

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two thick black horizontal bars.

**NEW YORK  
CITY BAR**

**IMMIGRATION DETAINERS  
NEED NOT BAR  
ACCESS TO JAIL DIVERSION PROGRAMS**

**COMMITTEE ON  
CRIMINAL JUSTICE OPERATIONS**

**JUNE 2009**

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
42 WEST 44TH STREET, NEW YORK, NY 10036**

**IMMIGRATION DETAINERS NEED NOT BAR  
ACCESS TO JAIL DIVERSION PROGRAMS**  
**A Report of the Committee on Criminal Justice Operations  
of the Association of the Bar of the City of New York**  
**June 2009**

**Introduction**

The increasing use of immigration detainers in the New York City Rikers Island jail has posed significant barriers for immigrant New Yorkers who seek to participate in alternative-to-incarceration (ATI) programs and problem-solving courts. Many criminal court judges, prosecutors, defense attorneys, and service providers assume that an immigration detainer effectively disqualifies an otherwise eligible immigrant defendant from participating in these types of jail diversion programs. This is unfortunate given the demonstrated effectiveness and cost-savings of New York's pioneering ATI programs and problem-solving courts, and the significant immigrant population in New York City that stands to benefit from such treatment services. However, detainers need not be a barrier if people within the criminal justice and immigration systems are able to work together in appropriate cases to facilitate access to ATI programs and problem-solving courts.

This report clarifies the role that detainers play in the criminal justice and immigration systems and urges judges, prosecutors, defense attorneys, and service providers to work with federal immigration officials to remove barriers to participation in jail diversion programs. Part I of the report discusses the problem and suggests that large numbers of immigrants may be affected by the detainer issue. Part II of the report discusses the role of detainers and explains that detainers may be lifted in the discretion of immigration officials with the cooperation of judges, prosecutors, defense attorneys, and services providers in the criminal justice system in appropriate cases. Part III of the report offers recommendations to those working within the criminal justice system to address these issues.

**I. The Scope of the Problem: Barriers to Immigrant Access to Jail Diversion Programs**

New York City is home to a number of innovative ATI programs and problem-solving courts. New York City has, for example, thirteen drug courts operating in each of the city's five constituent counties and five mental health courts operating in three of the five counties—Bronx, Brooklyn and Queens—with additional drug diversion programs in various counties also run by the District Attorneys' offices and mental health programs developed by private non-profit providers.<sup>1</sup> These programs provide defendants with an opportunity to choose to enter treatment instead of incarceration, and successful compliance with treatment requirements may result in a reduction or dismissal of the initial criminal charges, and/or a non-incarceratory sentence such as probation or a conditional discharge. Such programs have been successful in reducing recidivism and lowering costs to the criminal justice system. For example, a study of New

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<sup>1</sup> See New York State Unified Court System, OPERATIONAL DRUG TREATMENT COURTS AS OF JANUARY 1, 2009, at [http://www.courts.state.ny.us/courts/problem\\_solving/drugcourts/drugcourtslist.shtml](http://www.courts.state.ny.us/courts/problem_solving/drugcourts/drugcourtslist.shtml) (listing drug court locations); New York State Unified Court System, OPERATIONAL MENTAL HEALTH COURTS AS OF JANUARY 1, 2009, at [http://www.courts.state.ny.us/courts/problem\\_solving/mh/courts.shtml](http://www.courts.state.ny.us/courts/problem_solving/mh/courts.shtml) (listing mental health court locations).

York's drug courts statewide revealed that drug courts reduced recidivism rates and saved an estimated \$254 million in incarceration costs by diverting 18,000 individuals into drug treatment.<sup>2</sup> A study of Brooklyn's Mental Health Court revealed reductions in recidivism rates along with other indicators such as homelessness, substance abuse, psychiatric hospitalizations, and psychosocial functioning.<sup>3</sup>

The success of these programs has prompted efforts to expand the access and availability of these alternatives. Recently the New York State legislature passed a major drug law reform bill, expanding eligibility for drug treatment diversion so that more New Yorkers can participate in drug treatment alternatives. The new law also includes an exception to the traditional requirement that an individual must plead guilty to the drug offense prior to entering treatment in cases where the plea will create "severe collateral consequences."<sup>4</sup> It is unclear how this requirement will be implemented, but it may address some of the concerns raised by the Committee in its previous report, *The Immigration Consequences of Deferred Adjudication Programs in New York City* (2007), which highlighted how upfront guilty pleas often create unintended consequences for immigrants who successfully participate in treatment alternatives.<sup>5</sup>

The expansion and recognition of such programs may also provide an opportunity to address another barrier to some immigrants' participation in some treatment-based jail diversion programs—access to health insurance. Some drug treatment and mental health programs require participants to have health insurance to pay for treatment. This may pose a problem for some indigent immigrants, particularly those who may be deemed ineligible for federal and state health insurance programs because they lack qualifying immigration status. However, many immigrants—including many lawful permanent residents, asylees/refugees and others with qualifying immigration status, as well as some immigrants who lack current immigration status but are in the process of applying for qualifying status—do have access to state Medicaid or other health insurance programs.<sup>6</sup> Moreover, some treatment programs do not require health insurance for all participants, and the expansion of these programs—particularly if sources of funding become available with the new emphasis on reform and expansion of treatment

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<sup>2</sup> Michael Rempel et al., Center for Court Innovation, *THE NEW YORK STATE ADULT DRUG COURT EVALUATION: POLICIES, PARTICIPANTS AND IMPACTS* (2003), available at [http://www.courtinnovation.org/\\_uploads/documents/drug\\_court\\_eval.pdf](http://www.courtinnovation.org/_uploads/documents/drug_court_eval.pdf)

<sup>3</sup> Kelly O'Keefe, Center for Court Innovation, *THE BROOKLYN MENTAL HEALTH COURT EVALUATION*. (2007), available at [http://www.courtinnovation.org/\\_uploads/documents/BMHCevaluation.pdf](http://www.courtinnovation.org/_uploads/documents/BMHCevaluation.pdf).

<sup>4</sup> See NY State Legislature Public Protection and General Government Budget (A.156-B/S.56-B). The effective date for the relevant portion of the drug treatment reforms is October 7, 2009.

<sup>5</sup> See Association of the Bar of the City of New York, Committee on Criminal Justice Operations, *THE IMMIGRATION CONSEQUENCES OF DEFERRED ADJUDICATION PROGRAMS IN NEW YORK CITY* (2007), at <http://www.nycbar.org/pdf/report/Immigration.pdf>.

<sup>6</sup> For a comprehensive manual discussing immigrants' eligibility for health insurance, please refer to the Empire Justice Center, COMMUNITY, MIGRANT AND HOMELESS HEALTH CENTER HANDBOOK ON IMMIGRANT ELIGIBILITY FOR PUBLIC FUNDED HEALTH CARE BENEFITS (December 2008), available at [http://www.empirejustice.org/New/Immigration/Immigrant%20Eligibility%20Handbook\\_web.pdf](http://www.empirejustice.org/New/Immigration/Immigrant%20Eligibility%20Handbook_web.pdf). See also NYC Office of Citywide Health Insurance Access, Immigrant Eligibility, at [http://www.ci.nyc.ny.us/html/hia/html/public\\_insurance/immigrant.shtml](http://www.ci.nyc.ny.us/html/hia/html/public_insurance/immigrant.shtml); Access to Health Care for Uninsured Immigrants, at <http://www.thenyc.org/templates/documentFinder.asp?did=19>; Know Your Rights: Benefits for Undocumented Immigrants, at [http://www.lawhelp.org/documents/33702111-Benefits\\_for\\_Immigrants.pdf?stateabbrev=NY/](http://www.lawhelp.org/documents/33702111-Benefits_for_Immigrants.pdf?stateabbrev=NY/).

alternatives—will mean that more uninsured individuals, citizens and noncitizens alike, can benefit from treatment rather than face a jail term.

Yet despite these potential strides towards increased jail diversion accessibility for immigrants, another systematic barrier remains to be addressed—immigration detainers. An immigration detainer is a document that the U.S. Department of Homeland Security provides to a local jail to inform it that the Department intends to take an individual into immigration custody and authorizes the jail to hold that individual for up to 48 hours after the individual would normally be released from criminal custody (for example, release on bail, recognizance, completion of sentence, or even dismissal of charges) for the transfer to occur. While immigration detainers are not the equivalent of a final removal order and not all individuals with detainers will necessarily be ordered removed, *see* Part II *infra*, many in the criminal justice system will assume a detainer cannot be lifted and therefore disqualifies an immigrant from participating in a jail diversion program, no matter how much he or she would benefit or how much the savings would be to city and state resources. Instead, immigrants with detainers remain at Rikers until the criminal case is adjudicated in the traditional manner, which, if a sentence results or no bail is paid, may result in days or months of incarceration before transfer to an immigration facility.

In 2007, 3,979 immigration detainers were issued for people at Rikers Island alone.<sup>7</sup> While it is unclear how many of these individuals would be eligible for jail diversion programs like drug treatment, 2007 statistics indicate that 18% of foreign-born inmates in New York facilities were charged with drug offenses<sup>8</sup> (no such similar statistics are available regarding mental health concerns). At the same time, according to discussions that court officials and District Attorneys' offices have had with the drafters of this report, most drug courts, drug alternative to prison programs, and mental health courts in New York City are operating below capacity.

Anecdotally, however, some attorneys have reported success in getting detainers lifted. The drafters of this report discussed a small number of examples where individuals were permitted to participate in jail diversion programs despite having a detainer and have done well in the programs, particularly in the context of mental health services. The attorneys who achieved these results for their clients were knowledgeable about the immigration and criminal justice systems and were therefore able to work with key individuals in both to reach successful results.

## **II. Clarifying Misconceptions: Detainers, Deportation, and Jail Diversion Programs**

In order to replicate successful results on a larger scale and ensure greater access to jail diversion programs for immigrant New Yorkers, clarification is necessary on some key concepts about the role of detainers in the immigration system and how ATI programs and problem-

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<sup>7</sup> See U.S. Dept. of Homeland Security Response 08-FOIA-3629 (Dec. 18, 2008).

<sup>8</sup> See State of New York, Department of Correctional Services, THE IMPACT OF FOREIGN-BORN INMATES ON THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES (2008) at 23, *available at* [http://www.docs.state.ny.us/Research/Reports/2008/Impact\\_of\\_Foreign-Born\\_Inmates\\_2008.pdf](http://www.docs.state.ny.us/Research/Reports/2008/Impact_of_Foreign-Born_Inmates_2008.pdf)

solving courts might be affected by these concerns. This section of the report attempts to clarify how detainers operate and places them in context.

### **A. Immigration Detainers Defined**

An “immigration detainer” (also known as an “immigration hold”) is an immigration document that serves to “advise another law enforcement agency that the Department [of Homeland Security] seeks custody of an alien [non-citizen] presenting in the custody of that agency.”<sup>9</sup> The federal regulations further specify that “[u]pon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall 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.”<sup>10</sup> The detainer comes in the form of a federal immigration agency document labeled Form I-247, Immigration Detainer-Notice of Action.<sup>11</sup>

Thus, under the regulations, a local jail that receives a Form I-247 for someone in its custody is asked to inform the Department of Homeland Security before releasing that person, but if the Department of Homeland Security has not picked up the individual within 48 hours of the time he or she should have been released from the law enforcement agency’s custody (for example, on bail, recognizance, completion of sentence, dismissal, or some other court order), the jail must release the individual under the federal regulations.

It is important to note that the Department of Homeland Security places detainers on anyone the Department believes is removable, regardless of whether the individual has current immigration status. Some people in the criminal justice system assume that a detainer signifies that the subject of the detainer is out of immigration status, i.e., undocumented. However, lawful permanent residents, refugees/asylees, and others with various forms of immigration status may also be subject to removal proceedings because of a criminal conviction. Thus a detainer should not be taken as a signal that the individual necessarily is undocumented. Moreover, individuals who are currently undocumented may be in the process of applying or are eligible to apply for immigration status even under current law.

### **B. The Role of Immigration Detainers in Deportation Cases**

An immigration detainer facilitates a person’s transfer from a criminal custody setting, such as a jail or prison, to an immigration facility under the control of the Department of Homeland Security. However, the Department of Homeland Security’s authority to detain individuals is not limited to people with detainers. The Department of Homeland Security detains people from their homes, workplaces, streets, immigration interviews, and a number of other settings.

Moreover, a detainer is not a necessary part of the deportation process. A detainer does not commence the removal proceeding or otherwise signify whether or not a person will

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<sup>9</sup> 8 C.F.R. § 287.7(a).

<sup>10</sup> 8 C.F.R. § 287.7(d).

<sup>11</sup> *Id.*

ultimately be deported. A detainer is different than a Notice to Appear, which is the official filing that typically commences a removal proceeding against an individual.<sup>12</sup> Once a Notice to Appear is filed, an individual—whether detained or not—has the right to a hearing with an immigration judge before a final removal order is entered.<sup>13</sup> During that hearing, an individual will have the right to raise certain defenses and apply for relief.<sup>14</sup> An individual will not be ordered deported if, for example, it is determined that he or she is a U.S. citizen, has some other lawful status and is not subject to removal on the grounds specified, or obtains some form of relief from removal like a discretionary waiver or asylum. While overall statistics on the number of people granted relief from removal through immigration court hearings are not available, approximately one out of every five asylum applications in immigration court<sup>15</sup> and one out of every two “212(c)” applications (a form of relief that waives removal for immigrants with old convictions) in immigration court<sup>16</sup> are granted. Myriad other forms of relief are also available, including but not limited to “cancellation” of removal for lawful permanent residents and nonpermanent residents; relief for victims of domestic violence, trafficking, and other crimes through the Violence Against Women Act, T- or U-visas; and attaining “adjustment of status” to become a lawful permanent resident through a qualifying relative. Thus, a detainer typically signifies only that the Department of Homeland Security believes an individual may be removable—but does not mean that the person will ultimately be deported. The lifting of a detainer will not necessarily interfere with the commencement or continuation of removal proceedings against an immigrant.

### **C. The Effect that Release for Participation in a Jail Diversion Program Will Have on a Deportation Case**

The Department of Homeland Security has mechanisms in place for supervising individuals who are not detained pending removal proceedings. The Department of Homeland Security has offices in each district across the country, including field offices at 26 Federal Plaza in New York City, which supervise non-detained cases. Typically, individuals in removal proceedings who are not detained are still under supervision, with requirements to check in with an immigration officer on a regular basis and attend court hearings, similar to how probation or parole works in the criminal justice system. Some non-detained individuals are enrolled into intensive supervised programs that involve curfews, home visits, and ankle bracelets. Adjudication of non-detained cases is handled by immigration courts across the country, including courts at 26 Federal Plaza. Thus, the lifting of a detainer does not mean that immigrants will be able to avoid removal proceedings.

However, participation in jail diversion programs may have a beneficial impact for immigrant defendants who are facing removal. Participation in treatment programs helps to establish evidence of rehabilitation, a positive factor for some forms of immigration relief. It may also provide some defense against certain removal charges for lawful permanent residents

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<sup>12</sup> See 8 U.S.C. § 1229.

<sup>13</sup> See 8 U.S.C. § 1229a.

<sup>14</sup> See *id.*

<sup>15</sup> See Transaction Records Access Clearinghouse, THE ASYLUM PROCESS, available at <http://trac.syr.edu/immigration/reports/159/>.

<sup>16</sup> See *INS v. St. Cyr*, 533 U.S. 289, 295 n. 5 (2001) (noting that traditionally over half of 212(c) applications were granted).

or others with lawful immigration status, although that depends on how the precise jail diversion program is structured in terms of its guilty plea requirements.<sup>17</sup>

If a detainer is not lifted and an individual is transferred to immigration detention, his or her prospects for accessing treatment will be very different. Some individuals may be able to pay a bond to be released from immigration detention, and then be able to pursue treatment options if they are still available. However, many individuals in immigration detention would have a difficult time securing release due to the expense of immigration bond—which is often in the range of thousands of dollars—or due to the application of a “mandatory detention” law. Moreover, once a person is transferred into immigration custody, he or she may be held in any immigration jail in the country and may therefore lose access to counsel and family members to help secure a low bond. Many immigrant New Yorkers are detained, for example, in Alabama or Texas during their removal proceedings. Thus, for many immigrants, unless they are afforded an opportunity to be released from criminal custody into a treatment program first, they may be unable to participate once they are placed in immigration detention.

### **III. Recommendations**

In light of the information gathered for this report and the advice given by attorneys who have successfully navigated this system, we make the following recommendations:

- Immigrants with detainers should not be automatically disqualified (formally or informally) from consideration for participation in jail diversions programs.
- When an individual has a detainer on file but would otherwise be an appropriate candidate for a jail diversion program, judges, prosecutors, defense attorneys, and services providers should work together to provide information to the Department of Homeland Security to request that the detainer be lifted. This information may include:
  - an explanation of the treatment services, including how the program is supervised and progress is monitored;
  - an explanation of how the individual will benefit from treatment services (with an emphasis on any physical/mental health needs);
  - a description of other positive equities regarding the individual’s family and community ties, including how access to treatment will affect those family and community members; and
  - a description, if possible, of what relief the individual may have from removal.

The drafting of these requests should be done with the advice of an immigration law expert, so that nothing is said in the letter that might inappropriately or inadvertently damage the individual’s immigration case. New York City is home to several such

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<sup>17</sup> For example, an immigrant who does not plead guilty to an offense, completes treatment, and has the charges against him or her dismissed, would then be able to argue that he or she does not have a “conviction” for certain grounds of deportation. *See* Association of the Bar of the City of New York, Committee on Criminal Justice Operations, THE IMMIGRATION CONSEQUENCES OF DEFERRED ADJUDICATION PROGRAMS IN NEW YORK CITY (2007), at <http://www.nycbar.org/pdf/report/Immigration.pdf>.

expert organizations, described within the ‘immigration/criminal charges and immigration’ tabs at [www.lawhelp.org/NY](http://www.lawhelp.org/NY). A sample redacted letter with more detailed instructions is attached to this report.

- Key individuals and officials from the criminal justice system should engage in further discussions with the Department of Homeland Security to address broader solutions to the challenges that detainers pose for the adjudication of cases in the criminal justice system in New York.



## Sample Letter

**Instructions:** This letter is based on a sample provided by Ward Oliver, Esq., a criminal law and immigration law expert at The Legal Aid Society, (212) 577-3300. As an initial matter, counsel for the individual who is seeking the lifting of a detainer should contact the Criminal Alien Program (CAP) at Rikers Island at (718) 956-3101 and ask to speak with a supervising officer to discuss the jail diversion program and determine where to send supporting information, such as this letter. Significant follow-up in the form of additional phone calls and information provided to CAP or counsel for Department of Homeland Security at 201 Varick Street, New York, NY, will likely be required.

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[DATE]

[ADDRESS/FAX – may be to CAP unit at Rikers OR  
Deportation and Removal Office  
U.S. Immigration and Customs Enforcement  
201 Varick Street, 11<sup>th</sup> Fl.  
New York, NY 10014]

Re: [NAME OF DEFENDANT]  
NYSID # \_\_\_\_\_

Dear Officer:

[NAME OF DEFENDANT] is incarcerated at Rikers Island and has an immigration detainer lodged against her. As of the date of this letter, the resolution of her criminal case on Indictment number \_\_\_\_\_ (\_\_\_\_\_ County) is pending.

[NAME OF DEFENDANT] has been offered admission to a long-term, in-patient [PSYCHIATRIC/DRUG TREATMENT] program through [NAME OF PROGRAM]. Attached to this communication, you will find a letter confirming this from \_\_\_\_\_, Intake Specialist at [NAME OF PROGRAM]. This letter also describes the nature of the program and its supervision.

I am writing to ask you to lift the detainer at Rikers so that [NAME OF DEFENDANT] may participate in this program. [DESCRIBE EQUITIES, RELIEF FROM REMOVAL, ETC.: *For example:* Although [NAME OF DEFENDANT] may be subject to removal proceedings, I am informed that she may be eligible to apply for relief such as \_\_\_\_\_. She has lived in the United States for \_\_\_\_\_ years and has several family members who are United States citizens or lawful permanent residents.]

[DESCRIBE NATURE OF MEDICAL CONDITIONS IF APPLICABLE: *For example:* Importantly, [NAME OF DEFENDANT] suffers from a long-term and significant mental illness that has resulted in past hospitalizations. She would greatly benefit from the opportunity to participate in the [NAME OF PROGRAM] program.]

*continued on next page*

If you have any questions, please do not hesitate to call me or [NAME OF DEFENDANT]'s social worker at [PHONE NUMBER]. Thank you for your consideration.

Sincerely,  
[YOUR NAME]

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