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CENTER FOR LAW AND SOCIAL POLICY

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Director
Civil Rights Center
U.S. Department of Labor
Room N-4123
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Comments on the Revised DOL Recipient LEP Guidance

Dear Ms. Lockhart:

Thank you for seeking comments concerning the “Revised DOL Recipient LEP Guidance” (Guidance) issued by the Civil Rights Center of the Department of Labor (DOL) on May 29, 2003. The Guidance offers a needed opportunity to address the gaps in services that currently exist for people who are not fluent in English. In this letter we express our general support for the Guidance and offer a few recommendations to consider when finalizing it.

As the foreign-born population in the U.S. continues to grow, we believe it is increasingly important to ensure that these members of our community are fully served by programs for which they are eligible. Indeed, the undeniable presence of immigrants and children of immigrants, who may not be fluent in English, within the low-income population in the United States means that employment assistance services often cannot be provided to low-income residents without specific attention to linguistic needs.

I. Background: The Need for Services to the LEP Population

In this section, we document briefly why DOL-funded programs need to consider and serve the LEP population as required under the Guidance. Our recommendations for changes to the Guidance are included in **Section II: Recommendations for the Guidance**.

Because there is little direct information available about LEP individuals, we provide here background information about immigrants in general as a proxy for the LEP population itself. We believe the information presented reinforces the need for appropriately directed services to the LEP population. The DOL programs are designed to help all workers, particularly low-income and low-skilled people, to acquire the education, skills, and training needed to find, retain, and advance in employment. Further, DOL programs aim to increase business productivity by helping employers find skilled workers. It is vital that DOL programs be accessible to LEP individuals, as they represent a substantial and growing share of the workforce. Yet while immigrants were 15 percent of the workforce in 2000, and overrepresented in the low-wage labor market, just *7 percent of adults served through WIA in PY 2000 had limited English skills*. Because immigrants are projected to grow to over a fifth of the workforce by 2020 (21 percent), it is vital

for our economic productivity that DOL programs make the necessary modifications to serve this population well.¹

- **Adults with limited English skills represent a growing and critical segment of the U.S. workforce.**

Nearly half of the growth in our workforce during the 1990s—46 percent—was due to immigration, as compared to the 1980s when immigrants accounted for just a fourth of the workforce growth. Further, over the next two decades, the percentage of American workers whose English is limited will keep increasing due to continued growth in immigration and to the aging of the native-born workforce. Immigrants are expected to account for *all* of the net growth in the 25- to 54-year-old workforce during this time period.²

- **Recently arrived immigrants are settling in different states than earlier immigrants, creating new workforce opportunities and challenges.**

The Census estimates that over 13 million legal immigrants arrived between 1990 and 2000, with about 58 percent arriving between 1995 and 2000.³ New arrivals are particularly diverse, and are increasingly likely to come from countries where English is not the primary language. In addition, recent immigrants are increasingly choosing new places to live. A 2001 study identified 19 states which did not traditionally receive large numbers of immigrants, but which have seen their immigrant populations grow faster than the rest of the country. Between 1990 and 1999, states such as Arkansas, Idaho, Minnesota, Nevada, and North Carolina saw their immigrant populations rise by over 150 percent.⁴

Regions with a growing population of immigrants face both workforce opportunities and service challenges. To tap into this new labor force pool, employers must be prepared to work with employees with limited English skills. Demand for certain types of services—particularly English language and job training services for individuals unfamiliar with the U.S. workplace—will also increase.

- **Limited English skills can affect a person's ability to find work and earn enough to support his/her family.**

Spoken English appears to be an important component of economic stability and success in the U.S. Although few studies have collected employment rates for immigrants according to English ability, those that have show a strong connection. For example, the 1999 Refugee Survey shows that only 26 percent of refugees who did not speak English were employed compared with 77 percent of those who spoke English well or fluently.⁵ A review of Los Angeles's welfare-to-work program found that employment rates for Hispanic and Asian participants proficient in English were 10 to nearly 30 percentage points higher than employment rates for Hispanic and Asian participants who did not speak English well.⁶

The effect of learning English on immigrant workers' earnings is well-documented. For example, one review concluded that English fluency has roughly the same impact on immigrants' earnings as postsecondary education has on women's annual earnings—an increase of 17 percent, far more than increases attributed to additional years of work experience.⁷ Similarly, a recent analysis of 1990 Census

¹ Ellwood, D. (2002). How we got here. In *Grow Faster Together. Or Grow Slowly Apart*. Washington, DC: The Aspen Institute.

² Ellwood, D. (2002).

³ US Census Bureau. (2002).

⁴ Passel, J.S., & Zimmerman, W. (2001, April). *Are immigrants leaving California? Settlement patterns of immigrants in the late 1990s*. Washington, DC: The Urban Institute, Table B.

⁵ Office of Refugee Resettlement. (1999). Table 5.

⁶ Freedman, S., Knab, J., Gennetian, L.A., & Navarro, D. (2000, June). *The Los Angeles Jobs-First GAIN evaluation: Final report on a Work First program in a major urban center*. New York, NY: Manpower Research Demonstration Corporation, Table 4.6.

⁷ Fremstad, S. (2001). *Immigrants and the TANF program: What do we know?* Washington, DC: Center on Budget and Policy Priorities.

data found that, controlling for other characteristics, immigrants who are fluent in English earn about 14 percent more than those who are not.⁸

- **Immigrants tend to be concentrated in low-wage work and have low earnings.**

Immigrants remain over-represented in low-skilled jobs when compared to their presence in the general population. For example, about 13 percent of native workers hold service jobs, compared with 19 percent of all immigrants, and 22 percent of recent immigrants.⁹ Immigrants also tend to earn less than natives, especially recent immigrants. Nearly 24 percent of low-wage workers in low-income families with children are immigrants; about half are recent immigrants.¹⁰

Low wages add up to low earnings, even among full-time, year-round workers. In 2000, 45 percent of male immigrants working full-time, year-round, earned less than \$25,000 per year, compared to less than one-quarter of comparable native workers. Earnings are lowest among the most recent immigrants, who are the least likely to speak English: 57 percent of recent male immigrants working full-time, year-round earn less than \$25,000 annually.

II. Recommendations for the LEP Guidance

Given the importance of DOL programs for helping LEP individuals find, retain, and advance in jobs, and the importance of new immigrants to future workforce productivity, we believe the Civil Rights Center should make the following changes in its LEP Guidance:

Restore language and protections found in the previous DOL Guidance of January 2001.

The Guidance retreats in a number of ways from the Guidance first published by DOL in January, 2001, at 66 Fed. Reg. 4595. The deleted areas include much clearer, stronger language on

- giving preference to use of bilingual staff;
- requirements for formal arrangements with and training to community volunteers;
- using telephone interpretation services only where other options are unavailable; and,
- requirements that DOL service providers ensure the competency of interpreters.

In addition, the earlier Guidance indicated the DOL's MOA regulations require a written LEP plan, but that section has been deleted from the current Guidance. We urge you to restore the protections that were clearly stated in the earlier Guidance. The substitution in many instances of "should" for the many instances in which the former Guidance uses "must" can only result in fewer or lower quality services and benefits to LEP individuals and confusion for entities receiving federal funds.

In addition, many of the programs operated and/or funded by DOL involve either worker safety (including OSHA and mine safety programs and automobile safety under the Migrant and Seasonal Agricultural Worker Protection Act, as well as worker compensation laws) or basic family income (such as wage and hour laws, unemployment insurance, and state worker compensation). These programs are of such a high level of importance that they should be given the utmost protection under the four-factor analysis.

Include "safe harbor" provisions in the Guidance.

"Safe harbor" provisions provide a common starting point for measuring compliance with the written translation provisions. The Department of Justice (DOJ) standard is that vital documents must be translated for each eligible LEP language group that constitutes 5 percent of the population eligible to be served or

⁸ Chiswick, B.R., & Miller, P.W. (2002). Immigrant earnings: Language skills, linguistic concentrations and the business cycle. *Journal of Population Economics*, 15, 31-37.

⁹ U.S. Census Bureau. (2000, March). *Foreign-born population of the United States, Current Population Survey*. Washington, DC: Author, Tables 1.8 and 2.8. Available at <http://www.census.gov/population/www/socdemo/foreign/p20-534.html>.

¹⁰ Gregory Acs. (1999, May). *A profile of low-wage workers*. Washington, DC: The Urban Institute, Table 11. Available at http://www.dol.gov/asp/futurework/conference/lowwage/lowwage_toc.htm.

likely to be affected or 1,000 people (whichever is less). If there are fewer than 50 persons in a group that reaches the 5 percent trigger, the standard is for written notice, in the primary language, of the right to receive oral interpretation at no cost. DOL should include safeguards so that recipients of federal funds have a clear guideline, and because the omission of “safe harbor” provisions puts DOL out of step with other federal agencies interpreting the very same provisions of Title VI. Moreover, DOL’s initial Guidance included “safe harbor” provisions. These should be restored.

In addition, DOL inserts a section explaining that “safe harbor” provisions do not apply where oral language assistance is “needed” and is “reasonable.” DOL also indicates that oral interpretation should “generally” be offered “free of cost.” Oral language assistance must be provided without cost to all groups at all times in a way that does not burden LEP individuals, not just where it is “reasonable.” DOL should make this clear.

Clarify the requirement of written plans.

In the main text of the Guidance, DOL should clearly spell out the programs that are required to submit a written LEP plan. This is currently done in a footnote. As DOL states, written language plans demonstrate that an entity receiving federal funds has considered and applied the four factors. The DOJ Guidance contains language in its Supplementary Information preamble indicating that written plans are the rule rather than the exception, and it will look with disfavor on groups, other than the smallest agency with the most limited resources, that have no written LEP language access plan (67 Fed. Reg. 41455). DOL’s former Guidance stated clearly that written plans on universal access to certain DOL programs are required by 29 CFR 37.54.

Limit use of family and friends as interpreters and prohibit the use of minors as interpreters, except in emergency situations.

The DOJ Guidance contains stronger preamble language than does the DOL Guidance regarding reliance on informal interpreters (67 Fed. Reg. 41456). DOL’s Guidance should be clear that recipients of federal funds cannot rely on informal interpreters as part of their LEP access plans. The use of family and friends should be limited to instances where a clear choice has been expressed by the LEP individual, and recorded by the federal funds recipient, or exigent circumstances. Furthermore, except in emergency situations, minors should be prohibited from interpreting.

Expand the definition of LEP to include those who speak English “well” since they often lack the English literacy skills needed to understand government forms.

At times, the DOL Guidance seems to indicate that it considers LEP individuals to include only those who are counted in the Census as speaking English “not well” or “not at all.” This count should include those who say that they speak English “well” since the reading level of many government documents can be high and the penalties for inaccurate information can be so severe in the DOL programs, especially those concerning worker safety and essential benefits, such as unemployment insurance (UI) (68 Fed. Reg. 32291).

Strike Footnote 8 indicating that entities receiving DOL funds would never be required to create new job training services tailored to the needs of LEP individuals.

Many states have failed to meet the needs of LEP individuals in their job training programs. One of the best ways to provide job training to LEP individuals is to combine English language and job skills training in the same program. Two scientific evaluations of a training program serving primarily Hispanic immigrants found that integrating job training with English language, literacy, and numeracy instruction increased employment and earnings.¹¹ DOL should not foreclose the possibility that creating or expanding such programs can be an appropriate part of an LEP access plan.

¹¹ In the Minority Single Parent Demonstration, which included the Center for Employment and Training (San Jose, CA) program and focused on low-income female single parents (primarily welfare recipients), roughly 80 percent of the participants were Hispanic. See Zambrowski, A., & Gordon, A. (1993). *Evaluation of the minority single parent demonstration: Fifth-year impacts at CET*. Princeton, NJ: Mathematica Policy Research, Inc. In the JOBSTART evaluation, which also included CET and focused on young high school drop outs, over 70 percent of the participants were Hispanic. See Cave, G., Bos, H., Doolittle, F., & Toussaint, C. (1993). *JOBSTART: Final report on a program for school dropouts*. New York: Manpower Demonstration Research Corporation.

Require the use of certified interpreters in administrative hearings.

The use of certified interpreters in administrative hearings, in languages where formal accreditation or certification exists, should be required, rather than “strongly encouraged” (68 Fed. Reg. 32296). The Guidance recognizes that the quality and accuracy of language services in a UI appeals hearing or safety and health training must be “extraordinarily high.” The best way to ensure that it is high is to employ certified interpreters. Administrative hearings for DOL recipients can be a matter of hunger and health risk to a working family, since they can involve such critical issues as wages owed, UI to be received, and health and safety violations in the workplace.

Expand the list of vital documents to include UI applications and health and safety requirement information.

Currently, the Guidance says that UI applications and health and safety requirement information “could be considered” vital documents (68 Fed. Reg. 32298). These documents should be considered vital. In addition, consider adding other documents to this list, including job training applications, workers’ compensation applications and notices, and wage hour complaints and determinations.

Strongly encourage the keeping of logs of language requirements.

According to the Guidance, logging language requirements for applicants is something that “can be included as part of” the workers’ record. It should be at least strongly encouraged as evidence that the recipient is making an effort to provide services in an individual’s primary language (68 Fed. Reg. 32299).

Encourage meaningful access through the hiring of bilingual staff.

One example of providing meaningful access to services includes the hiring of bilingual receptionists for a One-Stop program. In order to adequately serve LEP individuals, programs need to do better than answer the phone in the native language of the customer—they need to actually provide services to them, including translations, oral interpretation, and services in the customers’ language.

In addition, the first full example on p. 32303 should delete the many references to the use of community volunteers, which should be discouraged in favor of use of bilingual staff in most instances. The Guidance should not highlight the use of volunteers to translate outreach materials without explaining that it is not appropriate to use community volunteers in a variety of other settings. Secondly, this example does not make it clear that a menu of languages should only be considered appropriate if the menu is available without the listener having to pass through several steps in English before reaching the only language that s/he understands.

Specify the need for translation of web-based services.

Many DOL recipients operate web-based services. Therefore, it is important to note that these are subject to the same four-factor analysis as are other services, including the telephone and in-person services. The fourth example on p. 32303 should be rewritten as follows:

In this instance, the state translates key documents and forms on its website into the most significant languages, e.g., representing five percent or more of the total eligible population to be served or 1,000 persons whichever is less, and has a language identification section with hyperlinks to language-appropriate information about its toll-free help line, which includes interpretation services, on the homepage of its website.

Use “safe harbor” provision standards in determining UI services delivery.

According to the Guidance, the first example of appropriate services says that using tag lines for correspondence and notice to LEP individuals numbering from between 3,500 and 6,000 in the service area is inappropriate (68 Fed. Reg. 32303). These numbers are far greater than would be allowed in the use of a tag line under the “safe harbor” provisions promulgated by DOJ and in DOL’s former Guidance. Under DOL’s own Guidance, “vital documents” should be translated for this group. “Vital documents” include

notices and letters (68 Fed. Reg. 32298). This example should be rewritten to comply both with DOL and DOJ Guidance.

The same is true for the remaining examples in the UI system. The repeated reference to “tag lines” to be used on vital documents is inappropriate and contrary to the DOJ model “safe harbors” language and to DOL’s former “safe harbor” language.

Thank you again for seeking comments on the DOL Guidance. We believe that the Guidance, with the types of improvements outlined here, can serve as an excellent model for services to the LEP population.

Sincerely,

Hitomi Kubo

On behalf of the Center for Law and Social Policy