




U.S. Immigration
and Customs
Enforcement

April 6, 2015

MEMORANDUM FOR: OPLA Attorneys

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SUBJECT: Guidance Regarding Cases Pending Before EOIR Impacted by Secretary Johnson's Memorandum entitled *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*.

Purpose

The purpose of this memorandum is to provide additional guidance to Office of the Principal Legal Advisor (OPLA) attorneys regarding pending proceedings involving individuals who may fall outside of the revised Department of Homeland Security (DHS) enforcement priorities in light of Secretary Johnson's November 20, 2014 memorandum entitled *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, which established DHS-wide priorities and guidelines for the use of prosecutorial discretion. Secretary Johnson's memorandum is available at: <http://www.dhs.gov/immigration-action>.¹

Background

In late 2011 and 2012, OPLA attorneys performed a complete review of all cases pending on the Executive Office for Immigration Review (EOIR) court dockets, exercising prosecutorial

¹ On November 20, 2014, Secretary Johnson also announced an expansion of the 2012 Deferred Action for Childhood Arrivals (DACA) policy, which offered deferred action to certain individuals who are unlawfully in the United States after having entered the country as children, and a new policy for certain undocumented parents of U.S. Citizens and Lawful Permanent Residents, the Deferred Action for Parental Accountability (DAPA) policy. On February 16, 2015, the U.S. District Court for the Southern District of Texas temporarily enjoined DHS from implementing the DAPA and expanded DACA policies. See *Texas v. United States*, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015). Officers, agents and attorneys of DHS are not to consider the DAPA and expanded DACA policies as a basis for exercising prosecutorial discretion or for determining whether deferred action is appropriate, unless and until further guidance is given. Therefore, this guidance only pertains to DHS's exercise of prosecutorial discretion with regard to its revised enforcement priorities – which are not enjoined by the temporary injunction – and not the DAPA and expanded DACA policies.

discretion as appropriate. OPLA has continued to engage in efforts to promote docket efficiency and has played a leading role in DHS's efforts to align finite enforcement resources with cases involving national security, public safety, and border security. Secretary Johnson's memorandum reaffirms a commitment to these efforts and makes some important refinements. OPLA has already taken a number of steps to further familiarize all personnel with the enforcement priorities to ensure consistency in their application, including, but not limited to, requiring all attorneys to complete Virtual University training by January 16, 2015.

Prosecutorial Discretion Reviews

Consistent with the current practice, DHS's enforcement priorities will continue to be national security, public safety, and border security. DHS personnel, including OPLA attorneys, are directed to prioritize removal assets accordingly. OPLA attorneys should continue to review their cases, at the earliest opportunity, for the potential exercise of prosecutorial discretion, in light of the enforcement priorities. OPLA should generally seek administrative closure or dismissal of cases it determines are not priorities. OPLA attorneys should also review available information in incoming cases to determine whether, in a case that falls within an enforcement priority, unique factors and circumstances are present that may warrant the exercise of prosecutorial discretion. Understanding that these factors and circumstances may change as the case progresses, if further prosecutorial discretion review is requested by the respondent, the case should be reviewed again in light of any changed facts and circumstances. Keep in mind that prosecutorial discretion may encompass actions beyond offers for administrative closure or dismissal of the case, including waiving appeal, not filing Notices to Appear, and joining in motions.

For administrative proceedings pending before an Immigration Judge or the Board of Immigration Appeals, respondents have been encouraged to submit requests for prosecutorial discretion to the appropriate Office of Chief Counsel's prosecutorial discretion email box in advance of immigration court hearings, so that prosecutorial discretion issues can be resolved prior to the court hearing in order to conserve docket time. A list of the OPLA field office mailboxes is available [here](#). As early in the case or proceeding as possible, OPLA attorneys should timely review these requests. OPLA attorneys should continue to file motions to administratively close or dismiss cases in advance of the next hearing. OPLA attorneys should also state whether the case should remain on the court docket because it is a removal priority or whether the case should be administratively closed or dismissed because the case is not a removal priority or appears amenable to the exercise of prosecutorial discretion.² Prior to all scheduled hearings, including master calendars, OPLA attorneys should review cases, including those where a respondent has not submitted a request for prosecutorial discretion, to determine whether the case falls within the priorities and be prepared to inform the court of DHS's position on each case.³

² Administratively closing a case is one way of exercising prosecutorial discretion to remove non-priority cases from the docket. Dismissing the case is an alternate course of action that may also be appropriate. Decisions about when and how to exercise prosecutorial discretion should continue to be made on a case-by-case basis.

³ Individuals in immigration court proceedings who are not represented by counsel may be unfamiliar with the enforcement priorities and the process of requesting exercise of prosecutorial discretion.

Detained Aliens

DHS must not seek administrative closure of immigration proceedings before EOIR while the respondent is in DHS custody.⁴ If prosecutorial discretion is to be exercised in a detained case where the alien is not subject to mandatory detention, in consultation with ERO, the respondent must be released prior to administrative closure. In the cases where a detained alien who is subject to mandatory detention may warrant the exercise of prosecutorial discretion, the alien may only be released after a motion to dismiss proceedings has been granted by EOIR.⁵

Procedural Matters: Background Checks and PLANet Protocol

The process for administratively closing a case for prosecutorial discretion has not changed in that background checks are required prior to taking the case off-calendar. At minimum, DHS will continue to require FBI fingerprint checks which will be considered current for a period of 15 months. On a case-by-case basis, OPLA attorneys may run additional background checks, as necessary, to inform their decision on whether or not prosecutorial discretion is appropriate. OPLA attorneys should continue to follow PLANet data entry protocol to ensure that decisions are properly recorded.

Docket Efficiencies

DHS personnel must exercise discretion in order to ensure that use of DHS's limited resources are devoted to the pursuit of enforcement priorities. As practicable, prosecutorial discretion should be exercised as early in the case or proceedings as possible in order to preserve government resources that would otherwise be expended in pursuing enforcement and removal of high priority cases. OPLA attorneys should timely review requests for prosecutorial discretion and continue to dispose of appropriate cases through motions to administratively close or dismiss, or be prepared to respond to those requests at the next immigration court hearing. At all times, DHS personnel should be cognizant that the authority to exercise prosecutorial discretion rests solely with DHS and is not reviewable by the court.

Conclusion

Consistent with Secretary Johnson's Memoranda to ensure that DHS's limited resources are devoted to the pursuit of its enforcement priorities, OPLA attorneys should continue to exercise prosecutorial discretion in appropriate non-priority cases to preserve both judicial and enforcement resources that would otherwise be expended in pursuing enforcement and removal of high priority cases.

⁴ Administrative closure of any detained case should be elevated to a supervisor.

⁵ Motions to dismiss proceedings in such instances should generally be jointly filed and make clear that dismissal is intended by both parties to be "without prejudice." *See* 8 C.F.R. § 1239.2(c). However, in deciding whether to exercise discretion in such cases, OPLA attorneys should be mindful of applicable precedent on the issue of *res judicata* (or the inapplicability thereof) in removal proceedings.

Disclaimer

As there is no right to the favorable exercise of discretion by the agency, nothing in this memorandum should be construed to prohibit the apprehension, detention, or removal of any alien unlawfully in the United States or to limit the legal authority of DHS or any of its personnel to enforce federal immigration laws. Similarly, this memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.