



National Immigrant Justice Center

September 30, 2011

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Re: Recommendations Regarding Implementation of the Prosecutorial Discretion Initiative

Dear Mr. Morton, Ms. Muñoz, Mr. Sandweg, Mr. Osuna, and Mr. Grossman:

We write regarding the White House and Department of Homeland Security's (DHS) August 18, 2011, announcement concerning the formation of a Prosecutorial Discretion Working Group to review pending immigration cases and administratively close those identified as a "low priority" for removal purposes.

While we acknowledge that this step is intended to alleviate the threat of imminent deportation for certain individuals, we are deeply concerned that without related and accompanying policy changes, as well as robust implementation in the field, the latest initiative will have little, if any, meaningful impact. The Frequently Asked Questions fact sheet that DHS released in late August 2011 addresses some of the issues raised by the August 18, 2011, announcement (August FAQs). However, legal professionals, advocates, and the immigrant community seek a clear plan for the roll-out and implementation of the review process.

Our groups have extensive expertise in direct services and policy reform. Based on our collective experience, we would welcome the opportunity to engage with the Prosecutorial Discretion Working Group as it develops criteria for “low priority” cases and begins its review process. We would also like to submit recommendations to make the review process more efficient and initiate systemic change.

Please find below our concerns and proposed recommendations, which could improve the Prosecutorial Discretion Working Group’s review process and determinations as well as the cooperation of the agency and immigration courts more generally.

Immediate Actions

Process and Procedure for Review

1. As you are aware, administrative closure of a case is used to temporarily remove the case from an immigration judge’s active hearing calendar. It is an administrative convenience that leaves the individual in legal limbo with no certainty about the future of the case.

We strongly recommend that in appropriate cases, the Prosecutorial Discretion Working Group and Immigration and Customs Enforcement (ICE) trial attorneys recommend termination of proceedings, without prejudice, rather than administrative closure. This would protect the intended procedural and cost benefits of removing “low priority” cases from the active court list and enable administrative resolution of some appropriate cases (e.g. applications filed with U.S. Citizenship and Immigration Services (USCIS) or the Department of State).

2. Before a case is determined to be administratively closed or terminated, relevant information pertinent to the individual’s case should be collected to assess the individual’s equities. Government documents often fail to properly capture information sufficient to support a favorable prosecutorial discretion determination.

It would seem advantageous for DHS to take steps to ensure that information about compelling equities are properly considered in any determination. Positive equities include the individual’s community and family ties, past service to the community, as well as medical issues. In our view, where there is an attorney on record, this would be best accomplished if the reviewers contacted the legal representatives. In the case of *pro se* respondents, notification to individuals that their case is under review should occur, including the opportunity to provide supplemental documents.

It is also worth noting that failure to capture this information risks undermining the agency’s messaging. A number of practitioners have recently reported that individuals are removed, despite otherwise meeting the “low-priority” criteria and substantial equities. A mechanism to avoid apparent inconsistent application of the prosecutorial discretion initiative would ensure quality decision making by the agency.

3. The working group must create procedures to ensure that cases identified for abbreviated forms of removal, such as removal via stipulated orders of removal, are also reviewed to determine whether there are low priority cases that merit the exercise of prosecutorial

discretion.¹ As outlined in a recent report, the stipulated removal program has deported over 160,000 individuals since 2004 and has been responsible for one-third of all removals in fiscal year 2008.² Moreover, 80 percent of those ordered removed via stipulated orders of removal were only charged with the civil violation of being present in the country without the proper papers—indicating many might merit the exercise of prosecutorial discretion.³

Case Prioritization

4. Review of detained individuals' cases must be prioritized to reduce unnecessary detention and wasteful government spending. Detained individuals whose cases are administratively closed or terminated without prejudice should be immediately released without bond. Again, termination without prejudice is superior to administrative closure. ICE offices nationwide have different practices with regard to the release of individuals whose cases are administratively closed. By contrast, where a case is terminated without prejudice, release from detention would necessarily follow. Obviously, to continue to detain after discretion is favorably exercised would defeat the stated purpose of the administration's initiative.
5. Individuals with upcoming final hearings should be prioritized for review over cases that have longer wait times for merits hearings. We are concerned that a number of individuals eligible for prosecutorial discretion will be overlooked and potentially ordered removed and deported before their cases are reviewed for administrative closure or termination. In addition, should the cases proceed on appeal, the government would continue to unnecessarily expend scarce resources defending cases before the Board of Immigration Appeals and the courts of appeals. This is inconsistent with the intention of the prosecutorial discretion initiative, and guidance should be issued promptly.

Effective Communication and Training

6. In the August FAQs, DHS indicated that ICE attorneys and agents will be tasked to review each case prior to the expenditure of resources to determine whether it is a priority case as defined by the June 30, 2010, Civil Enforcement Priorities memorandum and the June 17, 2011, Prosecutorial Discretion memorandum. However, we have little evidence that this policy directive has filtered down to the field. To date, immigration attorneys and advocates report that local ICE offices continue to deny requests for prosecutorial discretion in "low priority" cases, despite the administration's initiative. We strongly recommend that DHS immediately advise field offices of this initiative and train ICE attorneys, Customs and Border Protection (CBP), and USCIS officers, on its implementation.

In addition, while the "low priority" criteria and roll-out of the review process is finalized, we recommend that DHS issue an interim policy to the field, which at a minimum would include that ICE attorneys agree to continuances if requested by a respondent while they prepare material in support of the exercise of prosecutorial discretion. All immigration judges should be properly advised of this policy to ensure proper implementation.

¹ See <http://www.immigrantjustice.org/publications/policy-brief-stipulated-orders>

² See Jennifer Lee Koh; Jayashri Srikantiah, and Karen C. Tumlin, *Deportation without Due Process*, available at: <http://www.nilc.org/immlawpolicy/arrestdet/Deportation-Without-Due-Process-2011-09.pdf> at page 1.

³ *Id.* at pages 7-8.

7. Respondents should be promptly notified when the review of their cases has taken place, regardless of whether the agency intends to exercise prosecutorial discretion. Prior to a final determination, this notification process would enable a respondent to indicate if they do not want administrative closure or termination, particularly in circumstances where the respondent intends to pursue a form of immigration relief.

Further, if an ICE attorney opposes a Prosecutorial Discretion Working Group recommendation for the exercise of prosecutorial discretion, legal professionals, advocates, and immigrants would benefit from an opportunity to supplement the record. This opportunity would also preserve the legitimacy of the legal process. We recommend that in such situations, the local ICE office notifies the individual of the proposed reversal of the Prosecutorial Discretion Working Group's decision, including any reasons (unless classified) for this decision. The individual should then be afforded an opportunity to respond.

8. The current state of confusion among ICE trial attorneys, legal representatives, and the immigrant community regarding the scope and implementation of the prosecutorial discretion memo must be immediately addressed. The agency is at risk of losing credibility if it does not effectively communicate its roll-out and implementation plan.

One area of concern is the scope of protection for those individuals who demonstrate some of the positive factors set forth in your June 17, 2011 memorandum. In addition, we request clarification regarding the protection available to lesbian, gay, bisexual, and transgender (LGBT) immigrants and their families. We applaud the administration's decision to provide protection for vulnerable individuals, and we urge the administration to include a member in the working group who has expertise in those areas.⁴

Actions to Initiate Systemic Change

1. Some individuals who are eligible for a favorable grant of prosecutorial discretion may also be eligible for a form of immigration relief. Since so many individuals in immigration proceedings are unrepresented, a number of immigrants are likely to be confused about their legal and administrative options. Individuals must be in a position to understand their rights.

Accredited, not-for-profit legal services organizations deliver high-quality, low-cost advice in certain circumstances by providing "brief services."⁵ Through the provision of brief services, individuals are able to receive immigration benefits without the continued involvement of an attorney. However, the current regulations place serious restrictions on legal service providers' capacity to provide brief services.⁶ We are concerned that these limitations will significantly impact attorneys' authority to assist *pro se* respondents on prosecutorial discretion.

⁴ For example, an expert in LGBT family law may provide insights regarding LGBT families' unique circumstances.

⁵ Rule 1.2(c) of the American Bar Association Model Rules of Professional Conduct

⁶ "Professional Conduct for Practitioners: Rules, Procedures, Representation, and Appearances; Reopening the Public Comment Period," 76 Fed. Reg., No. 20, page 5267 (January 31, 2011).

We strongly recommend that DHS amend the regulations to ensure that legal service providers are in a position to best assist unrepresented individuals. Failure to do so will both jeopardize individuals' due-process protections and the "clear-out" process DHS hopes to achieve under its new initiative.

2. While we strongly support the thoughtful use of prosecutorial discretion, the limited remedy of closing or terminating cases alone is insufficient to improve court efficiency. Indeed, given that the Prosecutorial Discretion Working Group and ICE trial attorneys must already assess the 300,000 currently pending immigration cases, it would be inefficient to repeat that process in the future. We recommend that the administration confer reviewers with the authority to assess the strength of legal remedies available to individuals to consider other potential resolutions.
3. Individuals charged with or convicted of misdemeanors should not be treated as enforcement priorities. The Secure Communities program, the 287(g) program, and other ICE enforcement initiatives, continue to detect "low priority" individuals and place them in removal proceedings, creating no net gain to the overall operation of the immigration system. As you are well aware, we recommend the termination of the Secure Communities program until the fundamental flaws of the program are addressed. Further, we strongly urge that DHS train local law enforcement officers, CBP, and USCIS officers on the prosecutorial discretion memo and "low priority" criteria to ensure that individuals who fall outside of these priority areas are not unnecessarily fast-tracked into deportation proceedings, contrary to the agency's stated intentions.
4. We strongly encourage DHS to halt deportations of individuals who fall under the "low priority" category until the Prosecutorial Discretion Working Group and ICE attorneys can complete review and the initiative is fully implemented. This will avoid family separation and unnecessary hardship.

We urge you to consider these issues and adopt our recommendations. We would welcome the opportunity to discuss these recommendations with you in more detail. Please do not hesitate to contact the co-chair of the DHS-NGO Enforcement Working Group, Jane Zurnamer of Heartland Alliance's National Immigrant Justice Center, at jzurnamer@heartlandalliance.org or 312-660-1344.

Sincerely,

Heartland Alliance's National Immigrant Justice Center
American Immigration Council
American Immigration Lawyers Association
Americans for Immigrant Justice (formerly known as Florida Immigrant Advocacy Center)
Asian American Justice Center, member of Asian American Center for Advancing Justice
ASISTA Immigration Assistance
CARACEN (Central American Resource Center)
Casa de Esperanza
First Focus
Human Rights Watch
Immigrant Law Center of Minnesota

Immigrant Legal Resource Center
Immigration Equality
Legal Aid Justice Center – Immigrant Advocacy Program (Virginia)
Massachusetts Immigrant and Refugee Advocacy Coalition
Michigan Immigrant Rights Center
National Center for Transgender Equality
National Council of La Raza (NCLR)
National Immigration Forum
National Immigration Law Center
National Latina Institute for Reproductive Health
Northwest Immigrant Rights Project
South Asian Americans Leading Together (SAALT)
Shoba Sivaprasad Wadhia, Director of the Center for Immigrants' Rights at Penn State Law
Washington Defender Association's Immigration Project
Women's Refugee Commission

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