The Risks of Expanding The Limited License Legal Technician Program to Immigration Law
# Table of Contents

I. **INTRODUCTION** ............................................................................................................. 3

II. **CONCERNS OVER EXPANDING LLLT PRACTICE AREAS TO INCLUDE IMMIGRATION LAW** ............. 4
   1. Complexity of the Practice Area .................................................................................... 4
   2. Masterly is Difficult, Even for Attorneys. ..................................................................... 7
   3. Mistakes Have Severe Consequences. ........................................................................... 8
   4. The Nature of Unmet Legal Need is Unclear. ................................................................. 9
   5. It is Unclear Whether LLLTs Will Reduce the Cost of Immigration Services. ............ 10

III. **REGULATORY CONFLICTS** .......................................................................................... 11
    1. Federal Preemption ......................................................................................................... 11
    2. Washington Immigration Services Fraud Prevention Act of 2011 ............................. 14

IV. **ALTERNATIVE METHODS FOR INCREASING ACCESS TO IMMIGRATION SERVICES** .......... 16
    1. Support Existing Immigration Nonprofit Organizations that Have Attorneys and/or BIA Accredited Representatives. ........................................................................... 16
    2. Advocate for the Creation of a Public Immigration Defense Program. ....................... 16
    3. Empower and Fund the Practice of Law Board to Investigate Unauthorized Practice of Law and Other Scams Against Immigrants to Protect the Public from Scam Artists. ................................. 17
    4. Work Cooperatively to Promote Anti-Fraud Campaigns in Washington Communities . 17
    5. Improve the WSBA Website to Include Resources for Immigration Legal Services, Where to Get Help, and for Pro Se .................................................................................. 18
    6. Collect Better Data to Identify the Real Unmet Need for Immigration Services. ........ 18
    7. Help Promote Seattle University’s Incubator Program. .................................................. 19
    8. Provide Incentives to Do Pro Bono or Low Bono Service in Immigration Law. ............ 19
    9. Add Immigration Law as a Practice Area on the Modest Means Panel. ....................... 19
   10. Encourage WSBA Members Who Say They Practice Immigration Law to Join AILA. .... 20
   11. Advocate for Immigration Reform to Simplify the System. ......................................... 20

V. **CONCLUSION** .............................................................................................................. 21

**APPENDIX**

1. The Supreme Court of Washington, Order No. 25700-A-1005.
2. Practice of Law Board Response to SSB 5023.
4. AILA National, Comments on 8 CFR 1292.
5. USD0J, BIA Rules and Accreditation.
6. WSBA, Ethics Inquiry #2225.
I. Introduction

The Washington State Bar Association’s (WSBA) Limited License Legal Technician (LLLT) Board has invited our feedback on whether immigration law should be authorized as an area of practice for the LLLT program. We thank our colleagues at the WSBA for seeking our feedback, and applaud their efforts to ensure that all residents of our state have adequate access to legal services. Regardless of whether LLLTs are eventually authorized to practice in this area, we welcome engagement with the Bar on efforts to ensure excellent legal services are available in the area of immigration law.

Having recently surveyed our Chapter membership, we report that our membership overwhelmingly opposes authorization of immigration law as a practice area for LLLTs. Whereas the LLLT program was designed “to provide technical help . . . to clients with fairly simple legal law matters,” immigration law is anything but simple. It is conceivable that technical expertise alone could be sufficient in some scenarios once a case is correctly identified as “fairly simple.” But to properly identify the potential legal issues in immigration cases requires a level of expertise that exceeds the qualifications of a non-attorney.

Immigration law rivals criminal law in the harsh consequences that can follow from legal errors. Even “minor” legal errors can cause deportation and a permanent bar from the U.S. Such individuals may face removal to a country where their very lives are at risk.

We believe permitting LLLTs to practice immigration law would create a conflict with federal rules governing licensure to practice. Federal regulations narrowly define specific classes of individuals eligible to practice U.S. immigration law and LLLTs would fall into none of these. An attorney who aided a LLLT in practice would herself face sanction under federal disciplinary rules. Further, LLLTs practicing immigration law would violate Washington’s Immigration Services Fraud Prevention Act of 2011.

Finally, AILA-WA recognizes an unmet need for immigration legal services, as is currently the case for all areas of consumer law. We believe, however, that actions less drastic than authorizing problematic immigration LLLTs could greatly assist in meeting the unmet need. These actions include more support for existing nonprofits and referral services, empowerment of the Practice of Law Board, WSBA participation in anti-fraud campaigns, better data collection to assess the true and current unmet need, and inclusion of immigration law in the Modest Means panel.

1 LLLT Order at 8. See Appendix Exhibit 1 (emphasis added, quotes omitted).
2 “Immigration is an incredibly complex field of law.” Practice of Law Board Response to SSB 5023 at 8 (Oct. 31, 2011).
3 Written Statement of Hon. Dana Leigh Marks, President National Association of Immigration Judges, to Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law of the House Committee on the Judiciary on Oversight Hearing on the Executive Office for Immigration Review (June 17, 2010);
We offer the following detailed discussion in the spirit of productive engagement with the LLLT Board, and welcome further inquiries from the Board.

II. Concerns Over Expanding LLLT Practice Areas to Include Immigration Law

1. Complexity of the Practice Area.

It is well acknowledged within the legal community that immigration law is a highly complex and constantly changing area of law.\(^2\) AILA-WA is highly skeptical that LLLTs could be adequately trained to identify and analyze the full range of issues that arise in immigration practice.

Commenting on the complexity of immigration law, Hon. Dana Leigh Marks, President of the National Association of Immigration Judges, stated that “[t]he proceedings of which we preside rival the complexity of tax law proceedings, with the consequences which can implicate all that makes life worth living, or even threaten life itself.”\(^3\) Judge Marks went on to state that immigration matters can be so “complex and high-stakes” as to be tantamount to death penalty cases.\(^4\) The Ninth Circuit has stated that “[w]ith only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth.”\(^5\) Likewise, the Eleventh Circuit cautions that, “[i]t would seem that should be a simple issue with a clear answer, but this is immigration law where the issues are seldom simple and the answers are far from clear.”\(^6\)

While there may be a misperception among those who do not practice immigration law that immigration work consists of nothing more than filling out forms and preparation of simple paperwork, nothing could be further from the truth. Typically an immigration attorney focuses on one or two sub-specialty areas within immigration to practice such as family-based petitions, citizenship and naturalization, employment-based petitions, workplace compliance, education-based matters, affirmative asylum, before USCIS, or defensive asylum in the Immigration Court (EOIR), criminal immigration, removal services before EOIR and/or litigation in the federal

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\(^2\) “Immigration is an incredibly complex field of law.” Practice of Law Board Response to SSB 5023 at 8 (Oct. 31, 2011).
\(^3\) Written Statement of Hon. Dana Leigh Marks, President National Association of Immigration Judges, to Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law of the House Committee on the Judiciary on Oversight Hearing on the Executive Office for Immigration Review (June 17, 2010); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (deportation may result in “loss of both property and life, or of all that makes life worth living.”)
\(^4\) Written Statement of Hon. Dana Leigh Marks at 5.
\(^5\) Castro-O’Ryan v. U.S. Dept. of Immigration and Naturalization, 821 F.2d 1415, 1419 (9th Cir. 1987).
\(^6\) Alanis-Bustamante v. Reno, 201 F.3d 1303, 1308 (11th Cir. 2000).
courts, visa services before the Department of State (DOS) and/or border issues before US Customs and Border Protection (CBP) and more.

An immigration client’s primary need is to receive competent legal advice regarding the ability to either enter or remain in the United States, or to determine whether the individual can become, remain or is already a US citizen under the current immigration and citizenship laws. To effectively practice immigration law, a practitioner must understand the following:

- The Immigration and Nationality Act (INA) as amended;
- A litany of federal regulations;
- Ongoing policy changes (both internal and procedural) from multiple federal agencies;
- Presidential programs;
- Current unpublished federal agency procedures;
- The current political climate toward immigrants;
- Federal agency decisional law; and
- Federal case law.

The Federal Courts are notorious for interpreting immigration law in an incongruous and anomalous manner. Because “nothing is ever simple in immigration law” and because of the high stakes involved in obtaining immigration benefits, it is not surprising that the United States Supreme Court has admonished that “[m]eticulous care” must be taken to assure that a noncitizen is not unfairly deprived of an immigration benefit.

All of these legal and factual sources and the issues they raise create a very complex process for practitioners attempting to determine a client’s immigration eligibility where laws, policies and procedures change frequently. Furthermore, a valuable aspect of being an immigration attorney (and an AILA member) is the ability to meet with government officials through bar association liaison efforts. This is where our members gain valuable inside information about how these agencies work and their internal processes, staffing, and other issues not necessarily available in publications.

There are also many ancillary immigration and citizenship issues handled by immigration attorneys. Some of these issues include criminal law, foreign law, adoption issues, tax law, employment law, national security law, and workplace compliance issues. Because U.S. immigration law recognizes the birth and marriage laws of the countries where these events take

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7 Scialabba v. Cuellar de Osorio, 134 S.Ct. 2191, 2203 (2014) (underscoring the complex statutory scheme inherent in immigration law); Padilla v. Kentucky, 559 U.S. 356, 369 (2010) (observing that “Immigration law can be complex, and it is a legal specialty of its own” which does not generally fall “within the range of competence demanded of attorneys” who practice other areas of law); Baltazar-Alcazar v. INS, 386 F.3d 940, 947-48 (9th Cir. 2004)(remarking that “the immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth[.]”); Cervantes v. Perryman, 954 F.Supp. 1257, 1260 (N.D.Ill. 1997) (observing that the patchwork of Immigration law “presents an example of legislative draftsman that would cross the eyes of a Talmudic scholar”).
8 Padilla, 559 U.S. at 381 (Alito, J., concurring).
place, one may be analyzing foreign law in connection with immigration, and having to draw a distinction between religious, legal, and customary relationships while disentangling conflicting international laws. Similarly, immigration issues in adoption may require analysis of the Hague Convention and regional traditions. Regarding workplace compliance, frequent issues include raids and fraud investigations by ICE and audits by the Department of Labor (DOL). Business immigration issues also frequently cross over with federal and state wage and hour law, as well as international tax, business, customs and export controls law.

To competently complete even the simplest immigration application or petition form, a practitioner must be able to properly analyze how a client’s criminal history, immigration history, familial relationships, income level, and various other issues impact the client’s eligibility for immigration benefits. Many of the words and terms on forms have legal meanings or may be the subject of much litigation in the area. Committing one mistake regarding a client’s eligibility for benefits can lead to severe consequences, including removal and a permanent bar from future immigration benefits.10

It is crucial that practitioners be well versed in the complexities of immigration law and have a competent foundational understanding of the many integrated areas of law. For example, the term “conviction” means different things in criminal court than it does in immigration law. A person with an expunged criminal conviction may feel their criminal conviction no longer exists, and, therefore, not list their conviction on an immigration application. However, there is immigration case law providing that certain criminal expungements are not recognized for immigration purposes.12 Even expunged convictions can have dire immigration consequences.

Another example is a common question on immigration forms: “Have you ever made a false statement of a material fact for an immigration benefit?” “False statement” has a legal meaning, as does “material fact” and “immigration benefit.” Since immigration forms are signed under penalty of perjury, an unintentional mistake may lead to consequences of criminal perjury, civil fraud, and a bar to future immigration benefits.

The area of asylum is another good example of the complexity of immigration law. Although a cursory review of the documentary filing requirements for an asylum application may not appear difficult, the issues associated with determining asylum eligibility are complex. Each of the enumerated grounds upon which a person can base an asylum claim has been the subject of much litigation and interpretation. An immigration practitioner must be familiar with the relevant court holdings, various agency interpretations, regulations and procedures, statutory law, and

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10 Immigration law includes several bars to inadmissibility for getting a green card or visa in order enter the U.S. The most common bars are for 3-years, 10-years, or permanent bars for a period of unlawful presence or prior illegal entry. These bars can mean the difference between seeing your child growing up or not. These bars also directly affect where a person will apply for a green card (if eligible) – in the US or abroad, and whether they will be separated from family during that process.
11 This is particularly troublesome, as “immigrants have reduced access to appeal if they receive inadequate counsel[sic].” Practice of Law Board Response to SSB 5023 at 8 (Oct. 31, 2011).
how all of these interact with the facts and each other in order to effectively represent an asylum client. Similarly, among other issues, an understanding of asylum deadline requirements, bars to eligibility, and eligibility of family members are all crucial to effective representation. Credibility is a key issue in asylum law that is often the subject of litigation. Finally, improper representation or a frivolous application can lead to a client’s lifetime bar from immigration benefits.

2. Mastery is Difficult, Even for Attorneys.

As of October 1, 2014, there were 30,498 active WSBA attorneys. Of the 30,498 active WSBA attorneys only 654 (2.15%) identified themselves as practicing immigration or naturalization law. Yet according to the 2013 WSBA Lawyer Discipline System Annual Report, grievances filed against immigration attorneys in 2013 accounted for four percent of all grievances filed against WSBA attorneys that year. Furthermore, WSBA disciplinary actions and diversions against WSBA immigration attorneys in 2013 accounted for nine percent of all WSBA disciplinary actions and diversions that year. Although the vast majority of immigration attorneys provide competent representation, these WSBA statistics demonstrate the difficulty and risks, even for attorneys, in competently practicing immigration law as compared to other practice areas.

Although immigration law’s complexity makes competent representation more difficult than in other practice areas, there are separate reasons for which immigrants often struggle to find competent representation. In many cases immigrants’ unlawful legal status, language barriers, and cultural differences make it difficult for them to properly seek out or understand what constitutes credible legal advice. These issues impact both immigrants and immigration attorneys who in many cases spend significant amounts of time attempting to correct mistakes of non-lawyers and “notarios” whose incorrect legal advice has created serious problems for clients.

There are currently over 11,000,000 undocumented immigrants living in the United States. Congress has not yet passed immigration reform legislation that would put many of these individuals on a track to legal status, and given the new Congress just elected, is not likely to do so even in light of the President’s executive action. Most of these individuals simply have no options for immigration status at this time. For many of these eleven million people, once a competent immigration practitioner has reviewed their case and determined them to be ineligible for benefits, there are no immigration forms to file or other tasks that anyone could perform.

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15 Id., at 23.
17 As of November 20, 2014, President Obama has issued executive relief. Even so, the practitioner must evaluate the risks of availing a client of that relief, in the event that the next Congress or President takes it away.
3. Mistakes Have Severe Consequences.

Mistakes in immigration law can have extraordinarily severe consequences for the victim, even when such mistakes come from highly technical defects. Incorrect legal advice can lead to a client's detention, removal to a country where the client may be tortured or killed, separation from family members, criminal prosecution, financial losses (including loss of a job, business or assets), and a permanent bar from receiving immigration benefits in the future. The United States Supreme Court has acknowledged this issue, stating, “We have long recognized that deportation is a particularly severe penalty.” The Court went on to state “We too have previously recognized that preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.”

Encouraging some non-citizens to move forward with an affirmative application can be far more damaging than inaction. An error as simple as an omission on an immigration form, or inconsistencies between statements on a form and oral testimony may serve as the basis for denial of the immigration benefit and deportation. Information provided on immigration forms can be used to institute removal or deportation proceedings against an applicant. This means that incorrect legal advice, even on what appears to be the most straightforward or innocuous immigration form, can trigger a client’s potential deportation or removal from the United States.

Limiting LLLTs to focused areas of immigration practice would not avoid the risk of costly technical errors. Even if a LLLT is limited to working on family benefits or naturalization applications, it is essential to have a high-level of knowledge regarding removal law in order to avoid presenting an application where the client would not qualify and could be deported instead of becoming a lawful permanent resident “green” card holder or naturalized citizen. An immigration practitioner’s failure to understand how a client’s criminal convictions impact his or her immigration eligibility can be a crucial error with devastating consequences for the client. Indeed, a citizenship applicant will have her entire immigration history reviewed by the

18 The United States Supreme Court recently reiterated its longstanding recognition of the need for competent immigration advice, as the adverse consequences are dire. See Chaidez v. United States, 133 S.Ct. 1103,1117 n.4 (2013) (citing to a litany of cases, including: INS v. St. Cyr, 533 U.S.289, 322 (2001) (noting that “[p]reserving the client's right to remain in the United States may be more important ... than any potential jail sentence” (internal quotation marks omitted)); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)(“[D]eparture is a drastic measure and at times the equivalent of banishment or exile”); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922); (deportation may result in “loss of both property and life; or of all that makes life worth living”); and Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) (“Everyone knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.”)).
20 Id. at 368.
21 See e.g., Xian Tuan Ye v. DHS,446 F.3d 289, 295-96 (2nd Cir. 2006) (holding that an applicant's failure to include a reference to his alleged detention and beating in his asylum form is a “self-evident” inconsistency that the agency may rely on to deny the application without requesting an explanation from the applicant).
government. Not knowing an applicant’s entire history and statements on prior applications can be a huge mistake. The United States Supreme Court spoke to this issue by stating that, “The importance of accurate legal advice for noncitizens (including permanent residents) accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part - indeed, sometimes the most important part, of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”

Not only do immigration attorneys need to understand immigration law, but the interplay between criminal law and immigration law requires that immigration practitioners be knowledgeable about the immigration impact of criminal convictions. Failure to be competent in this area can lead to a misunderstanding of a client’s eligibility for immigration benefits and to severe consequences for clients.

4. The Nature of Unmet Legal Need is Unclear.

It appears to be accepted wisdom that there is a large unmet need for legal services within the field of immigration law, but it is unclear specifically what that need is. According to the 2003 Civil Needs Study cited by the Washington Supreme Court in its LLLT Order the legal needs in immigration law are as follows:

[C]laims for asylum, deportation [sic], naturalization, work adjustment [sic], right to petition for resident immigrant status under the Violence Against Women Act (VAWA), and other issues arising from a person’s immigration status.

As shown by its July 10, 2014 Meeting materials, these are the immigration law needs that the WSBA LLLT Board must consider addressing via the licensing of immigration LLLTs.

The Civil Needs Study was published over 11 years ago with data collected prior to that date. Since that time immigration law has substantially changed. Moreover, the language used in the Study suggests unfamiliarity with the unmet legal need the Study seeks to describe. The Study finds an unmet need in the field of “deportation,” but “removal” – rather than deportation – proceedings have been in place since 1996. Likewise, the term “work adjustment” has no particular meaning in immigration law. The Study could have intended a reference to Adjustment

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23 Id. at 364.
24 Pre-1997 deportation and exclusion were separate removal procedures. These procedures were consolidated under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) under the term of art “removal”.
25 Work adjustment is not a commonly used immigration term of art. It is not clear what the Civil Needs Study intended to mean by this. It is ambiguous and could mean either the employment-based adjustment of status (the process of receiving a lawful permanent resident “green” card through a job) or the application for an employment authorization document, which can only be had after an underlying immigration benefit application is filed. These errors in terminology put the validity of and expertise behind the Civil Needs Study in question.
27 The Practice of Law Board wrote, that it “would not be able to collect any meaningful information on the actual level of need for services or the degree to which this need has been met.” Practice of Law Board Response to SSB 5023 at 8 (Oct. 31, 2011).
of Status Petitions (Form I-485) that may be filed in employment-based processes, but this would be surprising since the cost of such legal work is customarily born by the employer.

The Civil Needs Study concluded that immigration represented 3% of the legal issues by problem area for low-income people. We do not disagree with the conclusion that there is unmet legal services need in the immigration sector. As discussed below, there are ways that AILA and the WSBA can help meet these needs, by expanding pro bono work, working with the Modest Means panel, etc. However, neither the court nor we are knowledgeable about the true need in terms of numbers and types of immigration services needed. (We do have some suggestions below, however, about how we could help obtain that information.)

In addition, rules imposed by EOIR strictly limit who can represent an alien in immigration court.\textsuperscript{28} The licensing of non-lawyers with substantially less education to represent the most vulnerable and fragile of the immigrant population does not comport with the “meticulous care” mandated by the United States Supreme Court in such matters.\textsuperscript{29} The sub-areas of immigration practice are numerous and highly distinct in terms of populations served and the nature of the legal work involved. Without better understanding the unmet needs of those seeking immigration legal services it is not possible to know whether LLLTs could effectively serve these needs.

5. It is Unclear Whether LLLTs Will Reduce the Cost of Immigration Services.

Presumably one of the Washington Supreme Court’s reasons behind creating the LLLT program was to lower the legal fees associated with representation of low and modest income clients. First, LLLTs are prohibited from charging for their services under the applicable federal regulations and Washington law, as discussed below, unless they are BIA accredited representatives, and even then they can only charge a “nominal fee.”\textsuperscript{30} But even if LLLTs were legally able to charge for their services, there is no evidence that hiring a LLLT would cost immigration clients less than hiring a fully licensed attorney. In fact, notarios,\textsuperscript{31} which are the unlicensed equivalent of an LLLT, often charge substantially more than an attorney.

Our members are very familiar with the mistakes created by non-lawyers. Our members often take on those cases and have to untangle the mess that was created. In the long run, it becomes more expensive for the clients than if they had hired a lawyer to begin with. Unfortunately, even if LLLTs were able to offer a lower hourly rate, the likely amount of time LLLTs will take to complete work as compared to attorneys and the need, in many cases, to hire an attorney to correct LLLT practice mistakes will likely offset any savings that would otherwise be created.

\textsuperscript{29} Bridges v. Wixon, 326 U.S. 135, 155 (1945).
\textsuperscript{30} See 8 C.F.R. § 292; RCW § 19.154.
With these issues in mind there is no evidence that hiring a LLLT will lead to a substantial savings for clients.

III. Regulatory Conflicts

1. Federal Preemption.

Extending the LLLT practice areas to immigration law would conflict with the plenary power exercised by the U.S. Congress to regulate immigration law.\textsuperscript{32} This authority has been exercised by the federal agencies to create clear licensing rules for immigration law practitioners. LLLTs would not be permitted to practice under these rules.

Congress has granted authority to establish regulations necessary to administer and enforce immigration laws to the Secretary of Homeland Security.\textsuperscript{33} Existing regulations specifically name which classes of individual can practice immigration law. The regulations identify seven classes of people that may represent a person in an immigration matter and unequivocally state, “no other person or persons shall represent others in any case.”\textsuperscript{34} The chart below sets forth those seven classes of people, and summarizes why LLLTs fall within none of the seven classes.

<table>
<thead>
<tr>
<th>Class Authorized</th>
<th>Federal Rule</th>
<th>Why LLLT Does not Qualify</th>
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<tbody>
<tr>
<td>(1) Attorney</td>
<td>Must be “… a member in good standing of the bar of the highest court of any State … not under any order of any court suspending, enjoining, restraining, disbaring, or otherwise restricting him in the practice of law.” \textsuperscript{35}</td>
<td>The LLLT rule explicitly sets LLLTs apart from attorneys, both in privileges and function. Furthermore, a plain reading of the act, as required by \textit{Chamber of Commerce of U.S. v. Whiting},\textsuperscript{36} suggests that “the bar of the highest court” would be the bar that commonly licenses attorneys who are not “restricted in the practice of law”.</td>
</tr>
<tr>
<td>(2) Law Student</td>
<td>Must be a “law student who is enrolled in an accredited U.S. law school or a graduate of an accredited U.S. law school who is not yet admitted to the bar.”</td>
<td>An LLLT cannot be a full-fledged law student because an LLLT does not seek to unreservedly practice law – a Limited License Legal Technician seeks – by definition – limited practice.</td>
</tr>
</tbody>
</table>

\textsuperscript{32} U.S. Const. art. I, § 8, cl. 4. \textit{Cf.} Fiallo v. Bell, 430 U.S. 787, 792 (1977) (“over no conceivable subject is the legislative power of Congress more complete”).


\textsuperscript{34} 8 C.F.R. § 292.1

\textsuperscript{35} 8 C.F.R. § 1.2

\textsuperscript{36} \textit{Chamber of Commerce of U.S. v. Whiting}, 131 S. Ct. 1968 (2011)
| (3) Reputable Individual in an Immigration Matter | Must:  
1. Appear on an individual case basis, at the request of the person entitled to representation;  
2. Appear without direct or indirect remuneration and files a written declaration to that effect;  
3. Have a pre-existing relationship or connection with the person entitled to representation; and  
4. Be permitted to appear by the DHS official before whom he or she seeks to appear. | An LLLT cannot comply with any of the requirements essential to qualify to act as a Reputable Individual: a Reputable Individual cannot be paid and must have a relationship with the person on behalf of whom they are appearing. |
| (4) Accredited Representative | Must be “[a] person representing an organization … who has been accredited by the Board [of Immigration Appeals].” | A LLLT could satisfy these requirements, but so could any other person an organization of this type selects to perform this function. That the Department of Homeland Security carved out this exception in the regulations indicates that it seeks to permit individuals acting under the direction of a qualifying non-profit organization, not for-profit LLLTs. |
| (5) Accredited Official | Must be “An accredited official, in the United States, of the government to which an alien owes allegiance, if the official appears solely in his official capacity and with the alien's consent.” | The mere fact the official is simultaneously an official and an LLLT obviates the possibility of appearing solely in an official capacity. |
| (6) Attorney Outside the United States | Must be an attorney | Even if LLLTs did qualify as attorneys, they could not perform the desired goal of increasing access to justice in Washington State while working from outside the United States. |
| (7) Person Authorized to Practice before the Board and Service Committee Prior to December, 23 1952 | Must be authorized before December, 23 1952 | The LLLT program did not exist prior to August 20, 2013. Consequently, any LLLT that could represent another person in an immigration matter under this exception would not need to be an LLLT to perform his or her functions because the LLLT would already have been authorized to perform those functions over sixty-one years ago. |
The Federal Register entry amending the definition of attorney notes “[s]tate bar rules uniformly require licensed attorneys to maintain an active status in order to practice law[.]”\(^{37}\) The term “practice law” as defined in the same section includes appearing in a case before the Department of Homeland Security. Under APR 28.H.5, LLLTs are restricted from appearing in hearings. As such, LLLTs would not be able to appear in EOIR removal proceedings. In addition, they are limited in practicing law because they do not meet the definition of Attorney that is required to practice before DHS.\(^{38}\)

DHS requires that a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative be filed whenever an authorized legal practitioner asserts her eligibility to appear on behalf of an applicant, petitioner, or beneficiary.\(^{39}\) As LLLTs are not listed among those legally entitled to represent clients in immigration law matters, LLLTs will not be able to file either a Form G-28 with DHS or an EOIR 27 or 28 in all immigration court matters. Without the ability to file a Form G-28, LLLTs cannot represent applicants before DHS, including the act of providing assistance with filing immigration applications and petitions.

If LLLTs are allowed to practice under APR 28, but not under federal regulations, a common practice may be for LLLTs to assist with and charge clients for form preparation services and legal analysis, but not to submit a Form G-28 to DHS or attend applicant interviews. This would create a serious problem because when no Form G-28 is filed, applicants are treated by DHS as pro se and LLLTs would not be held responsible by DHS for their representation. Furthermore, applicants would not receive the benefit of being represented at any immigration interviews related to their application, nor would their LLLT representative receive notices and communications from DHS or EOIR. Indeed, over the years, our members have seen cases where non-lawyers prepared forms (often having the client sign a blank form not knowing what the final form contained when filed) with the client not fully understanding that the non-lawyer had neither authority to represent them nor authority to provide advice, selection or completion of forms. The client then appeared at a government hearing only to find out the information submitted on their behalf was incorrect, even though signed under penalty of perjury.

In addition, the creation of an LLLT program would create risks and severe consequences for attorneys who work with LLLTs. Under federal standards a “practitioner” is subject to disciplinary sanctions if she assists in the unauthorized practice of law.\(^{40}\) Actions by a non-authorized practitioner that constitute unauthorized practice include “selecting, drafting, or completing legal documents affecting the legal rights of another in an immigration matter.”\(^{41}\)

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38 See 8 C.F.R. § 292.1.
40 8 C.F.R. § 1003.102(m); 8 C.F.R. § 292.3(a)(1) (“attorneys are subject to disciplinary sanctions when they engage in criminal, unethical, or unprofessional conduct, or in frivolous behavior”).
41 8 C.F.R. § 1.1(k); RCW § 19.154.060(2)(g).
APR 28 authorizes LLLTs to perform certain legal work if the work is reviewed and approved by a Washington lawyer. However, if a Washington lawyer were to assist an LLLT in the practice of law, he or she could be subject to federal disciplinary sanctions. Potential disciplinary sanctions include permanent expulsion from immigration practice, suspension from practice, public or private censure, or any other such disciplinary sanctions as the adjudicating official deems appropriate. The threat of these serious federal sanctions would dissuade attorneys from assisting LLLTs in the practice of law as envisioned in APR 28, and would dissuade attorneys from working on immigration cases referred by LLLTs. Thus, a bright, un-crossable line would exist between LLLTs and authorized practitioners.

Finally, the LLLT program is predicated on the authority of the Washington State Supreme Court to regulate the practice of law within Washington State. Yet any assistance in an immigration matter would require action by a LLLT outside the bounds of the State. All affirmative immigration petitions and applications must be filed in states other than Washington. Only interviews are conducted in Washington (for citizenship and lawful permanent resident “green” cards). Although there are immigration courts in Washington, the federal rules cited above prohibit unlicensed attorneys and non-lawyers not accredited by the BIA from making appearances. APR 28.H.7 specifically states that LLLTs may not act as follows:

Provide services to a client in connection with a legal matter in another state, unless permitted by the laws of that state to perform such services for the client.

Immigrants seeking a benefit from USCIS must file a petition with a central service center, none of which are located in Washington State. As such, the federal prohibition on appearances in immigration matters by anyone other than a federally qualified practitioner would prevent a LLLT from making any filing on behalf of a client.


A Supreme Court order authorizing LLLTs to practice immigration law would run afoul of Washington’s Immigration Services Fraud Prevention Act of 2011 (“ISFPA”). Because APR 28 is not intended to “modify existing law,” such a conflict would also transgress the Court’s own order implementing LLLT rules.

RCW § 19.154.060(1) provides as follows:

Persons, other than those licensed to practice law in this state or otherwise permitted to practice law or represent others under federal law in an immigration matter, are prohibited from engaging in the practice of law in an immigration matter for compensation.

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43 8 C.F.R. § 292.3.
44 APR 28.J.
A person who is not licensed to practice law in Washington (or authorized by federal law to offer immigration services) who engages in the above activities commits a gross misdemeanor, and is liable for per se unfair and deceptive trade practice. A plaintiff who establishes unfair or deceptive trade practice is entitled to attorneys’ fees, actual damages, and treble damages up to $25,000.

The legislative history of the ISFPA makes clear that the legislature intended to prohibit the practice of immigration law by anyone other than a fully licensed attorney. In passing the ISFPA, the Washington State legislature expressly found that “the practice by nonlawyers and other unauthorized persons of providing legal advice and legal services to others in immigration matters substantially affects the public interest.” The underlying bill was specifically amended to clarify “that persons, other than those with active bar licenses, are prohibited from engaging in the practice of law in an immigration matter for compensation.” The Legislature’s clear intent was to prevent “non-lawyers” from practicing immigration law and to punish them if they do so. However, it would directly conflict with the authorization of immigration LLLTs if they are deemed “licensed to practice law.” The ISFPA specifically does not apply to paralegals working under the direct supervision of a person licensed to practice law:

The prohibitions of subsections (1) through (3) of this section shall not apply to the activities of non-lawyer assistants acting under the supervision of a person holding an active license to practice law issued by the Washington state bar association or otherwise permitted to practice law or represent others under federal law in an immigration matter.

However, as discussed above, attorneys would be unable to supervise independent immigration LLLTs without risking discipline from the federal agencies. Moreover, for LLLTs to serve their intended purpose, they should be able to operate independently from attorneys, to the extent authorized by APR 28, yet this independence would run afoul of the ISFPA.

Finally, while state law is the typical way to punish the unlawful practice of immigration law, the Federal Trade Commission Act (FTCA) could potentially be used to take action against unfair acts and practices with respect to the practice of law.

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45 RCW § 19.154.100.
46 RCW § 19.154.090.
47 RCW § 19.86.090.
48 Findings, RCW § 19.154.010.
50 RCW § 19.154.060(4)(a).
IV. Alternative Methods for Increasing Access to Immigration Services

Before recommending immigration law as a LLLT practice area, WSBA should consider alternative ways of meeting the legal needs of low- and moderate-income immigrants and their families.

1. Support existing immigration nonprofit organizations that have attorneys and/or BIA Accredited Representatives.

WSBA should use the money it would otherwise spend on a new immigration LLLT program to support increased access to counsel by supporting existing nonprofit organizations that are BIA accredited and already have trained immigration lawyers and BIA accredited representatives on staff, such as Northwest Immigrant Rights Project (NWIRP). NWIRP, One America, and other groups could use further funding to support additional hires and other resources. They already have the expertise and already serve low-income individuals. NWIRP is the only BIA accredited organization authorized to handle removal proceedings. Other organizations accredited to handle Department of Homeland Security benefits applications include World Relief, Lutheran Family Services, Latino/a Bar Association, One America, Refugee Women’s Alliance, and many others.

Immigration advocates are well organized as a coalition of organizations. We have attached a list of organizations in Washington that provide either services by lawyers on staff or pro bono, and those organizations accredited by the BIA. The primary need is for thorough legal advice about immigration benefit eligibility and defenses to removal— not those who simply complete forms. AILA and these nonprofit organizations also cross-train each other, provide joint pro bono services, and work on immigration related projects together including advocacy for immigration reform. These groups already have infrastructure in place, such as client systems, training, and research materials, and are subject to Justice Department disciplinary rules. See Appendix.

2. Advocate for the creation of a Public Immigration Defense program.

It is unquestionable that non-citizens in removal proceedings need better protection. One answer to this would be to take the bold step of creating a Public Immigration Defense program in Washington. Washington State recognizes the need of indigents to receive effective and efficient delivery of defense services in the criminal setting. As has been shown above, immigrants often

54 USCIS is a component of DHS.
55 See http://www.justice.gov/eoir/ra/raroster_orgs_reps_state_city.htm#WASHINGTON.
57 RCW § 2.70.005.
need qualified representation to handle matters where such profound interests, potentially equivalent to the death penalty, are at stake. For example, WSBA could work with AILA and the City of Seattle or King County to create a public defender program for immigration court similar to the one that was just created in New York called Bronx Defenders’ New York Family Unity Project.\(^{58}\) Washington Superior Court Special Proceedings Rules require the Supreme Court to recruit attorneys who are trained and experienced in death penalty cases and to maintain a list of these lawyers.\(^ {59}\)

3. **Empower and fund the Practice of Law Board to investigate unauthorized practice of law and other scams against immigrants to protect the public from scam artists.**

WSBA and the Washington Supreme Court have stated in multiple forums that the purpose of the LLLT program is to “protect and serve the public.” One way to protect the public from unscrupulous people who would take advantage of immigrants is to empower and fund the Practice of Law Board to investigate the unauthorized practice of law and other scams against immigrants. We understand that funding for the PLB has been reduced over the years and that very few cases have been brought against unscrupulous non-lawyer practitioners. AILA-WA members have reported and tried to have action taken against several unscrupulous individuals.

Neither the Practice of Law Board nor the Consumer Protection Division of the Attorney General’s office appears to be taking a strong, proactive role in prosecuting immigration services fraud. Our members have experienced that both the PLB and the Attorney General’s office suggest that the other entity should handle UPL cases. Because the Bar is concerned about protecting and serving the public, this is one area that needs improvement because immigrants are frequently subject to such abuse. Immigrants tend not to understand our legal system; many distrust government; there are language and cultural barriers; and immigration law is particularly complex. All of these things make them susceptible to being taken advantage of by unknowledgeable individuals who claim to practice immigration law.

4. **Work cooperatively to promote anti-fraud campaigns in Washington communities.**

WSBA should work with USCIS, EOIR, the FTC, the ABA, AILA-WA, and the Washington Attorney General’s Office to cross-promote anti-*notario* fraud campaigns. To date we are not aware of WSBA’s involvement in any of these campaigns. WSBA should update its public website with warnings about *notario* fraud and the unauthorized practice of law, information about the availability of appropriate legal services, and a list of nonprofit and other organizations

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59 SPRC 2.
that handle immigration, such as the links provided above. When out in the community, WSBA officials should remember to remind the public how and where to get authorized immigration legal advice.60

5. Improve the WSBA website to include resources for immigration legal services, where to get help, and for pro se applicants.

Right now, the WSBA website’s “Find Legal Help” page lacks information about immigration law, immigration lawyers, where to get help, or other immigration resources. WSBA should improve this page and AILA-WA remains available to assist.61

The WSBA’s “Resources for the Public” page62 lists no legal and social service agencies that assist immigrants. We polled our members to better understand through which organizations they volunteer or counsel regarding immigration members.63 We might also suggest that WSBA have a link to Immigration Advocates Pro Bono Resource Network.64

Similarly, the WSBA should work with AILA and CLEAR to update the immigration provisions of the WashingtonLegalHelp.org website, direct inquiries to AILA and AILA-WA websites, the NWRIP website, and other websites that have more comprehensive immigration information. This should include more substantive information and where to get help in the community. Substantial immigration materials can be found elsewhere through various immigration organizations. CLEAR could help with translating this information as needed and AILA-WA can help by not reinventing the wheel, but by making Washington Legal Help more robust.

6. Collect better data to identify the real unmet need for immigration services.

AILA-WA believes there is a lack of clarity on the type of immigration law services for which there is an unmet need. Without clarity on that specific point, it is difficult to assess whether LLLTts would accomplish the goal of helping to meet that need. Is it for asylum? Family based immigration? Employment based immigration? Removal proceedings? Naturalization? Criminal immigration cases? Other sub areas of immigration law? Notably, immigration law made up only 5% of the 8 other practice areas with higher needs in the 2003 Civil Legal Needs Study.65 Immigration ranked 11th out of the areas by legal problem area a decade ago (3%).66 Without

63 See Appendix Exhibit 5.
64 http://www.immigrationadvocates.org/probono/.
66 Id. at 33-34.
quality statistics, it is hard to gauge the true need for LLLTs in our state over the need for WSBA support and resources for quality attorney-based advice and service.

7. Help promote Seattle University’s incubator program.

The money that would be spent on the Immigration LLLT program could be better spent training new law graduates who cannot find jobs and want to practice immigration law. This includes the Seattle University Incubator program to help new graduates learn to run a law practice by initially taking pro bono and low bono clients under supervision of mentors. AILA-WA members can help with training and mentorship. Similarly, AILA already works with the University of Washington’s Immigrant Families Advocacy Project (IFAP) program to provide training and mentorship. WSBA could do more to fund or otherwise support the IFAP program, which almost went out of existence last year. Both of these activities help improve the chances of success, business ownership or job readiness for new graduates, many of whom cannot find jobs now.

8. Provide incentives to do pro bono or low bono service in immigration law.

AILA-WA polled our members about their existing pro/law bono service and other services to nonprofit organizations and individuals of low or modest income. A majority of our members already perform pro bono and low bono service anywhere from 50-500 hours a year, which meets or exceeds AILA National’s and AILA-WA’s pro bono recommended commitment of at least 25-50 hours per year. Many also already discount fees as needed, and several of our members routinely charge very, very low fees. 40% would support mandatory pro bono service if there was some type of bar incentive such as discounted bar dues or free or low cost CLEs. To encourage others to participate more, whether pro bono is voluntary or mandatory, incentives should be built into the system. This is particularly true for immigration lawyers since the majority of them work solo or in small firms, where taking on pro bono cases can be very challenging economically.


WSBA should add immigration law as one of the practice areas on the Modest Means Panel, and AILA-WA offers to partner with the WSBA to implement this program. Fully half of our members responding to a recent survey indicated they would be interested in serving on the Modest Means Panel. Another third were undecided, and some commented that they wanted more information about the program.

Our members have capacity to take on the additional work associated with inclusion in the Modest Means Panel. A vast majority of our members surveyed (80.3%) said they could take on more cases, while only 12.12% said they were so busy they were turning business away. Participation in the Modest Means Panel could allow our members to provide services at a price point similar to LLLTs, but providing a vastly higher level of quality.
Because AILA-WA has members throughout Washington State, our participation in the Modest Means Panel would meet outstanding needs in underserved geographic areas. AILA-WA recently set up an Eastern Washington committee for attorneys to network about issues facing communities in the east side of the state. All affirmative immigration petitions and applications are done by mail or electronically, with only a portion thereof being interviewed locally. Thus, our members have systems for dealing with clients around the state and the world.

We also welcome the opportunity to coordinate these efforts with the Low Bono Section of the WSBA. Further, to the extent there are institutional barriers that make it difficult for sections to provide direct services to the public, or for the bar to conduct referral services as local bar associations do, it may make sense to revisit some of these institutional barriers.67

10. **Encourage WSBA members who say they practice immigration law to join AILA.**

The WSBA directory indicates that 702 members identify themselves as practicing immigration law. AILA-WA has 455 members, some of which are licensed in other states. Thus there are over 200 attorneys practicing immigration law in Washington State who are not AILA members.68 We invite WSBA to encourage all immigration practitioners to join AILA where they can obtain frequent, in-depth CLEs and publications, access to committees and message boards, access to government liaison meetings, networking and camaraderie to improve their skills. WSBA could help those practitioners obtain supervised pro bono work and enhance their skills by joining AILA. AILA-WA provides numerous opportunities for members to obtain experience with pro bono projects. For example, we routinely conduct pro bono citizenship days around the state with OneAmerica providing logistical support. We have worked with NWRIP to conduct DACA workshops. We have a national Military Assistance Project that offers pro bono services, including technical assistance, a book, and access to a listserv and training.

11. **Advocate for immigration reform to simplify the system.**

WSBA should advocate for legislative reform that would simplify the immigration system. For example, AILA advocates for the government appointment of attorneys for immigration defense. WSBA should help support this effort. The Bar should encourage legislative fixes that are easy to understand.

It is also important to recognize that the perception that there are millions of people who are not being served by immigration lawyers is based on the fact that Congress has not fixed the immigration laws in decades, and it is not likely to do so in the near future given the divisions in

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67 See, e.g., GR 12.
68 AILA vets new members for ethics and competency by requiring that at the time of application the attorney be “in good standing with, and for three years immediately preceding application has not been suspended or disbarred by any court, mandatory bar association, administrative agency or other disciplinary authority.” AILA Membership Eligibility, see http://www.aila.org/content/default.aspx?docid=1117
Congress. Due to our broken immigration system, most of the millions of undocumented people in the U.S. cited as not being served in fact have no relief available at all. Even if President Obama expands Executive relief in the next few months, it is not the legislative relief that only Congress can provide (expanded or new immigration categories, numbers or requirements). Any program like DACA (Deferred Action for Childhood Arrivals) is an interim quasi-relief akin to a bandage. Deferred action means the government will not deport the person – for now. It is not a long-term fix for this population, and the next GOP-controlled Congress could change any Executive Action that President Obama takes. Outcomes for the undocumented are not the only type of case that immigration lawyers face, including the people trying to come here legally or those seeking citizenship. The legal immigration system needs fixing, as does the enforcement system, as does the immigration court system. WSBA can have a role in providing a further voice encouraging Congress to reform our immigration laws.

V. Conclusion

In conclusion, the American Immigration Lawyers Association, Washington State Chapter strongly opposes the LLLT program in the immigration practice area. We recognize that while this program might work quite well in other practice areas that are governed by Washington State law, it simply cannot work at this time within immigration. The reasons set forth in this paper clearly show that federal law and procedure both preempts and dictates who may practice before an agency or tribunal. Furthermore, there are levels of protection for the public built into the system through federal disciplinary measures that would not be able to be applied to the LLLTs, as non-lawyers are not authorized under federal regulations as those authorized to practice law.

It is our hope that the WSBA puts the true needs of protecting the public first. Adding a layer of non-lawyers to an already complex area of law, where any fee can be charged and there is no risk of discipline by the federal government, is a recipe for serious harm.

We support expanding programs such as supporting the BIA accredited organizations in our state, adding immigration to the modest means program, and supporting the incubator program among other proposals above as ways to address the unmet legal needs of individuals who really need legal advice from attorneys. Even if the LLLT program is ultimately approved for the immigration practice area, unless the federal government changes its regulations, the LLLTs will not be authorized to practice before USCIS, DOL, ICE, CBP, or DOS agencies or EOIR tribunals. Unlike the other areas identified for the LLLTs, immigration practice is predicated upon petitions filed at the federal level. It is critical to contact government agencies, such as USCIS, DOL, ICE, CPB, DOS and EOIR for their opinions on this proposed program.

AILA takes service to and protection of the public very seriously. We provide extensive CLE opportunities for our attorneys, in addition to pro bono clinic training and mentorship. We are an
organization that encourages open dialog amongst members. We are very concerned that despite the training that LLLTs would receive, they would not be able to recognize the nuances that come with practice and training across multiple areas of law. We hope that the Washington State Bar Association will give our position paper serious consideration. We are available to meet and discuss our response in greater detail should you require.

/s/

A. Carin Weinrich
AILA-WA Executive Committee Chair