

Testimony of
Mr. Michael Creppy

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Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to testify on the Unaccompanied Alien Child Protection Act of 2001. Like other witnesses here today, I am sensitive to the way our nation responds to this vulnerable population. I applaud you and the members of your staffs for the interest you have shown in this issue, and for the encouragement you have given to those who confront it on a daily basis.

I am very pleased to have the opportunity to share my thoughts on S. 121. The 223 Immigration Judges across the country play a critical -- but essentially narrow -- role in the handling of unaccompanied juvenile aliens. We do not apprehend the juveniles at the border or the airport, nor do we provide juveniles with shelter when they are taken into custody. Similarly, the Immigration Judges do not manage the details of their return to their native country, when their stay in the United States is concluded. Rather, these are responsibilities of the Immigration and Naturalization Service (INS).

For those topics, I defer to the other witnesses appearing today. Instead, my comments before your Committee are focused on the part of the process where Congress and the Attorney General have authorized Immigration Judges to act - that of providing aliens with immigration hearings in Immigration Court.

Let me first tell you about current initiatives which EOIR has established to make the Courts more sensitive to the special issues that are unique to juvenile aliens in proceedings. When I refer to "unaccompanied juvenile" for the purposes of my testimony, I mean those juvenile aliens under the age of 18 who appear before an Immigration Judge without a parent or legal guardian.

Immigration Court Initiatives

Three years ago, in 1999, I began meeting with representatives of INS and non-governmental organizations (NGOs) in Phoenix, Arizona, in an effort to develop a program that would deal exclusively with unaccompanied, detained juveniles in immigration proceedings. After much work, we established a Pilot Program in Phoenix in the summer of 2000. Each of the participants in the Phoenix Pilot Program has a key role - from the INS identifying juveniles, to the NGOs assisting the juveniles and giving them "legal rights presentations." I established special "juvenile" dockets and assigned one Immigration Judge to preside over all juvenile cases. The purpose of such dockets was to provide access to juveniles for pro-bono attorneys and to consolidate all juvenile cases before one Immigration Judge for consistency purposes. We also have developed, and I have now mandated, the use of the "J" code to better track any case involving juveniles. Currently our data system does not track aliens by date of birth. However, once we update our system, we will have the ability to do so.

Although the Pilot Program is still in its infancy, I was so pleased with its success that I have expanded the "juvenile docket" program, with the cooperation of INS, to Harlingen, Texas; York, Pennsylvania; Los Angeles, San Diego and San Francisco, California. Moreover, we are working with the EOIR pro-bono coordinator to explore other programs relating to juveniles.

All Immigration Judges have received training and materials to assist them in dealing with juveniles in their court rooms. I provide, on a weekly, and at times on a daily, basis, information on case law, regulations and other legal matters that affect immigration law, including issues dealing with juveniles. Further, Immigration Judges have been provided books, guidelines and cultural sensitivity training pertaining to juvenile issues. Finally, at the 1998 and 1999 Immigration Judges' conferences, Judges received live lectures from experts in the juvenile area and they will again receive such instruction this June.

Let me assure the Subcommittee that all aliens, including juveniles, that pass through our Immigration Court system are given all the due process that the law accords them. Immigration Judges are committed to provide fair hearings for all, not just juveniles, and I encourage the Immigration Judges to do all that is required to ensure that this occurs. For juveniles, this means that an Immigration Judge may interview the juvenile in his or her chambers, or grant continuances to ensure that the juvenile is given adequate opportunity to obtain representation.

Now I would like to address those aspects of S.121 that involve Immigration Judges. Specifically, permit me to briefly address five topics that are of immediate relevance to the immigration hearings we provide: (1) the definition of eligible aliens; (2) second, access to legal counsel; (3) guardians ad litem; (4) interpreters; and (5) the "best interest of the child" standard.

S. 121

1. Definition of Eligible Aliens

My first topic addresses a technical, but critical, issue: the definition of "unaccompanied alien child". The term "child" is currently defined in Section 101(b)(1) of the Immigration and Nationality Act, in part, as "an unmarried person under twenty-one years of age. . . ." However, S.121 defines "unaccompanied alien child", in part, as one who "has not yet attained the age of 18. . . ." This difference with respect to the age limitation is inconsistent with current law and will cause confusion.

Instead, I suggest using the term "unaccompanied alien juvenile" in place of the phrase "unaccompanied alien child", since the regulatory definition of "juvenile" is an alien under 18 years of age. Again, I reiterate that for purposes of my testimony, when I refer to "unaccompanied alien juvenile", I mean those juvenile aliens under the age of 18 who appear before an Immigration Judge without a parent or legal guardian.

2. Appointment of Legal Counsel at Government Expense

Most Immigration Judges favor increased representation by legal counsel. Every day our Judges conduct cases involving respondents who appear pro se. The Judges know how to be fair, even when only one side to the proceeding is represented by counsel. However, when you combine the complexity of the immigration laws with the varying degrees of maturity of juveniles, it provides a greater challenge to Judges to ensure that the proceedings are fair, and that the juvenile understands the serious nature of such proceedings. If the Judge knew that competent counsel

were assured for every juvenile respondent, the efficiency of the hearing would be greatly improved. No longer would there be a preoccupation with procedural issues such as whether pro bono counsel can be located, or whether someone can assist the juvenile in completing the relief application.

Yet before a program providing legal counsel for juveniles can be established, there are some serious issues that must be addressed, questions which S.121, in its current form, does not answer.

First is the question of how such program would be structured. Factors such as oversight, administration, eligibility and selection of attorneys to serve as juvenile counsel, need to be fully evaluated and developed. These are the types of questions that S.121 does not answer.

S.121 also leaves unanswered the question of who will be responsible for giving the counsel direction. For example, to whom will the appointed counsel be answerable - the juvenile's parent, the Immigration Judge, or some other entity? Who will have authority to discharge the attorney if he or she is not competent? The counsel must truly represent the interests of the juvenile -- and not those of some third party. I am sure the Subcommittee is familiar with accounts of lawyers who appear to be in league with the smugglers who traffic in human cargo. Several of our Judges have voiced concerns about attorneys whose interests do not seem to be truly on behalf of the juvenile, or with whom the juvenile appears to have little, if any, contact.

This leads me to my third topic, the guardian ad litem.

3. Guardians ad litem

In some cases, a juvenile may be more than just an alien in the United States -- the juvenile may also be unaccompanied, with no adult to stand in the place of the absent parent. While an attorney can provide advice to the juvenile about his or her legal case -- such as whether or not the juvenile is eligible for relief from removal -- that advice is different from advice as to whether or not the juvenile should choose to try to stay in the U.S. or return to his or her family, a decision that a parent would be better suited to make. It is inappropriate for a counsel - even a talented and dedicated one - to make these decisions.

In cases where a juvenile does not have the capacity to make informed decisions on his or her own behalf, I believe that the Immigration Court process would be aided by the presence of an independent adult who can make informed recommendations for the juvenile respondent. A guardian ad litem or other adult acting in a similar capacity could be an active participant in deciding whether the juvenile should return to his or her native country or apply for relief from removal. Keep in mind, however, that a guardian may not be necessarily desirable in all cases -- yet it is mandated in S.121.

I support the concept of a guardian ad litem for a juvenile alien in limited circumstances. I have begun to explore the viability of this option, including whether Immigration Judges have the authorization or the organizational expertise to fully implement such a program. There are a series of issues that have not been fully explored, such as criteria that would render an individual eligible to be a guardian and the purview of such a guardian over an unaccompanied juvenile.

4. Interpreters

Current EOIR regulations allow for the hiring of interpreters to translate proceedings conducted before Immigration Judges. Appointed guardians ad litem and counsel will also need interpreters to speak to client juveniles outside of the proceeding before the Immigration Judge. Yet, S. 121 as drafted does not contain provisions for the appointment of interpreters. If such professional services are to be made available to unaccompanied juvenile aliens, it is necessary to make some provision for ensuring that such juveniles are able to obtain access to these services in a meaningful fashion.

5. "Best Interests of the Child"

Finally, Section 2 of S.121 declares that the "best interest of the child" shall be held "paramount" when making decisions regarding an unaccompanied juvenile. While no one would argue with such a standard as an important factor in the context of family law, the legislation should not permit any inference that the "best interest of the child" standard trumps any specific provision of the Immigration and Nationality Act or its implementing regulations. This provision, as currently drafted, would undermine the Immigration Court process by prompting endless arguments about whether specific provisions of the INA do or do not promote the "best interest" of the juvenile respondent in proceedings.

Conclusion

In conclusion, for the past several years the Immigration Judges have worked with children's rights advocates and the INS to identify concrete ways to improve our efforts on behalf of unaccompanied juveniles. The Unaccompanied Alien Child Protection Act of 2001 represents an attempt to deal comprehensively with a number of critical issues. However, it raises as many questions as it provides answers. In particular, the appointment of guardians ad litem and legal counsel for unaccompanied juvenile aliens would constitute significant changes to the current immigration system. We would, however, be pleased to work with you to define in greater detail the roles of the guardian ad litem and legal counsel, should you elect to pursue these concepts. It would be important, for example, to think through all potential issues that might arise in connection with their appointment and service. Moreover, because of the potential magnitude of the changes under consideration, the Department suggests that any program that may ultimately be adopted be tested and evaluated on a limited, "pilot program" basis prior to implementation on a broader scale.

Mr. Chairman, I look forward to working with the members of the Subcommittee as this legislation progresses. In the meantime, I am happy to respond to any question you might have for me.