March 28, 2016

Ms. Naomi Barry-Perez
Director, Civil Rights Center
U.S. Department of Labor
200 Constitution Avenue N.W., Room N-4123
Washington, DC 20210

RE: Regulatory Information Number (RIN) 1291-AA36

Dear Ms. Barry-Perez,

We are eleven national organizations focused on ensuring that immigrants, including those who are limited English proficient (LEP), have the skills and opportunities needed to reach their full potential. Thank you for the opportunity to provide comments to the Notice of Proposed Rulemaking (NPRM) to implement Section 188, the nondiscriminatory and equal opportunity provisions, of the Workforce Innovation and Opportunity Act (WIOA).

We strongly support the overall goal of the Department of Labor (Department) of updating these regulations to reflect recent developments in equal opportunity and nondiscrimination jurisprudence and to ensure the ability of job seekers and workers who are LEP to meaningfully access employment and training programs under Title I of WIOA. These updates are timely and necessary: The number of individuals who are LEP in the United States grew by 80 percent between 1990 and 2013, from nearly 14 million to 25.1 million, and LEP individuals are more likely to be less educated and to live in poverty when compared to English-proficient individuals.[1] The current severe underrepresentation of LEP individuals within Title I training programs underscores the need for regulations that will ensure more robust access to Title I programs and services for individuals who are LEP.

Further, these updates support WIOA's vision for increased services to individuals with barriers to employment, including individuals who are LEP. For example, WIOA includes a new priority for career and training services under the Title I adult formula program for individuals who are basic skills deficient. The statutory definition of basic skills deficient includes those youth or adults where "the individual is unable to compute or solve problems, or read, write, or speak English, at a level necessary to function on the

[1] Jie Zong and Jeanne Batalova, "The Limited English Proficient Population in the United States," *Migration Information Source*, July 2015, http://www.migrationpolicy.org/article/limited-english-proficient-population-united-states/.

job, in the individual's family, or in society."[2] Also, WIOA envisions and requires increased alignment and integration between the statutorily identified core programs – Title I Adult, Dislocated Worker, and Youth Formula programs; Title II Adult Education program; Title III Wagner-Peyser Employment Service; and Title IV Vocational Rehabilitation Services. More than 40 percent of Title II Adult Education program participants are enrolled in English literacy programs.[3] Thus, to achieve successful integration with Title II Adult Education programs, the Department must ensure that Title I Adult, Dislocated Worker, and Youth Formula programs are able to address the workforce needs of individuals who are LEP.

However, we are concerned that the proposed regulations focus more on providing translated or interpreted information about programs or activities in an individual's primary language than on providing meaningful access for LEP individuals to such programs and activities. Our specific comments are below.

UPDATED KEY DEFINITIONS

§38.4(i) - Support Inclusion of and Proposed Definition for "Babel Notice"

We agree with the Department that Babel Notices are important tools to ensure that regulated entities meet their nondiscrimination and equal opportunity obligations under WIOA regarding people who are LEP. Such notices inform these job seekers and workers that certain documents or electronic media contain vital information and provide direction on how to access the information in other languages. We support the inclusion of a definition for Babel Notice in the regulation in order to codify and clarify the intent of these notices, and we agree with the proposed definition.

§38.4(hh) - Support Proposed Definition of Limited English Proficient Individual

It is important to update the definition of "limited English proficient individual" to ensure that it is consistent with legal decisions interpreting the scope of national origin discrimination under Title VI of the Civil Rights Act of 1964 and U.S. Department of Justice (DOJ) regulations implementing Title VI. We support the proposed definition, which recognizes that an individual, whose primary language for communication is not English, may have a range of English language abilities – reading, speaking, writing, and/or understanding English – that may allow them to sufficiently function in one context (e.g., greeting an individual) but not others (e.g., discussing eligibility

[2] Workforce Innovation and Opportunity Act, §3(5)(B).
[3] U.S. Department of Education, Office of Career, Technical and Adult Education, National Reporting System: "State Enrollment by Program Type (ABE, ASE, ESL): All States," Program Year 2014, https://wdcrobcolp01.ed.gov/CFAPPS/OVAE/NRS/tables/view.cfm?tableID=3.

requirements). This nuanced definition will help maximize access to Title I employment and training programs for job seekers and workers that are LEP.

§38.4(xx) – Support Proposed Definition of Qualified Interpreter

We support the proposed definition of "qualified interpreter" and subdefinition (2) for "qualified interpreter for an individual who is LEP." The definitions acknowledge that new technology has expanded the availability of interpretation services (e.g., telephonic, video conferencing). This provides a range of methods for regulated entities to meet their responsibilities under the regulations. At the same time, the definitions help ensure that job seekers and workers who are LEP have access to quality interpretation by describing the quality of the interpreter as effective, accurate, impartial, expressive, and using necessary vocabulary. This is necessary to disallow the use of websites or services that only provide online translation services and which may be inaccurate and to discourage the use of children or family members or other untrained individuals as interpreters.

§38.4(ttt) – Support for Proposed Definition of Vital Information

We support the proposed definition of "vital information." The definition is broad and includes information that is necessary for a job seeker or worker to understand *how to* obtain as well as to *actually* obtain an "aid, benefit, service, and/or training" or is required by law. Further, the definition recognizes that such information may be provided to job seekers and workers in written, oral, or electronic formats. This is important as the increased usage of websites or other virtual services to provide employment and training information should not preclude job seekers or workers who are LEP from accessing those services.

NATIONAL ORIGIN DISCRIMINATION AND LIMITED ENGLISH PROFICIENCY

§38.9 – Need to Explicitly Clarify that Denial of Services Based on an Individual's Limited English Proficiency Constitutes National Origin Discrimination

We strongly support the inclusion of §38.9, which prohibits discrimination on the basis of national origin in any WIOA Title I-financially assisted program or activity. While the executive summary of the proposed regulations makes explicit that "this rule proposes to create a provision stating that discrimination against individuals based on their limited English proficiency may be unlawful national origin discrimination," that notion is not clearly articulated in proposed regulation §38.9.[4] We therefore recommend that the regulation explicitly state that denial of services based on an individual's limited English proficiency may constitute impermissible national origin discrimination.

[4] 81 F.R. 4497, January 26, 2016.

The proposed regulation is necessary to clarify the applicability of the legal prohibition on national origin discrimination to Title I recipients and to reflect current case law under Title VI as well as Guidance from the Department and from the DOJ on Title VI's prohibition against national origin discrimination affecting LEP individuals. As the U.S. Supreme Court recognized in *Lau v. Nichols*, 414 U.S. 563, 568 (1974), excluding LEP individuals from effective participation in a federally-funded program because of their limited English proficiency constitutes unlawful national origin discrimination under Title VI. The proposed regulation is also consistent with DOL Recipient LEP Guidance[5], and DOJ's guidance on "Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency."[6]

The recognition that discrimination against individuals who are LEP may constitute unlawful national origin discrimination is particularly important in light of the current severe underrepresentation of LEP individuals in Title I job training programs and the significant language access violations that the Department's compliance reviews have revealed. Currently, although LEP individuals comprise 8 percent of the total U.S. population and 32 percent of the country's low-educated adults ages 19 and older,[7] only 1.5% of individuals receiving intensive training services in Program Year (PY) 2013 were LEP.[8] That percentage represents a decline from the 1.8% of LEP individuals who received intensive training services in PY 2009.[9] Further, of the compliance reviews of state programs conducted by the DOL since fiscal year 2013, six found significant language access violations.

§38.9(b) – Expand to Ensure Meaningful Access for LEP Individuals Who to Participate in Title I Programs and Activities

We appreciate that the DOL has included in the proposed regulations the recognition that "a recipient must take reasonable steps to ensure meaningful access to each limited English proficient (LEP) individual served or encountered so that LEP individuals are

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[5] *See* 68 F.R. 32290, May 29, 2003.

[6] *See* 65 F.R. 50123. August 16, 2000.

[7] Jie Zong and Jeanne Batalova, "The Limited English Proficient Population in the United States" *Migration Information Source*, July 2015, http://www.migrationpolicy.org/article/limited-english-proficient-population-united-states; Margie McHugh and Madeleine Morawski, *Immigrants and WIOA Services: Comparison of Sociodemographic Characteristics of Native- and Foreign-Born Adults in the United States* (Washington, DC: Migration Policy Institute, 2015) http://www.migrationpolicy.org/research/immigrants-and-wioa-services-comparison-sociodemographic-characteristics-native-and-foreign.

[8] U.S. Department of Labor, WIASRD Data Book, PY2013, http://www.doleta.gov/performance/results/pdf/PY_2013_WIASRD_Data_Book.pdf, at p. 21.

[9] *Id*.

effectively informed about and/or able to participate in the program or activity."[10] We support the specific reasonable steps suggested in the regulations "to provide meaningful access to training programs," including providing written training materials in non-English languages by written translation or by oral interpretation and providing oral training in in non-English languages through in-person or telephonic interpretation.[11] And we applaud the inclusion in the Appendix to §38.9 of the training provider example incorporating English language learning.[12]

However, we are concerned that the draft regulations do not provide sufficient direction to recipients to ensure that they are not only effectively providing information to LEP individuals about potential Title I programs or activities, but that recipients are actually providing meaningful access to LEP individuals to participate in programs or activities under Title I. In short, the regulations should require recipients to take reasonable steps both to inform LEP individuals about Title I programs and activities *and* to facilitate their participation in such programs and activities. As such, we recommend that the "and/or" in §38.9(b) be replaced with "and," such that it would read:

> A recipient must take reasonable steps to ensure meaningful access to each limited English proficient (LEP) individual served or encountered so that LEP individuals are effectively informed about *and* able to participate in the program or activity.

Recipients must also take reasonable steps to ensure that there are meaningful on ramps and other mechanisms for LEP clients to participate in the program or activity.

For example, the proposed regulations fail to acknowledge that integrated education and training (IET) programs have been proven to be a feasible and more effective program design for individuals who are LEP and/or low-educated; these types of programs have been widely promoted by the Departments of Labor and Education in recent years as best practice models and are in fact featured throughout the WIOA legislation itself as a preferred--and in some cases required--program design. The proposed regulations should similarly set an expectation that IET models would be used by Title I providers in states and localities with LEP and/or low-educated residents. In so doing, states and local entities would both avoid engaging in national origin discrimination resulting from the use of program designs that do not provide access to LEP individuals and also comply with explicit provisions in the law (i.e. its priority of service for basic skills deficient individuals in Title I's adult formula programs).

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[10] §38.9(b).
[11] §§38.9(b)(2)(i) and (ii).
[12] *See* Appendix to §38.9, Illustrative Application in Recipient Programs and Activities, Example 3.

To that end, we recommend that the final regulations be expanded to include additional guidance on the reasonable steps that recipients must take to ensure that LEP individuals are afforded meaningful access to Title I programs and activities. We propose that the "[r]easonable steps to provide meaningful access to training programs" described in regulation §38.9(b)(2) include the following example of a reasonable method to ensure meaningful access to training programs:

> (b)(2)(iii) Programming that simultaneously provides English language training with vocational or other workforce training to limited English proficient individuals (integrated education and training).

§38.9(g)(1) – Should Include Translation of Training Materials

We strongly disagree with proposed §38.9(g)(1) which excludes written training materials offered or used in within employment-related training programs under §38.4(t) from the translation requirements. Proposed §38.9(g)(1) is contrary to the spirit of the proposed definition of vital information in §38.4(ttt), which is "information, whether written, oral or electronic, that is necessary for an individual to understand how to obtain any aid, benefit, service ***and/or training***; necessary for an individual to obtain any aid, benefit, service, ***and/or training***; or required by law" (emphasis added). It is not enough that recipients provide information about available Title I training programs in a language that job seekers and workers can understand, if job seekers and workers cannot then participate in training programs due to their limited English proficiency. Materials used in the provision of training are critical to actually obtaining the training. Thus, we strongly recommend that training materials used in programs under proposed §38.4(t) are not excluded from the translation requirements. Rather, regulated entities should be required to translate material offered or used within programs that meet the definition of §38.4(t) for participating individuals who are LEP and whose primary language for communication meets the threshold to be established in §39.4(g)(1).

It is necessary for the Department to provide regulated entities with clear direction and technical assistance on the requirements for translating vital information. We recommend that the Department establish a minimum threshold requiring regulated entities to translate vital information into written materials for languages spoken by 5 percent of or 500 individuals that are LEP in the service area, whichever is lower.

To determine the languages that meet this threshold, we recommend using data at the regulated entity's service delivery level. For example, state-level data should be used to establish thresholds for programs and activities operated by states (e.g., state-run employment websites, unemployment insurance programs, National Emergency Grants,

etc.), and local-level data should be used to establish thresholds for programs and activities operated at the local level (e.g., WIOA Title I adult, dislocated worker, and youth formula programs, YouthBuild programs, and Job Corps programs, etc.). This is necessary because state-level data may not necessarily reflect the wide variations in local communities.

Establishing this level for the threshold and using data at the service-delivery level would maximize access to Title I employment and training programs and activities for job seekers and workers that are LEP. Doing so aligns with and supports the new statutory requirements of expanding services to individuals who have barriers to employment, including the new priority for career and training services under Title I Adult Formula programs for individuals who are basic skills deficient. It is critical that the Department establish a minimum threshold so that federal regulations do not detract from nor limit greater antidiscrimination protections at the state or local levels, per §38.3.

Further, regulated entities should be required to implement these requirements as soon as possible, at most within a one-year timeframe. Any delay in complying with these requirements is a delay in ensuring that job seekers and workers who are LEP have access to Title I services.

§38.2 – Support Proposed Applicability of Part 38 to Federally-Funded Jobs Corps Centers

We support § 38.2, which deletes the current exclusion of federally-operated Job Corps Centers from the application of the provisions of Part 38. This provision is important to ensure the uniform applicability of nondiscrimination and equal opportunity requirements throughout the Job Corps system and to provide for a mechanism to address complaints that arise in federally-operated Job Corps Centers.

§38.3 – Support Clarification that Regulations Do Not Limit Other Laws that Provide Equal or Greater Protections

We support §38.3, which affirms that these regulations do not limit the remedies, rights, and procedures under federal, state, or local law that provides equal or greater protection than the regulations. This updated language provides more clarity than the existing language of §38.3(f) and promotes an appropriate federal recognition of states' and localities' interests in promoting nondiscrimination and equal employment opportunity.

§§38.10 and 38.11 – Support the Prohibition on Harassment and Discrimination based on National Origin and Citizenship Status

We support §§38.10 and 38.11, which prohibit harassment based on national origin and citizenship status (among other protected characteristics) and discrimination based upon

citizenship status, respectively. The prohibition on harassment in §38.10 remedies the omission of harassment as an impermissible form of discrimination in current part 38 and thus provides recipients with greater direction on the conduct that may constitute unlawful harassment so that they can more effectively prevent and redress it.

The prohibition on discrimination based on citizenship status in §38.11 provides greater clarity to recipients about the protections for certain noncitizens from discrimination based upon their citizenship status. We support the definition of discrimination based on citizenship status in the proposed regulation and the scope of individuals it protects. We are particularly supportive of the inclusion of the category of "other immigrants authorized by the Secretary of Homeland Security or the Secretary's designee to work in the United States" within the class of noncitizens protected from citizenship discrimination. That inclusion would encompass individuals, such as those with work authorization through the Deferred Action for Childhood Arrivals (DACA) initiative, who are eligible for services under Title I and who should thus be protected from discrimination in the provision of those services.

PROPOSED CHANGES RELATED TO THE DEPARTMENT'S ENFORCEMENT PROGRAM TO SUPPORT COMPLIANCE WITH EEO REQUIREMENTS

We support the proposed regulation §38.28, which strengthens the role of State Level Equal Opportunity Officers as well as regulations §§38.35-38.36 regarding equal opportunity notices and recipients' obligations to publish such notices on their web pages, internal communications, employee handbooks, and participant files, as well as provide them to registrants, applicants, and participants in appropriate languages identified in regulation §38.9.

While we support the affirmative outreach requirements contained in proposed regulation §38.40, we recommend that "reasonable efforts to include members of various groups protected by these regulations" should include analysis of local population data to identify ethnic/national origin groups and individuals with limited English proficiency that should be targeted by such outreach. Outreach materials should be translated into any languages identified in regulation §38.9 in order to effectively reach limited English proficient speakers of those languages.

We strongly support the proposed requirement in regulation §38.41 that recipients must record the limited English proficiency and preferred language of all applicants, registrants, participants and terminees in addition to individuals' race/ethnicity, sex, age, and disability. We recommend that the Department require this data to be made public

and evaluated annually to monitor the effectiveness of the required outreach and nondiscrimination regulations.

We support the requirement that the Governor must establish and implement a Nondiscrimination Plan for State programs. However, we recommend that regulation §38.54(c)(2)(iii) be amended to read:

> (c)(2)(iii) A system for reviewing recipients' job training plans, contracts, assurances, and other similar agreements to ensure that they are nondiscriminatory, contain the required language regarding nondiscrimination and equal opportunity, and demonstrate sufficient resources and program designs that will allow them to meet the needs of groups protected by these regulations, including limited English proficient individuals;

We also recommend that "supporting documentation to show that commitments made in the Nondiscrimination Plan have been and/or are being carried out" described in §38.54(c)(2)(viii) should include a comparison of the race/ethnicity, sex, age, disability, limited English proficiency, and language spoken of the state and local workforce area populations with data on the number of applicants, registrants, participants and terminees in each group. Finally, we recommend that the Department require all Nondiscrimination Plans be made publicly available on the website of the Governor or state workforce agency.

Again, thank you for the opportunity to provide comments to the NPRM to implement Section 188, the nondiscriminatory and equal opportunity provisions, of WIOA. If you have any questions about these comments, please don't hesitate to contact Joshua Stehlik, Supervising Attorney, National Immigration Law Center, at 213-674-2817.

Sincerely,

Asian Americans Advancing Justice | AAJC is a national nonprofit organization founded to protect civil and human rights. As a national advocate for Asian Americans based in Washington, D.C., we serve our country's newest American community by promoting justice for all Americans, empowering our communities, bringing local and national constituencies together, and ensuring Asian Americans are able to fully participate in our democracy.

The Immigrant Professional Integration (IMPRINT) coalition serves as a hub for a growing ecosystem of providers, policymakers, educators and employers seeking to address brain waste through targeted programs, innovative public policies, and new

research. Together we advocate on behalf of the one million immigrants and refugees who received their degrees abroad and are unemployed or underemployed in survival jobs in the U.S., and work to open an important talent pipeline for employers in communities across the country.

The Migration Policy Institute's National Center on Immigrant Integration Policy is a crossroads for elected officials, grassroots and nonprofit leaders, educators, journalists, researchers, local service providers, state and local agency managers, and others who seek to understand and respond to the challenges and opportunities today's high rates of immigration create in local communities.

The National Coalition for Asian Pacific Community Development (National CAPACD) is a coalition of nearly 100 organizations, spanning 19 states and Pacific Islands. Its mission is to improve the quality of life for low-income Asian Americans, Native Hawaiians, and Pacific Islanders (AAPIs) by promoting economic vitality, civic and political participation, and racial equity. National CAPACD's members work in the areas of affordable housing, community organizing, cultural preservation, and neighborhood revitalization as well as economic development such as career, workforce and business development.

The National Guestworker Alliance (NGA) is a membership organization of guestworkers. NGA's members organize in labor camps across the United States to win dignity at work. Using legal, policy, and organizing strategies, NGA engages in workplace fights across multiple industries to win dignified working conditions, just migration policy, and new rights and protections for all workers.

The National Immigration Forum, a leading immigrant advocacy organization, advocates for the value of immigrants and immigration to the nation. To advance policy and strategies that provide new Americans with the opportunities, skills, and status they need to reach their full potential, the Forum brings together innovative alliances of diverse business, community college, labor, faith, law enforcement, and other key constituencies from across the country.

The National Immigration Law Center (NILC) is a nonpartisan national legal advocacy organization that works to protect and promote the rights of low-income immigrants and their family members. Since its inception in 1979, NILC has earned a national reputation as a leading expert on the intersection of immigration law and the employment rights of low-income immigrants. NILC collaborates with an array of immigrant and worker advocacy organizations throughout the U.S. to help low-wage immigrant workers access quality employment as a means of securing economic stability.

The National Korean American Service and Education Consortium (NAKASEC) is a national organization focused on projecting a national progressive voice on major civil rights and immigrant rights issues and empowering the Korean American and Asian American community nationwide. Through grassroots organizing, community outreach, civic engagement, and advocacy work, NAKASEC is committed to ensuring that DACA, DACA+, and DAPA eligible Asian Americans and Pacific Islanders, can work without exploitation, receive access to an affordable education, and live with their families without fear of deportation. NAKASEC and its affiliates, the Korean Resource Center (KRC) and Korean American Resource and Cultural Center (KRCC), work in coalition with immigrant, labor, and racial justice organizations throughout the U.S. to help families and workers from low-income and all immigration statuses access fair employment and affordable education to be full members of society.

The National Partnership for New Americans (NPNA) is a non-partisan, non-profit, multiracial, multiethnic partnership that represents the collective power and resources of the country's 37 largest immigrant rights organizations in 31 states. NPNA's members provide large-scale services—from DACA application processing to voter registration to ACA outreach—for their communities, and they combine service delivery with advocacy to advance state and local policy. NPNA's aim is to achieve a vibrant, just, and welcoming democracy for all.

The National Skills Coalition (NSC) is a broad-based coalition working toward a vision of an America that grows its economy by investing in its people so that every worker and every industry has the skills to compete and prosper. We engage in organizing, advocacy, and communications to advance state and federal policies that support these goals – policies that are based on the on-the-ground expertise of our members. NSC's 4,000 members are drawn from the ranks of business, labor, community colleges, community-based organizations, and the public workforce system, across 30 states.

Welcoming America is a nonpartisan, nonprofit, membership-based organization that is leading a movement of inclusive communities across the nation becoming more prosperous by making everyone who lives there feel like they belong. As communities are reshaped by demographic change, there must be an intentional effort to manage that transformation. Receptive communities and inclusive policies at all levels of government are critical for immigrants to be able to fully participate in the social, civic, and economic fabric of their adopted hometowns and for building a globally competitive workforce. Welcoming America's unique focus is helping communities move beyond divisiveness and fragmentation to a coordinated web of policies and programs that ensure that all residents—including immigrants—can fully participate and belong.