

January 16, 2014

The Honorable Jeh Johnson
Secretary
Department of Homeland Security

The Honorable Alejandro Mayorkas
Deputy Secretary
Department of Homeland Security

Dear Secretary Johnson and Deputy Secretary Mayorkas:

On behalf of the undersigned national faith, labor, civil rights, civil liberties and immigration services and advocacy organizations, we congratulate you on your appointments and recent confirmations. We look forward to working with you toward the advancement of immigration policy and practice, and welcome your support of legislative immigration reform. We write today, however, to request a meeting to discuss the urgent need for further DHS administrative efforts to reform its policies and practices with respect to immigration enforcement. Our organizations and the people we serve have witnessed the painful and deleterious effects that aggressive and poorly targeted immigration enforcement has had on our families, communities, and the country as a whole. We ask that you make it your top immigration priority to examine enforcement practices in all immigration agencies to ensure that the investigation, arrest, detention, and removal of individuals is conducted in a humane, consistent, and measured manner with strong due process and civil liberties protections.

While fundamental changes to the immigration system require legislative reform, the enforcement policies and practices established by DHS are squarely within the control of the executive branch. By reforming immigration enforcement priorities and practices, DHS can reverse or slow the harm done to families and communities by uncoordinated and unrealistic enforcement goals. For example, we strongly applaud the agency's initiatives to provide affirmative protection from removal to specific individuals like DREAMers and military families. In the paragraphs below, we offer suggestions that we believe will help move the Department of Homeland Security (DHS) in that direction.

Ensure Immigration Enforcement Is Carefully Targeted and Applied Consistently in the Field

Although Immigration and Customs Enforcement (ICE) has reported a drop in removals for FY 2013, overall immigration enforcement continues at unprecedented levels. By early 2014, ICE will have removed 2 million people during the course of the Obama administration, far exceeding the removal rates of any other administration. Federal criminal prosecutions of immigration-related offenses—done with DHS cooperation—are also at the highest point in history, up 468 percent from 2003. Immigration detention rates continue to rise and now total about 430,000 individuals each year, at a cost of \$2 billion annually to American taxpayers.

DHS and ICE have taken steps to focus enforcement resources on priority cases, issuing a series of memos and announcements in 2010 and 2011 on enforcement priorities and the exercise of prosecutorial discretion. These policy statements, however, are sometimes inconsistent and easily misinterpreted or manipulated. Publicly ICE now claims that 98 percent of the individuals removed each year fall within its priorities for civil immigration enforcement, yet over 40 percent of those removed have no criminal background. Though ICE asserts that it is pursuing a targeted enforcement strategy, it is still removing hundreds of thousands of people who contribute to our communities, have lived in the U.S. for years, and would qualify for legal status under reform legislation currently pending. In the five years of the Obama administration, hundreds of thousands of parents of U.S. citizens have been removed.

DHS has failed to realize its stated goals of targeting those who pose real threats to our communities or who have a demonstrated pattern of egregious immigration law violations. For example, a “recent border crosser” is automatically considered a priority for removal even if other equities—such as overall length of time residing in the U.S., family ties, or the lack of a criminal record—would suggest that the individual merits prosecutorial discretion. Furthermore, certain ICE policies designate an individual with a single illegal entry as a priority for removal while others require an egregious record of immigration law violations. When making decisions about enforcement and prosecutorial discretion, DHS should recognize that the desire to rejoin one’s family is what drives many people to return to the U.S. after they have been deported. Finally, streamlined procedures that bypass immigration court and other due process protections, such as reinstatement, expedited removal, and administrative removal, are now used in the vast majority of removals. These practices give little incentive for agents or ICE attorneys to examine whether the case falls within enforcement priorities or opportunity for the individual to obtain a fair review.

With respect to prosecutorial discretion, agents and attorneys should be encouraged to exercise the most appropriate form of prosecutorial discretion and at the earliest appropriate time. As specified in the June 2011 memo, this may include a wide range of decisions from an initial apprehension, to whether to file a Notice to Appear with the court, to a decision to appeal an immigration judge’s grant of relief. In particular, we urge DHS to establish a more favorable policy of granting deferred action in cases where removal hearings are still pending to ensure that individuals are able to obtain employment authorization.

Even as DHS and ICE consider revising enforcement priorities, every effort should be made to ensure that the existing policies are implemented in the field. There are strong indications that ICE field agents and trial attorneys inconsistently apply established policies. Customs and Border Protection (CBP) has yet to publish any prosecutorial discretion policy. Without adequate and consistent messaging regarding the administration’s commitment to smart, targeted enforcement, including the exercise of prosecutorial discretion, these principles will repeatedly fall by the wayside. We hope you will reexamine DHS’s current enforcement priorities with a view toward addressing these problems.

Reduce Reliance on Institutional Detention

No one should be deprived of liberty except as a last resort. Yet each day, thousands of noncitizens are held in DHS detention who pose no flight risk or threat to public safety and therefore should not

have been detained in the first place, including asylum seekers and other vulnerable persons. ICE has underutilized much less costly and extremely effective alternatives to detention, such as release on recognizance, bond, electronic GPS technologies, and other monitoring and supervision methods. These alternatives are standard practice in criminal justice systems across the country. While institutional detention costs the American taxpayer an estimated \$159 per person per day, release on recognizance, community based support services or bond does not carry an expense and other alternatives cost from pennies to around \$18 per person per day and impose fewer restraints on liberty. Compared to billions spent annually on detention, alternatives represent a smarter, less costly, and more humane way to ensure compliance with immigration laws.

Importantly many detainees, including lawful permanent residents and asylum seekers, are held in detention without ever receiving a custody determination hearing before a judge—a fundamental deprivation of due process. ICE and the immigration court system have the authority and capacity to provide more prompt bond hearings for detainees. Moreover, ICE currently allows only for the use of institutional detention for those individuals who it is legally required to hold in custody. This policy has foreclosed the option that ICE could use alternatives to detention on large numbers, likely tens of thousands, of individuals. ICE should not waste limited resources to needlessly detain immigrants who could successfully and safely be released. It should screen such detainees for eligibility for alternatives.

The purpose of ICE detention is to ensure that people appear for hearings and comply with final orders. ICE's goals can be achieved at far less financial expense – and with less harm to families and communities across the country. We hope you will work actively with ICE to ensure alternatives to detention are implemented more frequently instead of institutional detention.

Detainers and Other Cooperation with State/Local Law Enforcement

Despite significant evidence that federal and state/local immigration enforcement partnerships drive immigrants into the removal system, undermine community policing efforts, and make immigrant communities more vulnerable to crime, DHS has continued to expand its involvement with state and local law enforcement agencies. ICE programs that partner with local law enforcement, such as Secure Communities, the Criminal Alien Program (CAP), and 287(g) agreements— along with the immigration detainers (sometimes called “ICE holds”) upon which they rely – have been widely criticized due to their negative impact on community policing, susceptibility to racial profiling, lack of transparency, and indiscriminate approach to immigration enforcement.

We remain particularly concerned about ICE's practice and policy regarding detainers, which continue to be a central component of civil immigration enforcement. The number of detainers issued by ICE has ballooned in just a few years, from less than 15,000 in FY2007 to 273,982 in FY2012. Yet despite the central role they play in federal civil immigration enforcement, DHS has published almost no data on detainers, despite promises to provide such information. Furthermore, individuals with minimal or no criminal histories are frequently subject to detainers, raising concerns that prosecutorial discretion is not being properly implemented at the detainer stage. In fact, United States citizens have also been the subject of detainers, which has prompted costly litigation. In December 2012, ICE issued new policy guidance on detainers, but still more needs to be done to ensure that detainers focus on the agency's highest priorities—public safety and national

security—and at the same time protect the due process and constitutional rights of citizens and noncitizens alike. We urge you to examine and revise the current detainer policies, guidelines and implementing forms, develop centralized detainer review procedures, and ensure increased transparency around detainer usage.

Strengthen Oversight of CBP Activities

Enforcement practices by CBP have raised serious concerns, most notably the continuing reports of improper use of force, including lethal force, by Border Patrol. Abusive CBP detention practices—including keeping facilities at dangerously cold temperatures, verbal and physical intimidation, and lack of basic health and hygiene provisions—are routinely reported by men, women, and children held at ports of entry or in Border Patrol detention facilities. Moreover, CBP lags years behind ICE in evaluating and reforming its detention facilities which are used on a short-term basis for border apprehensions. Widespread reports of racially motivated arrests, coercive interrogation tactics, and denial of the right to counsel are also of concern. These problems, which undermine the rights of both citizens and noncitizens, are made worse by the lack of any uniform or effective complaint mechanism to address misconduct by CBP officers.

In addition, as noted above, CBP has yet to publish any policy concerning prosecutorial discretion, a DHS initiative that was supported by the White House and was intended to extend to all immigration enforcement agencies. Earnest efforts will be needed to bring the practices of CBP in line with the broader directives of the agency.

Finally, over 100,000 individuals were removed last year through the summary “expedited removal” procedure, without ever seeing an immigration judge and with virtually no legal process. We have grave concerns about how the expedited removal process is being carried out, including its impact on asylum seekers. Border Patrol agents often fail to ask whether an individual has a fear of returning to his or her home country before ordering them removed, and even deny individuals who do express such a fear the ability to start the asylum application process. We urge you to conduct a thorough review of this practice and limit its application to far more narrow circumstances.

Ensure that workplace enforcement enhances and does not harm the interests of workers

Given limited resources, it is important to ensure that workplace enforcement efforts—including I-9 audits—enhance, rather than undermine, the wages and working conditions of U.S. and immigrant workers. ICE has policies in place to avoid interfering in a labor dispute, and those should be updated and strengthened. ICE should also develop policies to deprioritize enforcement against law abiding companies that are industry leaders in wages, benefits, and treatment of workers. Targeting such employers for immigration enforcement puts downward pressure on the wage structure for the entire workforce. Finally, ICE should review its confidentiality restrictions to ensure that workers who are affected by immigration enforcement actions are able to obtain the information they need to protect their rights.

Taken together, these issues detract from the administration’s support for immigration reform and exacerbate serious due process and civil liberties problems in the enforcement system. Within each of these categories, the necessity of review and reform is critical. We look forward to discussing

these issues with you in the coming weeks. If you would like further information, please contact Gregory Chen, Director of Advocacy, American Immigration Lawyers Association, at 202-507-7615 or gchen@aila.org.

Sincerely,

AFL-CIO
American Civil Liberties Union
American Immigration Council
American Immigration Lawyers Association
Catholic Legal Immigration Network, Inc.
Center for American Progress
Center for Community Change
Detention Watch Network
Immigrant Legal Resource Center
The Leadership Conference on Civil and Human Rights
Lutheran Immigration and Refugee Service
National Council of La Raza
National Immigrant Justice Center
National Immigration Forum
National Immigration Law Center
National Immigration Project of the National Lawyers' Guild
Service Employees International Union
U.S. Conference of Catholic Bishops