February 9, 2012

The Honorable Janet Napolitano
Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Dear Secretary Napolitano:

The undersigned organizations are encouraged by the recent prosecutorial discretion initiatives undertaken by the Department of Homeland Security (DHS). A robust prosecutorial discretion policy is essential to the smart enforcement of immigration law and to the fair adjudication of immigration cases. The memos and announcements that DHS issued last fall are important steps toward achieving these aims.

We do have concerns, however, about the implementation of this new policy. The way DHS is conducting the prosecutorial discretion review has departed significantly from what was initially announced, most notably the failure to grant work permits to those who receive a favorable exercise of discretion. We offer the following recommendations to ensure DHS fulfills its pledge of implementing an effective and fair prosecutorial discretion policy nationwide in the upcoming months.

1. **Eligibility to Apply for an Employment Authorization Document (EAD):** First and foremost, it is imperative that immigrants granted prosecutorial discretion be eligible to apply for an EAD. Statements made by you and other key DHS personnel to advocates and to members of Congress following the August 18, 2011 announcement made clear that individuals whose cases were administratively closed under this initiative would be eligible to apply for an EAD. In its FAQ following the announcement, DHS wrote:

> Per longstanding federal law, *individuals affected by an exercise of prosecutorial discretion will be able to request work authorization,* (emphasis added) including paying associated fees, and their requests will be separately considered by USCIS on a case-by-case basis.

However, more recent statements by DHS officials suggest that only those who have an *independent* basis for applying for an EAD will be able to do so. This is a clear change from what was originally announced and a break from the long-standing practice of granting work permits to removable individuals who are temporarily permitted to remain in the U.S. It makes little sense to allow individuals to remain temporarily in the U.S., but to then prevent them from working legally and supporting themselves and their families. The current practice will force these individuals to work in the shadows. By failing to establish a mechanism to apply for work authorization for those found to merit prosecutorial discretion, DHS is undermining its own prosecutorial discretion initiative.

2. **DHS Should Continue the Use of Deferred Action on a Generous Basis:** The exercise of prosecutorial discretion encompasses a broad range of possible agency actions, and for years DHS and legacy INS have used deferred action as an important tool to manage cases which are not prosecutorial priorities. Deferred action is listed in the June 17, 2011 ICE memorandum (Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, hereinafter "Prosecutorial Discretion Memorandum") as being among the types of prosecutorial discretion that should be considered in low priority cases.

In practice, however, we have observed that ICE is almost exclusively using administrative closure when it exercises prosecutorial discretion, and in fact, is more reluctant now than before to entertain requests for deferred action. Immigration attorneys report that grants of deferred action have actually *decreased* following the new prosecutorial discretion initiatives. Several Enforcement and Removal Operations (ERO) field offices have stated that deferred action can now only be granted to individuals with final removal orders. This is a change in policy from just a few months ago (and one not supported by statute or regulation). As a result, the implementation of the new prosecutorial discretion policy has actually placed some individuals in a *worse* situation than prior to the announcement in August.

DHS should utilize deferred action much more frequently when exercising prosecutorial discretion. Specifically, it should offer deferred action to those individuals whose cases have been administratively closed under the current case review and, as a matter of course, in other low priority cases.

As discussed above, DHS has not yet established a mechanism to provide work authorization for those who have been granted administrative closure. Granting deferred action could be the way for DHS to make those granted prosecutorial discretion eligible to apply for EADs.

3. **Detained Individuals:** In August, DHS announced that it would conduct a case-by-case review of *all* cases pending before the Executive Office of Immigration Review (EOIR). However, cases of detained individuals have largely been excluded from the prosecutorial discretion reviews currently under way. Although detained cases were to be included in the nationwide review being conducted by the Office of Principal Legal Advisor, we have learned that chief counsels in many jurisdictions have chosen to include only the non-detained docket in their reviews. Further, the pilot programs in Baltimore and Denver were explicitly limited to non-detained cases. DHS has not explained how the detained docket will be incorporated into future review processes.

There is a general assumption among ICE and DHS officials that detained individuals are *de facto* high priority cases. Yet many with highly compelling equities remain in detention. Some are simply unable to scrape together money for bond while others are subject to mandatory detention for minor convictions—possession of trace amounts of marijuana or pulling another woman's hair. As you are aware, more than 80 percent of detained individuals are *pro se* and many lack the skill or information necessary to apply for prosecutorial discretion on their own. We were pleased to hear ICE officials reiterate

recently that the cases of all individuals in detention will be reviewed. DHS should abide by its own announcement and review *all* pending cases—including detained matters—for the application of appropriate prosecutorial discretion. Not only is this the fair and equitable approach, it may also be the most cost-effective as detention is extremely expensive.

4. **Public Information and Pro Se Respondents:** DHS will review hundreds of thousands of cases in the upcoming months as part of the prosecutorial discretion initiative, yet the Department has disseminated very little information that is accessible to the general public and respondents who are unrepresented by counsel. DHS should engage in a public information campaign and broad stakeholder meetings to explain the prosecutorial discretion policy to the public. Information in plain, simple language—translated into Spanish and other languages—explaining what the policy is and how individuals can obtain more information is urgently needed. Information is also needed to help ensure that immigrant communities can protect themselves against notarios and other unscrupulous operators.

Although the Offices of Chief Counsel (OCCs) have set-up email addresses for receiving prosecutorial discretion requests or documents to supplement files, the email addresses are difficult to obtain and have not been posted publicly, making it more difficult for *pro se* respondents to provide relevant information about their cases to ICE counsel. This public information campaign should involve the Department of Justice as individuals may approach immigration court staff for information about how prosecutorial discretion affects their case.

5. **June Memorandum Versus November Memorandum:** The November 2011 *Guidance to ICE Attorneys* which accompanied the November 17 ICE memorandum has been described as a fast-track means for OPLA attorneys to quickly identify those cases most obviously meriting prosecutorial discretion. While the November *Guidance* references the June ICE Prosecutorial Discretion Memorandum stating that it does not "replace or supersede" it, DHS has not explained how or when ICE will apply the June factors if a case is not found eligible under the November *Guidance*. We are concerned that in practice the November Guidance will become the primary tool for review of cases for prosecutorial discretion. The Baltimore and Denver pilots were also largely limited to these much narrower criteria.

If the November *Guidance* becomes the primary basis upon which cases are reviewed for prosecutorial discretion, DHS will expend more time on duplicative case review. Cases found ineligible under the November *Guidance* that would nonetheless merit prosecutorial discretion under the June 17 memorandum will continue to clog the immigration court docket. Cases not found eligible under the November *Guidance* will need to be reevaluated under the June factors, at a later date, assuming a process is even established for subsequent review. DHS is expending considerable resources conducting these reviews, but many cases that should qualify for prosecutorial discretion will be placed or remain in proceedings if the November *Guidance* becomes the primary tool for review. It is important that the primacy of the June 17 memorandum be made clear to all ICE personnel and the public.

6. **DHS Should Encourage Attorneys to Stipulate to Grants of Relief:** In strong cases for relief that are also low priority cases, an ICE offer to stipulate to an application for relief or to indicate that a grant of relief will not be opposed makes more sense than administrative

closure. Indeed, offering only administrative closure in such cases may prove counterproductive to unclogging the court docket. Those offered administrative closure are being told that it is a one-time offer; if declined now, a future request for prosecutorial discretion will be denied. As a result, even respondents with the strongest cases for relief may decide to accept administrative closure, leaving immigrants who should have obtained legal status in limbo and cases lingering on the court docket. Instead, ICE attorneys should be directed to offer to stipulate to a grant of relief or come to agreement on resolving certain aspects of a particular case, as appropriate, instead of merely putting a case on hold for another day.

7. **Prosecutorial Discretion and Customs and Border Protection (CBP):** In June, DHS announced that all DHS agencies would be issuing prosecutorial discretion policies. ICE has taken a number of steps, including trainings and the docket review, to implement prosecutorial discretion and U.S. Citizenship and Immigration Services (USCIS) has issued guidance regarding issuance of Notices to Appear. However, no such steps have been evident from CBP. Since each agency within DHS has certain enforcement-related functions and can initiate removal proceedings in individual cases, each agency must consistently be applying the same prosecutorial discretion guidelines for the policy to be meaningful. ICE cannot be seen as the oversight mechanism for CBP merely because ICE attorneys review Notices to Appear issued by CBP. The reality is that many individuals are turned away at a port of entry, voluntarily returned, or referred for prosecution by CBP without any ICE involvement or oversight. CBP should be required to issue guidance, conduct trainings, and implement monitoring to ensure that its agents are also exercising prosecutorial discretion.

8. **The Inclusion of Lesbian Gay Bisexual and Transgender (LGBT) Family Members Must Be Put in Writing:** A key positive factor in exercising prosecutorial discretion is a person's family ties to the U.S. In August 2011, high-ranking DHS officials participating in several community forums and phone calls stated that, for purposes of exercising prosecutorial discretion, ICE would include LGBT relationships in the definition of family relationships. However, this decision has not yet been put in writing. Without specific, written guidance, there remains the very real risk that agency officers, agents, and attorneys making decisions about individual cases will overlook LGBT family ties and decline to exercise prosecutorial discretion. DHS should issue written guidance explicitly including LGBT relationships in the definition of family relationships for purposes of prosecutorial discretion.

9. **Implementation of June 17, 2011 ICE "Victims Memo":** A second ICE memorandum also issued on June 17, 2011 (Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, hereinafter "Victims Memorandum") sets forth categories of immigrants who are presumptively eligible for prosecutorial discretion absent "special circumstances," or "serious" adverse factors, such as "serious" crimes. This "presumptive" standard is more favorable to the exercise of prosecutorial discretion than the standard set forth in the Prosecutorial Discretion Memorandum. The categories referred to in the victims memorandum include "individuals engaging in a protected activity related to civil or other rights (for example, union organizing or complaining to authorities about employment discrimination or housing conditions) who may be in a non-frivolous dispute with an employer, landlord, or contractor." The memorandum suggests

that deferred action or a stay of removal are the appropriate remedies in such cases, although administrative closure is also mentioned.

As yet, DHS and ICE have not announced what steps they have taken to implement the Victims Memorandum. We recommend that steps be taken to ensure this memorandum is fully implemented in the field and that training on the memorandum be incorporated or supplemented in the trainings for all ICE trial attorneys and ERO personnel.

Thank you for your time and attention. We look forward to working with DHS on the issue of prosecutorial discretion. If you have questions or concerns please contact Gregory Chen, AILA Director of Advocacy, 202/507-7615, gchen@aila.org.

Sincerely,

AIDS Foundation of Chicago
American Civil Liberties Union
American Friends Service Committee
American Immigration Council
American Immigration Lawyers Association
Americans for Immigrant Justice, formerly Florida Immigrant Advocacy Center
APALA Education Fund
Asian American Justice Center, member of the Asian American Center for Advancing Justice
Asian Pacific American Labor Alliance, AFL-CIO
ASISTA Immigration Assistance
Casa Cornelia Law Center
Casa de Esperanza: National Latin@ Network for Healthy Families and Communities
Catholic Charities Archdiocese of San Antonio
CenterLink: The Community of LGBT Centers
Central American Refugee Center, CARECEN, NY
Central American Resource Center, CARECEN, Los Angeles
Disciples Justice Action Network
Diocesan Migrant & Refugee Services
Domestic Violence Immigration Clinic, University of Wisconsin Law School
First Focus
FORGE
Franciscan Action Network
Gay, Lesbian & Straight Education Network
Gulfcoast Legal Services
Heartland Alliance's National Immigrant Justice Center
HIV Law Project, Inc.
HIV Prevention Justice Alliance (HIV PJA)
Human Rights Campaign
Illinois Coalition for Immigrant and Refugee Rights
Immigrant Defense Project
Immigrant Law Center of Minnesota
Immigrant Legal Advocacy Project

Immigrant Legal Resource Center
Immigration Equality
InMotion
Kentucky Coalition for Immigrant and Refugee Rights
Lambda Legal
The Leadership Conference on Civil and Human Rights
Legal Advocacy Center of Central Florida
LGBT Humanist Council
Lutheran Immigration and Refugee Service
Massachusetts Law Reform Institute
Michigan Coalition for Immigrant and Refugee Rights
Michigan Immigrant Rights Center
Muslim Public Affairs Council
National Advocacy Center of the Sisters of the Good Shepherd
National Asian Pacific American Women's Forum
National Black Justice Coalition
National Center for Transgender Equality
National Coalition for LGBT Health
National Coalition of Anti-Violence Programs (NCAVP)
National Council of La Raza (NCLR)
National Employment Law Project
National Gay & Lesbian Chamber of Commerce® (NGLCC)
National Gay and Lesbian Task Force
National Immigration Forum
National Immigration Law Center
National Latina Institute for Reproductive Health
National Minority AIDS Council
National Queer Asian Pacific Islander Alliance
National Senior Citizens Law Center
NC Immigrant Rights Project
Neighbors In Support of Immigrants (NISI)
New York Immigration Coalition
People For the American Way
PFLAG National (Parents, Families and Friends of Lesbians and Gays)
Physicians for Human Rights
Rights Working Group
Salvadoran American National Network
Sisters of Mercy of the Americas
South Asian Americans Leading Together (SAALT)
Service Employees International Union
The United Church of Christ, Justice and Witness Ministries
Transgender Law Center
Unid@s, The National Latin@ LGBT Human Rights Organization
United We Dream
Washington Defender Association's Immigration Project – Seattle, WA

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