coordinate government actions across Departments and agencies.<sup>107</sup> Such an office would play an important role in ensuring that policy relating to immigrant integration was not limited to DHS, where the competing mission of national security and integration can diminish the opportunities for fully integrating immigrants into our country and our economy. Advocates hope to see the Administration build upon the momentum that USCIS has generated thus far so that our national immigration dialogue is not only focused on deporting individuals, but instead on how to welcome immigrants into the fabric of American society.

## ASYLUM

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Among the critical concerns listed in the Blueprint for asylum and refugee processing was the failure of the federal government to implement recommendations of

## HAITI

DHS demonstrated its capacity to deliver a pragmatic and compassionate response to a humanitarian emergency following the devastating earthquake that struck Haiti on January 12, 2010. Secretary Napolitano quickly designated Haiti for Temporary Protected Status (TPS), enabling tens of thousands of Haitians who were already present in the United States to remain in the country with temporary employment authorization and without the threat of removal.<sup>1</sup> This solution serves not only the Haitians who are in the United States, but reconstruction efforts as well; Haitians with TPS can earn money here and send remittances home to rebuild their country.<sup>2</sup> USCIS took extra measures to maximize outreach to the Haitian community in the United States by posting on its home page three instructional videos explaining the TPS application process—in English, French, and Creole.<sup>3</sup>

DHS has taken many additional steps beyond TPS to help Haiti. At the outset of the crisis, it deployed hundreds of reserve Coast Guard service members to assist U.S. aid efforts in Haiti, conducting medical and other evacuations and delivering nearly 700 first responders to Port Au Prince.<sup>4</sup> Garnering much attention is the DHS humanitarian parole policy to allow orphaned Haitian children with prospective adoptive parents to come to the United States to complete their adoptions.<sup>5</sup> By the end of January, nearly 500 orphans had received humanitarian parole.<sup>6</sup> In addition, USCIS has agreed to expedite and give favorable consideration to certain immigration applications by Haitian nationals (such as change or extension of nonimmigrant status, re-parole, parole extensions, advance parole, off-campus employment authorization for F-1 students, immigrant petitions for children of U.S. citizens and lawful permanent residents).<sup>7</sup> These measures have collectively made a big difference in the lives of Haitians and in the public perception of DHS as more than just a law-enforcement agency.

Going forward, advocates building on the momentum of these positive developments ...

*Continued...*

the U.S. Commission on International Religious Freedom. These recommendations, many of which were aimed at CBP, included revising the procedures for expedited removal. Other recommendations in this section involved rescinding restrictive parole guidance for persons found to have a credible fear of removal, adopting regulations designed to protect victims of persecution based on gender, enhancing protections for children and other vulnerable populations, and protecting asylum applicants from overly restrictive interpretations of material support.

In addition to the new parole guidance for asylum seekers, advocates point to developments on gender-based persecution as one of the most significant changes of the past year. DHS finally supported a grant of asylum for Rodi Alvarado (*Matter of R-A-*) based on her past experience as a victim of domestic violence. Following a prolonged 14-year legal battle, ICE attorneys agreed in an October 2009 brief (and in an April 2009 brief in an unrelated domestic violence case before the Board of Immigration Appeals, *Matter of L-R*) that women who have suffered domestic violence may establish eligibility for asylum on account of one's particular social group if they meet certain specific criteria.<sup>108</sup> These positions are a long overdue but welcome development in the protection offered to women who suffer domestic violence. However, some immigrant advocates report that DHS attorneys continue to make arguments contrary to the positions taken in the L-R- and R-A- briefs, and refuse to acknowledge that these briefs reflect the official position of DHS on domestic violence-based asylum cases. Similarly, some immigration judges adjudicate domestic violence-based asylum case inconsistently given the lack of official guidance or binding regulation.<sup>109</sup> To ensure consistency in the government's position, DHS and DOJ should promulgate asylum regulations that reflect this critical interpretation of a particular social group.

Asylum seekers and refugees continue to be obstructed in their quest for protection by the one-year filing deadline and the overly broad interpretation of the material support bars, which frequently link innocent applicants to terrorism charges, regardless of the evidence. Given the arbitrary nature of the statutory one-year filing requirement, DHS should broadly

hope to see the Administration do more to support the people of Haiti and to avoid a migration crisis at sea. DHS should expand the use of humanitarian parole for Haitians who are the beneficiaries of immigrant petitions, but whose priority dates are not yet current.<sup>8</sup> The Administration should also support efforts to make more visas available to Haitians, either through a reallocation of priority dates that favors Haiti or by supporting legislation that would create additional visas available only to Haitians.<sup>9</sup> Finally, to avoid returning refugees to serious harm in Haiti, DHS should provide Haitians interdicted at sea a meaningful screening to determine an individual's credible fear of persecution and access to a Creole interpreter.<sup>10</sup>

<sup>1</sup>Department of Homeland Security, U.S. Citizenship and Immigration Services: Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3476, Jan. 12, 2010.

<sup>2</sup>Immigration Policy Center, "How Remittances can Help Haiti Recover and Strengthen the U.S. Economy," Immigration Impact Blog, Feb. 10, 2010); Kristin Johnson, "Many Happy Returns: Remittances and their Impact," Feb. 2010.

<sup>3</sup>USCIS, "Temporary Protected Status – Haiti," available at: <http://www.uscis.gov/portal/site/uscis/menuitem. eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e54e60f64f336210VgnVCM100000082ca60aRCRD&vgnnextchannel=e54e60f64f336210VgnVCM100000082ca60aRCRD> (last updated 2/19/10). USCIS also expanded its hours of live assistance and blogs frequently to disseminate information and dispel rumors at: <http://www.uscis.gov/blog/>.

<sup>4</sup>U.S. Department of Homeland Security, "The Department of Homeland Security Continues to Assist Recovery Efforts in Haiti," Jan. 28, 2010 available at: [http://www.dhs.gov/ynews/releases/pr\\_1264706448793.shtm](http://www.dhs.gov/ynews/releases/pr_1264706448793.shtm).

<sup>5</sup>US Citizenship and Immigration Services, "Secretary Napolitano Announces Humanitarian Parole Policy for Certain Haitian Orphans," Jan. 18, 2010, available at: <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=9c22546ade146210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

<sup>6</sup>Department of Homeland Security, "The Department of Homeland Security Continues to Assist Recovery Efforts in Haiti," Jan. 28, 2010 available at: [http://www.dhs.gov/ynews/releases/pr\\_1264706448793.shtm](http://www.dhs.gov/ynews/releases/pr_1264706448793.shtm).

<sup>7</sup>USCIS, "Haitian Relief Measures: Questions and Answers," available at: <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=855260f64f336210VgnVCM100000082ca60aRCRD&vgnnextchannel=9cf75869c9326210VgnVCM100000082ca60aRCRD> (last updated 1/18/10).

<sup>8</sup>See, e.g., Mark Hetfield, The Huffington Post, "Preventing Migration Aftershock for Haiti," Feb. 2, 2010 available at: [http://www.huffingtonpost.com/mark-hetfield/preventing-migration-afte\\_b\\_446591.html](http://www.huffingtonpost.com/mark-hetfield/preventing-migration-afte_b_446591.html).

<sup>9</sup>Ibid.

<sup>10</sup>Ibid.

interpret the exceptions and support legislation that would rescind the one-year deadline. Likewise, DHS should review its interpretation of the terrorism-related bars and apply the law consistent with its text and purpose, to target those who advance terrorist activity.<sup>110</sup> Conduct that was involuntary or inconsequential to the furtherance of terrorist activity should not be considered a bar to protection.<sup>111</sup> Although progress has been made on granting waivers for “material support” provided under duress, additional waivers are needed for actions taken by other victimized groups, such as child soldiers, or voluntary associations and actions taken alongside any non-governmental group that used force (even where the U.S. supports its position). The Administration should also support legislation to eliminate the concept of “Tier III” undesignated terrorist organizations and amend the definitions of “terrorist activity” and “material support.”<sup>112</sup>

To foster greater uniformity across the Department on refugee and asylum issues, many observers have long called for the Department to create a DHS Refugee Protection Office<sup>113</sup> that would report directly to the DHS Secretary or Deputy Secretary. Although former DHS Secretary Michael Chertoff created the position of Special Advisor for Refugee and Asylum Affairs in 2005, the position is currently housed in the DHS Office of Policy. In the past, the position’s focus was diluted by a broad portfolio of immigration issues.<sup>114</sup>

## CONCLUSION

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### DHS, IMMIGRATION REFORM, AND THE YEARS TO COME

Surveying the wide range of accomplishments, near misses, and disappointments that make up the first year of immigration policy under the Obama Administration would be incomplete without discussing the DHS role in immigration reform. The heightened attention given to immigration policy and enforcement within DHS, evidenced by everything from the Secretary’s stated priorities to her choice of staff, signals that immigration issues are far more integrated into the Department’s mission than at the time of its inception. Second, the message of reform, both administrative and legislative, has been repeated constantly. Although much of the work goes on behind the scenes, the Department is engaged in building an immigration policy for the 21<sup>st</sup> century.

But, while more humane and thoughtful, DHS policy is nonetheless predicated on an enforcement model that many within the immigrant advocacy world find untenable. The growing emphasis on existing programs such as Secure Communities and Operation Streamline, conceived as programs to rapidly sweep up unauthorized immigrants, is inconsistent with the message of immigration reform. That is not to say that enforcement of the law is not absolutely critical. It is and always will be. But without greater exercise of prosecutorial discretion, more care in how we process and adjudicate cases, and a broader acknowledgement that immigration enforcement is only one component of immigration policy, calls for reform are lost in the crush of more enforcement initiatives.

This tension between reform and expanded enforcement is evident throughout DHS, and there is no single explanation for the problem. Leadership, politics, and internal disputes all play a role in the ongoing battle for the soul of immigration policy. But no matter how earnest the reform effort, it is likely to be eclipsed by the crushing burden of the broken immigration system. Although this document points out many areas where the Administration—without any act of Congress—can have a positive impact, ultimately it will not be enough. Secretary Napolitano herself identified the problem during her major statement on immigration in November 2009—**the more we reform, the more we know we have**



**to change the system.** The immigration agencies themselves cannot possibly hope to succeed as long as we rely on them to create reason out of chaos. To that end, the longer we delay comprehensive immigration reform, the greater the burden will be on DHS to carve rational policy out of irrational laws, and the more difficult that task will become.

The sheer scope of the issues over which the DHS immigration agencies have jurisdiction is overwhelming. By all rights, an annual review of each agency is necessary to capture the full range of successes and failures that mark our immigration policy. Numerous issues relating to border enforcement, expedited removal, smuggling, immigration backlogs, adjudication of business visas, and so on have not been addressed. But by using the Transition Blueprint as a template, we have been able to evaluate the broad sweep of change within DHS immigration policy and practice. It is a mixed review, one where the promise of reform seems to fight daily with the dynamics of an entrenched belief in an enforcement-driven culture. For every two steps forward, it seems that the Department takes one step backward, inching its way toward a more humane and just system. There is clearly much more that can and should be done at an administrative level—without Congressional action—to improve the system. But we are living on borrowed time. Without immigration reform that gives DHS the breathing room to do the right thing, annual reviews will increasingly be catalogs of more enforcement measures without corresponding opportunities for immigrants to make the kinds of contributions to our country that enrich us all.

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