Department of Homeland Security
Office of Inspector General

Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers

OIG-10-13

November 2009

AILA InfoNet Doc. No. 09120361. (Posted 12/03/09)

Office of Inspector General

U.S. Department of Homeland Security
Washington, DC 20528

November 10, 2009

MEMORANDUM FOR: John T. Morton
Assistant Secretary
U.S. Immigration and Customs Enforcement

FROM: Richard L. Skinner
Inspector General

SUBJECT: *Letter Report: Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers (OIG-10-13)*

We reviewed Immigration and Customs Enforcement (ICE) detainee transfer policies and procedures in response to a request from nongovernmental organizations. These organizations reported that some transfers have not complied with ICE National Detention Standards and have created hardships for detainees. Our objective was to determine whether ICE detention officers properly justify detainee transfers according to ICE's standards.

Transfer determinations made by ICE officers at the detention facilities are not conducted according to a consistent process. This leads to errors, delays, and confusion for detainees, their families, and legal representatives. Communication and coordination with the Department of Justice's Executive Office for Immigration Review (EOIR) immigration courts regarding detainee status can also be improved to eliminate confusion and delays. We are recommending that ICE establish a national standard for reviewing each detainee's administrative file prior to a transfer determination, and that it develop protocols with EOIR court administrators for exchanging hearing and transfer schedules.

The report contains two recommendations. ICE concurred with both recommendations. The full text of ICE's comments can be found in Appendix B. Within 90 days of the date of this memorandum, please provide our office with management's official response to the final report. The response should indicate corrective actions planned or taken; other supporting information; and, where appropriate, dates for achieving actions and the official responsible for implementation of the actions.

We trust our recommendations will be of assistance as you conduct detention and removal operations and provide custody management during removal proceedings.

Should you have any questions, please call me, or your staff may contact Carlton I. Mann, Assistant Inspector General for Inspections, at (202) 254-4100.

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Background

The Immigration and Customs Enforcement (ICE) Office of Detention and Removal Operations (DRO) is responsible for arresting, detaining, and removing inadmissible and deportable noncitizens (aliens) from the United States. This includes aliens who are inadmissible or removable under the *Immigration and Nationality Act* (INA), guilty of certain crimes, in violation of the status in which they were admitted to the United States, or who have final orders of removal. Under the INA, certain inadmissible or removable aliens are subject to mandatory detention. Those not subject to mandatory detention may be detained, paroled, or released on bond or recognizance until a removal determination is complete.

Since its creation in 2003, ICE has detained more than 1.7 million individuals. ICE estimates that during FY 2009, more than 442,000 detainees will spend time in ICE custody, more than double its first year of operations. ICE transfers detainees to other detention facilities to prepare for final removal, reduce overcrowding, or meet the specialized needs of the detainee. Recently, the number of detainee transfers has increased because of insufficient bed space in some facilities. Most detainees transferred owing to overcrowding are sent from eastern, western, and northern state detention facilities to locations in the southern and southwestern United States. In FY 2008, ICE had an average daily detention population of 31,244. Currently, ICE has a total bed capacity of 33,400 through use of its own service processing centers, contracted facilities, and local jails under Inter-governmental Service Agreements.

ICE National Detention Standards outline the policy, applicability, standards, and procedures for the transfer of a detainee. ICE must consider the detainee's security requirements, medical needs, legal representation, and requests for a change in venue for the removal proceeding.[1] The detention standards state that ICE shall consider alternatives to transfer, especially when the detainee is represented by legal counsel and where immigration proceedings are ongoing. Legal representatives are required to notify ICE and the immigration court that they are the alien's legal counsel or representative.[2] The standards require that ICE notify the detainee's legal counsel no later than 24 hours after a transfer to another detention facility.

The Notice to Appear informs the alien of the reasons for arrest, the right to representation by counsel at no cost to the government, and the time and location of a removal proceeding. According to federal regulations, DRO must determine within 48 hours of an alien's arrest whether to issue a Notice to Appear and warrant of arrest and whether the alien will remain in custody or be released on bond or recognizance. In addition to the reasons for arrest and right to representation, a Notice to Appear must contain proof that the alien received the Notice to Appear, confirm that the alien received

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[1] On September 12, 2008, ICE introduced new Performance-Based National Detention Standards and was implementing these new standards at detention facilities over a 12 month period.

[2] For ICE, this is Form G-28; for the Executive Office for Immigration Review, this is Form E-28.

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a list of free (pro bono) legal services available in the district where the hearing will be held, and indicate the immigration court in which it is filed. At ICE's discretion, the Notice to Appear may indicate that the notice of the time and place of the removal proceeding will be given to the respondent once ICE has filed the Notice to Appear with an immigration court.

Filing the Notice to Appear with the immigration court establishes jurisdiction for the removal proceeding. ICE is not required to file the Notice to Appear with the immigration court within a specified time after it has been served. ICE may decide for operational or other reasons to transfer a detainee from the jurisdiction where the detainee was arrested to a detention facility outside of that jurisdiction. For those detainees, ICE files the Notice to Appear with the immigration court that has jurisdiction over the receiving detention facility.

Immigration judges from the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR) conduct removal proceedings. Detainees and legal counsel have the right to examine evidence against them, present evidence, and cross-examine witnesses. Detainees may challenge their detention by requesting that an immigration judge with jurisdiction over the place of detention review and reassess ICE's custody or bond determination. Aliens determined to be inadmissible or removable may apply to the immigration court for relief, and may appeal a removal order with the DOJ Board of Immigration Appeals or the United States Court of Appeals. In FY 2008, 220 judges assigned to 56 immigration courts received 291,781 cases. An increase in cases and only a modest increase in immigration judges has created case backlogs and longer detainee wait times for proceedings. Because of the high case volume and logistical issues, many detainees appear before the court via a videoconference link from their detention facility.

Results of Review

ICE/DRO Can Improve the Detainee Transfer Process

A detainee's Alien File (A-File) is an important part of the transfer process. The A-File contains information regarding the detainee and his or her movement through the detention process. ICE detention officers review documentation in an A-File to make a determination regarding a detainee transfer. ICE detention standards state that, before transferring a detainee, ICE "shall consider alternatives to transfer, especially when the detainee is represented by legal counsel and where immigration proceedings are ongoing."

Detention officers at five ICE Field Offices we visited do not consistently determine whether detainees have legal representation or a scheduled court proceeding when transferring detainees. EOIR judges and ICE detention officers in transferring jurisdictions and the judges and officers at receiving facilities said detainees with legal representation and scheduled court proceedings are being transferred to detention facilities outside of the scheduling court's jurisdiction. At one location, court and detention officers estimated that this occurs at least once a week.

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ICE officials said that the transfer of detainees who already have a scheduled court hearing occurs because ICE has not received the EOIR notification of the detainee's scheduled court appearance. ICE officials also said that inadvertent detainee transfers occur when the detainee's legal counsel submits a request for a custody or bond hearing with the immigration court before submitting a Form G-28, Notice of Entry of Appearance as Attorney or Representative, which announces the detainee's legal representative. In these cases, ICE said it is not aware that a detainee has legal representation or a scheduled court appearance at the time of transfer.

The detention officers we interviewed were knowledgeable of the ICE detention standards. However, they were not consistently given written guidance regarding what specific information to assess in the detainee's A-file before making a transfer determination. ICE officials said that, based on geographic and other factors, directors of ICE Field Offices have discretion regarding the guidance and procedures they use to manage detainee transfer determinations. Transfer determinations at the ICE Field Offices we visited were not consistent. This has resulted in detainees being transferred without required A-File documentation, or with pending or outstanding warrants, criminal prosecutions, or custody determinations. ICE officers told us that some transferred detainees arrive at facilities:

- Without being served an NTA;
- Without proper security classification;
- With active arrest warrants in the previous jurisdiction;
- With pending criminal prosecutions in the previous jurisdiction;
- With final orders for removal that are past 90-day deadlines;
- With 6-month post-removal-order custody determinations that are past deadlines;
- With a high probability of being granted bond;
- With incomplete A-file documentation, including files without detainee photographs or conviction records; and
- With late or no notification of the transfer location to the immigration court or the detainee's legal representative.

Staff at ICE Field Offices receiving transferred detainees said that the receipt of incomplete A-Files has led to errors, delays, and confusion for detainees, their families, legal representatives, and the EOIR courts. When the detainee's location changes, Notice to Appear information on court proceedings and legal services becomes outdated or incorrect. Transfers may also create delays in filing the Notice to Appear with an immigration court, prolonging the time the detainee remains in detention.

Detainees transferred with scheduled court appearances have their proceedings (1) rescheduled to a date after the detainee is returned to the original court's jurisdiction; (2) conducted in absentia or by videoconference; or (3) withdrawn by legal counsel and re-filed in the jurisdiction where the detainee is currently being held. Returning detainees to the jurisdictions where a Notice to Appear was first served or re-filing bond or custody

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determinations creates unnecessary cost and additional time in detention. Officials at one Field Office estimated that they return detainees to the sending jurisdiction two or three times per week.

When ICE transfers detainees far from where they were originally detained, their legal counsel may request a release from representation because the distance and travel time or cost make representation impractical. Transferred detainees have had difficulty or delays arranging for legal representation, particularly when they require pro bono representation. Difficulty arranging for counsel or accessing evidence may result in delayed court proceedings. Access to personal records, evidence, and witnesses to support bond or custody redeterminations, removal, relief, or appeal proceedings can also be problematic in these cases.

In June 2008, after detainees' legal representatives informed the Philadelphia Field Office director of concerns regarding transfers, the office developed a written protocol to guide transfer decisions. The protocol establishes that:

- Notices to Appear for aliens detained in the ICE Philadelphia Area of Responsibility and held in York, PA, will be served at the York EOIR court. ICE will not transfer these detainees prior to a judge's decision.
- Detainees from the ICE Philadelphia Area of Responsibility with final orders of removal will be held in York, PA, when the detainee has:

    1. Ties or family in the ICE Philadelphia Area of Responsibility. Detainees considered to have ties include those who are legal permanent residents or have local residences, employment, or relatives;
    2. An attorney of record with Form G-28 on file; or
    3. Pending hearings, or when detainees are eligible for bond and there is a high probability that EOIR will grant bond.

The Philadelphia Field Office director, a representative from the legal community, and EOIR personnel said this protocol has helped eliminate many of the problems regarding detainee transfers. ICE officers who process detainees at later stages in the transfer process said that, as a result of this protocol, required documentation is less frequently missing from Philadelphia Field Office A-files. This protocol could serve as a best practice for all ICE Field Offices to ensure a standard A-file review prior to detainee transfer.

Some immigration courts and Field Offices have developed localized methods of communication and coordination for custody hearings and detainee transfers. Under these arrangements, EOIR provides ICE staff with court docket calendars that list all custody hearings. When notified in advance, ICE can cancel transfers of detainees with a scheduled hearing. ICE also provides courts with lists of detainees scheduled for transfer. This helps avoid scheduling custody hearings for detainees who are in the process of transfer to another facility.

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Recommendations

We recommend that the Assistant Secretary, ICE:

Recommendation 1: Establish a national standard for reviewing A-files prior to transferring a detainee.

Recommendation 2: Implement a policy requiring Field Offices to develop protocols with EOIR court administrators for exchanging custody hearing and detainee transfer schedules.

Management Comments and OIG Analysis

We obtained written comments on our draft report from the Director of the ICE Audit Liaison Office and made changes where appropriate. We have included a copy of the written comments in Appendix A.

ICE concurred with both of our recommendations. ICE intends to publish two advisories to all Field Office Directors: (1) to ensure the most current information pertaining to the detained alien is forwarded to the receiving law enforcement official in accordance with National Detention Standards; and (2) to reinforce the need to coordinate with EOIR court administrators. We consider both recommendations resolved and open.

The intent of recommendation 1 is to ensure that ICE conducts a consistent and thorough review of the most current information pertaining to the detainee prior to a transfer determination. Therefore, in its planned advisory, ICE should stress that the detention officer responsible for the transfer determination will require the detainee's most current information in order to make the decision to transfer the detainee.

ICE plans to publish an advisory from the DRO Director to Field Office Directors to satisfy the intent of recommendation 2. The advisory will reinforce the need for Field Office Directors to coordinate with EOIR court administrators. The advisory should stress the need for a regular exchange of timely and accurate information useful to both ICE and EOIR. We agree with ICE that information sharing with EOIR should take place after considering and the detainee's physical safety and any law enforcement-related security interests.

ICE should provide the OIG with the full text of the advisories once they are published.

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Appendix A
Purpose, Scope, and Methodology

We reviewed U.S. Immigration and Customs Enforcement (ICE) Office of Detention and Removal policies and procedures related to transferring detainees in response to a request from representatives of nongovernmental legal organizations. These organizations reported that ICE does not adhere to its detention standards when transferring detainees. They contend that such transfers disrupt and delay removal proceedings, creating hardships for detainees.

Our objective was to determine whether immigration detention facilities properly justify detainee transfers according to ICE's *Detention Operations Manual*.

We performed fieldwork from October 2008 to February 2009. We visited ICE Office of Detention and Removal Field Offices in Washington, DC; Philadelphia, PA; Newark, NJ; New York, NY; and San Antonio, TX. We visited and observed operations at detention facilities in New York, NY; Elizabeth, NJ; York, PA; and Pearsall, TX. We visited administrative offices and observed immigration proceedings at Department of Justice Executive Office of Immigration Review (EOIR) immigration courts in New York, NY; Elizabeth, NJ; York, PA; and San Antonio, TX. During these visits, we interviewed and collected data from ICE Field Office directors, ICE detention and deportation officers and staff, EOIR immigration judges and court administrators, government lawyers, and immigration attorneys representing detainees.

We conducted our review under the authority of the *Inspector General Act of 1978,* as amended, and according to the *Quality Standards for Inspections* issued by the Council of Inspectors General on Integrity and Efficiency.

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Appendix B
Management Comments to the Draft Letter Report

Office of the Assistant Secretary
U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

September 18, 2009

MEMORANDUM FOR: Carl Mann
Office of Inspector General

FROM: Robert F. De Antonio for [illegible] 28 SEPT 09/1125
Director
Audit Liaison Office

SUBJECT: ICE Response to Office of Inspector General Draft Report: "Immigration and Customs Enforcement Policies and Procedures to Detainee Transfers"

U.S. Immigration and Customs Enforcement (ICE) appreciates the opportunity to comment and respond to the two recommendations in the subject Office of Inspector General (OIG) draft report.

OIG Recommendation 1: "Establish a national standard for reviewing A-files prior to transferring a detainee."

ICE Response to Recommendation 1: ICE concurs with this recommendation. The Detainee Transfer ICE National Detention Standard (NDS) was created, in part, to establish a uniform method of reviewing A-files prior to detainee transfers.

The Detainee Transfer NDS, Section III – D, "Preparation and Transfer of Records," requires that alien files (A-files) be reviewed prior to a detainee's transfer to ensure the most-current information pertaining to the detained alien is forwarded to the receiving law enforcement official so as to preserve acceptable standards for custodial stewardship. The NDS is currently in effect in all Intergovernmental Service Agreement facilities.

Further, the ICE Performance-Based National Detention Standards (PBNDS), Part I – Emergency Plans, Section V, G. 2, which is currently in effect in all Service Processing Centers, provides for the same requirement.

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To ensure compliance with these procedural requirements, The Director of the ICE Office of Detention and Removal Operations (DRO) will publish an advisory to all DRO Field Office Directors and subordinate supervisors to remind the field personnel of their obligation to meet these specific requirements, or alternatively, if they are unable to meet these requirements, to take corrective action as appropriate to address any instance of non-compliance with agency policies, procedures and standards, including those outlined within the ICE NDS and PBNDS.

Please consider this recommendation as resolved and open pending the publishing of the advisory. A copy of the advisory will be provided to OIG within 90 days of the publishing of the OIG's final report on this matter.

OIG Recommendation 2: "Implement a policy requiring Field Offices to develop protocols with EOIR court administrators for exchanging custody hearing and detainee transfer schedules."

ICE Response to Recommendation 2: ICE concurs with this recommendation. To address this issue, the DRO Director will publish an advisory to Field Office Directors that will reinforce the need to coordinate with EOIR court administrators. To this end, information sharing will continue to be permitted as necessary for this purpose, but at the discretion of the Field Office directors after considering the individual's physical safety and any law enforcement-related security interests.

Please consider this recommendation resolved and open pending the dissemination of the memorandum. A copy of the advisory will be provided to OIG within 90 days of the publishing of the OIG's final report on this matter.

Should you have any questions or concerns, please contact OIG Audit Portfolio Manager Margurite Barnes by telephone at (202) 732-4161 or by e-mail at Margurite.Barnes@dhs.gov.

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Appendix C
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Appendix D
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