

**PRACTICE ADVISORY<sup>1</sup>**  
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**DHS REVIEW OF LOW PRIORITY CASES FOR PROSECUTORIAL DISCRETION**

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Over the last several months, the Department of Homeland Security (DHS) has made a series of announcements regarding its intent to eliminate low priority cases from the immigration court dockets and instead focus on its highest immigration enforcement priorities—national security, public safety, border security, and the integrity of our immigration system. First, on June 17, 2011, ICE Director John Morton issued two memoranda encouraging the expanded exercise of prosecutorial discretion in all phases of immigration enforcement.<sup>3</sup> Subsequently, on August 18, 2011, DHS announced the establishment of a joint DHS-Department of Justice (DOJ) working group charged with reviewing the approximately 300,000 cases pending before the Executive Office for Immigration Review (EOIR) to identify candidates for administrative closure. Most recently, on November 17, 2011, DHS issued three documents detailing how the agency will implement the review process.

The November 17 documents describe new procedures DHS will use to implement its prosecutorial discretion policy as well as new standards and criteria to be used by ICE officials. At the same time, however, the November announcements also leave many questions unanswered about the scope and logistics of the review process. Additionally, some guidance included in the November documents is inconsistent with the June 17 memo. Accordingly, this practice advisory not only summarizes DHS's current policies on prosecutorial discretion but also explains some of the ambiguities and contradictions that the recent announcements have created.

**OVERVIEW OF THE AUGUST AND NOVEMBER ANNOUNCEMENTS**

**August 18, 2011 Announcement.** See [Napolitano Letter](#) and [Backgrounder](#).

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<sup>3</sup> See [Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens](#) and [Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs](#). For a detailed analysis of these memoranda, see the Legal Action Center's practice advisory, [Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client](#).

In August, DHS announced the establishment of a high-level joint DHS-DOJ working group to review removal cases currently pending before the immigration courts, the Board of Immigration Appeals (BIA), and the federal courts of appeals. Removal cases identified as “low priority” will be administratively closed and the respondents may be eligible to apply for an employment authorization document (EAD) with USCIS. The working group also will initiate a case-by-case review to ensure that new cases placed in removal proceedings meet DHS’s enforcement priorities, and will issue guidance to prevent, on a case-by-case basis, low priority cases from entering the system. Additionally, the working group will issue department-wide guidance on prosecutorial discretion, including for respondents who already have final orders of removal.

**November 17, 2011 Document, *Next Steps in the Implementation of the Prosecutorial Discretion Memorandum and the August 18 Announcement on Immigration Enforcement Priorities* (“[Next Steps Document](#)”).**

This unattributed document describes ICE’s plans to implement the review process announced on August 18. First, it explains that the agency has launched a “comprehensive training program on the appropriate use of the June 17, 2011 Prosecutorial Discretion Memorandum.” The document describes the training as “scenario-based” and states that all ICE enforcement officers and attorneys will have completed the training by January 13, 2012.

Second, the document describes the launch of two pilot programs. The first (“Pilot 1”), is a nationwide fast-track review process running through January 13, 2012. The purpose of this pilot is to “prevent[ ] new low priority cases from clogging the immigration court dockets.” (emphasis added) As such, ICE attorneys are directed to review all “*incoming* cases in immigration court”<sup>4</sup> (emphasis added) and all cases appearing on the master calendar docket using the Prosecutorial Discretion Memorandum<sup>5</sup> and “a set of more focused criteria”<sup>6</sup> to identify cases “most clearly eligible and ineligible for a favorable exercise of discretion.”

The second pilot (“Pilot 2”), set to run from December 4, 2011, to January 13, 2012, is intended to test processes for the systematic review of *all* cases pending in the immigration court. Unlike Pilot 1, Pilot 2 will be launched in only two jurisdictions (Baltimore and Denver). In this pilot program, a team of attorneys from ICE, USCIS, and CBP will review cases on the non-detained dockets in the two immigration courts. It is unclear whether the attorneys will be from local DHS offices or from elsewhere. The review will be based on the factors outlined in the June 17 memo, as well as “a set of more focused criteria.”<sup>7</sup> During Pilot 2, EOIR will shift judges from the non-detained dockets in the Denver and Baltimore immigration courts to the detained dockets

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<sup>4</sup> Presumably “incoming cases in immigration court” refers to cases in which NTAs have been issued but not filed with EOIR.

<sup>5</sup> The memo is not specified but presumably this is a reference to the June 17, 2011, memorandum issued by ICE Director John Morton, [Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens](#). (“June 17 Memo”). It is unclear whether this also encompasses the second memo issued on June 17, 2011, focusing on victims, witnesses, and plaintiffs.

<sup>6</sup> The focused criteria are not specified, but presumably this is a reference to the Guidance to ICE Attorneys discussed in this practice advisory.

<sup>7</sup> It is unclear whether the criteria are the same as or different from the criteria in the Guidance to ICE Attorneys, discussed below.

to expedite the processing of detained cases.<sup>8</sup> AILA members who practice in the Baltimore and Denver immigration courts should contact the local chapters for specific guidance relating to implementation of the pilot project.

Once both pilot projects end, DHS will assess the data and implement the processes on a nationwide basis. Importantly, during the duration of the pilot projects, ICE officers are not precluded from favorably exercising prosecutorial discretion in cases outside the pilot projects. Indeed, the memo specifically directs ICE employees to continue applying the full range of factors set forth in the June 17 memo during this pilot period.

**November 17, 2011 Memorandum from Principal Legal Advisor Peter Vincent,  
Case-by-Case Review of Incoming and Certain Pending Cases ([“OPLA memo”](#)).**

This memorandum provides details about Pilot 1, the fast-track review of incoming cases and cases on the master calendar docket (described above). However, unlike the description of Pilot 1 contained in the *Next Steps Document* above, the categories of cases to be reviewed also includes non-detained cases with merits hearings scheduled through June 2012. The OPLA memo specifies that in conducting its review, each Office of the Chief Counsel (OCC) should focus on criteria from the June 17 memo and the *Guidance to ICE Attorneys* (“Guidance” described below).<sup>9</sup> According to the OPLA memo, the criteria in the Guidance are intended to help attorneys identify those cases most likely eligible or ineligible for favorable discretion. The type of discretion contemplated is administrative closure.<sup>10</sup>

To implement the OPLA memo, each OCC is directed to immediately draft and implement a standard operating procedure (SOP) establishing a process for the review. Each SOP must be approved by headquarters<sup>11</sup> and must include several specified provisions, such as a supervisory review, a notice process in cases where OCC decides to exercise discretion, and a national security and public safety check. The OCC also must establish an electronic mailbox for receipt of additional documents from respondents, and establish a system to inform respondents when a favorable exercise of prosecutorial discretion has been made. (AILA members should keep in contact with their local chapter to learn the email address to which documentation can be sent.)

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<sup>8</sup> See Notice from Brenda L. Cook, Administrator for Baltimore Immigration Court, AILA InfoNet Doc. No. 11112963; Notice from Alec Revelle, Administrator for Denver Immigration Court, AILA InfoNet Doc. No. 11120169.

<sup>9</sup> The OPLA memo also directs attorneys to consider the following memos: [Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens](#) (republished on March 2, 2011); [Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions](#) (August 20, 2010); and [Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs](#) (June 17, 2011). For a discussion of these memos, see the Legal Action Center’s practice advisory, [Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client](#).

<sup>10</sup> The memo explains that in other places in the OPLA memo and the Guidance to ICE Attorneys, case dismissal is also mentioned. It is unclear exactly what this reference to case dismissal means. Under existing policy, certain cases with applications or petitions for relief pending with USCIS may be entitled to have their cases dismissed and the memo could simply be referencing this. See [Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions](#) (August 20, 2010). It also is possible that the memo is referring to cases that fall within Pilot 1 in which an NTA is served but not filed yet.

<sup>11</sup> Reportedly, as of the date of this Practice Advisory, the SOP from the Denver ICE office is being reviewed by DHS headquarters. It is likely that this and other office’s SOPs will issue in the near future.

For cases where discretion is favorably exercised, the OCC is to file a joint motion for administrative closure or make an oral motion before the immigration court.

The OPLA memo also says that OPLA will issue a revised policy for the review of cases following the initial implementation period (from November 17, 2011, through January 13, 2012), incorporating any needed changes to the process. Finally, the memo notes that “at all stages of the immigration enforcement process, attorneys should consider . . . the full range of factors set forth in the [June 17 memo],” thus indicating that ICE attorneys are to continue to consider all cases for prosecutorial discretion, including those that do not fall within this fast-track review (Pilot 1).

**November 17, 2011, *Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review* (“[Guidance to ICE Attorneys](#)” or “Guidance”).**

This unattributed document was likely an internal ICE document intended to accompany the OPLA memo as further instruction to OCC regarding the fast-track review process. The Guidance to ICE Attorneys is referenced in the OPLA memo and sets out focused criteria for exercising prosecutorial discretion through this process.<sup>12</sup> The Guidance divides cases into “enforcement priorities” and “not enforcement priorities.” Cases in the first category “should generally be pursued in an accelerated manner before EOIR.” By contrast, cases in the second category should be carefully considered for prosecutorial discretion.

According to the Guidance, the enforcement priorities include individuals with nearly any type of criminal conviction, without regard to how long ago the offense occurred or the circumstances of the crime. Individuals with *any* felony conviction or multiple misdemeanor convictions, as well as individuals with a *single misdemeanor violation* involving DUI, violence or threats, assault, or flight from the scene of an accident are all included in this category. Other misdemeanor convictions mentioned are those involving sexual abuse or exploitation, drug distribution or trafficking, or “other significant threat to public safety.” In addition to those with criminal convictions, this category also includes persons who entered without inspection or violated the terms of their visas during the last three years; are gang members/human rights violators or otherwise pose a “clear threat to public safety”; were previously removed from the country; committed immigration fraud; or “who otherwise has an egregious record of immigration violations.”

Cases that are “not enforcement priorities” include (1) current members or veterans of the military or the spouse or children of such members; (2) youths who have been in the United States for more than five years and have pursued educational opportunities in the United States; (3) individuals over 65 in the United States for 10 years or longer; (4) crime victims; (5) individuals who have been LPRs for 10 years or longer who have a single, “minor” conviction for a non-violent offense; (6) individuals with serious mental or physical conditions but only if

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<sup>12</sup> The OPLA memo makes clear that this Guidance is to be used during the Pilot I fast track review of cases. Whether the guidance also is to be used in all other review of cases for prosecutorial discretion is unclear. The reference in the guidance to cases pending before the BIA would indicate a broader application than just the Pilot I fast track cases.

the condition “would require significant medical or detention resources”; and (7) individuals who have a “very long-term presence” in the United States, an immediate family member who is a U.S. citizen, have established compelling ties to the United States, and have made compelling contributions to the United States.

According to the Guidance, when an ICE attorney decides to exercise prosecutorial discretion, he or she must notify a supervisory charging official at CBP, USCIS, or ICE of the decision. If the supervisory official disagrees with the decision, the dispute is to be taken to the ICE Chief Counsel. If local resolution proves impossible, the matter is to be elevated to the Deputy Director of ICE.

Finally, the Guidance reminds ICE attorneys that decisions to exercise prosecutorial discretion are to be made on a case-by-case basis under the totality of the circumstances, and reaffirms that “the cornerstone for assessing whether prosecutorial discretion is appropriate in any circumstance” is the June 17 memo. Presumably, this paragraph refers to cases that do not fall within this fast-track review, such as cases with merits hearing after June 2012, cases which fall outside the criteria set forth in the Guidance for ICE Attorneys, and requests for motions to reopen. However, when and how these other reviews are to take place is unclear. This paragraph and other similar statements in the Next Steps Document and the OPLA Memo may engender confusion as the pilots move forward.

## **QUESTIONS AND ANSWERS**

### **What are DHS’s enforcement priorities?**

In the [June 17, 2011 memo](#) and a subsequent question and answer guide ([FAQ](#)) regarding the August 18 announcement, DHS explained that its enforcement priorities are national security, public safety, border security, and recent and repeat immigration law violators. These terms were not fully defined. However, the June 17 memo did explain that, while criminal history is a factor to be considered in all cases, “particular care and concern” is warranted only in those cases involving serious felons, repeat offenders, those with lengthy criminal records, or known gang members. Similarly, the June 17 memo explained that while past immigration history was a factor to be considered in all cases, “particular care and concern” is warranted only in cases of “egregious” immigration violators.

The documents issued on November 17 say that the June 17 memo sets forth the standard to be followed. Despite this, these documents contain contradictory information regarding how those with criminal histories or past immigration violations are to be considered. For example, the FAQ stated for the first time that DHS will have “zero tolerance” for those apprehended at the border and that removal cases involving recent border crossers will not be included in the review of cases carried out by the working group. The November Guidance goes one step further, stating that noncitizens who entered the country illegally or violated the terms of their admission *within the last three years* are deemed high priority. Because not all individuals who violated the terms of their admission within the last three years are either repeat immigration law violators or “egregious immigration violators,” this new guidance appears on its face to conflict with the June 17 memo. As a result, it is unclear to what extent an individual who entered illegally within



the last three years but who has compelling equities will be considered for prosecutorial discretion.

Similarly, the recent guidance conflicts with the June 17 memo by labeling “criminal aliens” as a high priority when the memo limits the high priority category to serious felons, repeat offenders and those with lengthy criminal histories. It is unclear to what extent an individual’s prior criminal history, no matter if minor or from the distant past, will preclude prosecutorial discretion from this point on.

### **What are low priority cases?**

Under the June 17 memo, low priority cases are to be identified in accord with a list of factors that DHS should weigh in all cases. While the June 17 memo made clear that no category of cases will receive a blanket exercise of favorable prosecutorial discretion, the memo does identify categories of individuals who are to receive particular care and attention due to certain favorable factors. These include: veterans; long-time permanent residents; minors and the elderly; individuals who have been present since childhood; individual with serious disabilities or health issues; women who are nursing or pregnant; and victims of domestic violence or other serious crimes. In all cases, DHS is to weigh the totality of the circumstances. For a full discussion of the factors in the June 17 memo, *see* the LAC practice advisory, [Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client](#).

The November Guidance states that the June 17 memo applies and that the totality of the circumstances should be considered in all cases. Despite these general statements, however, the Guidance appears to deem at least two categories of individuals “high priority” that were not identified in the June 17 memo as such: all individuals with a criminal history (apparently without regard to the severity of past crimes) and individuals who violated the terms of their admission within the last three years. It remains to be seen whether these become categorical designations such that DHS will not exercise prosecutorial discretion in any case that falls within them.

### **Is it possible for cases with criminal convictions to be considered low priority?**

The June 17, 2011 memo makes clear that cases will be reviewed on a case-by-case basis and considered based on the totality of the circumstances presented in each individual case. There is no bright-line rule that would automatically disqualify any case. However, the memo does contain a list of negative factors that will be looked at with particular care. This list includes “serious felons, repeat offenders, and individuals with a lengthy criminal record of any kind,” as well as “known gang members.”

Nonetheless, the November Guidance lists as enforcement priorities any noncitizen with a felony conviction or multiple misdemeanor convictions, or a single misdemeanor conviction involving “violence, threats, or assault”; “sexual abuse or exploitation”; “driving under the influence of alcohol or drugs”; “flight from the scene of an accident”; “drug distribution or trafficking”; or “other significant threat to public safety.” The November Guidance thus includes as “high priority” cases unlikely to receive a favorable exercise of prosecutorial discretion many deportable offenses that would not be classified as such under the June 17 memo. As a

consequence, longtime LPRs whose cases might otherwise be considered “positive” might instead be deemed an enforcement priority based upon a prior criminal conviction. In cases such as this, attorneys should emphasize the positive factors in the case that are found in the June 17 memo and argue that the list of crimes in the November Guidance is not dispositive where favorable factors are strong.

### **What will happen to cases deemed low priority?**

According to the August 18 announcement, all cases currently before the immigration courts and the BIA will be reviewed and those that are deemed low priority will be administratively closed. Removal cases currently pending in federal court also will be reviewed, and low priority cases will be considered for a favorable exercise of prosecutorial discretion, although it is not clear what this will be. The November 17 documents provide some explanation about how DHS will proceed with the review, and we anticipate that DHS will provide additional guidance in 2012 following the completion and assessment of the pilot projects. At this point, it is unclear whether DHS will forgo initiating removal proceedings in new cases that are identified as low priority, or whether proceedings will be initiated and then administratively closed.

For matters presently before USCIS, a memorandum released by the agency in early November provides additional guidance regarding the exercise of prosecutorial discretion in the referral of cases to immigration court through Notices to Appear.<sup>13</sup>

### **What is the difference between administrative closure and termination of proceedings?**

Administrative closure is a procedural mechanism used to temporarily remove a case from the immigration court’s calendar. *Matter of Avetisyan*, 25 I&N Dec. 688, 690 (BIA 2012). Until recently, Board precedent held that neither the Board nor an immigration judge could administratively close a case over a party’s objection. *Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996). In *Matter of Avetisyan*, however, the Board overruled *Matter of Gutierrez* on this point, and instead held that the Board and immigration judges have the authority to administratively close a case over a party’s objection where it is “otherwise appropriate under the circumstances.” *Matter of Avetisyan*, 25 I&N Dec. at 690, 692-93, 697. In evaluating a request for administrative closure, the Board or immigration judge should consider all the relevant factors including, the reason for administrative closure; the basis of any opposition; the likelihood the respondent will succeed on any petition or application being pursued outside removal proceedings; the anticipated duration of the closure; the responsibility of either party for any delay; and the ultimate outcome of removal proceedings once the case is re-calendared. *Id.* at 696.

*Matter of Avetisyan* opens the door for a respondent to request administrative closure independent of an offer of prosecutorial discretion from the government. However, the reverse is also true. DHS could move for administrative closure even where a respondent refused an offer of prosecutorial discretion which suggested such closure. In opposition to such a government

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<sup>13</sup> See USCIS Policy Memorandum, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens* (Nov. 7, 2011), AILA InfoNet Doc. No. 11110830.

motion, a respondent could argue that it is never appropriate to administratively close a case where the respondent wishes to proceed with an application for relief.

A person whose case has been administratively closed remains in removal proceedings, and either party can request that the case be placed back on the court's calendar at any time. By contrast, termination of proceedings means that the case has ended and the respondent is no longer in removal proceedings. Upon termination, the individual will revert to the same status he or she was in prior to commencement of proceedings. If the government wants to place the individual back into removal proceedings after a case is terminated, it must file a new Notice to Appear (NTA).

Should an individual (other than an "arriving alien") whose case has been administratively closed eventually become eligible for adjustment of status, he or she must have the removal proceedings terminated to enable USCIS to exercise jurisdiction over the adjustment application.

### **Will individuals whose cases have been administratively closed receive EADs?**

In its [FAQ](#) following the August 18 announcement, DHS stated, "Per longstanding federal law, individuals affected by an exercise of prosecutorial discretion will be able to request work authorization, including paying associated fees, and their requests will be separately considered by USCIS on a case-by-case basis."

The November 17 OPLA memo states that administrative closure is the primary form of prosecutorial discretion that will be exercised for incoming and certain pending cases. Despite what was said in the August 18 FAQ, DHS more recently has stated that those whose cases are administratively closed will only be able to apply for employment authorization documents (EAD) if they have an independent basis for work authorization (e.g., a pending adjustment or asylum application).

AILA and other advocates are seeking additional guidance on the issuance of EADs and are advocating for EAD eligibility for those without an independent basis for work authorization. Until further guidance is provided, those who do not have an independent basis to apply for work authorization should consider requesting deferred action, which does allow the recipient to apply for an EAD (8 C.F.R. § 274.12(c)(14)).

Importantly, the Guidance states that respondents with pending asylum applications who agree to administrative closure will have their asylum clock stop upon the filing of the joint request. Consequently, asylum applicants who have not met the 180-day waiting period for EAD eligibility may want to consider the impact of administrative closure on their eligibility for work authorization before they agree to any offer of this from DHS.

### **What should I be doing now?**

With the exception of non-detained cases rescheduled by the Baltimore and Denver immigration courts, both removal proceedings and removals are expected to continue while the working group carries out its review. During this time, ICE attorneys and officers have been told to consider all cases in light of DHS enforcement priorities. Thus, you should continue to make



requests for prosecutorial discretion. Requests should be made in writing and include as much supporting documentation as possible, and should be sent to the email address established by the local ICE office to receive requests for prosecutorial discretion.<sup>14</sup> (AILA members should keep in contact with their local chapter to learn the email address to which documentation can be sent.) For pending cases that will be subject to review, this will ensure that there is favorable information in the client's file when the working group review takes place. It does not appear that respondents or their attorneys will know in advance when the review of their cases will take place. To learn more about local implementation of the guidance, attorneys may wish to consult their local AILA chapters to arrange meetings with ICE officials in their jurisdiction.

Moreover, although the working group will conduct a systematic review of all pending cases, other avenues for requesting prosecutorial discretion remain open. ICE attorneys and officers still retain the authority to exercise prosecutorial discretion and now may be more amenable to exercising it favorably than in the past. Additionally, the announced review process does not include cases with final removal orders, so no systematic review of these cases is expected. Utmost caution should be exercised before bringing a final order case to the attention of DHS by submitting a request for prosecutorial discretion. If ICE denies such a request, the agency may execute the removal order against your client. In final order cases in which DHS already is aware of the client's situation and/or location, individual advocacy for prosecutorial discretion on behalf of the client may be warranted. In all such cases, the prosecutorial discretion request should be brought only with the informed consent of a client who understands the risks involved.

You should also ensure that your clients understand that their obligations under the immigration laws remain the same. There has been much confusion and misinformation over the significance of the August and November announcements. It is important that your clients understand that the announcement is not an amnesty. For example, some individuals granted voluntary departure have been reported to believe that they no longer need to leave the country. This is simply wrong. The August and November announcements have no impact on an existing voluntary departure orders; anyone under such an order who fails to timely depart will face the consequences.<sup>15</sup>

Additionally, individuals should not seek to turn themselves into immigration authorities to obtain an EAD or otherwise test the extent to which DHS is favorably exercising prosecutorial discretion. As the DHS FAQ explains, such action carries a high risk that the individual will be placed in removal proceedings and may be ordered removed. For helpful guidance for clients, see [AILA Consumer Advisory](#).

### **What can I do to assist AILA and LAC in monitoring implementation of the new guidance?**

In order to monitor how the new guidance is being implemented in the field, we need to hear your experiences with your local office. Please complete this [survey](#) and tell us about your cases. Doing so will help our ongoing liaison and advocacy efforts with DHS. Thank you!

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<sup>14</sup> For more on preparing a request for prosecutorial discretion, see [Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client](#).

<sup>15</sup> For more on these consequences, see the Legal Action Center's practice advisory [Voluntary Departure: Automatic Termination and the Harsh Consequences of Failing to Depart](#).

