

Deputy Secretary

U.S. Department of Homeland Security
Washington, DC 20528



Homeland
Security

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Re: "Petition for Rulemaking to Promulgate Regulations Governing Detention Standards for Immigration Detainees," January 24, 2007

Dear Mr. Wishnie and Ms. Shah:

This letter responds to the January 24, 2007, petition for rulemaking under 5 U.S.C. § 553(c) (the "petition") to promulgate regulations governing detention standards for immigration detainees. After careful consideration of the petition, and for the reasons stated in this response, the Department of Homeland Security ("DHS") does not intend to initiate a rulemaking proceeding covering detention standards for immigration detainees at this time. Accordingly, your petition is denied.

The Petition

The petition asserts that the National Detention Standards ("NDS"), adopted by U.S. Immigration and Customs Enforcement ("ICE") in 2003, lack enforcement tools and are ineffective in complying with existing detention standards governing environmental health and safety, grievance procedures, access to legal materials and telephones, housing classifications, and recreation. *See* Petition at 3-4, 7-8. The petition concludes that codified regulations would provide the best enforcement instrument to ensure compliance with immigration detention standards.

Historical Development of National Detention Standards

The Immigration and Naturalization Service ("INS"), in consultation with outside stakeholders, first issued uniform, comprehensive standards for facilities housing INS detainees

in November 2000. These standards, which later became known as the NDS, took effect in January 2001 and set out thirty-six standards governing conditions of confinement, access to legal representation, safe and secure operations, and health care services that were designed to serve the needs of detainees. See U.S. Immigration and Customs Enforcement, Department of Homeland Security, *2000 Detention Operations Manual* (last modified Nov. 17, 2008)¹. The standards were based on then-current INS detention policies, Federal Bureau of Prisons (“BOP”) program statements, and the widely accepted American Correctional Association’s (“ACA”) Standards for Adult Local Detention Facilities. The NDS covered areas from religious services to legal services and materials and were implemented over a two-year period to enable facilities to “ramp up” their operations to meet these standards.

The American Bar Association (ABA) and other organizations were instrumental in developing these standards. Then-ABA President Martha Barnett called the detention standards “a significant achievement” and a positive move toward “providing uniform treatment and access to counsel for immigrants and asylum-seekers, whether detained in INS-run facilities or county jails.” See INS Hopes to Bring Uniformity to Detention Facility Processes with Release of Comprehensive Standards, *77 Int. Rel.* 1637 (Nov. 20, 2000). The NDS applied to all facilities housing detainees held for more than seventy-two hours, including Service Processing Centers (“SPC”), Contract Detention Facilities (“CDF”), and state and local government facilities with which ICE had entered into an Intergovernmental Service Agreement (“IGSA”). These facilities were required to meet implementing procedures for each detention standard and the facilities were subject to annual inspections to ensure compliance with the standards.

In June 2004, the ACA issued its Fourth Edition Performance-Based Standards for Adult Local Detention Facilities, which set out seven goals of safety, security, order, care, programs and activity, justice, and administration and management. In response, ICE began revising its detention standards to a performance-based format. ICE reasoned that this migration was necessary to promote consistency with established industry standards and integrate its practices and procedures with those measurements employed by the ACA.

Federal Bureau of Prisons and DHS administrative detention populations and operations

The petition refers to the regulations adopted by the BOP as a regulatory standard that DHS should emulate, although, as the petition correctly notes, there are substantial differences between BOP convicted criminal and DHS administrative detainee populations. See 28 C.F.R. parts 522, 524, 527, 540 – 553. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 536-37 (1979) (conditions or restrictions of detention are premised on whether person is a pretrial detainee (Due Process Clause rights) or an inmate (punishment under the Eighth Amendment)); *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982) (confinement treatment and conditions “more considerate” for civilly detained persons than criminals); *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004) (person detained under civil process cannot be subjected to punitive conditions), *cert. denied sub nom., County of Sacramento, Cal. v. Jones*, 546 U.S. 820 (2005).

¹ Available at <http://www.ice.gov/pi/dro/opsmanual/index.htm>.

DHS alien detainees differ from inmates remanded to BOP to serve federal criminal sentences. BOP inmates are confined incident to punishment; DHS alien detainees are detained only for the minimum time necessary to effectuate their removal from the United States or release from custody. As of February 2, 2009, for example, ICE detainees averaged thirty-three days in custody, while the average length of stay was forty months for a BOP prisoner for calendar year 2008. In fiscal year 2007, ICE detained approximately 311,000 aliens. See Office of Immigration Statistics, Department of Homeland Security, *Immigration Enforcement Actions: 2007* (Dec. 2008)². ICE currently has 32,000 authorized detention “beds,” only a small percentage of which are owned and operated directly by DHS. BOP, on the other hand, has reported its inmate population as approximately 200,000. See Federal Bureau of Prisons, Department of Justice, *State of the Bureau 2007*, at 11 (at the end of FY2007, BOP’s total inmate population was 200,020)³. ICE is trying to reduce the length of time that aliens are detained in its facilities. Due to the fundamental differences in populations, the health care goals, for example, vary greatly between DHS and BOP. DHS provides detainees access to health care within the relatively brief period of detention typical for the detainee population, while BOP provides inmates with health maintenance throughout their extended term of imprisonment.

Performance Based National Detention Standards

On September 12, 2008, ICE published forty-one Performance Based National Detention Standards (“PBNDS”) to replace the NDS. The PBNDS, which were revised on December 5, 2008, and modified on February 20, 2009, to add an additional standard, are publicly available at <http://www.ice.gov/partners/dro/PBNDS/index.htm>. The PBNDS identify specific outcomes and expected practices to be achieved for each standard, and require SPCs, CDFs, and IGSAAs to meet 90% of the non-mandatory components and 100% of the mandatory components. Implementation is multi-phased, with the new PBNDS first applying to SPCs and CDFs. ICE will implement the PBNDS gradually until final implementation in 2010. On-site compliance reviewers and annual reviewers began using the PBNDS for ICE SPCs on April 1, 2009. On June 1, 2009, the PBNDS were implemented at all CDFs with compliance reviewers and annual reviewers to begin work on January 1, 2010. In addition, starting on January 1, 2010, the PBNDS will begin implementation at IGSA facilities; implementation at IGSAAs will also include the use of on-site compliance reviewers and annual reviewers.

Many of the standards in the PBNDS address concerns raised in your petition. For example, in the PBNDS, the Facility Security and Control standard enumerates procedures protecting the community, staff, contractors, and detainees from harm and outlines expected outcomes ensuring that: (1) security posts and positions are staffed with qualified personnel, and (2) the health and safety of the staff and detainees are enhanced through observation, supervision, and interaction. See ICE/DRO Detention Standard, Facility Security and Control at 1 (Dec. 5, 2008). Additionally, the Environmental Health and Safety standard prescribes hygiene standards to provide for living area safety, housekeeping sanitation and cleanliness, fire prevention and control, and medical operations in administering care to detainees. This standard provides that compliance with the applicable safety and sanitation laws are reflected by documented internal and external inspections and corrective actions when indicated. See

² Available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf.

³ Available at <http://www.bop.gov/news/PDFs/sob07.pdf>.

ICE/DRO Detention Standard, Environmental Health and Safety (Dec. 5, 2008). Furthermore, the Grievance System standard explains the formal and informal grievance process and provides a mechanism to resolve disputes between staff and detainees, the law libraries standard explains the detainees' accessibility to the law libraries and legal materials, and there are individual standards that govern telephone access, recreation, and housing classification. *See* ICE/DRO Grievance System (Dec. 5, 2008), Law Libraries and Legal Material (Dec. 5, 2008), Telephone Access (Dec. 5, 2008), Recreation (Dec. 5, 2008), and Classification System (Dec. 5, 2008). The PBNDS also include facility quality assurance and inspection contracts, and compliance is monitored through internal assessments, independent annual audits, and quality assurance reviews. In summary, the PBNDS cover the subject matter areas that you express concerns about, and provide performance outcome measures to ensure compliance with these standards.

ICE coordinated with a number of nongovernmental organizations (NGOs) in drafting the PBNDS through the collaborative efforts of the ICE/NGO Working Group, which included, among other organizations, the ABA and the American Immigration Lawyers Association, and also with other organizations such as the United Nations High Commissioner for Refugees (UNHCR). The input and perspective gathered from the NGO community was exceedingly valuable as a means for ensuring that the PBNDS give due consideration to the rights, needs, safety, and humane care of the detainee population. ICE thus integrated many of the NGOs' comments and suggestions in the drafts, culminating in a finished product that represents the interests of the agency and interested parties to safely house detainees in an environment that protects their legal rights and promotes each facility's compliance with the standards established.

Besides issuing the PBNDS, ICE has implemented another oversight mechanism to ensure compliance. ICE created the Detention Facilities Inspection Group within the Office of Professional Responsibility, which reviews the inspection of facilities against the PBNDS for facility accreditation and conducts quality assurance reviews to further validate these inspections. Put simply, ICE has implemented institutional measures to cross-check facilities' compliance with the PBNDS. ICE plans to publish semi-annual reports on compliance with these standards.

DHS believes that performance-based standards, which currently are employed by the ACA, the National Commission on Correctional Health Care, and the Joint Commission, will effectively improve the conditions of confinement for immigration detainees in ICE custody and hold facilities housing detainees accountable by cross-checking their performance against the criteria set out in the PBNDS. The performance-based standards enumerated in the PBNDS articulate goals and objectives in providing detainee care, measure each facility's practices and procedures against these standards, and require the facilities to document actions taken to promote quality detainee and health care services. In focusing on expected outcomes and identifying clear practices and objectives, the performance-based standards enable the agency to measure specific outcomes over time and evaluate the progress each service provider achieves in meeting the defined performance criteria. In other words, DHS believes that integrating its detention standards into a performance-based format improves the accuracy and credibility of facility performance ratings consistent with industry standards, and will promote best practices and accountability, which will improve detention conditions. Critically, the PBNDS will facilitate ICE's oversight of the facilities and expedite remediation or modification, if appropriate, when standards are not satisfied.

Administration of Performance Based National Detention Standards

The petition suggests that the detention standards be promulgated as legislative rules for the purpose of making those standards judicially enforceable. Petition at 7, 9-10. DHS declines to create additional judicially enforceable rights through such an action. Adoption of judicially enforceable regulations is no substitute for management of facilities and DHS is committed to better management of detention facilities. Many of the “gaps” raised by the petition have been met by the 2008 PBNDS. Petition at 31-42.

DHS uses a number of internal and external means to ensure quality and compliance with the PBNDS. For example, the Detention Management Control Program (DMCP) assesses detention-related risks and tests the adequacy of internal controls within detention operations. The DMCP provides a template to examine ICE’s detention program and conduct reviews and special assessments to ensure compliance with applicable laws, policies, and procedures; recommend solutions to remedy deficiencies at detention facilities; and identify key performance indicators to monitor critical areas and operations. DHS and ICE believe that these standards as implemented promote safe and secure environments for detainees and provide appropriate conditions of confinement.

The Detention Standards Compliance Unit (DSCU) oversees the facility inspection program and develops policies, standards, and procedures for ICE detention operations to conduct compliance reviews. DSCU-certified officials have unconditional access to the facilities and have employed contract inspection companies to evaluate facilities based on direct observations, interviews with detainees and staff, and documentary reviews. DSCU reviews the final report of the contractor and assigns a rating. Facilities that receive a deficient or at-risk rating must submit a plan of action identifying the corrective measures to be taken to address the non-complying conditions. ICE reserves the right to discontinue using any facility that fails to comply with the NDS, and PBNDS, until it receives an acceptable rating. DSCU further distills these assessments to determine whether the detention standards should be amended and internal controls should be modified to improve detention operations.

Moreover, representatives from the UNHCR and the ABA regularly visit detainee facilities. These visits, which commenced in 1993, permit these organizations to give ICE information, recommendations and opinions based on their observations. ICE meets with the UNHCR to discuss its observations and compliance concerns.

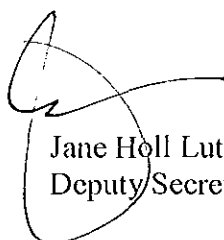
Conclusion

After careful consideration of the petition to initiate a rulemaking action, DHS has determined that the PBNDS is the appropriate mechanism to improve detention facility management and ensure compliance with detention standards. DHS believes that implementing the PBNDS, rather than codifying the NDS, is the best way to ensure appropriate detention conditions and improve the quality of life of detainees. The PBNDS will provide the agency with the necessary flexibility to enforce standards that ensure proper conditions of confinement and will change those standards as appropriate.

DHS has considered the benefits and burdens of conducting a rulemaking to codify the NDS and concludes that rulemaking would be laborious, time consuming, and less flexible, and could impede DHS's ability to expeditiously respond to changed circumstances, emergency situations, and crises to protect the health, safety, and welfare of the detained aliens, agency personnel and contractors, and to ensure compliance with the NDS. DHS advises that ICE may modify the PBNDS in the future, depending on, among other things, suggestions by accrediting bodies or organizations like those you represent. DHS believes that the PBNDS and the multi-layered review process now in place preserve and protect the health and welfare of alien detainees, and provide appropriately for both quality control and accountability of the facilities housing the detainees. DHS had decided that ICE will employ the PBNDS as currently published (and subsequently updated, as appropriate) rather than initiating a rulemaking action.

As always, DHS appreciates your commitment to the humane and just treatment of the detained immigrant population and remains engaged in meeting the needs of detainees housed at ICE facilities. Nevertheless, at this juncture, ICE intends to administer the PBNDS and not codify the NDS. Accordingly, the petition for rulemaking is denied.

Sincerely,



Jane Holl Lute
Deputy Secretary

cc: John Morton, Assistant Secretary, ICE