April 20, 2020

The Hon. Christopher A. Santoro
Acting Chief Immigratoin Judge
Office of the Chief Immigration Judge
5107 Leesburg Pike Suite 2500
Falls Church, VA 22041

Via Email

Dear Acting Chief Immigration Judge Santoro,

We are writing to follow up on our letter on behalf of immigration law professors dated March 20, 2020, urging you to immediately develop and implement proactive plans for the prevention and management of COVID-19 at all U.S. immigration courts. Since we sent you our letter, the situation has become even more dire, with COVID-19 spreading to at least 21 immigration detention centers in 13 states. It is critical for EOIR to take immediate action to contain the spread of this disease by prioritizing bond hearings, ordering the release of detained individuals, and temporarily closing the immigration courts, as explained in our previous letter. This letter reiterates our requests and highlights additional concerns that have developed since our prior letter.

Spread of COVID-19 in Detention Centers

As of April 16, 2020, Immigration and Customs Enforcement (ICE) reports 124 detained individuals who have tested positive for COVID-19, and the number is increasing daily.[1] ICE further reports that 30 of its employees assigned to detention centers and 91 other ICE employees have tested positive.[2] This figure does not include positive tests among the employees of *contractors* (private companies and state and local governments) that operate many of the immigration detention facilities. Additionally, the Office of Refugee Resettlement (ORR) has reported that 25 children in its custody and 39 personnel affiliated with its facilities have tested positive.[3] The actual number of infected individuals in detention is likely much higher due to delays in testing and asymptomatic carriers. In fact, Guatemalan authorities reported that dozens of people deported from the United States tested positive for COVID-19.[4] The high number of detained individuals who have tested positive for COVID-19 in other correctional systems further suggest that the disease will spread rapidly in immigration detention. For example, the

[1] *See* https://www.ice.gov/coronavirus (tab for "confirmed cases").
[2] *Id.*
[3] Melissa Sanchez, "At Least 19 Children at a Chicago Shelter for Immigrant Detainees Have Tested Positive for COVID-19," ProPublica Illinois, Apr. 13, 2020, https://www.propublica.org/article/at-least-19-children-at-a-chicago-shelter-for-immigrant-detainees-have-tested-positive-for-covid-19.
[4] Caitlin Dickerson and Kirk Semple, "U.S. Deported Thousands Amid Covid-19 Outbreak. Some Proved to be Sick," NY Times, April 18, 2020, https://www.nytimes.com/2020/04/18/us/deportations-coronavirus-guatemala.html.

rate of infection is 10% among prisoners at Parnall Correction Facility in Jackson, Michigan, 7% at Cook County Jail in Chicago, and 8% in New York City jails.[5]

Access to Counsel

Detained individuals are currently facing significant obstacles to accessing counsel. This alone justifies suspending detained hearings, releasing respondents, and temporarily closing the courts, since detained cases cannot move forward without trampling on constitutional and statutory rights. Legal contact visits with detained clients have become extremely difficult and dangerous for representatives. ICE's Guidance on COVID-19 previously stated that representatives must bring their own Personal Protective Equipment (PPE) to detention centers to have contact visits. Now ICE's Guidance on COVID-19 states that representatives are required to undergo "the same screening as staff," without specifying what that screening involves.[6] At some detention centers, representatives are still required to bring their own PPE to have contact visits. Additionally, some detained courts are requiring representatives to wear PPE. Many representatives do not have PPE and cannot obtain it.

Remote visitation is also extremely challenging, if not impossible, due to the paucity of phones available in detention centers for legal calls, lack of privacy and confidentiality on non-legal phone lines and video calls, tight time limits on calls, and the cost of calls. It is also much more difficult to establish trust and prepare clients to testify remotely. Certain tasks essential to effective representation cannot be performed at all over the phone, such as assessing a client's demeanor, evaluating the client's overall physical and mental health condition, and showing photographs or documents. For respondents, it is also incredibly difficult to engage with the legal process when interactions occur remotely, which can lead them to give up on submitting applications for relief.[7]

Representatives are placed in an impossible position of trying to reconcile their obligation to zealously represent clients against the very real threats to their personal health. Because access to counsel cannot be ensured at this time for detained individuals, their hearings should be suspended and they should be released.

Bond Hearings and Release of Detained Individuals

Given the risk of infection and obstructed access to counsel for detained individuals, it is critical for courts to prioritize bond hearings and order the release of detained individuals. As stated in our previous letter, COVID-19 should also be deemed a changed circumstance that justified subsequent bond reconsideration hearings. Issuing a nationwide EOIR policy that prioritizes bond hearings and recognizes COVID-19 as a changed circumstance will promote consistency in how courts handle these bond issues.

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[5] Angie Jackson and Kristi Tanner, "The High COVID-19 Infection Rate at this Michigan Prison Has Inmates Fearing for Their Health," BuzzFeed News, Apr. 16, 2020, https://www.buzzfeednews.com/article/angiejackson/coronavirus-prison-inmates-michigan-parnall-covid.

[6] *See* https://www.ice.gov/coronavirus.

[7] *See* Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NORTHWESTERN L. REV. 933 (2015).

At a minimum, individuals who remain detained during the pandemic should be given the option of postponing their cases until after the pandemic is over, as being transported to court and making in-person appearances poses dangers to their health on top of the dangers created by detention.

The Right to Present and Cross-Examine Witnesses

Some of the immigration courts that have issued temporary, COVID-19 standing orders for detained hearings do not include witnesses among the people who can be present in the courtroom. They limit who can be present to the respondent, respondent's counsel, DHS counsel, essential EOIR staff, and security personnel. Other COVID-19 standing orders specify that witnesses must submit written affidavits or declarations instead of appearing in court. These limitations apply to both the respondent and ICE, undermining the right to present and cross-examine witnesses, which is protected by both the Immigration and Nationality Act and due process. Witnesses should be allowed to appear in person or telephonically if they so desire.

Telephonic Appearances

The Center for Disease Control's Interim Guidance on Management of COVID-19 in Correctional and Detention Facilities stresses that it is important to "arrange lawful alternatives to in-person court appearances."[8] Most, if not all, of the existing COVID-19 standing orders for detained hearings allow telephonic appearances without a motion. But many impose conditions or constraints that raise concerns. Three common conditions are that (1) counsel will be required to appear in-person at any rescheduled hearing if the court is unable to reach counsel by phone; (2) counsel waives the right to object to the admissibility of any document offered in court on the sole basis of being unable to examine the document; and (3) no additional filings will be accepted at the hearing if counsel does not appear in person, and the decision of the court will be based on documents in the Record of Proceedings at the close of the hearing. As explained in our prior letter, under the current circumstances of a global pandemic that makes counsel unable to appear in person, these conditions threaten statutory rights and raise due process concerns.

Some COVID-19 standing orders include other constraints on telephonic appearances. For example, the Cleveland Immigration Court requires the consent of the opposing party to a telephonic appearance. The Houston Immigration Court's standing order states that if the court cannot reach the representative by phone, it will be considered a failure to appear, and authorizes judges to halt a telephonic appearance and order the attorney, respondent, or witness to appear in person. These conditions may force an attorney to appear in person during the pandemic, even if the attorney is in a high-risk category, based on age or underlying medical conditions, for COVID-19.

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[8] *See* https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html.

For the limited duration of this pandemic, it is critical that immigration courts allow telephonic appearances for all detained hearings, without conditions or constraints that jeopardize statutory and due process rights, or otherwise endanger the health and safety of counsel.

Filings and Deadlines

We appreciate the temporary email filing system that EOIR has established to assist with filings. However, further guidance on filings and deadlines is needed from EOIR for both detained and non-detained cases during the pandemic.

We recommend that all filings in non-detained cases be postponed until at least 30 days after the courts reopen for those cases. Otherwise, attorneys will have to defy stay-at-home and jeopardize their health in order to prepare non-detained clients and witnesses to testify, as well as to compile and submit documentary evidence. Additionally, the temporary email filing system is ill-equipped to handle large filings that are hundreds of pages in length and must be divided into numerous pdfs. It makes sense for paper copies of filings in non-detained cases to be submitted after the courts reopen for those cases.

As for detained cases, many of the COVID-19 standing orders make no exceptions to the filing deadlines set forth in the Immigration Practice Manual, including the general requirement that documents must be filed at least 15 days before a hearing. Other COVID-19 standing orders have set more generous filing deadlines, such as 2, 5, or 10 days before a hearing. We believe that it is necessary to shorten the time period before the hearing for submitting documents during the pandemic, especially given the access to counsel issues discussed above.

With respect to motions to continue specifically, many of the COVID-19 standing orders for detained hearings allow for continuances to be requested by calling, faxing, or emailing the court. This same procedure should be extended to all detained and non-detained cases during the pandemic so that representatives can request continuances quickly in an emergency situation and receive a ruling before the hearing. Because non-detained hearings are currently scheduled to resume May 1, it is likely that continuances will be needed for many of those cases as well.

Certain filing deadlines should be automatically tolled or extended during the pandemic for both detained and non-detained cases. Specifically, COVID-19 should be deemed an exceptional and changed circumstances that extends various filing deadlines, including the one-year filing deadline for asylum applications and the 90-day filing deadline for a motion to reopen.

For all email filings submitted during the COVID-19 pandemic, EOIR should accept electronic signatures for respondents and representatives. Otherwise, in order to obtain the respondent's handwritten ink signature, the representative must visit the respondent in-person or mail the document that needs to be signed and wait for it to be returned in order to scan and submit it with an electronic filing.

Procedures to Prevent the Spread of COVID-19 in Immigration Courts

Finally, EOIR should establish a nationwide policy, informed by medical professionals, to ensure that adequate procedures are in place to help prevent the spread of COVID-19 in all immigration courts. This policy should include minimum procedures for cleaning and disinfecting the immigration courts. In addition, EOIR should establish basic steps that courts must take if a positive case is reported. None of the current COVID-19 standing orders address this issue, beyond prohibiting individuals who have tested positive, are symptomatic, or who have had contact with someone who tested positive, from coming to court. To our knowledge, at least three courts (NYC, Elizabeth, and Boston) closed for *only one day* after reports that someone had tested positive, and an Immigration Judge in Denver simply self-quarantined after being found presumptively positive. We also urge EOIR to share data regarding the number and location of positive cases reported so that the public can take appropriate protective measures.

We thank you for your time and attention to this matter and look forward to your prompt response. For any questions or concerns, please do not hesitate to contact Fatma Marouf at fatma.marouf@law.tamu.edu or 310-431-6693.

Signed, with institutional affiliation listed for identification only, by the following:

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