



AMERICAN
IMMIGRATION
LAWYERS
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October 5, 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 Universal 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 follow up on our March 25, 2021, letter regarding the need for the Department of Homeland Security (DHS) to establish a functioning universal system of receipt and adjudication of discretionary requests for release from U.S. Immigration and Customs Enforcement (ICE) custody. Our previous letter described the significant barriers to release attorneys have reported to us. Since then, attorneys have continued to report similar barriers without improvement.

Importance of a Functioning System of Release from Detention

ICE detention has been shown to cause significant barriers to access to counsel,¹ as well as severe physical and mental harm.² It is therefore crucial that people in ICE custody have an opportunity for release whenever possible. The only proven solution to these harms of detention is release, with the provision of community-based support services as needed.³

¹ Ingrid Eagly and Steven Shafer, American Immigration Council, “Access to Counsel in Immigration Court,” September 28, 2016, <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

² American Immigration Council and American Immigration Lawyers Association, “Failure to provide adequate medical and mental health care to individuals detained in the Denver Contract Detention Facility,” June 4, 2018, https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_demands_investigation_into_inadequate_medical_and_mental_health_care_condition_in_immigration_detention_center.pdf.

³ American Immigration Council and Women’s Refugee Commission, “Factsheet: Community Support for Migrants Navigating the U.S. Immigration System,” February 26, 2021,

Continued Due Process Failures and Fundamental Unfairness in Current System

We believe that recent litigation⁴ supports the need for the administration to standardize release protocols across ICE field offices and re-affirm that a functioning system of release—both from ICE custody and from CBP processing—is in the interest of both the U.S. government and people seeking protection in our immigration court system.

Continued Due Process Failures and Fundamental Unfairness in Current System

As we raised in March, ICE’s current system of discretionary release is replete with due process failures that lead to the unnecessary detention of individuals. The system is fundamentally unfair because it is arbitrary and lacks clear and consistently applied guidelines on eligibility for release. The following are a few of the many barriers that detained individuals and their attorneys continue to face in requesting release.

1. ICE frequently does not make individualized custody determinations when reviewing custody determinations under Acting Director Tae Johnson’s February 18, 2021, memo *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (“*Enforcement Priorities Memo*”).⁵ For example, the Denver Field Office has repeatedly responded to release requests with boilerplate denials almost identical to the following: “In consideration of this request your supporting evidence, your client’s administrative file, medical records, criminal history, and previous release denials were reviewed. After consultation with management, Immigration and Customs Enforcement has determined a favorable exercise of discretion is not warranted in this case at this time.”⁶ In some cases, ICE’s denials of release requests incorrectly state the name of the detained individual or state the date of custody review as before the date the individual arrived in the United States. In at least one case, the San Antonio Field Office stated by phone only that a request had been denied based on “higher orders”, with no written response.
2. Consistent with the failure to make individualized custody determination, in all of the field offices in which we work,⁷ ICE frequently issues boilerplate denials of requests for release from individuals who are eligible for one or more forms of release and who have clearly demonstrated that they are not a flight risk or danger to the community. One attorney’s client was detained for over a year, despite being diagnosed with at least four different COVID risk factors. Her U.S. citizen minor child also has serious conditions. This woman’s criminal history does not include an aggravated felony and is the direct result of the severe human trafficking she has suffered, but

<https://www.americanimmigrationcouncil.org/research/community-support-migrants-navigating-us-immigration-system>.

⁴ Texas v. Biden, No. 21-10806 (5th Cir. 2021)

⁵ Tae Johnson, *Interim Guidance: Civil Immigration Enforcement and Enforcement Priorities*, February 18, 2021, https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf.

⁶ See Exhibit D.

⁷ 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. We currently place cases in the Atlanta, Denver, El Paso, New Orleans, San Antonio, and San Diego field offices.

she was denied release at least three times by the local field office and once through the ICE Case Review process.⁸ The Denver Field Office denied a request that an attorney made for her client to be released, even temporarily, to attend his son's funeral.⁹ The New Orleans Field Office denied release for a young man who had recently turned 18, had no criminal history, was grieving the deaths of his father and his aunt who served as his caregiver, and was at risk of losing eligibility for Special Immigrant Juvenile classification if he remained detained. The denial was later affirmed through the ICE case review process.¹⁰

3. Similarly, ICE frequently does not provide "justification for continued detention" pursuant to *Fraihat v. ICE*, as required by court order.¹¹ The Denver Field Office has stated by phone that denial of release pursuant to *Fraihat v. ICE* does not require an individualized explanation. ICE also frequently does not follow the court order's instructions that "[d]efendants shall ensure that the presence of a Risk Factor is given significant weight and that the custody reviews are meaningful."¹² For example, the Denver Field Office has denied release to multiple people who it admits are *Fraihat* class members solely because of their criminal history.¹³ The Atlanta Field Office informed multiple individuals that they would be released under *Fraihat v. ICE* but later told them that ICE Headquarters had reserved the decision and that they would remain detained.
4. In all of the field offices in which we work, attorneys report that detained individuals who submit a request for release often wait weeks or months for a response, or do not receive one at all. This failure to adjudicate requests often amounts to a de facto denial with no justification, because the individual continues to be detained without knowing why. One attorney submitted 25 requests for release to the El Paso Field Office, and only through very intensive follow up eventually received three responses. The El Paso Field Office has stated over the phone to an attorney that it is too difficult for the agency to have to communicate with attorneys about all decisions. Without seeing release denials with individualized justifications, attorneys cannot understand the field office's release eligibility requirements. They therefore cannot assess whether clients may be eligible for release or what evidence they need to provide to be eligible. Instead, attorneys must blindly submit release requests for all of their detained clients, including those that are unlikely to be granted, wasting time for both the attorney and ICE.

⁸ See Exhibit A.

⁹ See Exhibit B.

¹⁰ See Exhibit C.

¹¹ *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. Oct. 7, 2020), ECF No. 240,

https://www.splcenter.org/sites/default/files/fraihat_v_ice_mte_order_quotes-oct_7_2020-final.pdf.

¹² *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. Oct. 7, 2020), ECF No. 240,

https://www.splcenter.org/sites/default/files/fraihat_v_ice_mte_order_quotes-oct_7_2020-final.pdf.

¹³ See Exhibits E and F.

5. National guidelines for, and oversight of, release determinations are inadequate, leading individual field offices to follow their own arbitrary rules in making these determinations such as the following:

Atlanta Field Office

- ICE states it can only release a certain number of people per day, resulting in people being detained for weeks after their initial release approval with no communication regarding their exact release date.
- ICE releases people in roughly alphabetical order over periods of weeks rather than releasing them all at the same time.

Denver Field Office

- ICE states it does not have jurisdiction to release people who entered without inspection.
- ICE states that "credible fear parole" and "humanitarian parole" are two separate types of parole and require the submission of two separate requests.
- ICE only releases individuals under *Fraihat v. ICE* if facility medical staff have affirmatively flagged that individual as eligible.
- ICE states that a sponsor's lease agreement must include the name of the detained individual.¹⁴

El Paso Field Office

- ICE states that it does not have jurisdiction to release people who entered without inspection.¹⁵
- ICE states that it does not have officers on-site at some facilities,¹⁶ so the agency cannot obtain the sponsor information necessary to release individuals from whose records that information is missing and cannot evaluate whether someone is a *Fraihat v. ICE* class member if facility medical staff have not affirmatively flagged them as such.¹⁷
- ICE states that it cannot release people with *prima facie* eligibility for Temporary Protected Status (TPS) because ICE Headquarters has not issued the necessary guidance.
- ICE states that it is too difficult for the agency to have to communicate with attorneys about all decisions regarding their clients' cases.

New Orleans Field Office

- ICE states that it cannot release people unless they have an identification document, even in cases of an affidavit of identity submitted by a family member.

¹⁴ See Exhibit G.

¹⁵ See Exhibit H.

¹⁶ See Exhibit I.

¹⁷ See Exhibit J.

- Some ICE officers tell detained individuals that their sponsors should not purchase plane or bus tickets prior to release, while other officers tell the sponsors of these same people that they are required to provide a confirmation number for the tickets in order for the person to be released.

San Antonio Field Office

- ICE states that it does not have jurisdiction to release people who entered without inspection.

San Diego Field Office

- ICE states that institutional sponsors, such as shelters, must submit financial documents for the release to be granted.
- ICE states that people with *prima facie* eligibility for TPS are not eligible for release if they have a final order of removal, even if the order is stayed.

Guidance on Discretionary Release from Custody Must be Included 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”.¹⁸ Although more than 200 days have passed, these recommendations have not been issued. Until ICE detention can be phased out and support services as well as universal publicly-funded legal representation,¹⁹ we continue to ask DHS to immediately create a functioning system of discretionary release. Such a system should include:

- 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, a presumption of release for all detained individuals, and individualized justifications for release denials;
- A procedure for requesting release that is accessible to all detained individuals, regardless of disability, native language, literacy, or whether they have legal representation, and that requires the agency to communicate a decision on the request to the detained individual and their counsel;

¹⁸ 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.

¹⁹ 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>.

- Training on release eligibility and procedure for all ICE officers involved in release decisions, with training materials that are publicly available; and
- Oversight at the national level of the consistent application of all guidance across detention centers and field offices.

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