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April 13, 2011

U.S. Department of Homeland Security
Office of the General Counsel
245 Murray Lane
Mail Stop 0485
Washington, DC 20528-0485

Submitted via www.regulations.gov

Re: Reducing Regulatory Burden; Retrospective Review Under Executive Order
13563, 76 Fed. Reg. 13526 (Mar. 14, 2011)
Docket No. DHS-2011-0015

Dear Sir or Madam:

In response to your request for comments in connection with the Department's review of its existing regulations, the American Immigration Council wishes to highlight several issues of concern. We urge the Department to take this opportunity to address the need for regulatory reform in the following areas:

Access to Counsel. Based on a nationwide survey conducted by the American Immigration Council and the American Immigration Lawyers Association, we have received widespread reports of restrictions on access to counsel during clients' interactions with U.S. Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE). The important role of counsel in DHS proceedings is recognized in the governing law, both statutory and regulatory. For example, 8 C.F.R. § 292.5(b) states that "[w]henver an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative." However, the experience of immigration lawyers across the country demonstrates that USCIS, CBP and ICE construe this regulation much too narrowly. Additional regulations are needed to clarify that the right to counsel applies in all DHS proceedings.

Furthermore, 8 C.F.R. § 292.5(b) contains a proviso indicating that this provision does not apply to "any applicant for admission in either primary or secondary inspection . . . , unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody." Although CBP officers still have the discretion to allow an attorney to accompany a client at any time, this proviso is frequently used to bar attorneys from primary and secondary inspection, as well as deferred inspection – which the proviso does not even mention. Access to counsel is not only vital for immigrants attempting to navigate our complex immigration system,

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but also improves the quality and efficiency of immigration decision making. Accordingly, we recommend that the proviso be repealed.

Employment Authorization Asylum Clock. The Immigration and Nationality Act (INA) requires asylum applicants to wait 150 days after filing an application to apply for a work permit. However, due to problems with the Employment Authorization Document (EAD) asylum clock – a clock which measures the number of days after an applicant files an asylum application before the applicant is eligible for work authorization – applicants often wait much longer than the legally permitted timeframe to receive a work permit. Many of these problems result from inconsistent and overly broad interpretations by asylum officers of what constitutes “delay requested or caused by the applicant,” which, pursuant to 8 C.F.R. § 208.7(a)(2), causes the clock to stop. For example, some asylum officers always stop the clock when referring cases to an Immigration Judge. The EAD asylum clock should not stop if a case is referred to EOIR because referral, on its own, is not a delay requested or caused by the applicant. Moreover, in adjudicating EAD applications for respondents in removal proceedings, USCIS regularly defers to improper interpretations of the regulations by Immigration Judges and often confuses the EAD asylum clock with EOIR’s asylum adjudication clock, which is intended to promote timely case completion and may be stopped for reasons other than applicant-caused delay. We recommend that the regulations be expanded to clarify the types of delays that justify stopping the EAD asylum clock and to clearly distinguish the EAD asylum clock from EOIR’s asylum adjudication clock.

In February, 2010, the American Immigration Council and Penn State Law’s Center for Immigrants’ Rights issued a comprehensive report, *Up Against the Clock: Fixing the Broken Employment Authorization Clock*, available at http://www.legalactioncenter.org/sites/default/files/docs/lac/Asylum_Clock_Paper.pdf, which examines laws, policies and practices regarding the EAD asylum clock. The report recommends solutions to asylum clock problems that will ensure asylum applicants become eligible for employment authorization without unnecessary delays and closer to the timeframe outlined in the INA.

Detainers. 8 C.F.R. § 287.7 does not adequately protect the rights of those subject to detainers. ICE issues detainers to notify state law enforcement agencies (LEAs) that the agency seeks custody of alleged noncitizens arrested on criminal charges. As indicated in 8 C.F.R. § 287.7(a), a detainer is a “request” that an LEA notify ICE when a particular noncitizen will be released so that ICE can arrange to assume custody. Under 8 C.F.R. § 287.7(d), LEAs can hold noncitizens against whom detainers have been issued for only 48 hours (excluding weekends and holidays) after they would otherwise have been released from state custody to enable ICE to pick them up. In practice, ICE often fails to take custody of these noncitizens within the designated timeframe, and LEAs continue to detain them in violation of the 48-hour maximum. As a result, unlawfully detained persons often languish in jail with no recourse.

To help alleviate confusion and resolve this misuse of detainers by LEAs, DHS should remove the word “shall,” which implies mandatory custody, from section § 287.7(d), and replace it with “may”:

(d) ***Temporary detention at Department request.*** Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency ~~shall~~ may maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.

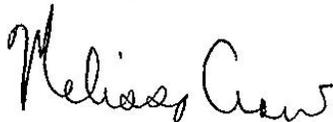
In addition, DHS should promulgate new regulations that ensure more effective oversight over the issuance of detainers and better protect those subject to detainers. Such regulations should prioritize the issuance of detainers in cases that fall within ICE’s enforcement priorities, as set forth in a June 30, 2010 memorandum on civil immigration enforcement issued by Assistant Secretary John Morton, and should include a notice requirement. New regulations also should establish a system for challenging improperly or improvidently-issued detainers. In addition, ICE should be required to undertake data collection necessary to monitor compliance with existing regulations.

Additional discussion of problems caused by the current regulatory framework governing detainers can be found in the *Comments on U.S. Immigration and Customs Enforcement Draft Detainer Policy*, available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/NGO-DetainerCommentsFinal-10-1-2010.pdf>, which were submitted by numerous organizations including the American Immigration Council.

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Thank you for the opportunity to comment on the Department’s regulatory review process and for your attention to these issues. Should you have any questions regarding our comments, please do not hesitate to contact me at 202-507-7523 or mcrow@immcouncil.org.

Respectfully submitted,



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