February 6, 2009

Via email and personal delivery

Mr. Carlton I. Mann
Assistant Inspector General
Office of the Inspector General
Department of Homeland Security
1120 Vermont Ave. NW
Washington, DC 20036

Re: DHS OIG audit of immigration detainee transfers and impact on legal representation

Dear Assistant Inspector Gen. Mann:

At our meeting in September, your staff requested that we develop written recommendations on how to address the due process problems presented by DHS's practice of transferring immigration detainees, especially those detainees transferred to facilities in other states. Based on our discussions at that meeting, we have crafted the following recommendations organized around three due process guarantees:

(1) The statutory right to counsel in removal proceedings at no expense to the government[1] shall not be eroded by the transfer of the immigration detainee to facilities out-of-state. This statutory guarantee applies to:

   - Detainees who are represented prior to their transfer; and
   - Detainees who are not represented prior to their transfer.

(2) The statutory right to a reasonable opportunity to present evidence in removal proceedings shall not be eroded.[2] This requires that an immigration detainee be afforded the opportunity to present his or her case and that he or she must not lose or forfeit forms of immigration relief as a result of his or her transfer to a different jurisdiction.

(3) The right to not be detained for a prolonged period of time shall not be eroded by the transfer of the immigration detainee to a different detention facility.

The following recommendations are designed to apply to immigration detainee transfers between all categories of ICE detention facilities (Service Processing Centers, Contract Detention Facilities, and State or Local Government Facilities under Intergovernmental Service Agreements). The recommendations have been developed by Human Rights Watch, National Immigrant Justice Center, American

[1] INA § 292.

[2] INA § 240(b)(4)(B).

Immigration Lawyers Association, and the American Civil Liberties Union, in consultation with immigration detention attorneys across the country.

I. <u>The statutory right to counsel in removal proceedings may not be eroded by the use of immigration detainee transfers</u>.

A. *Impact of transfers on immigration detainees who are represented prior to their transfer*:

In order to address interference with already-retained counsel caused by transfers of immigration detainees and the reluctance of local counsel to take on representation of detainees who may subsequently be transferred,[3]

We recommend that the Assistant Secretary for Immigration and Customs Enforcement ("ICE"):

- Revise the Performance Based National Detention Standards (2008) (hereinafter "PBNDS") to require ICE/DRO to refrain from transferring detainees who are represented by local counsel before the immigration court or in other ongoing legal proceedings in state or federal courts, *unless* ICE/DRO determines that: (1) the transfer is necessary to provide medical care or mental health care to the detainee, (2) the transfer is necessary to comply with a change of venue ordered by the Executive Office for Immigration Review ("EOIR"), (3) the transfer is necessary to protect the safety and security of the detainee, detention personnel, or other detainees located in the pre-transfer facility, or (4) the detainee specifically requests such transfer.
- Revise the PBNDS to require that whenever a detainee with local counsel is transferred for one of the above enumerated reasons, such transfer will be only for the limited period of time necessary to accomplish its purpose, after which time ICE/DRO will return the detainee to the location where he/she has counsel.
- Amend the "Detainee Transfer Checklist" appended to the Transfer PBNDS to include a list of criteria that ICE/DRO must consider in determining whether someone has a preexisting relationship with local counsel,[4] and designation on the checklist of one or more of the four reasons enumerated above for transfer of a detainee with local counsel (including the length of time that detention in the new location is anticipated to be necessary), and communication of the reason(s) to that local counsel upon notification of the transfer.
- Reinstate the prior Transfer NDS, which required notification to counsel "once the detainee is *en route* to the new detention location" [emphasis added], and require that all such notifications are completed within 24 hours of the time that the detainee is placed in transit.

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[3] In accordance with 8 CFR § 3.17(b), attorneys who agree to represent a noncitizen in removal proceedings must request permission from the immigration court to withdraw from such representation, and thus are reluctant to take on representation of a detainee who may be transferred to a remote location because of concern that they will not be granted leave to withdraw.

[4] For example: no G-28 on file, no EOIR-28 on file, and detainee has been asked about any existing relationship with counsel and has answered in the negative.

- Issue guidance for ICE detention officers and trial attorneys, requiring them to file "Notices to Appear" (which initiate and establish venue of removal proceedings) in the location where the non-citizen/detainee is arrested, rather than delaying the filing of such Notices until after a detainee has been transferred.[5]
- Issue guidance for ICE trial attorneys requiring that they refrain from filing motions to change venue in cases where detainees have been transferred away from counsel unless a detainee so requests, or unless other justifications exist for such a motion apart from ICE convenience.
- Issue guidance for ICE/DRO requiring that, absent a change of venue ordered by the EOIR, detainees who have been transferred away from counsel must be returned to the pre-transfer location sufficiently in advance of any proceedings to allow for in-person consultation with such counsel.[6]
- Issue guidance for ICE trial attorneys requiring them to refrain from opposing appearances by detainee counsel as well as detainees themselves via video or telephone whenever a detainee has been transferred away from local counsel to accommodate continuance of the proceedings in the original venue, or if venue is changed, to ensure ongoing access to distant counsel in the new venue.
- Issue guidance for DRO requiring that immigration detainees have access to their legal documents and papers, no later than 24 hours after transfer.

B. ***Impact of transfers on immigration detainees who are not represented at the time of their transfer****:*

In order to address the interference with each detainee's statutory "Right to Counsel" (INA Sec. 292); that is, the right to "[be] represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, *as he shall choose*" [emphasis added] **caused by transfers of detainees to remote locations where there is no meaningful opportunity to obtain local counsel in the new jurisdiction,**

We recommend that the ICE Assistant Secretary:

- Cease the construction of, or contracting with, detention centers in locations where there is no significant immigration bar or pro bono legal services.
- Revise the PBNDS to require ICE/DRO to transfer detainees to only those detention facilities with a significant immigration bar or legal services community in the vicinity.

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[5] If a Notice to Appear is filed in the location where the detainee is arrested, venue attaches in that jurisdiction and if the detainee is subsequently transferred and either party desires a change of venue, a motion must be filed with the immigration court, which must consider the interests of *both* parties in determining if venue should be changed.

[6] A similar requirement is part of the permanent injunction in *Orantes-Hernandez v. Meese,* 685 F.Supp. 1488 (C.D.Cal. 1988)*, aff'd sub nom Orantes-Hernandez v.Thornburgh,* 919 F.2d 549 (9th Cir. 1990).

In order to address the interference with each detainee's statutory "Right to Counsel" (INA Sec. 292); that is, the right to "[be] represented (at no expense to the government) by such counsel, authorized to practice in such proceedings , *as he shall choose*" [emphasis added] **caused by transfers of detainees who, subsequent to transfer, find counsel of their choosing near to their family or former place of residence (i.e., near to their pre-transfer place of detention),**

We recommend that the ICE Assistant Secretary:

- Revise the PBNDS to require that whenever a detainee is transferred for one of the above enumerated reasons, such transfer will be only for the limited period of time necessary to accomplish its purpose, after which time ICE/DRO will return the detainee to the location where the detainee has obtained counsel.
- Issue guidance for ICE trial attorneys requiring them to refrain from filing motions to change venue away from a location where the detainee has subsequently obtained counsel, unless the detainee so requests, or unless other justifications exist for such a motion apart from mere agency convenience.
- Issue guidance for ICE trial attorneys requiring them to refrain from opposing motions for change of venue filed by detainees who retain counsel of choice in another location, unless other justifications exist for such a motion apart from agency convenience.

II. Immigration detainees may not be unnecessarily detained for prolonged periods of time due to their transfer to a different detention facility. The sole purpose of immigration detention is to ensure that the detainee appears for future immigration court hearings and/or DHS interviews. Transfers of detainees, especially across state lines, often result in a change of venue as well as a change in the cast of characters including the detainee's counsel, ICE trial attorney, ICE DRO officer, and the immigration judge. Changes in immigration court proceedings often result in delayed hearings in order to allow the new attorneys and judge to study, investigate, and develop the case. Any delay in court proceedings often results in unnecessarily prolonged detention.

In order to remedy the potentially needless prolonged detention of individuals who are eligible for release on bond but who are transferred to a new detention location before a bond hearing can take place,

We recommend that the ICE Assistant Secretary:

- Revise the PBNDS to require ICE/DRO to refrain from transferring any detainee until after his or her first custody review hearing for the purposes of bond, unless the detainee affirmatively requests transfer prior to such a hearing after having been advised of his right to the hearing and the consequences of delaying the bond hearing until after his transfer.

- Amend the "Detainee Transfer Checklist" appended to the Transfer PBNDS to include a list of criteria that ICE/DRO must consider in order to determine whether a detainee has requested a bond hearing or is entitled to request such a hearing, and/or has consented to transfer without such a hearing.
- Pursue placement of the detainee in all alternative to detention programs prior to transfer.

III. Immigration detainees may not lose or forfeit forms of immigration relief as a result of their transfer to a different jurisdiction.

Immigration detainees often rely on family members, friends, and relationships in churches and communities of origin to help build the merits of their immigration case. In many cancellation of removal cases (nonpermanent residents, 8 U.S.C. 1229b(b)(1)(D), INA 240A(b)(1)(D); or abused spouses, 8 U.S.C. 1229b(b)(2)(A)(v), INA 240A(b)(2)(A)(v)), the detainee's spouse, parent, and/or child is a critical witness to establish that deportation would result in exceptional and extremely unusual hardship. In other cases in which a detainee is able to defend against removal based on derivative US citizenship, or the resolution of a pending application for adjustment of status, the detainee's spouse, parent, and/or child is a critical witness in establishing the required family relationship. In still other cases in which a detainee's moral character is relevant to the removal proceedings, employers, family members, and community witnesses can provide essential evidence. Moreover, family members and friends often provide the critical link between detainees and immigration counsel, by helping detainees locate and retain counsel as well as by assisting in collecting supporting documents and declarations. Therefore, it is imperative that detainees have access to such individuals as they prepare a case from the confines of immigration detention facilities.

Finally, there are numerous disagreements between the federal circuit courts regarding their substantive interpretations of immigration law. [7] Accordingly, a detainee may have developed his asylum

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[7] There are many examples of circuit splits in immigration law. For example, the Fifth Circuit (the Circuit to which many detainees are transferred), determined in *Mwembie v Gonzales,* 443 F.3d 405 (5th Cir. 2006) that the imprisonment and repeated rapes of Ms. Mwembie in the Democratic Republic of the Congo (DRC) were part of a legitimate investigation into the assassination of the DRC's head of state. This aspect of the decision conflicts with the 3rd Circuit's decision in *Zubeda v Ashcroft*, 333 F.3d 463 (3d Cir. 2003) (recognizing that rape constitutes persecution and torture). Moreover, the 5th Circuit (again, the Circuit to which many detainees are transferred), follows its own decision in *Mortera-Cruz v. Gonzales*, 409 F. 3d 246 (5th Cir. 2005) as well as the BIA's decision in *Matter of Torres-Garcia*, 23 I. & N. Dec. 866 (BIA 2006), finding that immigrants with pending INA § 245(i) applications for adjustment of status cannot surmount the bars to such adjustment contained in INA § 212, necessitating their departure from the US for at least ten years. By contrast, the 9th Circuit (*Acosta v. Gonzales*, No. 04-72682 (9th Cir. 2006)) and the 10th Circuit (*Padilla-Caldera v. Gonzales*, 426 F.3d 1294 (10th Cir. 2005)) have held that such bars can be overcome in particular circumstances. In yet another example, in *Niang v. Gonzales,* 492 F.3d 505 (4th Cir. 2007), a Senegalese woman sought asylum/withholding based on her fear that her daughter would be subjected to female genital mutilation if forced to return to Senegal. The 4th Circuit denied her request, finding no legal basis to grant a parent protection based on fear of female genital mutilation to child. The 6th

claim or defense against removal based on the federal circuit court's interpretation of the law in the pre-transfer jurisdiction, only to be transferred to a detention facility and venue where the law has been interpreted differently, resulting in the detainee and counsel (if any) being forced to build a new legal case based on legal arguments relevant to the new jurisdiction. Transferring detainees from one circuit to another may result in a genuine refugee being denied asylum from persecution, or in other immigrants losing protections under immigration law, including the ability to present certain defenses against removal. Such circumstances may also require the detainee to file new briefs, resulting in further delay and a longer period of custody for the detainee.

In order to lessen the interference with detainees' capacity to defend against removal caused by their transfer away from family members and communities of origin,

We recommend that the ICE Assistant Secretary:

- Revise the PBNDS to require ICE/DRO to refrain from transferring detainees who have family members, community ties, or other key witnesses present in the local area *unless* ICE/DRO determines that: (1) the transfer is necessary to provide medical care or mental health care to the detainee, (2) the transfer is necessary to comply with a change of venue ordered by the Executive Office for Immigration Review ("EOIR"), (3) the transfer is necessary to protect the safety and security of the detainee, detention personnel, or other detainees located in the pre-transfer facility, or (4) the detainee specifically requests such transfer.
- Revise the PBNDS to require that whenever a detainee is transferred away from family members, community ties, or other key witnesses, such transfer will be only for the limited period of time necessary to accomplish one of the enumerated purposes, after which time ICE/DRO will return the detainee to the pre-transfer location.
- Amend the "Detainee Transfer Checklist" appended to the Transfer PBNDS to include designation of one or more of the four reasons enumerated above for transferring detainees away from family members, community ties, or other key witnesses present in the local area, including the length of time that detention in the new location is anticipated to be necessary.
- Issue guidance for ICE DRO officers and trial attorneys requiring them to file "Notices to Appear" in the location where a non-citizen/detainee is arrested, rather than delaying the filing of such Notices until after a detainee has been transferred. As a result, any subsequent change in

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Circuit reached the opposite result on this issue in *Abay v Gonzales,* 368 F.3d 634 (6th Cir. 2004). In *Niang,* the 4th Circuit also found that non-physical harm does not constitute persecution, conflicting with numerous circuits, including *Fatin v. INS,* 12 F.3d 1233 (3d Cir. 1993) (conduct abhorrent to an individual's deepest beliefs can constitute persecution), *Makhoul v Ashcroft,* 387 F.3d 75 (1st Cir. 2004) (psychological harm can be enough to constitute persecution), and *Mashiri v Ashcroft*, 383 F.3d 1112 (9th Cir. 2004) (emotional/psychological harm can rise to the level of persecution). The *Abay* decision in the 6th Circuit also conflicts with the 7th Circuit's jurisprudence on parent-child asylum claims as detailed in *Oforji v Ashcroft*, 345 F.3d 609 (7th Cir. 2003).

location of proceedings would require a motion to change venue to the immigration court, which must consider the interests of *both* parties in determining if venue should be changed.
- Issue guidance for ICE trial attorneys requiring them to refrain from filing motions to change venue away from a location where the detainee has family members, community ties, or other key witnesses, unless the detainee so requests or consents, or unless other justifications exist for such a motion apart from ICE agency convenience.
- Issue guidance for ICE trial attorneys requiring them to refrain from opposing motions for change of venue filed by detainees who have family members, community ties, or other key witnesses in another location, unless other justifications exist for such a motion apart from mere agency convenience.

In order to ensure that transfer of detainees does not interfere with the ability of counsel and family members to locate and communicate with detainees,

We recommend that the ICE Assistant Secretary:

- Require ICE/DRO to develop a reliable tracking system that enables prompt identification of the location where any detainee is being held.
- Require that local ICE field offices maintain up-to-date information about the location of all detainees in their custody and make that information readily available to family members and attorneys of detainees who call inquiring about the location of a detainee.
- Require that ICE/DRO provide 24 hours notice to any detainee prior to transfer to another detention facility, unless exigent circumstances dictate an immediate transfer.
- Revise the PBNDS to provide that if a detainee who has been transferred is unable to make a telephone call at his/her own expense within 12 hours of arrival at the new location, the detainee shall be permitted a single domestic telephone call at the Government's expense.

In order to lessen the problems caused by transfers of detainees away from the jurisdiction in which the applicable law is favorable to their case to a new jurisdiction in which the applicable law is less favorable,

We recommend that the ICE Assistant Secretary:

- Issue guidance for ICE trial attorneys requiring that they refrain from moving for a change of venue whenever the applicable law in the post-transfer jurisdiction is less favorable than that in the pre-transfer jurisdiction, unless the detainee so requests after having been advised of the potential consequences for his or her case of the variance in the law, or unless other justifications exist for such a motion apart from ICE agency convenience.
- Issue guidance for ICE trial attorneys requiring them to refrain from opposing motions for change of venue filed by detainees for whom the applicable law in the post-transfer jurisdiction

is less favorable than that in the pre-transfer jurisdiction, unless other justifications exist for such a motion apart from DHS agency convenience.

In order to address interference with counsel and other detrimental legal outcomes (i.e. aging out of Special Immigrant Juvenile Status ("SIJS")) caused by the transfers of unaccompanied minors to Office of Refugee Resettlement (ORR) facilities located in places remote to their counsel and former place of residence in the United States,

We recommend that the ICE Assistant Secretary for Immigration and Customs Enforcement, together with the ORR Director:

Provide age-appropriate ORR facilities for all unaccompanied minors near to their counsel or in locations where there is access to counsel, and, in the case of unaccompanied minors who have resided in the United States for longer than one year, their former place of residence in the United States.

IV. *Recommendations regarding staffing, accountability, and management of immigration detainee transfer decisions*

In order to ensure that all transfer decisions are made by ICE/DRO personnel with the requisite expertise to assess not only agency operational needs but also the legal issues raised by a transfer decision,

We recommend that the ICE Assistant Secretary:

- Require that all transfer decisions be approved by both ICE/DRO detention personnel and an ICE trial attorney.
- Create a mechanism for immigration detainees, their counsel, and/or family members to appeal a transfer decision.

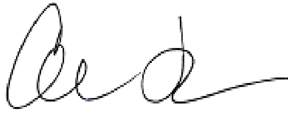
In order to improve agency accountability and management practices as well as accurate accounting of operational costs involved in transfers,

We recommend that the ICE Assistant Secretary:

- Require detention operations personnel to enter the date of transfer, originating facility, receiving facility, reasons for transfer, and counsel notification into the Deportable Alien Control System, or any successor system used by ICE to track the location of detainees.
- Include costs associated with inter-facility transfers of detainees, as a category distinct from transfers made to complete removals from the U.S. in annual financial reporting by the agency.

Thank you for the opportunity to provide these recommendations on improving DHS practices with respect to immigration detainee transfers. We look forward to reading the DHS OIG's report.

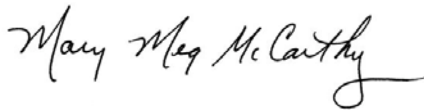
Sincerely,



Caroline Fredrickson
American Civil Liberties Union
Washington Legislative Office

Alison Parker
Human Rights Watch

Jeanne Butterfield
American Immigration Lawyers Association



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