Practice Advisory:
Advocating for Prosecutorial Discretion in Removal Proceedings Under the Doyle Memo[1]
June 21, 2022

I. Overview of the Doyle Memo

A. Introduction

On April 3, 2022, U.S. Immigration and Customs Enforcement (ICE) Principal Legal Advisor (PLA) Kerry Doyle issued a memorandum (Doyle memo)[2] providing guidance to all ICE Office of the Principal Legal Advisor (OPLA)[3] attorneys on how and when to exercise prosecutorial discretion (PD) in removal proceedings under the Department of Homeland Security's (DHS) enforcement priorities.[4] The Doyle memo took effect on April 25, 2022 and supersedes the previous OPLA guidance issued in May 2021 by former PLA John D. Trasviña.[5]

The Doyle memo is based on "enduring principles of prosecutorial discretion" and previous guidance issued by DHS Secretary Alejandro Mayorkas, "Guidelines for the Enforcement of Civil Immigration Law" (Mayorkas Memo), detailing DHS's priorities for immigration

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[2] Kerry A. Doyle, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion*, April 3, 2022. Note, because this practice advisory focuses almost exclusively on the Doyle memo, we are not including page citations to each reference to or quotation from the memo.

[3] The Office of the Principal Legal Advisor (OPLA) was formerly known as the Office of Chief Counsel (OCC).

[4] The Doyle memo operationalizes DHS's final enforcement priorities set forth in the September 30, 2021 memorandum from DHS Secretary Alejandro Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law* (Mayorkas memo). The Doyle memo applies only to OPLA, while the priorities set forth in the Mayorkas memo apply to all DHS components, including ICE Enforcement and Removal Operations (ICE-ERO), Customs and Border Protection (CBP), and United States Citizenship and Immigration Services (USCIS).

[5] *See* John D. Trasviña, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities*, May 27, 2021. Though the memo is dated May 27, 2021, OPLA released it to the public on June 4, 2021.

enforcement and removal. The Doyle memo states that its main goal in exercising PD is to "preserve limited government resources" and help alleviate the court backlogs, while achieving "just and fair outcomes" and advancing DHS's mission. The guidance in the Doyle memo covers various decisions made by OPLA attorneys in removal proceedings, particularly regarding filing Notices to Appear (NTAs), dismissal of proceedings, administrative closure, stipulations to issues and relief, continuances, appeals, joint motions to reopen, bond proceedings, and waiving appearances at hearings. Note that the OPLA guidance does not constitute any change in immigration law; it clarifies the use of existing discretionary authority. Though the guidance encourages OPLA attorneys to exercise PD for individuals who are not deemed enforcement priorities (nonpriorities), OPLA attorneys continue to have broad discretion to make their own assessments and pursue removal. This practice advisory provides key information on the Doyle memo and practice tips for advocating for PD with OPLA.

The Mayorkas enforcement priorities memo has been challenged in federal court and is currently being litigated. On June 10, 2022, Judge Drew B. Tipton of the U.S. District Court for the Southern District of Texas vacated (cancelled) the Mayorkas Memo, and at the time of this writing, the court's decision is scheduled to take effect on June 24, 2022. Though the court's decision does not mention the Doyle memo, the Mayorkas memo is referenced several times throughout the Doyle memo. The Biden administration has appealed the court's decision to the Fifth Circuit Court of Appeals and has sought an emergency stay of the vacatur to allow the Mayorkas memo to remain in effect. At this time, it is unclear how the litigation will affect OPLA's exercise of PD. If the Fifth Circuit stays the District Court's decision, the Doyle memo will remain in effect for the duration of the stay. PLA Doyle stated during the 2022 American Immigration Lawyers' Association (AILA) National Conference that if the District Court's vacatur takes effect, PD will continue in some form, but may "look different," and the underlying guidelines may change. Practitioners should continue filing PD requests under the Doyle memo until OPLA provides further guidance. Check the ILRC and NIPNLG websites for updates on the litigation, as well as NIPNLG's practice alert on the District Court's decision.

B. DHS Enforcement Priorities

The Doyle memo discusses how OPLA should exercise PD in removal proceedings in accordance with the three immigration enforcement priorities announced in Mayorkas memo issued on September 30, 2021.[6] Those enforcement priorities are discussed in further detail in our previous practice advisory[7] and described below:

"***National Security"***: Individuals who have engaged in or are suspected of terrorism or espionage, or who otherwise pose a danger to national security.

[6] The Mayorkas Memo replaced the *Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* issued on January 20, 2021 by then-Acting Secretary David Pekoske, and the *Interim Guidance: Civil Immigration Enforcement and Removal Priorities*, issued on February 18, 2021 by Acting ICE Director Tae D. Johnson.

[7] IDP-ILRC-NIPNLG, *Practice Advisory for Immigration Advocates: The Biden Administration's Final Enforcement Priorities*, (Nov. 2022).

The Doyle memo adds that "terrorism" and "espionage" should be applied consistently with the Immigration and Nationality Act (INA) (e.g., INA § 212(a)(3)(B)(iii)-(iv)), and that individuals engaged in or suspected of "serious human rights violations" will also be considered national security priorities.

"***Border Security"***: Individuals apprehended at the border or ports of entry while attempting to enter unlawfully,[8] or who were apprehended in the United States after entering unlawfully after November 1, 2020.[9]

The Doyle memo adds that individuals who are knowingly involved in smuggling, especially where the smuggled individuals were abused or mistreated, and those who engaged in "serious immigrant benefit fraud"[10] could be considered border security priorities. Importantly, the Doyle memo states that the same mitigating factors applicable to public safety determinations (discussed below) should be considered in the border security determination. For example, if someone appears to be a priority due to an unlawful entry to the United States after November 1, 2020, practitioners may still be able to demonstrate to OPLA that the person should be a nonpriority because mitigating factors are present.

"***Public Safety"***: Individuals who pose a *current* threat to public safety, typically because of "serious criminal conduct."

In determining whether a noncitizen "poses a current threat to public safety," all relevant factors must be considered in the "totality of the circumstances," and not all factors must be weighed equally.[11] In addition to the factors listed in the Mayorkas memo, the Doyle memo iterates additional "mitigating" and "aggravating" factors for OPLA's consideration, while clearly stating that the list of factors is non-exhaustive, and any other relevant factors should also be considered. The factors discussed in the Mayorkas and Doyle memos include:

[8] The Doyle memo clarifies that the border security category applies to individuals who were apprehended while attempting to enter unlawfully *after November 1, 2020*.
[9] OPLA may not know about a respondent's manner of entry and, because those who present themselves at a port of entry are "considered different from priority unlawful entry cases," practitioners should inform OPLA if a client appeared at a port of entry rather attempting to enter without inspection. *See* American Immigration Lawyers Association (AILA), AILA Liaison Meeting with ICE (4/7/22), AILA Doc. 22032504, aila.org.
[10] Examples of serious immigration benefit fraud cited in the memo include: marriage fraud, document fraud, frivolous asylum filings, certain false claims to U.S. citizenship, and document mill forgers. However, using fraudulent documents to flee persecution or for employment, and false statements made by minors, would generally *not* be considered serious immigrant benefit fraud.
[11] Practitioners should use this language to argue that certain mitigating factors clearly outweigh any negative factors, such as criminal history.

Mitigating Factors	**Aggravating Factors**
• Age (if a person is young or elderly) • Longtime presence in the United States • Mental health condition that contributed to the person committing the conduct (like schizophrenia, post traumatic stress disorder, cognitive disabilities, or other mental illness) • Mental or physical health condition that requires care or treatment • Being a victim, witness, or other party in legal proceedings • Impact of the person's removal on family members in the United States, such as loss of provider or caregiver • Eligibility for humanitarian protections and immigration relief • Military or public service of the person or their immediate family members (parents, spouse, or children) • Time since the offense and evidence of rehabilitation • Conviction was expunged or vacated • A person's exercise of workplace or tenant rights, or service as a witness in a labor or housing dispute • Person is pregnant, postpartum, or nursing* • Person is lawful permanent resident (LPR) especially if longtime LPR or LPR since young age* • Underlying arrest seems discriminatory or made in retaliation for asserting one's rights[12]* • Crime has since been decriminalized* • Cooperation as witness or informant, or other assistance sought from/provided to law enforcement, including labor and civil rights law enforcement agencies* *Additional factors listed in the Doyle memo	• Seriousness of the crime • Degree of harm the criminal conduct caused • "Sophistication" of the crime (i.e., the amount of planning, intent, and resources that went into committing the crime, as well as the number of people involved) • Use of, or threat to use, a firearm or dangerous weapon • Serious prior criminal record • Victim of crime is child or particularly vulnerable* • Crime involved violence or of sexual nature* • Gang-related (as defined under 18 U.S.C. § 521(a)) criminal conduct, BUT inclusion in a gang database is not conclusive of gang membership* • Crime resulted in harm to public health or pandemic response efforts* *Additional factors listed in the Doyle memo

[12] This factor can be used to show that an arrest was a result of racial profiling or overpolicing of Black and brown neighborhoods. Practitioners may demonstrate this by providing documentary evidence like reports regarding policing and demographics in the state, county, or city.

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Importantly, the memo states that a person's criminal history, regardless of severity, is not the only indicator of whether they pose a current threat to public safety. However, this standard can cut both ways for clients; it can be used to show that despite the existence of criminal history, a person is a nonpriority, but OPLA can also deem a person a priority who has never been arrested, prosecuted, or convicted of a crime (for example, if there is evidence that the person is involved in gang activities).[13] Practitioners should continue to vehemently argue that arrests only, without conviction, should never be used as a negative factor in the public safety determination.

NOTE ON SURVIVORS AND SIJS APPLICANTS: Consistent with the ICE memorandum "Using a Victim-Centered Approach with Noncitizen Crime Victims,"[14] the Doyle memo instructs OPLA attorneys at footnote 8 to give particular consideration to victims of crime when determining if the person is a public safety threat or a border security priority, and individuals with pending applications for survivor-based benefits (U-visa, T-visa, VAWA, and Special Immigrant Juvenile Status (SIJS)) who appear prima facie eligible for such relief should be deemed nonpriorities until USCIS adjudicates their applications.

C. OPLA Priority Designations

Under the Doyle memo, OPLA attorneys are directed to make a priority or nonpriority designation for each case upon first encountering it, which is generally upon review of an NTA[15] or when there is an upcoming hearing. OPLA should consider PD for all nonpriority cases, though some forms of PD are also available for priority cases, as discussed later.

In general, OPLA will review cases that were filed with the court before November 29, 2021 (the effective date of the Mayorkas memo) to make priority designations. For cases initiated on or after November 29, 2021, OPLA will defer to priority designations made by the DHS component—ICE-ERO, USCIS, CBP—that issued the NTA. To designate a respondent a priority, OPLA attorneys must get approval from their Chief Counsel or Deputy Chief Counsel, unless the person is a border priority due to unlawful entry or attempted entry after November 1, 2020.

If OPLA has designated a case a priority, practitioners can seek re-designation for their clients by presenting new information or evidence. Re-designation requires approval from Chief Counsel.

Although discretion may be exercised at any point in removal proceedings, OPLA attorneys are encouraged to exercise PD at the earliest point possible. Even if OPLA does not agree that a particular case merits PD at one stage, reconsideration may be warranted if additional

[13] However, the memo states that inclusion in gang databases is not conclusive evidence of gang membership.
[14] ICE Directive 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021).
[15] NTAs are most commonly issued by ICE-ERO, CBP, or USCIS. *See* 8 CFR § 239.1(a) for the full list of DHS officers who may issue an NTA.

information comes to light or circumstances change, so practitioners should continuously evaluate the appropriateness of seeking PD reconsideration throughout the case.

PRACTICE TIP: If OPLA previously denied a PD request prior to April 25, 2022 (the effective date of the Doyle memo), practitioners may seek PD anew under the Doyle guidance. OPLA will review currently pending PD requests under the Doyle guidance, regardless of when the request was submitted.

II. Types of Prosecutorial Discretion under the Doyle Memo

OPLA attorneys are authorized to exercise PD at various stages in a removal case, including to determine whether to file or cancel an NTA; whether to agree to, or unilaterally move to, dismiss proceedings; whether to agree to administrative closure; stipulations to certain issues or grants of relief; continuances; joint motions and reopen; and bond (or other conditions of release); whether to pursue appeal; and whether to waive OPLA's appearance at certain hearings.

A. *NTAs*

The Doyle memo emphasizes that OPLA attorneys should exercise PD at all stages of proceedings. As discussed above, OPLA will presume that NTAs issued on or after November 29, 2021, the effective date of the Mayorkas memo, have been issued subject to DHS's priorities. However, OPLA is tasked with considering PD at various stages of proceedings and at the earliest moment practicable, so if practitioners have an argument for why the NTA should not have been issued, or if facts have changed since issuance of the NTA, they can contact OPLA to request that OPLA not file the NTA. If OPLA agrees to not file an NTA, OPLA will document the reasons for not filing the NTA and ask ICE-ERO to cancel the NTA and inform the noncitizen of the cancellation.

PRACTICE TIP: ICE-ERO often issues NTAs based solely on criminal or immigration history, without consideration of mitigating factors. Even if the NTA was issued on or after November 29, 2021, if it has not been filed with the court yet, practitioners may present arguments and evidence to OPLA demonstrating why their client is not an enforcement priority and request non-filing of the NTA.

In cases in which a nonpriority client has been served an NTA that OPLA has not filed with the court, practitioners may affirmatively reach out to OPLA asking them to not file the NTA. Practitioners providing community education should inform immigrant communities of the possibility that OPLA may choose to not file an NTA and that ICE-ERO may reach out to them to inform them of this development, assuming that their contact information is up to date. Often NTAs are not filed with or processed by the court immediately, which can lead to long delays before the court enters the NTA into their system. Respondents should never assume that because a certain time has passed, OPLA has chosen not to file the NTA. To avoid an *in absentia* removal order, respondents and practitioners should continue to monitor cases via the Executive Office for Immigration Review's (EOIR) 1-800 phone hotline or online system.

B. *Dismissal of Proceedings*

OPLA has made clear that its strongly preferred form of PD is moving to dismiss proceedings, apparently in an effort to decrease the immigration court backlog, and thereby preserve OPLA resources.[16] Dismissal of proceedings means that the current removal proceedings are over and the immigration court is divested of jurisdiction over the case. However, OPLA has been moving to dismiss cases without prejudice to preserve DHS's ability to initiate new removal proceedings in the future by serving a new NTA.

While dismissal may be a good result for noncitizens who have no eligibility for relief, weak applications for relief before the immigration court, applications for relief before USCIS, or whose cases are docketed before immigration judges (IJs) who deny most applications for relief,[17] it is critical that practitioners discuss the pros and cons of accepting dismissal with their clients. Practitioners should discuss this possibility with their clients as early as possible, particularly because OPLA has been making unilateral motions to which the respondent must respond within ten days. For many noncitizens, the certainty of dismissal may be preferable to risking a hearing where they may be ordered removed. On the other hand, dismissal means that the noncitizen may be in a permanent state of limbo, with no application pending, and remaining undocumented indefinitely.[18] See below for further discussion of various considerations.

> *Example:* Marta crossed the border in 2017 with her daughter, Elsa. They passed a credible fear interview and have been in removal proceedings, awaiting a merits hearing since then. In the meanwhile, Elsa has filed for SIJS and has an approved SIJS petition but will likely have to wait several years for her priority date to be current. Marta and Elsa filed for asylum with the immigration court, based on general fear of gangs in their country, but have not experienced any direct harm. In this case Marta and Elsa may want dismissal which will allow Elsa to adjust status with USCIS when her priority date is current. Elsa will also be able to obtain an employment authorization document (EAD) based on her approved SIJS petition. Dismissal will mean that Marta does not have to go forward on a likely weak asylum application that may lead to a removal order against her and her daughter. On the other hand, if they accept dismissal, they will lose their asylum-based employment authorization, and Marta may be left in limbo without another form of relief to pursue or another avenue to seek an EAD.

[16] *See* AILA, AILA Liaison Meeting with ICE (Apr. 7, 2022), AILA Doc. 22032504, aila.org.
[17] *See* Innovation Law Lab and Southern Poverty Law Center, *The Attorney General's Judges: How The U.S. Immigration Courts Became a Deportation Tool*, at 25, 2019. (Some "attorneys report that at least one judge simply issues removal orders without holding merits hearings, sometimes contacting the attorney the night before to say that there is no need to come to court as he plans to deny the case.")
[18] Practitioners should also consider that having an application pending for relief will generally stop accrual of unlawful presence. Dismissal of proceedings and the application will mean that the noncitizen will begin (or resume) accruing unlawful presence.

PRACTICE TIP: OPLA is likely to agree to dismissal in cases where noncitizens have applications pending with USCIS, especially survivor-based applications such as U-visa, T-visa, VAWA, and SIJS applications in light of footnote 8 of the Doyle memo. Although OPLA should generally deem pending U-visa/T-visa/VAWA/SIJS cases nonpriorities, practitioners should highlight this footnote in any request for PD they make on behalf of noncitizens in these categories.

i. Unilateral motions to dismiss

Under the Doyle memo, individual OPLA attorneys are authorized to move unilaterally to dismiss proceedings.[19] Although the Immigration Court Practice Manual (ICPM) specifies that counsel should seek opposing counsel's position on a motion before filing the motion,[20] the Doyle memo states that "OPLA attorneys are *not* required to obtain the noncitizen's concurrence with unilateral DHS motions to remove nonpriority cases from the immigration court dockets filed pursuant to this memorandum" (emphasis in original). This decision is rooted in OPLA's desire to clear cases from its docket with the least expenditure of resources.[21]

In many instances, respondents will not want their cases dismissed. Some respondents are eager to pursue cancellation of removal in court, which may be their only avenue to lawful permanent residence. Others may be desperate to have their asylum cases heard if they have family members in harm's way abroad. Respondents who want to have their cases heard in immigration court should be prepared to file an opposition to OPLA's motion to dismiss. For a template opposition, see NIPNLG's Template Opposition to DHS Unilateral Motion to Dismiss.[22]

Under the ICPM, opposing counsel has ten days from the date of the motion to file a response.[23] Some practitioners have reported that IJs have dismissed cases before the ten-day response period has elapsed. If that happens, practitioners should file a motion to reconsider before the IJ, and if the judge does not adjudicate the motion before the appeal deadline has run, appeal the ruling to the Board of Immigration Appeals (BIA). At the same time, practitioners should contact the local Assistant Chief Immigration Judge[24] and complain that the IJ did not follow proper procedures. According to stakeholder calls, EOIR has issued a reminder to IJs to wait until the ten-day response period has passed before issuing a decision on the motion to dismiss. In cases where respondent's counsel is concerned that OPLA will likely move to dismiss and the respondent wants to move forward in court, counsel should consider reaching out to OPLA at the earliest opportunity to explain why they oppose dismissal, especially in cases where the respondent has a strong claim for relief which can only be pursued in immigration court, such as

[19] NIPNLG has been tracking trends with unilateral motions to dismiss. Please respond to this survey to report experiences with DHS moving unilaterally to dismiss.
[20] ICPM, Chapter II.5.2(i).
[21] The footnote says, "Obtaining concurrence of the noncitizen or their legal representative prior to filing such a motion would, in many cases, require the expenditure of more effort than the preparation, filing, and service of the motion itself," clearly signaling OPLA's goal to clear as many cases as possible with as little effort as possible.
[22] NIPNLG, Template Opposition to DHS Unilateral Motion to Dismiss (May 3, 2022).
[23] ICPM, Appendix C, Deadlines.
[24] Department of Justice (DOJ), Assistant Chief Immigration Judge (ACIJ) Assignments.

non-LPR cancellation of removal. In addition to stating that counsel should make a good faith effort to ascertain opposing counsel's position, the ICPM also says that counsel should state that position in the motion, so, even if OPLA claims to not have the resources to contact opposing counsel, it has no similar argument to leave out the stated position of respondent's counsel.[25] Under the Doyle memo OPLA is instructed not to move unilaterally to dismiss certain case types where there is a regulatory right to be placed in removal proceedings, including asylum cases referred by the asylum office and I-751 petitions denied by USCIS.

ii. Employment authorization eligibility after case dismissal

Many noncitizens who are awaiting a merits hearing in immigration court will have applications pending with the immigration court for asylum, cancellation of removal, or adjustment of status and will have an EAD based on the pending application for relief. If the removal proceedings are dismissed, the application will also be dismissed, leaving noncitizens without an application pending that gives rise to EAD eligibility. Thus, practitioners should carefully explain to clients the likely effect that dismissal will have on their ability to obtain or maintain a valid EAD.

iii. Special considerations for asylum seekers

Individuals who are awaiting a merits hearing in immigration court and who have asylum applications pending with the immigration court may wish to have their case dismissed so that they can pursue asylum affirmatively. For many asylum seekers, the non-adversarial interview process before an asylum officer may be preferable and more appropriate than the adversarial court process. Moreover, if an asylum seeker accepts dismissal and is not successful before the asylum office, the case would, again, be referred to immigration court,[26] giving the asylum seeker two opportunities for adjudication rather than one. Before accepting dismissal in this scenario, however, counsel should consider several issues that remain unanswered by USCIS.[27]

First, it is unclear how USCIS will interpret the one year filing deadline in these cases. Pursuant to 8 CFR § 208.4(a)(5)(iv), there is an extraordinary circumstances exception to the one year filing deadline for individuals who maintained lawful status. Individuals with asylum applications pending are considered to be in a period of authorized stay, which, according to the Asylum Office Lesson Plan on the One Year Filing Deadline,[28] is relevant to an extraordinary circumstances exception. The Lesson Plan concludes that those in a period of authorized stay

[25] ICPM, Chapter II.5.2(i).
[26] 8 CFR § 208.14(c)(1).
[27] On May 18, 2022, the AILA Asylum Committee sent a letter to USCIS laying out many of the questions posed here. As of the date of this practice advisory, USCIS has not responded to the letter. *See* AILA Asylum & Refugee Committee Requests Guidance from DHS on Asylum Applications Processing after the Doyle Memo, AILA Doc. 2205190, aila.org.
[28] USCIS, One Year Filing Deadline Lesson Plan (May 6, 2013). Note, this publicly available asylum officer lesson plan is dated 2013. It is not clear whether USCIS has updated these materials or whether this lesson plan is still in use.

should be considered for an extraordinary circumstances exception.[29] As with any exception to the one year filing deadline, applicants would need to refile within a reasonable period of time.[30]

Second, it is unclear whether these applications will be seen as newly filed and therefore subject to the Last In, First Out (LIFO) scheduling policy. According to the USCIS website, under LIFO, the first priority for scheduling asylum interviews is for rescheduled interviews, and the next priority is for cases pending fewer than 21 days; all other applications fall into the third scheduling priority.[31] Therefore, if USCIS views these applications as newly filed, they may be scheduled very quickly for interviews. If the application is not granted by the asylum office, the noncitizen may have their case referred back to immigration court within the course of a few months. If the cases are not subject to LIFO, asylum seekers may be trading one backlog for another, as the asylum office currently has cases that have been pending for several years.[32]

Third, if USCIS considers these applications newly filed, asylum seekers who have had their applications pending for years in immigration court may need to wait 180 days before they become eligible for a new asylum-pending EAD. To date, USCIS has not given any guidance on the EAD implications for asylum seekers whose cases have been dismissed by EOIR.[33]

Fourth, if USCIS considers the applications newly filed, children who were dependents on their parent's asylum application when originally filed may no longer be considered dependents if they have turned 21 while the case was pending before the immigration court. If the child does not have an independent claim for asylum, practitioners may need to advise against accepting dismissal.

Finally, under footnote 22 of the Doyle memo, OPLA should not move unilaterally to dismiss asylum cases that have been referred to immigration court following an interview at the asylum office. Nonetheless, it may be possible for respondent's counsel to move jointly with DHS to dismiss such cases. It is not clear how the asylum office will adjudicate these applications if they

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[29] *Id.* at 19-20 ("An alien with a pending application, who is not in any lawful status, may be considered to be an alien whose period of stay is authorized by the Attorney General. The types of 'stay authorized by the Attorney General' that the asylum officer might encounter could include pending applications for adjustment of status. Such applicants would not be analyzed specifically under the 'lawful status' exception to the one-year filing deadline. However, insofar as the 'extraordinary circumstances' exception is not limited to the precise scenarios outlined, the Asylum Officer should consider the totality of the circumstances when determining whether an applicant with a pending application can establish an exception to the requirement that the application be filed within one year of last arrival.")

[30] 8 CFR § 208.4(a)(5).

[31] USCIS, Affirmative Asylum Interview Scheduling, last revised May 31, 2022.

[32] As of July 2021, half of the cases in the Arlington asylum office backlog had been pending for more than three years. *See* Letter to Rep. Gerald Connolly (Jul. 29, 2021). At local stakeholder meetings, the New York and New Jersey Asylum Offices have indicated that they have cases pending since 2016 in their backlogs.

[33] Pursuant to 8 CFR § 208.7(b)(2), if an asylum application is denied by an IJ, the authorized employment ends when the EAD expires. The regulations do not address a withdrawn asylum application, but it is likely DHS would employ the same interpretation, and find that work remains authorized until the expiration date of the existing EAD. Nonetheless, there will likely be a gap in authorized employment for many asylum seekers with an EAD who accept dismissal of the removal proceedings.

have already conducted an interview. In the Affirmative Asylum Procedures Manual (AAPM), there is a discussion of asylum seekers refiling an asylum application after their cases have been denied by the asylum office.[34] In that context, asylum seekers must generally demonstrate changed circumstances from the previous adjudication of the asylum application. The AAPM also explains that, if possible, the applicant should be interviewed by the same officer who conducted the initial interview or, if that is not possible, should be conducted by an officer who is supervised by the same supervising asylum officer.[35] It is too early to tell how the asylum offices will adjudicate cases that were previously referred to immigration court and have now been refiled after dismissal by the immigration court.

PRACTICE TIP: Where the asylum case was initially filed with USCIS and then referred to the immigration court, some practitioners have had success requesting that OPLA agree to dismiss proceedings **and remand** the case back to the asylum office. By remanding, the application remains pending, which helps to avoid issues regarding the one year filing deadline and maintaining EAD eligibility. Because OPLA does not have jurisdiction to remand an asylum case to the USCIS, the court order must include the remand language. This is a new strategy, and it remains unclear if it will be successful on a national scale, as it is ultimately up to the local asylum office to determine how to adjudicate such cases.

iv. Withholding-only proceedings

In cases where the respondent is in "withholding-only" proceedings pursuant to a reinstated removal order, practitioners should generally not accept dismissal of the removal proceedings,[36] because the respondents in those cases already have a removal order against them. Pursuant to 8 CFR § 208.31, noncitizens with reinstated removal orders will be referred for "withholding-only" proceedings after they pass a reasonable fear interview, meaning the reinstated order cannot be executed until EOIR renders a decision on the applications for withholding and/or Convention Against Torture (CAT) protection. Dismissing the withholding-only proceedings means that the noncitizen still has a reinstated removal order outstanding, but no longer has the guarantee of a day in court before the order can be executed. Counsel can try negotiating with OPLA to rescind the prior removal order, but these orders are often issued by CBP or ICE-ERO, so OPLA will likely advise counsel to contact those agency components.

[34] While INA § 208(a)(2)(C) bars asylum seekers from filing for asylum after an asylum application has been previously denied, the regulations clarify that this prohibition only applies to asylum applications that have been denied by an IJ or the BIA. 8 CFR § 208.4(a)(3). Even so, the AAPM does permit a subsequent asylum application if there were changed circumstances. AAPM at 82. The AAPM addresses the situation where an asylum seeker was in lawful status, received a denial from the asylum office, and then refiles. The AAPM does not appear to contemplate the new situation created by the Doyle memo where asylum seekers may refile after an affirmative interview that resulted in referral of the case rather than dismissal. Note, the publicly available version of the AAPM is dated 2016 and says "Draft" on it, so it is unclear whether asylum offices are following the procedures in this version. USCIS, AAPM, (May 17, 2016).

[35] *Id.* at 83.

[36] Practitioners should also note that OPLA may lack authority under 8 CFR § 239.2 to unilaterally move to dismiss withholding-only proceedings because there is no NTA in such proceedings.

Example: Joao entered the United States in 2018, was put into expedited removal, and removed to Brazil. He returned in 2019 and his removal order was reinstated when he was apprehended shortly after crossing the border. He is LGBT, though he never suffered physical harm in Brazil, and after passing a reasonable fear interview, he was placed in withholding-only proceedings. OPLA has offered dismissal of the proceedings but will not take any steps to vacate the prior removal order. Although Joao's attorney is uncertain of the strength of his withholding case, there is little benefit to accepting dismissal of the proceedings because that would leave Joao with a removal order in place. Joao might be eligible for an EAD if he has an ICE-ERO order of supervision after the case is dismissed, but he would also be in a vulnerable position if DHS enforcement priorities change.

PRACTICE TIP: If a respondent has strong facts to support a grant of withholding of removal under INA § 241(b)(3) or protection under CAT, respondent's counsel should advocate with OPLA to agree to a grant of withholding or CAT protection. If OPLA will not agree to a grant of protection, and the respondent is reluctant to go forward with a hearing, respondent's counsel may seek administrative closure. Although OPLA has stated its preference for dismissal over administrative closure, OPLA may agree that a respondent in withholding-only proceedings is a good candidate for administrative closure given that dismissal could lead to the respondent's removal with no further review of their stated fear of persecution or torture.

v. Unrepresented respondents

The Doyle memo contains different instructions for when OPLA may seek dismissal in the context of unrepresented respondents. If the respondent does not have counsel, OPLA should advise the IJ that the respondent is not an enforcement priority, explain to the judge why OPLA believes it is appropriate to dismiss the proceedings, and consent to a continuance to allow the respondent to seek the advice of counsel. However, if the respondent is unable to secure counsel or does not agree to dismissal, OPLA may still move forward with a written or oral motion to dismiss proceedings.

Practitioners consulting with a *pro se* respondent or providing community education should discuss the meaning and impact of dismissal as well as other available forms of PD so that *pro se* respondents may be better equipped to respond orally to OPLA's motion to dismiss at the next hearing.[37]

C. *Administrative Closure*

The Doyle memo emphasizes that OPLA "strongly prefers dismissal" over administrative closure. Nonetheless, the memo includes administrative closure as a PD option in limited circumstances for nonpriority cases, such as when the respondent would be unavailable to attend court for an extended period of time due to a medical condition or incarceration. Because administratively closed proceedings are still pending (but inactive) before the court, the respondent's application(s) for relief remain pending as well, allowing them to maintain EAD

[37] OPLA has issued its own public-facing guidance on how to request PD and a sample *pro se* PD request for dismissal of proceedings.

eligibility based on the application. See section II.B. above. Therefore, many respondents may prefer administrative closure over dismissal. Unfortunately, OPLA has indicated that it is generally unwilling to agree to administrative closure solely so the respondent can maintain EAD eligibility. However, in an April stakeholder engagement meeting with PLA Doyle and Dallas Chief Counsel Paul Hunker, OPLA Dallas suggested that administrative closure may be appropriate if there are compelling circumstances tied to the need to maintain EAD eligibility, such as if the respondent is a single parent who is going to lose their insurance coverage without an EAD and has a child with medical needs relying on that insurance.

PRACTICE TIP: In *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (AG 2021), the Attorney General restored IJs' authority to grant administrative closure in removal proceedings.[38] Citing to *Matter of Avetisyan*, the Attorney General noted in a footnote the factors that the IJ should consider in determining whether to grant administrative closure over the objection of one of the parties.[39] Thus, even if OPLA does not agree to administrative closure, the respondent may still move for administrative closure over OPLA's objection.

D. *Stipulations to Issues and Relief*

The Doyle memo clearly authorizes and "encourage[s]" OPLA attorneys to stipulate to relief in cases where they believe the respondent has met their burden to prove eligibility and merits favorable discretion (in cases that have a discretionary element). Since the Doyle memo has been in effect, practitioners have pushed OPLA to stipulate to relief in strong cases that are well-documented, arguing that such stipulations lead to just results and, in some contexts, such as asylum or adjustment of status, will preserve government resources, rather than forcing USCIS to adjudicate relief after OPLA has already expended resources reviewing the file. Despite the strong language in the Doyle memo, during stakeholder calls, OPLA has emphasized that its preferred method of PD is dismissal of cases.[40] Nonetheless, practitioners should continue to push OPLA to stipulate to relief, or, at a minimum, to stipulate to issues before individual hearings, such as past persecution for asylum cases and ten years' continuous presence for non-LPR cancellation cases. Furthermore, OPLA can stipulate to mandatory forms of relief such as withholding of removal, as discussed above, or CAT protection for both priority and nonpriority

[38] Note that the Sixth Circuit previously held that IJs do not have general authority to administratively close cases. *See Hernandez-Serrano v. Barr*, 981 F.3d 459 (6th Cir. 2020), though it also found that IJs could do so for the limited purpose of provisional waivers. *Garcia-DeLeon v. Garland*, 999 F.3d 986 (6th Cir. 2021). Both of these decisions pre-date *Cruz-Valdez*, however. *See also* David Neal, EOIR, *Administrative Closure*, DM-22-03 (Nov. 22, 2021). ("For cases arising in the Sixth Circuit, adjudicators must determine to what extent administrative closure is permitted given that court's case law, and they must handle issues involving administrative closure accordingly.")

[39] These factors are: "(1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings . . . when the case is recalendared before the Immigration Judge or the appeal is reinstated before the Board." *Id.* at 327 n.1, citing *Matter of Avetisyan*, 25 I&N Dec. 688, 696 (BIA 2012).

[40] *See* AILA, ICE/EOIR Committee Takeaways from ICE/OPLA Spring Liaison Engagement May 4, 2022, AILA Doc. 22032504, aila.org.

respondents. Practitioners should be specific about what type of stipulation they are seeking when making this type of PD request.

E. *Continuances*

OPLA attorneys will assess whether "good cause" exists to support a continuance and, if "good cause" exists, will agree to a continuance in nonpriority and priority cases alike. However, the Doyle memo instructs OPLA attorneys to seek "more durable and efficient forms" of PD instead of repeated continuances to allow USCIS and other agencies to adjudicate applications or petitions. In those circumstances, OPLA will likely push for dismissal.

Practitioners representing clients who would benefit from a continuance should ensure that they meet the regulatory "good cause shown" standard as interpreted by EOIR.[41] While the Doyle memo references *Matter of L-A-B-R-*, 27 I&N Dec. 405 (AG 2018), other BIA precedent exists on the "good cause shown" standard.[42] Whenever possible, practitioners should file written motions to continue containing arguments in support of "good cause shown" to allow the IJ and OPLA time to fully assess the arguments.[43] In anticipation of efficiency arguments from OPLA, practitioners should consider discussing in the motion why a continuance comports with OPLA's efficiency goals or why efficiency goals are irrelevant or contrary to the client's interests.

F. *Pursuing Appeal*

Under the Doyle memo, OPLA attorneys may waive appeal or withdraw an already-filed appeal. The Doyle memo informs OPLA attorneys that they retain discretion over the decision to appeal a merits or bond decision while encouraging them to focus on priority cases. However, if a nonpriority case presents a "compelling basis" for appeal, such as "the need to seek clarity on an important legal issue or correct systematic legal errors," OPLA attorneys may pursue an appeal. In deciding how to proceed, OPLA attorneys should weigh any "compelling basis" for appeal against "compelling discretionary factors" such as the respondent's detention status, the impact of detention on the respondent, the government resources expended in appealing a detained matter, and if the IJ granted asylum or related protection in a detained case. Additionally, OPLA attorneys may reserve appeal to decide, based on the IJ's decision and overall factors, whether to actually pursue the appeal. Therefore, practitioners should not interpret an OPLA attorney reserving appeal as an indication that the OPLA has declined or will ultimately decline to exercise PD.

If the client is considered a priority and wins relief before the IJ but OPLA reserves appeal, practitioners should consider submitting a PD request in writing asking OPLA not to file an appeal. The written request should follow the general guidelines provided by the Doyle memo

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[41] 8 CFR § 1003.29

[42] *See Matter of L-A-B-R-*, 27 I&N Dec. 405 (AG 2018) (collateral relief context); *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009); *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009) (employment-based visa context); *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012) (U-visa context).

[43] For guidance on how to establish "good cause shown" in the various continuance contexts, *see* Catholic Legal Immigration Network Inc.'s (CLINIC) Practice Advisory: *Matter of L-A-B-R-*, 27 I&N Dec. 405 (AG 2018).

and the tips in this practice advisory. Practitioners may also need to argue that no "compelling basis" for appeal exists and expressly raise any significant discretionary factors.

For detained cases, practitioners should discuss in the PD request if the client is likely to remain detained during the appellate process (e.g., subject to mandatory detention), how detention will negatively impact the particular client (e.g., hardship to family members, effects on mental and physical health, etc.), and a cost assessment of how much DHS will likely expend to detain the client while the BIA decides the case.[44] Finally, practitioners who succeed on an asylum or related protection claim for a detained client should immediately confirm with the OPLA attorney that OPLA will notify ICE-ERO of the IJ's decision.[45] Pursuant to ICE-ERO policy, ICE-ERO should favor release of noncitizens who have been granted protection relief, "absent exceptional concerns such as national security issues or danger to the community and absent any requirement under law to detain."[46]

G. *Joint Motions to Reopen*

The Doyle memo encourages OPLA attorneys to join motions to reopen and dismiss in nonpriority cases and provides parameters on when to join motions to reopen. Where the respondent proves eligibility for permanent or temporary relief outside of immigration court, or reopening would restore the respondent's LPR status, OPLA attorneys are encouraged to agree to a joint motion to reopen and dismiss proceedings. In general, OPLA attorneys are discouraged from agreeing to reopen cases if reopening would recalendar the case and add to the immigration court backlogs. However, OPLA may agree to reopen proceedings where 1) the noncitizen is newly eligible for relief before the immigration court that has not been considered, and 2) in completed cases where due process was not availed. PLA Doyle has also stated during an unofficial stakeholder call that there is no general rule for or against joining certain motions and that OPLA will consider these on a case-by-case basis and consistent with local guidance.

A request for a joint motion to reopen and dismiss to pursue relief outside of immigration court should include documentary evidence proving eligibility for the relief. When seeking reopening in order to pursue relief before the immigration court, practitioners should consider including the applications for relief in addition to the documentary evidence. Requests to join a motion to reopen and dismiss to restore LPR status will likely be based on post-conviction relief to vacate a prior deportable conviction, or a change in law, so practitioners should include evidence clearly establishing the basis to restore LPR status and arguments that the client is a nonpriority. Finally, in cases where there were due process violations, such as lack of notice, ineffective assistance of counsel, or interpretation issues, practitioners should include an explanation of the alleged due

[44] According to Lutheran Immigration and Refugee Service (LIRS), the cost of ICE adult detention is approximately $134 per person, per day.
[45] The Doyle memo cites to Tae D. Johnson, Acting Director, ICE, REMINDER: Detention Policy Where an Immigration Judge has Granted Asylum, Withholding of Removal, or Convention Against Torture Protection, and DHS has Appealed (June 7, 2021); however, that document is not publicly available. The Doyle memo does note though that that policy cites to ICE Directive 16004.1: Detention Policy Where an Immigration Judge has Granted Asylum and ICE has Appealed (Feb. 9, 2004).
[46] ICE Directive 16004.1: Detention Policy Where an Immigration Judge has Granted Asylum and ICE has Appealed (Feb. 9, 2004).

process violations as well as any documentary evidence in support of the request, including a declaration from the respondent.

H. *Bond Proceedings*

Once ICE-ERO has made a custody determination, OPLA is expected to defer to and defend that custody determination while also exercising discretion to review custody determinations in both priority and nonpriority cases when new, relevant information arises. If practitioners present new evidence that credibly mitigates flight risk or dangerousness concerns, OPLA may stipulate to a bond amount or to other conditions of release in consultation with ICE-ERO, or may waive appeal of an IJ's custody redetermination assuming the respondent is not subject to mandatory detention and not in withholding-only proceedings.[47]

Practitioners who wish to seek PD in custody re-determinations should consider filing a written PD request that includes the new, relevant information and evidence that mitigates flight risk or dangerousness concerns and states the type of PD sought. For example, if the client can pay a lower bond amount, include that amount in the request, or if the client is willing to be subject to an alternative to detention, note that as well. Discuss in the PD request how the new, relevant facts mitigate flight risk or dangerousness concerns and why it is likely that the client will appear at a future proceeding if released.[48] Practitioners may also consider conferring with the OPLA attorney immediately prior to the hearing.

PRACTICE TIP: ICE-ERO often makes initial custody determinations based solely on criminal or immigration history, without considering mitigating factors. Therefore, practitioners preparing for a bond hearing can often present "new," relevant information, even if circumstances have not changed, and request stipulation to bond or other conditions of release.

I. *Assigning OPLA Attorneys (Waiving Appearance in Court)*

Finally, the Doyle memo states that whether to assign an OPLA attorney at all to a case is a matter of PD. Even after an OPLA attorney has been assigned to a case, OPLA may waive its court appearance at master calendar hearings, at *in absentia* hearings where removability has already been established, and even at individual hearings on a case-by-case basis. OPLA may also submit its position in writing instead of appearing in court. It is unclear how OPLA would submit objections, take cross examination, or present closing arguments tailored to the individual hearing, but practitioners should object to circumstances in which the IJ attempts to serve as both the judge and the prosecutor in ways that undermine the respondent's right to a fundamentally fair proceeding.

[47] *See Johnson v. Guzman-Chavez*, 141 S. Ct. 2271 (2021) (holding that the detention of a noncitizen subject to a reinstated order of removal is governed by INA § 241 instead of INA § 236).
[48] *See* CLINIC's "Practitioners' Guide to Obtaining Release From Immigration Detention" (Jul. 29, 2021), for guidance on what types of facts and evidence to include in the PD request.

To date, OPLA has not implemented this portion of the memo on a wide scale, and at OPLA stakeholder meetings, OPLA has indicated that they are still working on guidance regarding the circumstances under which OPLA will not appear in court.

PRACTICE TIP: In cases where OPLA will not agree to stipulate to relief, practitioners may try advocating with OPLA to waive their appearance at the individual hearing, or certain portions of their appearance, such as cross examination.

PRACTICE TIP REGARDING *IN ABSENTIA* ORDERS: In cases where the IJ issued an *in absentia* order, practitioners should review the Digital Audio Recording (DAR) to assess if OPLA was present at the hearing. If OPLA was not present at the hearing and failed to submit a written argument and documentary evidence of removability, practitioners may consider arguing that if OPLA was not present to affirmatively prove that the respondent received notice and to establish removability as required by INA § 240(b)(5)(A), OPLA did not meet its burden of proof, and the IJ is prohibited from fulfilling OPLA's burden of proof for them. If OPLA did submit a written argument and documentary evidence of removability, practitioners should assess if the IJ complied with 8 CFR § 1003.26 in holding an *in absentia* hearing and reviewed the evidence to determine whether DHS had met its burden of proof by presenting "clear, unequivocal, and convincing evidence."[49]

III. Requesting Prosecutorial Discretion: Procedures & Practice Tips

When submitting a PD request, practitioners should first consider whether the client falls within one of the three enforcement priority categories laid out in the Mayorkas memo. If there is any possibility that they do, practitioners must convince OPLA that the client is a nonpriority by filing a request for PD.

A. What to Include

To determine what to include in the PD request, practitioners should review the OPLA PD FAQs and the standard operating procedures (SOPs) for the OPLA office that will consider the PD request, available on OPLA's website. Every OPLA office has issued local guidance in the form of SOPs, which include instructions on how, when, and where to submit a PD request for that specific office.

If the client wants dismissal and is clearly a nonpriority (e.g., has no criminal history or traffic tickets only, entered on or before before November 1, 2020, and presents no national security issues), OPLA's FAQs state that practitioners need to submit only a statement confirming that the client is a nonpriority and there is no objection to the case being dismissed. If the client has a pending application for relief before USCIS (especially survivor-based relief), it is also good practice to include a copy of the receipt notice and evidence of prima facie eligibility for relief.

[49] INA § 240(b)(5)(A).

If the priority designation is unclear, practitioners should include an explanation of why the client is a nonpriority under the Doyle memo[50] and supporting evidence addressing any positive or negative factors in the case. A common scenario is where the client has criminal history, such as a DUI(s), but practitioners are unsure how OPLA will treat it given the lack of bright line rules in the PD assessment under the Doyle memo. Practitioners should also include confirmation that there is no objection to dismissal (if dismissal is the goal).[51] Lastly, include arguments stating that even if OPLA has designated the case a priority, the client still merits PD based on mitigating factors and either merits re-designation as nonpriority or, even if the case remains a priority for OPLA, a particular form of PD. For example, clients who entered unlawfully after November 1, 2020 may initially be deemed a priority, but practitioners can still ask for PD and re-designation by demonstrating mitigating factors.

PRACTICE TIP: Even if a client's criminal history was from many years ago or appears minor, it is still good practice to include evidence of mitigating factors, as individual OPLA attorneys have significant discretion and often view cases differently from one another. Do not assume that OPLA will view the client's case as a nonpriority.

Common examples of positive supporting evidence include evidence of a pending application and prima facie eligibility for relief;[52] certified criminal dispositions[53] and proof of rehabilitation; proof of longtime presence in the United States; evidence of family and community ties; letters of support from family, friends and co-workers; and evidence of employment history and tax returns.[54] These are just examples; *any* evidence that highlights positive equities, particularly evidence of the mitigating factors listed above under section I.B, may be included.

IMPORTANT! OPLA now requires **FBI fingerprint-based background checks** for respondents ages 14 and over before exercising PD. If the client's biometrics are already on file from an application for relief or DHS arrest, OPLA can re-run the biometrics check. If there are no biometrics on file, the respondent should submit an FBI fingerprint check with the PD request.[55]

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[50] It can also be helpful to reference other relevant DHS guidance in PD requests, if appropriate. For example, DHS has recently issued several other memos, such as the victims of crime memo (likely the most relevant in this context), safe release planning memo for detained individuals with mental health disorders, protected areas policy, and worksite enforcement memo. Check for forthcoming guidance as well.

[51] Practitioners should follow the same framing and guidelines if seeking another form of PD other than dismissal. Consult the local SOPs for guidance.

[52] This does not mean practitioners must submit a copy of the whole application packet to OPLA. Instead, submit only the documents that are needed to demonstrate prima facie eligibility.

[53] Practitioners should carefully consider what types of criminal records to submit to OPLA. Generally, final criminal dispositions, such as a final judgement or dismissal order, should be sufficient. OPLA may request police or arrest reports, and practitioners should generally push back against submitting such evidence, as it is often highly prejudicial to the client, unnecessary, and inaccurate.

[54] Always check that tax returns were properly filed, and never include documents containing fake social security numbers.

[55] Individuals who were fingerprinted at the border will likely need to submit an FBI background check. However, individuals who were arrested by ICE in the interior of the United States will likely already have biometrics on file. *See* AILA, AILA Liaison Meeting with ICE (Apr. 7, 2022), AILA Doc. 22032504, aila.org.

If practitioners are unsure if OPLA already has biometrics on file, consider submitting an FBI background check anyway to expedite review of the PD request.

PRACTICE TIP: If the client can benefit from PD, do not be afraid to request it (as long as the client agrees)! If the client is in removal proceedings, practitioners should consider seeking PD, even if it is an uphill battle, because there is often nothing to lose by asking for PD when the client is already in removal proceedings.

B. Where and When to Send a PD Request

Practitioners should consult the local SOPs for instructions on where to send PD requests. All OPLA offices have dedicated PD email addresses that are listed on OPLA's PD website. Some OPLA offices may also accept PD requests by e-service or regular mail, but most, if not all, prefer that practitioners send PD requests to the dedicated PD inbox.[56] If the practitioner has filed a request that is pending but needs to submit supplemental evidence, it is generally good practice to send the supplemental evidence to the OPLA attorney who is handling the case or PD request.[57] However, practitioners should not submit duplicate PD requests.

OPLA affirmatively reviews cases for PD, even without receiving a request. However, to ensure OPLA has all the relevant information and put forth arguments in the client's favor, practitioners should submit a request as early as possible. The Doyle memo discourages "late stage" PD requests. OPLA generally reviews cases for PD in order of upcoming hearings, so if there is no upcoming hearing in the client's case or the hearing is scheduled many months out, it may take OPLA several weeks or months to respond. Practitioners should follow up with OPLA regularly about the pending PD request. The Doyle memo does not prescribe any specific timelines for review of PD requests though many OPLA field offices have implemented their own goals for timely review and provided guidance regarding when to follow up on a pending request. At the April 7, 2022 AILA EOIR/ICE Joint Liaison Committee Meeting, ICE noted that jurisdictions are responding to PD requests in a timely manner, within an average response time of sixty to ninety days, but stated that requests for joint motions to reopen are not a response priority.[58] If OPLA fails to respond to a PD request, practitioners may contact the Chief Counsel and, if the Chief Counsel does not respond within five to seven business days, practitioners who are AILA members may raise the issue to AILA ICE National Committee for elevation to OPLA Headquarters.[59]

If OPLA denies the PD request, practitioners may still re-file a PD request if circumstances change, or new, relevant evidence arises. Keep in mind that PD may be appropriate at different postures of a case, and though OPLA may deny a request early on, they may be more willing to consider it once there is additional evidence in the record that allows them to better understand

[56] Some offices have separate email addresses for specific types of requests, such as joint motions to reopen. Check the SOPs for guidance.
[57] Practitioners should consult the local SOPs for guidance on submitting supplemental information and may need to reach out to OPLA to inquire about attorney assignment for the PD request.
[58] *See* AILA, AILA Liaison Meeting with ICE (Apr. 7, 2022), AILA Doc. 22032504, aila.org.
[59] *Id*.

the client's circumstances and equities (e.g., denying a request to stipulate for relief early on but reconsidering once supporting evidence for a merits hearing is available).

C. Case Escalation of Denied PD Requests

If the practitioner believes that an OPLA attorney has improperly denied the PD request, they can escalate the case for review through the OPLA field office chain of command.[60] Reach out to the Deputy Chief Counsel and then Chief Counsel; contact information for all Chiefs Counsel is available to AILA members on AILA's website. Unfortunately, OPLA has not instituted a case escalation process to National Headquarters or PLA Doyle. If the practitioner fails in obtaining PD after escalation to Chief Counsel and the client's circumstances are compelling, consider asking the client's local congressperson to conduct a congressional inquiry or launching a public deportation defense campaign in partnership with community organizers.[61]

IV. Conclusion

Overall, the Doyle memo, and OPLA's willingness to exercise PD, are positive developments for many noncitizens in removal proceedings. As discussed above, however, the memo raises many issues that do not yet have definitive answers. It is important that practitioners keep informed about trends on how PD is being exercised so they can provide their clients with the best information as they decide whether it is in their interest to pursue PD.

[60] While the Doyle memo is silent on case escalation procedures, AILA notes from the April 7, 2022 AILA Liaison Meeting with ICE explain this process. *See* AILA, AILA Liaison Meeting with ICE (Apr. 7, 2022), AILA Doc. 22032504, aila.org.

[61] *See, e.g.*, Emily Tucker et al., Building the Movement, Vera Institute for Justice, May 2020; Mijente and Just Futures Law, Deportation Defense Toolkit, Nov. 2021.