



**Interstate Commission
for Adult Offender Supervision
ADVISORY OPINION**

Opinion Number: 13-2006
Dated: August 1, 2007
Revised: March 19, 2019

Issued by:
Richard L. Masters, Legal Counsel

State Requesting: Washington

Description: Clarification on offenders who are undocumented immigrants

Background & History

Pursuant to Commission Rule 6.101(c) the State of Washington is requesting an opinion regarding Commission Rule 3.101 as it relates to undocumented immigrants. Washington asks the following:

- 1) *If an offender seeking to transfer under ICAOS and is an undocumented immigrant, does this status make the offender ineligible for transfer?*
- 2) *What if the offender is released to supervision under a court order to obey all laws, and the state of being undocumented may violate this condition?*
- 3) *If an offender who was transferred to Washington has a parole condition that requires the offender to obey all laws, does the offender's status as an undocumented immigrant render the offender in violation of his condition? If so, is it a significant violation that could result in retaking by the sending state from Washington?*

Discussion

Considering these questions in order:

- 1) *If an offender seeking to transfer under ICAOS is an undocumented immigrant, does this status make the offender ineligible for transfer?*

First, an undocumented immigrant who meets the definition of “*Offender*” under Article II of the Compact and Rule 1.101 of the ICAOS Rules and seeks to transfer under the Compact and its rules is subject to the jurisdiction of the Compact. While such person’s status as an “undocumented” immigrant would not necessarily disqualify an immigrant from transferring under the Compact, the applicable rules may result in the transfer’s denial due to the immigrant’s inability to meet eligibility criteria. For example, under *Rule 3.101* it must be established that the immigrant is a “*resident*” of the state to which transfer is sought or that the immigrant has “*resident family*” in the receiving state. If the immigrant has not lived in the receiving state for the required one year period or the receiving state is not the principal place of residence, or cannot establish that family members have resided in the receiving state for the required time period, obviously the offender would not be eligible for transfer under the mandatory transfer requirements of *Rule 3.101*.



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Similarly, the immigrant's status as "undocumented" could disqualify such a person from being eligible for transfer under *Rule 3.101* if this status renders the immigrant not in "*substantial compliance*" with the terms of supervision in the sending state as required under *Rule 3.101(c)*. Since the definition of "*substantial compliance*" under Rule 1.101 means that the offender is in sufficient compliance with the terms and conditions of supervision in the sending state to prevent revocation proceedings, if the sending state revokes an immigrant's parole or probation as the result of being undocumented, then such a person is disqualified from transfer under Compact Rule 3.101. It may seem anomalous that an undocumented immigrant whose status as such constitutes a *per se* violation of federal law could ever be considered to be in "substantial compliance" with the terms of supervision. As defined in Rule 1.101 and applied in Rule 3.101 (c), "substantial compliance" requires this result if the sending state does not revoke probation or parole when an offender is an undocumented immigrant.

2) *What if the offender is released to supervision under a court order to obey all laws, and the state of being undocumented may violate this condition?*

The second question assumes that an undocumented immigrant, with a condition of supervision to obey all laws, is placed under supervision notwithstanding their status as an undocumented immigrant, and then asks if the status of being undocumented violates this condition. This is a decision that must be made by the court, which is responsible for the initial decision as to whether or not the offender is entitled to be released to the community under supervision. If the sentencing court determines that the immigrant's status is that of being undocumented, and therefore presumably in violation of federal law, it is difficult to understand why such court would release the offender to supervision in the community. However, if the court is aware of this status and nevertheless releases the offender to supervision, then it is logical to proceed with determining whether the offender qualifies for transfer under the provisions of Rule 3.101.

3) *If an offender who was transferred to Washington has a parole condition that requires the offender to obey all laws, does the offender's status as an undocumented immigrant render the offender in violation of this condition? If so, is it a significant violation that could result in retaking by the sending state from Washington?*

The third question raises the issue of whether the offender transferred to Washington with a parole condition requiring compliance with all laws is in violation of that condition as a



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result of being undocumented and, if so, whether this constitutes a “*significant violation*,” which could result in the sending state retaking the offender.

Rule 5.101(a) specifies that retaking by the sending state is at the sole discretion of the sending state. Exceptions to this Rule are pending felony or violent crime charges or convictions, offender engages in behavior requiring retaking, or the offender absconds from supervision. See ICAOS rules, 5.101-1, 5.102, 5.103 and 5.103-1. Further, if an offender is transferred under the ‘discretionary transfer’ provisions of Rule 3.101-2, the receiving state may add a condition to that acceptance requiring the offender to be retaken upon determination that the offender is undocumented.

Summary and conclusion

In summary, this advisory opinion concludes:

- (1) An undocumented immigrant who meets the definition of “offender” and seeks to transfer under the Compact is subject to the jurisdiction of the Compact. The immigrant’s status as “undocumented” would not be a *per se* disqualification as long as the immigrant meets the prerequisites of Rule 3.101. This includes the requirement that the immigrant be in ‘substantial compliance’ with the terms and conditions of supervision in the sending state.
- (2) If a Court knowingly releases an undocumented immigrant to supervision under the compact, the language of the current rules requires that the supervision of such an offender must be transferred if the mandatory criteria of Rule 3.101 are met and the sending state does not revoke parole or probation based upon an offender’s status as an undocumented immigrant.
- (3) Under Rule 5.101, retaking an undocumented immigrant is at the sole discretion of the sending state unless the offender meets the exceptions provided in Rules 5.101-1, 5.102, 5.103 and 5.103-1. If an offender is transferred under the ‘discretionary transfer’ provisions of Rule 3.101-2, the receiving state may add a condition to that acceptance requiring the offender to be retaken upon determination that the offender is undocumented.