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Marielena Hincapié

April 14, 2014

The Honorable Jeh Johnson
Secretary
Department of Homeland Security

The Honorable Eric H. Holder
Attorney General
Department of Justice

Dear Secretary Johnson and Attorney General Holder:

On behalf of the undersigned grassroots, labor, faith, legal, and advocacy groups, the National Immigration Law Center respectfully submits the attached recommendations regarding immediate actions the Obama administration can take to decrease deportations, increase the number of people with immigration status, and ensure that all immigrants' labor and civil rights are protected.

We believe the current status quo has reached a crisis point and is unacceptable. More than 1,000 immigrants are separated from their families and communities each day because of deportations. The Obama administration has the legal and moral authority to prevent tomorrow's citizens from suffering the consequences of political inaction. This suffering is unnecessary, and there are many tangible steps the Department of Homeland Security (DHS) and the Department of Justice (DOJ) can, and should, implement immediately to prevent discrimination and racial profiling, reduce family separation, and build healthier, more prosperous American communities.

The attached recommendations are not exhaustive but rather critical steps that must be taken to alleviate the pain resulting from the administration's detention and deportation policies. These recommendations are not being offered as alternatives to one another - all of them are needed. First and foremost, President Obama should exercise his authority to significantly expand the use of affirmative relief to ensure that currently unauthorized immigrants can live and work and contribute to their communities without fear of deportation. Second, regardless of whether immigration reform is enacted or affirmative relief is granted there are a significant number of important changes that the administration should make to its detention and deportation policies.


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In response to President Obama's call for a review of the administration's immigration enforcement priorities, we submit these recommendations for your immediate consideration and implementation. We look forward to working with you to ensure that these recommendations become a reality and are implemented in a meaningful manner.

Sincerely,



Marielena Hincapié, Executive Director
National Immigration Law Center

On behalf of:

American Friends Service Committee
America's Voice Education Fund
Arab-American Institute
Arab Community Center for Economic and Social Services (ACCESS)
Asian Americans Advancing Justice-AAJC
Asian Americans Advancing Justice-LA
Asian Students Promoting Immigrant Rights through Educations-Los Angeles (ASPIRE-LA)
Bridge Project
California Immigrant Policy Center
Casa Latina
Center for Community Change
Chadash Community UCC
Church Council of Greater Seattle
Church World Service
Coalicion de Derechos Humanos
Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)
Colorado Immigrant Rights Coalition
Conference of Major Superiors of Men
Consejo de Federaciones Mexicanas /Council of Mexican Federations (COFEM)
Detention Watch Network
DRUM - South Asian Organizing Center
El Centro de la Raza
Esperanza Immigrant Rights Project
Fair Immigration Reform Movement (FIRM)
Farmworker Justice Fund
First Focus
Hispanic Federation
Immigrant Defense Project
Immigrant Legal Resource Center
Jobs With Justice

Korean Resource Center
Koreatown Immigrant Workers Alliance
LA Center for Law & Justice
Latin American Coalition
Latino Education & Training Institute
LatinoJustice PRLDEF
Lawyers' Committee for Civil Rights Under Law
Leadership Conference on Civil and Human Rights
Leadership Conference of Women Religious
National Advocacy Center of the Sisters of the Good Shepherd
National Alliance of Latin American and Caribbean Communities (NALACC)
National Council of La Raza (NCLR)
National Employment Law Project
National Guestworker Alliance
National Immigrant Justice Center
National Immigration Law Center
National Immigration Project of the National Lawyers Guild
National Latina Institute for Reproductive Health
National Network for Arab American Communities (NNAAC)
New Sanctuary Coalition
North Carolina Justice Center
Organización en California de Líderes Campesinas, Inc.
Pride Foundation
Public Counsel
Skagit Immigrant Rights Council
South Asian Americans Leading Together (SAALT)
Southeast Asia Resource Action Center (SEARAC)
Southern Border Communities Coalition
The New York Immigration Coalition
UNITE HERE International Union
United Church of Christ, Justice and Witness Ministries
United Food and Commercial Workers International Union
United Methodist Church, General Board of Church and Society
Washington CAN!
Washington DREAM Act Coalition
Washington New Sanctuary Movement

cc:

Cecilia Muñoz, Director, White House Domestic Policy Council
Alejandro Mayorkas, Deputy Secretary, Department of Homeland Security

Affirmatively Expanding Administrative Relief

DHS can exercise its power and legal authority to grant administrative relief (a power derived from statute, case law, and general prosecutorial discretion authority) to allow non-U.S. citizens to lawfully remain in the U.S. and obtain work permits. This can be done by:

Granting a reprieve from deportation with work authorization to every person who was has ties to the U.S. There are numerous types of administrative relief that the administration can provide ranging from deferred action to parole in place. DHS can create a program similar to the Deferred Action for Childhood Arrivals (DACA) for undocumented immigrants, on a case-by-case basis, to affirmatively apply for permission to remain in the U.S. and obtain work authorization. This will allow those who have family, employment, community, business, and other ties to the U.S. to remain here without the threat of deportation. There are multiple ways in which such a program or programs could be crafted. We believe this should be done in the broadest, most expansive way to benefit the greatest number of people.

Immediately designate Temporary Protected Status for the Philippines. The Philippines has been devastated by the Typhoon Haiyan, Typhoon Bopha, and the Bohol earthquake. Combined, these disasters have compounding effects and in total, have directly affected over 23 million people and displaced as many as 8 million. Given the damaged and ravaged communities, the Philippines meets the necessary requirements for TPS.

Expand the DACA program to all young immigrants who entered before the age of 16, regardless of how old they are today. The DACA program currently excludes young immigrants who have been in the U.S. since there were young but who were born before June 15, 1981. This has the unfortunate effect of excluding young immigrants who have been in the U.S. the longest.

Move the DACA continuous residence cut off to June 15, 2009. When announced on June 15, 2012, the DACA guidelines required continuous residence for 5 years. The guidelines should be updated to allow young immigrants who currently have 5 years of continuous residence in the U.S. and who otherwise qualify for DACA to apply.

Broaden use of advance parole. Issue DHS-wide policies to ensure that DACA recipients and others receiving advance parole are assured that they would be able to re-enter the United States prior to departing. Clarify that the Board of Immigration Appeal's decision in *Matter of Arrabally*, 25 I. & N. Dec. 771 (2012), is national policy applicable to those who travel pursuant to a grant of advance parole.

Enforcement Reforms DHS Can Undertake Immediately

Prosecutorial Discretion

Make prosecutorial discretion and parental interest memos meaningful for individuals.

1. Create a presumption of hardship for people with ties to the U.S. DHS personnel should be required to ascertain a person's ties to the U.S. and other equities before taking enforcement action, and presume hardship to a person who has family, employment, community, business, or other ties to the U.S. These people should not be removed absent exceptional circumstances.
2. Ensure the memos are applicable to all of DHS (not just Immigration and Customs Enforcement (ICE)).
3. Exercise discretion to issue deferred action *with work authorization* to anyone whose case is administratively closed or otherwise benefits from the exercise of prosecutorial discretion. Consistent with the *Morton memo*, administrative closure *alone* should not be the default remedy; rather, cases should be terminated and removed from overburdened immigration court dockets.
4. Issue time limited grants of discretion (stays of removal, etc.) for a minimum of three and up to ten years to ensure stability and humanitarian protections.
5. Use prosecutorial discretion broadly. The criteria should be evaluated *at each stage* of an individual's contact with DHS and should require DHS to actively inquire about individuals' potential bases for discretion at various stages of the immigration enforcement process. ICE should also create a process that readily identifies immigrant workers for whom discretion should be used. This process should encourage affirmative inquiries by ICE personnel at the time of apprehension, processing, and prosecution regarding the immigrant's existing labor or civil rights claims.
6. Consider group prosecutorial discretion requests for workers; strict adherence to individualized review can threaten the effective enforcement of labor and civil rights laws.
7. Ensure training, application, and tracking of implementation of the *Certain Victims, Witnesses, and Plaintiffs Memorandum* which applies a unique standard to protect civil and labor rights defenders and survivors of domestic violence and trafficking.
8. Ensure compliance with the *Enforcement Actions at or Focused on Sensitive Locations Memorandum* and expand the list of sensitive locations for which enforcement actions require prior approval to include:
 - a. state and federal courthouses and administrative agencies and locations where proceedings related to a pending court case or administrative complaint are taking place;
 - b. organizations that provide services to vulnerable populations, including survivors of crime or abuse; and
 - c. community health centers.

Detention

Strengthen due process and human rights protections in detention.

1. Do not interpret appropriations language that requires the maintenance of a certain number of detention beds as a “mandated quota” to fill those beds. Do not allow the detention bed quota to drive DHS decisions whether to detain any specific individual or categories of individuals.
2. Consistent with best practices in the criminal justice system, DHS should use alternatives to detention and offer a continuum of supervision mechanisms for individuals who must remain in custody, rather than relying on costly and less humane jail detention. Adopt a national uniform rule providing bond hearings by an immigration judge to all immigrants detained for six months or more.
3. Close the Etowah County Detention Center in Alabama due to the tremendous costs of maintaining the center and the human rights concerns that have been raised there. DHS and ICE committed to closing the Etowah center in 2010 but it still remains open.
4. Bring all facilities in line with the 2011 Performance-Based National Detention Standards (PBNDS), standards to prevent, detect, and respond to sexual abuse and assault in DHS confinement facilities (6 C.F.R. 115), and additional directives.

Labor & Civil Rights

Ensure that worksite enforcement does not undermine immigrants’ labor and civil rights.

1. Clarify and make public a process in which immigrants engaged in the defense of civil and labor rights, or the attempted defense of those rights, obtain immediate, affirmative immigration status and work authorization. This should include workers for whom this is their only eligibility for relief and those with pending immigration petitions (e.g., T and U visas, etc.).
2. Prohibit civil immigration or criminal arrests of workers in the context of workplace enforcement against employers.
3. Require ICE, prior to the initiation of any immigration worksite enforcement action including I-9 audits, to investigate and inquire of the employer whether workers have made formal or informal complaints regarding their labor or civil rights, or their terms and conditions of employment within the last 12 months.
4. Issue guidance requiring that during an employer-initiated self-audit, employers must give workers information explaining that an I-9 audit is occurring at the worksite and describing basic affirmative protections workers have under labor, employment and civil rights laws.
5. Clarify that an employer’s misuse of electronic verification to violate workers’ rights is actionable under existing labor and employment laws and revoke an employer’s use of electronic verification if an employee asserts their rights under such laws.

Ensure civil rights and anti-retaliation protections.

1. Adopt a non-retaliation policy that prohibits DHS agents from targeting civil and labor rights defenders for arrest, detention, or deportation and from using information from civil rights investigations in deportation proceedings.
2. Prohibit deportations based on arrests that are unconstitutional or violate ICE's own guidelines.
3. Adopt policies that require any party with whom DHS contracts, including local and state law enforcement agencies and detention centers, to comply with labor and civil rights laws. DHS should not contract with local and state entities with a pattern and practice of civil rights violations and should terminate any contract with an entity that has been found to have violated labor and civil rights laws.

State and Local Enforcement

End the use of detainers. Detainers are unconstitutional and should no longer be issued.

End the Secure Communities ("S-Comm") program. S-Comm encourages racial profiling and fear of the police, and indiscriminately funnels people into the detention and deportation system.

End the 287(g) program. DOJ investigations have found multiple examples of racial profiling stemming from this program. Entangling state and local police in immigration enforcement is poor policy that breeds mistrust between communities and police.

End all other ICE ACCESS programs that undermine public safety and community security, including the Criminal Alien Program (CAP), Criminal Alien Removal Initiative (CARI), and Fugitive Operations.

Ban the mining of state criminal justice and driver's license systems for immigration enforcement. Ban the sorts of activities¹ that ICE proposed carrying out in North Carolina and elsewhere in the South:

1. Relying on data from daily police encounters where the individual is the subject of a traffic ticket or warning or a field interview and is not taken into custody and running those individuals through ICE databases.
2. Stationing ICE officers in jails during scheduled local law enforcement checkpoints to identify any foreign-born nationals amenable to removal before they have a chance to post bond.
3. In addition, DHS shall not use information provided by driver's license applicants or entered into state Department of Motor Vehicle (DMV) databases, for purposes of civil immigration enforcement.

¹ <http://www.usatoday.com/story/news/nation/2013/02/14/immigration-criminal-deportation-targets/1919737/>.

Border Enforcement

End the Operation Streamline program and scale back prosecutions on entry-related charges. Eliminate criminal prosecutions through Operation Streamline and significantly reduce entry-related prosecutions generally, in line with the DOJ announcement instructing U.S. attorneys to no longer charge nonviolent, low-level offenders with crimes that carry mandatory sentences.

Roll back CBP's claimed 100-mile authority. Pursuant to outdated DOJ regulations, CBP currently claims operational authority to patrol anywhere within 100 miles of any land or sea border and in fact conducts operations even further into the interior, infringing on the constitutional rights of border residents. The agency should limit interior enforcement operations to areas within 25 miles of the border and clarify legal limits, for example, on initiating stops, referring vehicles to secondary inspection areas at interior checkpoints, and conducting searches. The 25-mile authority is consistent with the proposed changes at the northern border under S. 744.

Implement short-term custody standards for CBP holding facilities. The U.S. Customs and Border Patrol's (CBP) short-term custody facilities need oversight and accountability for the hundreds of thousands of migrants processed annually. CBP must promulgate robust and enforceable short-term custody standards with consistent and transparent monitoring and reporting requirements.

Limit drone zone. The U.S. government has greatly increased the use of drones to monitor the southwest border and there are no clear protections for the privacy rights of border residents who are subject to drone surveillance. Drones should be limited to the area immediately adjacent to the border and limited to border security functions, not loaned out to state and local law enforcement as is the current practice.

Equip CBP officers and agents with body-worn cameras, with appropriate privacy protections, for recording all public interactions. Body-worn cameras, which are in successful use in urban police departments and recognized by DOJ as a law-enforcement best practice, would provide a record on any incident, creating a mutually beneficial objective perspective to protect CBP personnel from false accusations and the public from abuse.

Ensure that rescue beacons and water stations are placed throughout the border region. Fences along the Southwest border and other enforcement policies have pushed people to cross the border in more and more dangerous terrain, leading to a spike in migrant deaths. Rescue beacons and water stations provide life-saving relief to migrants stranded in difficult terrain.

Require DHS to disclose complaints, investigations, and disciplinary action taken against DHS personnel. In 42 CBP-involved killings since 2005, in no case is any agent publicly known to have been disciplined, and CBP has claimed, falsely, that the Privacy Act prevents such disclosure.

Prosecute agents who use excessive force. Investigations of high profile agent-involved killings remain in limbo for years, and very few are prosecuted even in cases where there is extensive evidence of agency wrongdoing.

Removal Proceedings

Stop initiating removal proceedings against lawful permanent residents based on convictions older than 5 years or where the crime was not a deportable offense at the time that it was committed. Lawful permanent residents often face deportation based on conduct that occurred decades ago, sometimes based on pleas that would not have made them deportable at the time. Creating a “statute of limitation” for initiating removal proceedings based on old conduct would make immigration law consistent with other areas of law which limit the time during which the government may bring criminal or civil charges against an individual. For example, under federal criminal law, an individual may generally not be prosecuted or punished for a non-capital offense unless charges are brought within five years (18 U.S.C. § 3282). Similarly, under non-criminal federal law, an action or proceeding may generally not be brought against an individual for the enforcement of any civil penalty or forfeiture unless commenced also within five years (28 U.S.C. § 2462).

Ensure due process in removal proceedings.

1. Impose limits on stipulated orders of removal. Ensure that agents do not pressure detained persons into agreeing to be deported, and hold agents that engage in such conduct accountable. Require that detained people be given in-person hearings before immigration judges to ensure that, if they have agreed to a stipulated order of removal, they have done so voluntarily.
2. Curtail the use of summary removal procedures, especially expedited removal and reinstatement of removal, which lack fundamental due process and now account for more than 70% of removals each year. Require that all people facing expedited removal be given in-person hearings before an immigration judge, unless expressly required by statute.
3. Create an administrative appeal process for individuals to challenge an expedited or stipulated removal order, visa waiver removal order, or voluntary departure.

Racial Profiling

Prohibit racial profiling in immigration enforcement.

1. Ensure that criminal arrests are not a conduit for individuals being placed into the detention and deportation pipeline in communities where law enforcement engages in racial profiling. This is especially critical in jurisdictions where the federal government or private civil rights lawsuits are challenging such conduct.
2. Withdraw the broad exceptions for national security and border integrity from the DOJ’s June 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies. These two expansive exceptions actually permit and

promote profiling in border communities and anywhere that a national security justification can be invoked.