

March 25, 2021

Secretary Alejandro Mayorkas

U.S. Department of Homeland Security

500 12th St. SW Washington, D.C. 20536

Acting Director Tae D. Johnson

U.S. Immigration and Customs Enforcement

500 12th St. SW Washington, D.C. 20536

Re: The Critical Need for a Functioning System of Discretionary Release from ICE Detention

Dear Secretary Mayorkas and Acting Director Johnson:

The American Immigration Council and the American Immigration Lawyers Association (AILA), through our joint initiative the Immigration Justice Campaign, write to urge the Department of Homeland Security (DHS) to establish a functioning system of receipt and adjudication of discretionary requests for release from U.S. Immigration and Customs Enforcement (ICE) custody. The Immigration Justice Campaign recruits, trains, and mentors pro bono attorneys for the purpose of representing individuals detained in ICE facilities across the United States. As DHS conducts its pending “Department-wide review of policies and practices concerning immigration enforcement”¹, ICE’s system of discretionary release requires immediate attention and improvement. All detained individuals, especially the most vulnerable and those who fall outside the current interim immigration enforcement priorities², must have a meaningful opportunity to have their custody evaluated, with a presumption of release. While the recently announced ICE Case Review process³ is a step in the right direction, relying solely on its oversight will prolong detention for many people and present logistical hurdles for those without legal counsel. In

¹ Memorandum from David Pekoske, Acting Secretary of Homeland Security to U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, and U.S. Citizenship and Immigration Services, “Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities,” January 20, 2021, https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf.

² Memorandum from Tae D. Johnson, Acting Director to all ICE Employees, “Interim Guidance: Civil Immigration Enforcement and Removal Priorities,” February 18, 2021, https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf.

³ U.S. Immigration and Customs Enforcement, “Contact ICE About an Immigration/Detention Case,” Updated March 12, 2021, <https://www.ice.gov/ICEcasereview>.

addition to continuing to improve oversight of local release decisions, ICE must ensure that those decisions are accessible and fair at the time of initial adjudication.

ICE's Discretion to Release Individuals from Detention

Due process under the U.S. Constitution requires ICE to make individualized determinations to detain or continue to hold a person in its custody. INA 212(d)(5) allows for ICE to release anyone on a case-by-case basis for urgent humanitarian reasons or significant public benefit. Other sections of the INA, such as Section 236, allow for release as well. These make up the basis of a latticework of statute sections, regulations, and policy memos that allow ICE to release people from their custody.

With individualized determinations, ICE has the discretionary authority pursuant to statute and regulations to release individuals in a variety of manners, including on his or her own recognizance, on Orders of Supervision, on bond, or on parole.⁴ A functional and consistent process for making decisions on all types of release is necessary to protect due process.

Due Process Failures and Fundamental Unfairness in Current System

ICE's current system of discretionary release is replete with due process failures that lead to the unnecessary and sometimes illegal detention of individuals. The system is fundamentally unfair because it is arbitrary and lacking in clear guidelines on eligibility for release. The following are a few of the many barriers experienced by detained individuals and their attorneys in requesting release.

1. ICE frequently denies requests for release from individuals who are eligible for one or more forms of release and have demonstrated that they are not a flight risk or danger to the community. The regulations specifically list certain categories of people who are eligible for parole including those who have serious medical conditions, are pregnant, or whose continued detention is not in the public interest.⁵ Yet, many individuals in these categories with strong claims for release continue to be detained. For example, one client who is being helped by the Immigration Justice Campaign fled threats against her family, arriving to the border in early 2021. She passed her credible fear interview but was denied parole, despite no criminal history and having a sponsor ready to receive her in California.

⁴ ICE parole authority is found at INA § 212(d)(5) (8 USC § 1182(d)(5)(case-by-case basis for urgent humanitarian reasons or significant public benefit) and INA §236(a) (8 USC § 1226(a)(“conditional parole”), in addition to other authorities for release.

⁵ 8 C.F.R. 212.5(b)

Separately, under *Fraihat v. ICE*, a federal judge ordered ICE to conduct a review of all individuals in its custody and consider release of those who met certain “Risk Factors placing them at heightened risk of severe illness and death upon contracting the COVID-19 virus”.⁶ The Immigration Justice Campaign has repeatedly observed ICE deny requests for release for individuals with such medical conditions who are able to demonstrate that they are not a flight risk or a danger to the community. For example, another client with whom the Immigration Justice Campaign is working has high blood pressure and asthma that requires the use of an inhaler multiple times a day. He has been in ICE custody for over a year and repeatedly denied release.

2. ICE frequently does not make individualized custody determinations, as is required by the plain language of the statute.⁷ Many field offices do not adjudicate parole on a case-by-case basis, but instead issue boilerplate parole denials providing no explanation for their decision. This makes any attempt at a review process functionally meaningless, as there is nothing to “review.” For example, at least seven clients with whom the Immigration Justice Campaign is working who are detained in the Houston ERO district received parole denials stating that they “failed to fall into any of the categories of aliens whom (*sic*) parole would generally be justified,” without any facts or analysis specific to the individual or the request they submitted.
3. National guidelines for, and oversight of, release determinations are inadequate, with individual field offices creating arbitrary rules to define aspects of release criteria, such as who is eligible for release, the flight risk or danger to the community that makes a person ineligible, or the additional documentation or changed circumstances required to file a new parole request. For example, some legal service providers that partner with the Immigration Justice Campaign have reported that their local ICE field office has a blanket rule that individuals are a flight risk based on whether the sponsor is a legal permanent resident or U.S. Citizen, and deny release based on that alone. ICE determined one asylum-seeking woman detained at the Denver Contract Detention Facility a flight risk because his sponsor had a past due balance on their internet bill.

Many parole requests are left pending for weeks or even months or are never adjudicated. One client with whom the Immigration Justice Campaign is working has been denied the surgery he needs for his broken finger and is at high risk of complications from COVID-19 because he is a former chronic smoker. He has received no response to multiple requests for release over a period of more than nine months, the most recent one being over four months ago.

⁶ *Faour Abdallah Fraihat, et al v. U.S. Immigration and Customs Enforcement, et al*, Case No. 5:19-cv-01546-JGB-SHK (C.D. Cal. Apr. 20, 2020), ECF No. 132.

⁷ INA 212(d)(5) requiring review for release on parole on a “case-by-case basis”

Discretionary Release from Custody Must be a Priority in DHS' Upcoming Enforcement Policy Recommendations

On January 20, 2021, Acting Secretary of Homeland Security Davis Pekoske directed DHS to complete within 100 days a Department-wide review and develop “recommendations to address aspects of immigration enforcement”.⁸ In these recommendations, DHS should include a functioning system of discretionary release that includes:

- An affirmative, comprehensive case review involving ICE headquarters of the custody determinations for all individuals already in ICE custody, under a presumption of release;
- Pursuant to this review process, the release of all individuals who fall outside ICE’s interim enforcement priorities⁹ and the immediate release of those who are most vulnerable, such as those with serious medical conditions and/or heightened risk of complications from COVID-19.
- Clear, nationally consistent guidance on release eligibility including the criteria for demonstrating danger to the community or flight risk, whether the government or the detained individuals sustains the burden of proof, and a presumption of release for all detained individuals;
- A procedure for requesting release that is accessible to all detained individuals, regardless of disability, native language, literacy, or whether they have legal representation;
- Training on release eligibility and procedure for all ICE officers involved in release decisions; and
- Oversight at the national level of the consistent application of all guidance across detention centers and field offices.

While we believe that detention should be phased out entirely and replaced with community-based support programs as needed,¹⁰ people in ICE custody cannot wait for this necessary change. Continuing to deny detained individuals due process in their requests for release will do untold physical and emotional harm to them, their families, and our communities. Detained individuals and their legal representatives need access to an independent system which receives and adjudicates requests for release in a timely manner based on consistent, transparent criteria, with a presumption of release.

⁸ Memorandum from David Pekoske, Acting Secretary of Homeland Security to U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, and U.S. Citizenship and Immigration Services, “Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities,” January 20, 2021, https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf.

⁹ Memorandum from Tae D. Johnson, Acting Director to all ICE Employees, “Interim Guidance: Civil Immigration Enforcement and Removal Priorities,” February 18, 2021, https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf.

¹⁰ American Immigration Council and Women’s Refugee Commission, “Community Support for Migrants Navigating the U.S. Immigration System,” February 26, 2021, <https://www.americanimmigrationcouncil.org/research/community-support-migrants-navigating-us-immigration-system>.

Sincerely,

American Immigration Council

American Immigration Lawyers Association

CC: Angela Kelley, Senior Counselor, U.S. Department of Homeland Security

Timothy Perry, Chief of Staff, U.S. Department of Homeland Security