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Revamping The International Prisoner Transfer Program

Law360, New York (February 08, 2012, 1:12 PM ET) -- Treaties between the United States and 76 countries allow eligible foreign national inmates serving sentences in United States prisons to apply for transfer to a prison in their home country. Many attorneys and their foreign national clients are unfamiliar with the U.S. Department of Justice's International Prisoner Transfer Program, commonly referred to as the "treaty transfer program."

And that is one of several problems that the DOJ's Office of the Inspector General has recommended the DOJ address. In a December 2011 comprehensive report,[1] the OIG made findings and recommendations regarding the better administration of the treaty transfer program so that eligible foreign-national defendants may serve a substantial portion of their sentences in prisons located in their home countries.[2]

This article discusses the history and details of the treaty transfer program and discusses how this program can play a critical role in resolving white collar cases — cases that are becoming increasingly multinational.

The benefits of a transfer to the foreign national inmate are most notably serving the sentence close to family in a facility more attune to the inmate's language and culture, and the possibility of taking advantage of the home country's laws and procedures to shorten the sentence by parole or conditional release.

The International Foreign Prisoner Transfer Program

The treaty transfer program began in 1977 when the United States and Mexico entered into a bilateral treaty, the primary purpose of which was to secure the transfer of American citizens from Mexican prisons to prisons in the United States. But the treaty also allowed the transfer of Mexican nationals from United States prisons to Mexican prisons. Thereafter, the United States has entered into similar bilateral treaties with 75 other countries.

The program is administered by the DOJ through the Bureau of Prisons, the DOJ's Criminal Division, the United States Attorneys' Offices, and the United States Marshals Service.[3] The BOP is charged with explaining the program to foreign national inmates soon after their arrival at the prison where they will serve their sentences. The BOP must also determine if a current treaty agreement exists for an interested inmate and if the inmate is eligible.[4] Once their prison sentence commences, eligible inmates may seek transfer by making application to the International Prisoner Transfer Unit ("IPTU") of the Criminal Division's Office of Enforcement Operations.

The application is reviewed by the IPTU and approved or denied based on law enforcement concerns about the inmate, the likelihood of the inmate's social rehabilitation, and the likelihood that the inmate will return to the United States. The government prosecutors provide the IPTU with the facts surrounding the conviction and recommendations to consider in reviewing the application. The United States Marshals Service administers the transportation of the inmate to court proceedings, as well as the eventual transfer of the inmate to the custody of the home country authorities.

The inmate's home country must also approve the transfer and agree to take custody of the inmate.

The process of obtaining the IPTU's and the home country's approval may take several months.

The OIG Report

The lengthy December 2011 OIG report on the treaty transfer program concludes that the DOJ is currently underutilizing the program and, thus, indirectly denying transfer to otherwise eligible inmates.

The report identifies several factors that are to blame. These include the fact that language barriers prevent many foreign inmates from fully understanding the treaty transfer program, especially because written information is only available in English, French and Spanish. The foreign national who is not fluent in English and without counsel will be at a distinct disadvantage given the limitations of the program.

In addition, the report found that the IPTU was understaffed and that it and the BOP are prone to incorrectly determining an inmate's eligibility or suitability for a transfer.[5] Finally, the report found that very few inmates secured a plea agreement that contained language regarding treaty transfers, despite the fact that United States Attorneys and DOJ lawyers may include language recommending a transfer.

Ultimately, the OIG report recommends that the DOJ address these problems and make better use of the treaty transfer program. The report notes that, in addition to cutting down on the BOP's incarceration expenses, international treaty transfers benefit the inmates by allowing them to be closer to their families.

The Application Process[6]

Upon arrival at the prison facility, the BOP provides a foreign national inmate with a one-page "Transfer Inquiry Form," which informs the inmate of the treaty transfer program and asks if the inmate is interested in applying.[7] If the inmate signs the form indicating his interest, the inmate's BOP case manager has 60 days to prepare the inmate's application packet. The application is first reviewed by officials at the inmate's prison facility and then forwarded to the BOP's Central Office for further review.

The Central Office is required to forward the application to the IPTU within 10 days. The application is assigned to an analyst who conducts an investigation; contacting the BOP, the law enforcement agencies involved in the investigation and prosecution, and the U.S. Department of Homeland Security. The analyst prepares a report of the investigation with a recommendation. The report is then reviewed by the IPTU's chief, who then makes a recommendation to the OEO's deputy director, who, in turn, makes the final decision.[8]

The OEO's decision is communicated to the inmate, inmate's home country and counsel by letter. If the application is denied, the letter summarizes the reasons.[9]

No appeal lies for a denial of a transfer request, and the IPTU generally requires inmates to wait two years before reapplying, unless the basis for the denial (such as the need for assistance in an investigation) no longer exists. Thus, careful and timely compliance with the application process is necessary.

If the application is approved, the IPTU sends an approval packet to the home country, which then considers the transfer request in accordance with the applicable treaty and its own procedures. If the home country denies the request, the inmate must reapply to the home country under its procedures. If the home country approves the request, a consent verification hearing is conducted by a U.S. magistrate judge, the purpose of which is to ensure the inmate understands and consents to the transfer.

After the hearing, the IPTU notifies the home country to coordinate travel arrangements between the home country and the BOP.

Once in the home country prison facility, the inmate serves the remainder of the U.S. imposed sentence in accordance with the laws and procedures of the home country, including those pertaining to the reduction of confinement by parole or conditional release.

Practice Guide for Advising Clients about the Program

Foreign national white collar defendants are particularly well suited to make the most of this new push to utilize the treaty transfer program. These defendants are in a better position to overcome many of the challenges that other foreign defendants and inmates face.

Generally, white collar defendants tend to be better educated and have more financial resources than other defendants.[10] As a result, foreign national white collar defendants will be less reliant on the translation services that the DOJ and the BOP provide to inmates. Likewise, because white collar defendants are more likely to be represented by counsel than other defendants,[11] they are more likely to secure recommendations for the treaty transfer program in their plea agreements. And because foreign inmates can be represented throughout the transfer application process, counsel can enhance the inmate's chances of having an application approved.

Certain practical factors play a significant role in advising an otherwise eligible foreign national client whether to apply for a treaty transfer:

First, counsel must determine whether a treaty exists between the United States and the client's home country.[12] While the BOP is charged with the responsibility of promptly informing inmates of their eligibility for treaty transfer, counsel should not rely on the BOP.

Second, if the client is otherwise eligible for treaty transfer, counsel should advise the client of the availability of the program and explain the process involved. Again, counsel should not rely on the BOP to explain the program and process, particularly where the client is not fluent in English, Spanish or French and requires other translation services which only counsel can arrange.[13]

Third, in the situation of a negotiated guilty plea, counsel should seek inclusion in the plea agreement of a provision stating the government will recommend, or at least not object to, a treaty transfer.[14] Language for such a provision is as follows:

> If the defendant meets all of the terms and conditions set forth in this Plea Agreement, the United States agrees that it will advise the Office of Enforcement Operations ("OEO") in the Criminal Division of the Department of Justice that it [recommends approval of] [has no objection to] the defendant's application to transfer to [defendant's home country] to serve his sentence pursuant to the international prisoner transfer program. The defendant acknowledges and understands, however, that if he is eligible and applies for transfer, the transfer decision rests in the discretion of OEO and that the position of the United States is neither binding nor determinative of the positions of other federal agencies or on the final transfer decision of OEO. The defendant further understands that in addition to OEO, federal law and the underlying transfer treaties require that the foreign government must also approve the transfer.

The OIG report expressly notes the appropriateness of inclusion of such language.[15] The OIG report recommends that the IPTU "provide [United States Attorneys' Offices] with sample plea agreement language which explains that [they] can agree to recommend or not oppose a transfer request while also making clear that the determination rests with IPTU and the [U.S. Attorney's] concession in the plea agreement does not bind IPTU."[16]

The federal prosecutor may oppose the inclusion of such a provision based on a concern that the inmate would not be required to serve the full sentence — because, for instance, a home country may allow parole before the end of the sentence (while parole has been abolished in the federal system).

However the nature of the white collar defendant's offense and length of sentence, as well as the OIG report's general finding and recommendation that transfer should be encouraged due to overriding policy reasons, should be advanced to call for the inclusion of a transfer provision the plea agreement.[17]

Fourth, counsel should investigate and advise the foreign national client whether conditions in the home country prison are such that a transfer would benefit the client. In the context of white collar inmates, a minimum security prison camp in the United States may well be preferential to the home country's alternative. In addition, as the OIG report acknowledged, some countries, specifically Canada and Mexico, generally do not approve transfer requests from the IPTU.[18] Moreover, home countries are sometimes not timely in approving the transfer, resulting in no transfer taking place before the U.S. sentence is completed.[19] Counsel should investigate the home country's approval practice for both of these contingencies.

Fifth, counsel should consider the length of sentence. Many treaties — though not all — require that a foreign inmate have at least six months remaining on his or her sentence at the time the transfer application is submitted.[20] Moreover, some treaties provide that a minimum amount of the sentence be remaining before the home country approves the transfer and agrees to take custody of the inmate. Thus, if a foreign national receives a relatively short sentence, it is incumbent that counsel initiate the transfer request process at the earliest opportunity.

Sixth, counsel should consider the effect of an appeal of the conviction or sentence. An inmate cannot be transferred if there is a pending "appeal or collateral attack upon the conviction or sentence."[21] Moreover, in those cases where an application may only be made if the inmate has at least six months remaining of the sentence or where a minimum amount of the sentence must remain to be served before the home country will approve a transfer, counsel must evaluate and advise the client that the length of the appeal process may prevent transfer — especially if the client's primary goal is to return to his or her home country as soon as possible, whether or not in prison.

Seventh, if the client wishes to apply for transfer, counsel should make contact with the client's BOP case manager to inform him or her that counsel will be assisting the inmate in the application process and should be copied on all correspondence and reports.

Eighth, counsel must promptly contact the consulate of the inmate's home country and initiate that country's parallel transfer process. Counsel should consider using counsel in the home country to assist and monitor that process.

Conclusion

Although the treaty transfer program has existed for over 30 years, the OIG report suggests that the DOJ will place a new emphasis on using the program going forward. Despite the substantive and procedural obstacles posed by the transfer process, foreign national white collar defendants, with the aid of counsel, are particularly well suited for transfer and should take advantage of this recent policy development where otherwise appropriate and beneficial.

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[1] Office of the Inspector General, U.S. Dep't of Justice, No. I-2012-002, The Department of Justice's International Prison Transfer Program (2011) ("OIG Report"), available at http://www.justice.gov/oig/reports/2011/e1202.pdf.

[2] Seventy-five percent of foreign national inmates interviewed by the OIG for its report either did not fully understand the treaty transfer program or had unanswered questions about it. Id. at iv, 16.

[3] For a description of the Program, see U.S. Dep't of Justice Program Statement, included in the OIG Report at 86.

[4] See 28 C.F.R. Ch. 5 § 527.44.

[5] The eligibility determination largely depends on the requirements of each bilateral treaty.

[6] See, generally, OIG Report at 80-84.

[7] See OIG Report at 132, Appendix VII (BOP Form 297), for the treaty transfer inquiry form

[8] A diagram showing the steps in the application process is set forth in the OIG Report at 84.

[9] OIG Report at 45-46. Denials of transfer applications typically occur where appeals from conviction or sentence are pending, or where the prosecutor or other law enforcement official needs the prisoner to remain in the U.S. for testimony or assistance in an investigation.

[10] Marilyn Price & Donna M. Norris, White-Collar Crime: Corporate and Securities and Commodities Fraud, 37 J. Am. Acad. of Psychiatry & the Law 538, 542 (2009).

[11] Office of Justice Programs, U.S. Dep't of Justice, No. NCJ 179023, Defense Counsel in Criminal Cases (2000), available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=772.

[12] A list of the countries with treaties as of December 2010 is set forth in the OIG Report at 79.

[13] The transfer inquiry form which the BOP provides inmates is only available in English, Spanish and French. Id. at 80 n.112.

[14] The United States Attorneys' Manual provides that U.S. Attorneys may either recommend or agree not to oppose a treaty transfer request. United States Attorneys' Manual, Title 9, Chapter 9-35.100.

[15] See, e.g., OIG Report at iii, vii. The Report noted that absence of such provisions in plea agreements are attributable in part to Assistant U.S. Attorneys general unfamiliarity with the program, and the fact that the United States Attorneys' Manual "provides outdated guidance on the program." Id. at vii.

[16] Id. at 51.

[17] The OIG Report cites the benefits of the program to include improved rehabilitative potential by closer proximity to family, cost saving for the U.S. institutions, and reduction of U.S. prison population. Id. at i.

[18] Id. at 52-54.

[19] Id. at 54.

[20] This requirement applies to inmates from Mexico or from a signatory to the Council of Europe Convention on the Transfer of Sentenced Persons (63 countries, not including the United States) or the Inter-American Convention on Serving Criminal Sentences Abroad (16 countries, not including the United States). See OIG Report at 28-29, 8. The Council of Europe Convention, however, provides that this requirement can be waived in "in exceptional cases." See OIG Report at 30.

[21] 18 U.S.C. § 4100(c). The restriction exists for the same countries identified supra Note Error: Reference source not found. See OIG Report at 28-29.