March 17, 2011

The Honorable Janet Napolitano
Secretary
The Department of Homeland Security

Dear Secretary Napolitano:

There is an urgent need for systemic change in the Department of Homeland Security's (DHS) enforcement policies and programs. We urge you to take immediate action on these pressing concerns and offer several bullet point recommendations within the overall themes of prosecutorial discretion and the prioritization of enforcement resources.

A. Prosecutorial Discretion

As a prosecutor, you appreciate the necessity to target resources toward cases where national security and public safety are at greatest risk. Despite statements by the President and published agency priorities, however, DHS's selection of individuals to target for apprehension, detention and deportation continues to be haphazard and arbitrary in practice, resulting in suffering for countless families and communities. Indeed, hundreds of thousands who are detained and/or deported are productive, contributing members of society. The limited resources of the federal government should not be spent apprehending, detaining and prosecuting these individuals. This lack of discretion is painfully experienced across our nation and is causing deep suffering within our communities.

We urge you to implement a robust policy on prosecutorial discretion that encourages officers to utilize discretion in the initiation of removal proceedings and to grant relief from deportation by giving favorable consideration in individual cases with compelling circumstances. A good starting point would be the 2000 memorandum on prosecutorial discretion from INS Commissioner Doris Meissner (attached). More specifically, individuals with strong ties to the community such as Dream eligible students, as well as other people with strong equities and compelling circumstances, should not be placed in removal proceedings and should be granted deferred action as early as possible in the removal process. DHS headquarters should clarify the process for applying for deferred action and request that field offices notify Headquarters about removal proceedings involving Dream eligible students and others that may merit relief from deportation. DHS should issue deferred action based on the merits of each case instead of requiring the involvement of Congressional offices.

B. Prioritization of Enforcement Resources

Our communities continue to see immigration enforcement conducted at exceedingly high levels with little consistency or apparent regard to agency-stated priorities, such as the declared prioritization of enforcement against dangerous convicted criminals. This Administration has greatly expanded state and local police enforcement of immigration laws by entering into more 287(g) memorandums of agreement than any previous administration and expanding Secure Communities rapidly while suppressing resistance from state and local jurisdictions. This practice undermines the trust between local law enforcement and immigrants and fundamentally erodes faith in the Administration's commitment to the fair implementation of laws. At the workplace, the number of I-9 audits has increased dramatically and apparently indiscriminately. Because of the failure to adequately target these audits, employers who are trying to comply with the law are disproportionately burdened, which plays into the hands of bad-actor employers who routinely violate labor law. Moreover there are inadequate oversight mechanisms to ensure consistent implementation of policies by rank-and-file federal immigration officers and state and local law enforcement.

1. **Detainers**: The use of detainers drives several DHS enforcement programs, but there is insufficient guidance, safeguards, and oversight. Common misuses of detainers include blanket filing of detainers,

abuses of and civil rights violations caused by current detainer practice. In August 2010, ICE released both a draft detainer policy for public comment and an interim detainer policy. The initial draft policy is woefully inadequate to address the numerous concerns about current detainer practice. Furthermore, months have passed since the public comment period ended, but a new detainer policy has not been issued. Despite DHS's assertions that enforcement actions are keyed to agency priorities, detainers continue to be filed seemingly without regard to those priorities and frequently include individuals charged with traffic or other minor offenses.

Recommendations:

a) Issue improved guidance clarifying: (1) that immigration officers must have probable cause of removability before placing a detainer on an individual; (2) that immigration officers are not mandated to issue detainers; (3) that detainers are a request for an immigration hold and not a federal requirement or mandate; 4) that if local law enforcement officers decide to submit to ICE's request, that the local law enforcement agents are not permitted to hold individuals not otherwise detained by the state or local agency for more than 48 hours; (4) that the subject of the detainer and defense counsel must be advised of the right to file a complaint/appeal; and (5) that a uniform process must be established for challenging detainers.
b) The guidance should restrict and carefully monitor the use of detainers against: (1) juveniles; (2) victims of domestic violence, human trafficking, and other crimes; and, (3) individuals not convicted of a crime.
c) Provide notice to individuals in criminal custody or at booking that 1) officers are not permitted to hold individuals not otherwise detained by the state/local agency for more than 48 hours, and 2) the individual has the right to file a complaint/appeal. These notices should be required in all 287(g) and Secure Communities jurisdictions.
d) Provide oversight on and prevention of abusive practices and civil rights violations. DHS should also collect and analyze detailed data on the use of detainers.

2. **Push forward stalled detention reform initiatives.** In fall 2009, you announced many planned reforms to immigration detention. But since then most of the reforms remain stalled owing to challenges or resistance in the political and policy environment. Moreover, there are continuing reports of serious abuses, deaths, and sexual assault in detention facilities. Conditions in facilities are in urgent need of reform. To avoid wasting resources and arbitrary detention, DHS needs to initiate a dramatic reduction in the use of detention, relying on it only in those cases where there is a demonstrated risk to public safety or risk of flight. DHS should ensure that detention conditions are humane and detainees' due process rights (including those of parents facing challenges to their parental rights) are protected.

Recommendations:

Support DHS/ICE in full implementation of the following initiatives:

a) Memo clarifying the use of detainee transfers.
b) The risk and classification assessment tool for those in DHS custody.
c) 2010 Performance Based National Detention Standards.
d) Due process protections for parents who are detained.

3. **Phase out the 287(g) program.** Eight years after the 287(g) program was first initiated, there has been thorough documentation of abuses and poor management of the 287(g) program, including two scathing reports by the DHS OIG and startling analysis of ICE's own data by the Migration Policy Institute. The reliance on state and local law enforcement agencies to enforce immigration laws is unworkable and compromises community safety and the effectiveness of local police. This failure is not without financial waste, with an estimated $68 million dollars funding the 287(g) program each year.

Recommendation:

Initiate a rapid phase out of the 287(g) program that includes a freeze on any new MOAs with state/local law enforcement agencies and the step-by-step termination of existing MOAs.

4. **Secure Communities**: DHS continues to implement this program rapidly despite the grave concerns lodged against it in many jurisdictions nationwide. Contrary to the program's stated goal of identifying and removing those convicted of serious crimes who are removable, in fact about 28 percent of the people deported under Secure Communities have never been convicted of a crime. Secure Communities also undermines community policing and trust between law enforcement and immigrant communities and communities of color. Many local and state authorities have opposed the program but confusion remains about whether opt-out or even customization is possible.

   Recommendations:
   Work with state and local police and community groups to overhaul Secure Communities so that it is focused on serious criminals and does not undermine community policing:
   a) Revise the program so that it is not engaged until an individual is actually convicted of a crime that poses a threat to public safety. Secure Communities should not be applied to individuals who are merely arrested and/or booked for an offense. This is the easiest way to ensure the program reaches its intended targets, maximizes public safety, and respects community policing.
   b) Implement clear procedural safeguards and oversight. These would include (1) data collection, including data on racial profiling; (2) oversight mechanisms; (3) benchmarks to ensure the program operates as intended; and (4) safeguards to stop abuses, such as a meaningful, confidential, and accessible complaint process.
   c) Permit local jurisdictions to opt-out and/or further limit the program to address local needs.
   d) Facilitate collaboration between DHS and DOJ to screen for potential racial profiling and other civil rights abuse.

5. **Issue a policy permitting individuals to apply for waivers in the U.S.:** Currently, immediate relatives of U.S. citizens and residents are eligible for waivers of unlawful presence but most don't take advantage of available relief because they must apply for the waiver outside the U.S. A DHS policy permitting family members to apply for waivers inside the U.S. would allow these individuals to come forward to get right with the law without unnecessary risk.

6. **Prioritize I-9 audits to ensure they do not interfere with union organizing or undermine the wages and working conditions of U.S. workers:** In the past two years, ICE has dramatically increased the number of I-9 audits. Currently, businesses that pay substandard wages and skirt occupational and other workplace protections pose a competitive threat to those who continue to attempt to comply with the law. When I-9 audits are conducted without regard to such realities, they can damage the wage and employment structures in industries that employ significant numbers of immigrant workers, undermining wages and reducing tax receipts and overall compliance with the law. Although ICE has sometimes told advocates and attorneys that I-9 audits are focused on employers that have poor labor law compliance records, our experience has not borne this out. In fact, we are aware of many audits of employers who are industry leaders in wages and working conditions.

   Recommendations:
   a) Focus worksite enforcement and target resources on the most abusive employers who egregiously violate labor laws or serious criminal laws, or pay workers under the table, as well as on industry models such as franchising and subcontracting that are conducive to labor law violations.
   b) Create an inter-agency working group to re-design the workplace enforcement strategy so that it is consistent with administration goals of raising the wages and working conditions of U.S. workers.
   c) Always obtain assurances from DOL before initiating an audit, and design a cooperative relationship with DOL so as to ensure that immigration enforcement doesn't interfere with an organizing campaign or chill worker cooperation with a DOL investigation.

d) Use U Visas and prosecutorial discretion aggressively to protect workers who cooperate with labor law enforcement.

7. Finalize and implement the Memorandum of Understanding between ICE and DOL

It goes without saying that the appropriate division of roles and responsibilities between ICE and DOL for worksite enforcement activities should be set forth in a clear and transparent manner. In this way, each agency can effectively meet its statutory mandate while avoiding the risk that unscrupulous employers will hire and exploit undocumented workers and then retaliate against them by calling ICE when DOL launches an investigation or when employees complain about unsafe or unfair working conditions or attempt to form a union. Unfortunately, the current Memorandum of Understanding on this topic (between DOL and the then-INS) dates to 1998, before ICE was even created. This MOU is out-of-date and in our experience is often unknown or ignored by field staff from both agencies. Fortunately, a new MOU has been negotiated between ICE and DOL and is now complete and sitting at the White House. We appreciate the efforts of both agencies in developing this new MOU, but are very concerned with the delay of its publication.

Recommendation:

a) Advocate with the White House to release this important policy guidance immediately.

Thank you for your attention to these matters.

Sincerely,

AFL-CIO

America's Voice

American Immigration Council

American Immigration Lawyers Association

Asian American Justice Center

CAUSA

Center for American Progress

Center for Community Change

Church World Service, Immigration & Refugee Program

National Council of La Raza

National Hispanic Christian Leadership Conference

National Immigration Forum

National Immigration Law Center

Pineros y Campesinos Unidos del Noroeste (PCUN)

Service Employees International Union

United Farm Workers

United States Catholic Conference of Bishops