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The NDNY-FCBA's CLE Committee
Presents:

"Immigration Law: An Overview of Immigration Changes Under the Biden Administration"

November 18, 2021

4:00 pm- 5:00 pm

R.S.V.P. by November 15, 2021

Because of COVID-19 related restrictions, this CLE will be offered in a virtual setting, via Zoom. A link for the Zoom CLE will be provided to registered attendees.

Program Description

This program will provide a review of the changes in immigration law which have occurred under the Biden Administration. This discussion will also touch upon items that attorneys practicing within the Northern District of New York may encounter during their practice, including the forms of immigration relief available to individuals residing in the United States, immigrants' due process rights and collateral consequences.

Presenter:

Mary Armistead, Esq.
Staff Attorney for the Legal Project and
Adjunct Professor at Albany Law School

Agenda:

4:00-4:05: Introduction

4:05-4:50: Presentation

4:50-5:00: Continuation of Presentation (Q&A in Chat Box throughout)

"Immigration Law: An Overview of Immigration Changes Under the Biden Administration" has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for **1 Credit** towards the **Areas of Professional Practice requirement**.

The Northern District of New York Federal Court Bar Association has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York.

A code will be provided at a particular point in the program, which can be used to claim CLE credit for participation in the webinar.

This program is appropriate for newly admitted and experienced attorneys. This is a single program. No partial credit will be awarded. This program is complimentary to all Northern District of New York Federal Court Bar Association Members.

Mary Armistead, Esq., is a Staff Attorney at The Legal Project, a non-profit civil legal services organization in Albany, New York. In her position, she works with survivors of human trafficking, both labor and sex, by providing direct representation in a variety of civil legal proceedings, primarily immigration, family law, and employment law. She also engages in capacity-building, policy issues, and education regarding human trafficking, focusing on identifying human trafficking victims, immigration issues, and trauma-informed lawyering. Mary also teaches Immigration Law as an Adjunct Professor of Law at her alma mater, Albany Law School, where she graduated summa cum laude. Prior to The Legal Project, Mary held a clerkship at the New York State Court of Appeals for one year before working as the Staff Attorney of the Immigration Law Clinic at Albany Law School for three years. In this position, Mary both supervised students and maintained a personal docket in providing legal advocacy services and direct representation to detained and non-detained immigrants eligible for humanitarian immigration relief. She also developed the Special Immigrant Juvenile Pro Bono Attorney panel, wherein she connects clients to and supervises attorneys in providing pro bono representation to vulnerable immigrant children.

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

January 20, 2021

MEMORANDUM FOR: Troy Miller
Senior Official Performing the Duties of the Commissioner
U.S. Customs and Border Protection

Tae Johnson
Acting Director
U.S. Immigration and Customs Enforcement

Tracey Renaud
Senior Official Performing the Duties of the Director
U.S. Citizenship and Immigration Services

CC: Karen Olick
Chief of Staff

FROM: David Pekoske
Acting Secretary

SUBJECT: **Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities**

This memorandum directs Department of Homeland Security components to conduct a review of policies and practices concerning immigration enforcement. It also sets interim policies during the course of that review, including a 100-day pause on certain removals to enable focusing the Department's resources where they are most needed. The United States faces significant operational challenges at the southwest border as it is confronting the most serious global public health crisis in a century. In light of those unique circumstances, the Department must surge resources to the border in order to ensure safe, legal and orderly processing, to rebuild fair and effective asylum procedures that respect human rights and due process, to adopt appropriate public health guidelines and protocols, and to prioritize responding to threats to national security, public safety, and border security.

This memorandum should be considered Department-wide guidance, applicable to the activities of U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS).

A. Comprehensive Review of Enforcement Policies and Priorities

The Chief of Staff shall coordinate a Department-wide review of policies and practices concerning immigration enforcement. Pursuant to the review, each component shall develop recommendations to address aspects of immigration enforcement, including policies for prioritizing the use of enforcement personnel, detention space, and removal assets; policies governing the exercise of prosecutorial discretion; policies governing detention; and policies regarding interaction with state and local law enforcement. These recommendations shall ensure that the Department carries out our duties to enforce the law and serve the Department's mission in line with our values. The Chief of Staff shall provide recommendations for the issuance of revised policies at any point during this review and no later than 100 days from the date of this memo.

The memoranda in the attached appendix are hereby rescinded and superseded.

B. Interim Civil Enforcement Guidelines

Due to limited resources, DHS cannot respond to all immigration violations or remove all persons unlawfully in the United States. Rather, DHS must implement civil immigration enforcement based on sensible priorities and changing circumstances. DHS's civil immigration enforcement priorities are protecting national security, border security, and public safety. The review directed in section A will enable the development, issuance, and implementation of detailed revised enforcement priorities. In the interim and pending completion of that review, the Department's priorities shall be:

1. **National security.** Individuals who have engaged in or are suspected of terrorism or espionage, or whose apprehension, arrest and/or custody is otherwise necessary to protect the national security of the United States.
2. **Border security.** Individuals apprehended at the border or ports of entry while attempting to unlawfully enter the United States on or after November 1, 2020, or who were not physically present in the United States before November 1, 2020.
3. **Public safety.** Individuals incarcerated within federal, state, and local prisons and jails released on or after the issuance of this memorandum who have been convicted of an "aggravated felony," as that term is defined in section 101(a) (43) of the Immigration and Nationality Act at the time of conviction, and are determined to pose a threat to public safety.

These priorities shall apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action or parole. In

addition, all enforcement and detention decisions shall be guided by DHS's ability to conduct operations and maintain custody consistent with applicable COVID-19 protocols.

While resources should be allocated to the priorities enumerated above, nothing in this memorandum prohibits the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities herein. In order to ensure appropriate allocation of resources and exercise of prosecutorial discretion, the Acting Director of ICE shall issue operational guidance on the implementation of these priorities. This guidance shall contain a protocol for the Acting Secretary to conduct a periodic review of enforcement actions to ensure consistency with the priorities set forth in this memorandum. This guidance shall also include a process for the Director of ICE to review and approve of any civil immigration enforcement actions against individuals outside of federal, state or local prisons or jails.

These interim enforcement priorities shall go into effect on February 1, 2021 and remain in effect until superseded by revised priorities developed in connection with the review directed in section A.

C. Immediate 100-Day Pause on Removals

In light of the unique circumstances described above, DHS's limited resources must be prioritized to: (1) provide sufficient staff and resources to enhance border security and conduct immigration and asylum processing at the southwest border fairly and efficiently; and (2) comply with COVID-19 protocols to protect the health and safety of DHS personnel and those members of the public with whom DHS personnel interact. In addition, we must ensure that our removal resources are directed to the Department's highest enforcement priorities. Accordingly, and pending the completion of the review set forth in section A, I am directing an immediate pause on removals of any noncitizen[1] with a final order of removal (except as noted below) for 100 days to go into effect as soon as practical and no later than January 22, 2021.

The pause on removals applies to any noncitizen present in the United States when this directive takes effect with a final order of removal except one who:

1. According to a written finding by the Director of ICE, has engaged in or is suspected of terrorism or espionage, or otherwise poses a danger to the national security of the United States; or
2. Was not physically present in the United States before November 1, 2020; or
3. Has voluntarily agreed to waive any rights to remain in the United States, provided that he or she has been made fully aware of the consequences of waiver

[1] "Noncitizen" as used in this memorandum does not include noncitizen nationals of the United States.

and has been given a meaningful opportunity to access counsel prior to signing the waiver;[2] or

4. For whom the Acting Director of ICE, following consultation with the General Counsel, makes an individualized determination that removal is required by law.

No later than February 1, 2021, the Acting Director of ICE shall issue written instructions with additional operational guidance on the further implementation of this removal pause. The guidance shall include a process for individualized review and consideration of the appropriate disposition for individuals who have been ordered removed for 90 days or more, to the extent necessary to implement this pause. The process shall provide for assessments of alternatives to removal including, but not limited to, staying or reopening cases, alternative forms of detention, custodial detention, whether to grant temporary deferred action, or other appropriate action.

D. No Private Right Statement

These guidelines and priorities are not intended to, do 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.

[2] A voluntary waiver encompasses noncitizens who stipulate to removal as part of a criminal disposition.

APPENDIX

Department of Homeland Security, *Enforcement of the Immigration Laws to Serve the National Interest,* Memorandum of February 20, 2017.

U.S. Immigration and Customs Enforcement, *Implementing the President's Border Security and Interior Immigration Enforcement Policies*, Memorandum of February 20, 2017.

U.S. Immigration and Customs Enforcement, *Guidance to OPLA Attorneys Regarding the Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement*, Memorandum of August 15, 2017.

US Citizenship and Immigration Services, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens,* Policy Memorandum of June 28, 2018. (US Citizenship and Immigration Services should revert to the preexisting guidance in Policy Memorandum 602-0050, US Citizenship and Immigration Services, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens*, Policy Memorandum of Nov. 7, 2011.)

US Citizenship and Immigration Services, *Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) When Processing a Case Involving Information Submitted by a Deferred Action for Childhood Arrivals (DACA) Requestor in Connection with a DACA Request or a DACA-Related Benefit Request (Past or Pending) or Pursuing Termination of DACA,* Policy Memorandum of June 28, 2018.

U.S. Customs and Border Protection, *Executive Orders 13767 and 13768 and the Secretary's Implementation Directions of February 17, 2017*, Memorandum of February 21, 2017.

Policy Number: 11090.1
FEA Number: 306-112-002b

Office of the Director

U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

February 18, 2021

MEMORANDUM FOR: All ICE Employees

FROM: Tae D. Johnson
Acting Director

SUBJECT: Interim Guidance: Civil Immigration Enforcement and Removal Priorities

Purpose

This memorandum establishes interim guidance in support of the interim civil immigration enforcement and removal priorities that Acting Secretary Pekoske issued on January 20, 2021. Acting Secretary Pekoske issued the interim priorities in his memorandum titled, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Interim Memo).

This interim guidance is effective immediately. It applies to all U.S. Immigration and Customs Enforcement (ICE) Directorates and Program Offices, and it covers enforcement actions, custody decisions, the execution of final orders of removal, financial expenditures, and strategic planning.

This interim guidance will remain in effect until Secretary Mayorkas issues new enforcement guidelines. The Secretary has informed me that he will issue new guidelines only after consultation with the leadership and workforce of ICE, U.S. Customs and Border Protection, and other Department of Homeland Security (Department) agencies and offices. He anticipates issuing these guidelines in less than 90 days.

I have requested approval of certain revisions to the Interim Memo until the Secretary issues new enforcement guidelines. My requested revisions have been approved, and they are incorporated into this guidance. To the extent this guidance conflicts with the Interim Memo, this guidance controls. As you will read below, the revisions include, but are not limited to: (1) authorization to apprehend presumed priority noncitizens[1] in at-large enforcement actions without advance approval; (2) the inclusion of current qualifying members of criminal gangs and transnational criminal organizations as presumed enforcement priorities; (3) authorization to apprehend

[1] For purposes of this memorandum, "noncitizen" means any person as defined in section 101(a)(3) of the Immigration and Nationality Act (INA).

without prior approval other presumed priority noncitizens who are encountered during enforcement operations; (4) how to evaluate whether a noncitizen who is not a presumed priority nevertheless poses a public safety threat and should be apprehended; (5) the further delegation of approval authority; and (6) the importance of providing advance notice of at-large enforcement actions to state and local law enforcement.

Section C of the Interim Memo has been enjoined. This memorandum does not implement, nor take into account, Section C. This memorandum implements Section B (Interim Civil Enforcement Guidelines).

Background

On January 20, 2021, President Biden issued Executive Order (EO) 13993, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 25, 2021), which articulated the Administration's baseline values and priorities for the enforcement of the civil immigration laws.

On the same day, Acting Secretary Pekoske issued the Interim Memo. The Interim Memo did four things. First, it directed a comprehensive Department-wide review of civil immigration enforcement policies. Second, it established interim civil immigration enforcement priorities for the Department. Third, it instituted a 100-day pause on certain removals pending the review. Fourth, it rescinded several existing policy memoranda, including two ICE-related memoranda, as inconsistent with EO 13993.[2] The Interim Memo further directed that ICE issue interim guidance implementing the revised enforcement priorities and the removal pause.

On January 26, 2021, the U.S. District Court for the Southern District of Texas issued a temporary restraining order (TRO) enjoining the Department from enforcing and implementing the 100-day removal pause in Section C.

Like other national security and public safety agencies, ICE operates in an environment of limited resources. Due to these limited resources, ICE has always prioritized, and necessarily must prioritize, certain enforcement and removal actions over others.

In addition to resource constraints, several other factors render ICE's mission particularly complex. These factors include ongoing litigation in various fora; the health and safety of the ICE workforce and those in its custody, particularly during the current COVID-19 pandemic; the responsibility to ensure that eligible noncitizens are able to pursue relief from removal under the immigration laws; and the requirements of, and, relationships with, sovereign nations, whose laws and expectations can place additional constraints on ICE's ability to execute final orders of removal.

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[2] Memorandum from Matthew T. Albence, Exec. Assoc. Dir., ICE, to All ERO Employees, *Implementing the President's Border Security and Interior Immigration Enforcement Policies* (Feb. 21, 2017); Memorandum from Tracy Short, Principal Legal Advisor, ICE, to All OPLA Attorneys, *Guidance to OPLA Attorneys Regarding Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement* (Aug. 15, 2017).

Accordingly, in executing its critical national security, border security, and public safety mission, the Department must exercise its well-established prosecutorial discretion and prioritize its limited resources to most effectively achieve that mission.

Civil Immigration Enforcement and Removal Priorities

In support of the interim priorities, the guidance established in this memorandum shall be applied to all civil immigration enforcement and removal decisions made after the issuance of this memorandum. The civil immigration enforcement and removal decisions include, but are not limited to, the following:[3]

- Deciding whether to issue a detainer, or whether to assume custody of a noncitizen subject to a previously issued detainer;
- Deciding whether to issue, reissue, serve, file, or cancel a Notice to Appear;
- Deciding whether to focus resources only on administrative violations or conduct;
- Deciding whether to stop, question, or arrest a noncitizen for an administrative violation of the civil immigration laws;
- Deciding whether to detain or release from custody subject to conditions;
- Deciding whether to grant deferred action or parole; and
- Deciding when and under what circumstances to execute final orders of removal.

For ease of reference, the interim priorities identified in the Interim Memo, and as revised by this guidance, are set forth below along with further explanation.

As a preliminary matter, it is vitally important to note that the interim priorities do not require or prohibit the arrest, detention, or removal of any noncitizen. Rather, officers and agents are expected to exercise their discretion thoughtfully, consistent with ICE's important national security, border security, and public safety mission. Enforcement and removal actions that meet the criteria described below are presumed to be a justified allocation of ICE's limited resources. Actions not reflected in the criteria described below may also be justified, but they are subject to advance review as outlined further below.

In determining whether to pursue an action that falls outside the criteria described below, all relevant facts and circumstances regarding the noncitizen should be considered. For instance, officers and agents should consider: whether there are criminal convictions; the seriousness and recency of such convictions, and the sentences imposed; the law enforcement resources that have been spent; whether a threat can be addressed through other means, such as through recourse to criminal law enforcement authorities at the federal, state, or local level, or to public health and other civil authorities at the state or local level; and, other relevant factors (including, for example, the mitigating factors identified on page 5).

[3] As discussed above, the Department is enjoined from enforcing the Immediate 100-Day Pause on Removals in the Interim Memo. This following interim guidance should not be read to permit implementation of Section C of the Interim Memo.

Criteria Defining Cases That Are Presumed to be Priorities

Priority Category 1: National Security. A noncitizen is *presumed* to be a national security enforcement and removal priority if:

1) he or she has engaged in or is suspected of engaging in terrorism or terrorism-related activities;
2) he or she has engaged in or is suspected of engaging in espionage or espionage-related activities;[4] or
3) his or her apprehension, arrest, or custody is otherwise necessary to protect the national security of the United States.

In evaluating whether a noncitizen's "apprehension, arrest, or custody is otherwise necessary to protect" national security, officers and agents should determine whether a noncitizen poses a threat to United States sovereignty, territorial integrity, national interests, or institutions. General criminal activity does not amount to a national security threat (as distinguished from a public safety threat) and is discussed below.

Priority Category 2: Border Security. A noncitizen is *presumed* to be a border security enforcement and removal priority if:

1) he or she was apprehended at the border or a port of entry while attempting to unlawfully enter the United States on or after November 1, 2020[5]; or
2) he or she was not physically present in the United States before November 1, 2020.

To be clear, the border security priority includes any noncitizen who unlawfully entered the United States on or after November 1, 2020.

Priority Category 3: Public Safety. A noncitizen is *presumed* to be a public safety enforcement and removal priority if he or she poses a threat to public safety and:

1) he or she has been convicted of an aggravated felony as defined in section 101(a)(43) of the INA[6]; or

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[4] For purposes of the national security enforcement priority, the terms "terrorism or terrorism-related activities" and "espionage or espionage-related activities" should be applied consistent with (1) the definitions of "terrorist activity" and "engage in terrorist activity" in section 212(a)(3)(B)(iii)-(iv) of the INA, and (2) the manner in which the term "espionage" is generally applied in the immigration laws.

[5] The statutory mandates in Section 235 of the INA (regarding asylum seekers) continue to apply to noncitizens.

[6] This criterion tracks Congress's prioritization of aggravated felonies for immigration enforcement actions. Whether an individual has been convicted of an aggravated felony is a complex question that may involve securing and analyzing a host of conviction documents, many of which may not be immediately available to officers and agents. Even when all conviction documents are available, whether a conviction is for an aggravated felony may be a novel question under applicable law. Accordingly, in deciding whether a noncitizen has been convicted of an

2) he or she has been convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or is not younger than 16 years of age and intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization.

In evaluating whether a noncitizen currently "pose[s] a threat to public safety," officers and agents are to consider the extensiveness, seriousness, and recency of the criminal activity. Officers and agents are to also consider mitigating factors, including, but not limited to, personal and family circumstances, health and medical factors, ties to the community, evidence of rehabilitation, and whether the individual has potential immigration relief available.

Officers are to base their conclusions about intentional participation in an organized criminal gang or transnational criminal organization on reliable evidence and consult with the Field Office Director (FOD) or Special Agent in Charge (SAC) in reaching this conclusion.

Particular attention is to be exercised in cases involving noncitizens who are elderly or are known to be suffering from serious physical or mental illness. Similarly, particular attention is to be exercised with respect to noncitizens who have pending petitions for review on direct appeal from an order of removal; have filed only one motion to reopen removal proceedings, and such a motion either remains pending or is on direct appeal via a petition for review; or have pending applications for immigration relief and are prima facie eligible for such relief. In such cases, execution of removal orders should have a compelling reason and are to have approval from the FOD.

A civil enforcement or removal action that does not meet the above criteria for presumed priority cases will require preapproval as described below.

Enforcement and Removal Actions: Approval, Coordination, and Data Collection

To ensure compliance with this guidance and consistency across geographic areas of responsibility, and to facilitate a dialogue between headquarters and field leadership about the effectiveness of the interim guidance, ICE will require that field offices collect data on the nature and type of enforcement and removal actions they perform. In addition, ICE will require field offices to coordinate their operations and obtain preapproval for enforcement and removal actions that do not meet the above criteria for presumed priority cases. The data and coordination will inform the development of the Secretary's new enforcement guidance.

No Preapproval Required for Presumed Priority Cases

Officers and agents need not obtain preapproval for enforcement or removal actions that meet the above criteria for presumed priority cases, beyond what existing policy requires and what a supervisor instructs.

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aggravated felony for purposes of this memorandum, officers and agents must have a good-faith belief based on either a final administrative determination, available conviction records, or the advice of agency legal counsel.

Preapproval for Other Priority Cases

Any civil immigration enforcement or removal actions that do not meet the above criteria for presumed priority cases will require preapproval from the FOD or SAC. In deciding to undertake an enforcement action or removal, the agent or officer must consider, in consultation with his or her leadership, the nature and recency of the noncitizen's convictions, the type and length of sentences imposed, whether the enforcement action is otherwise an appropriate use of ICE's limited resources, and other relevant factors. In requesting this preapproval, the officer or agent must raise a written justification through the chain of command, explaining why the action otherwise constitutes a justified allocation of limited resources, and identify the date, time, and location the enforcement action or removal is expected to take place.

The approval to carry out an enforcement action against a particular noncitizen will not authorize enforcement actions against other noncitizens encountered during an operation if those noncitizens fall outside the presumption criteria identified above. An approval to take an enforcement action against any other noncitizen encountered who is not a presumed priority must be separately secured as described above.

In some cases, exigent circumstances and the demands of public safety will make it impracticable to obtain preapproval for an at-large enforcement action. While it is impossible to preconceive all such circumstances, they generally will be limited to situations where a noncitizen poses an imminent threat to life or an imminent substantial threat to property. If preapproval is impracticable, an officer or agent should conduct the enforcement action and then request approval as described above within 24 hours following the action.[7]

As always, it is important that ICE endeavor to remove noncitizens with final removal orders who have remained in post-order detention for more than 90 days. ICE will continue to review such noncitizens' cases on a regular basis, consistent with existing law and policy. ICE will endeavor to remove such noncitizens consistent with legal requirements and national, border security, and public safety priorities.

Periodically, ICE receives requests to exercise some form of individualized discretion in the interests of law and justice. ICE will create and maintain a system by which personnel can evaluate these individualized requests.

Notice of At-Large Enforcement Actions

The execution of an at-large enforcement action should be preceded by notification to the relevant state and local law enforcement agency or agencies. This notification will advance

[7] Where approval is sought following the enforcement action due to exigent circumstances, the request shall explain the exigency, where and when the enforcement activity took place, and whether the noncitizen is currently detained. Additionally, when the location of a proposed or completed enforcement action is a courthouse, as defined in ICE Directive 11072.1: Civil Immigration Enforcement Actions Inside Courthouses (Jan. 10, 2018, or as superseded), or a sensitive location, as defined in ICE Directive No. 10029.2, Enforcement Actions at or Focused on Sensitive Locations (Oct. 24, 2011, or as superseded), that should be explicitly highlighted in the request.

public safety and help ensure that planned immigration enforcement actions do not improperly interfere with state and local law enforcement investigations and actions.

Weekly Reporting of All Enforcement and Removal Actions

The Director will review all enforcement actions to ensure compliance with this guidance and consistency across geographic areas of responsibility and to facilitate a dialogue between headquarters and field leadership about the effectiveness of the interim priorities.

Each Friday, the Executive Associate Directors for Enforcement and Removal Operations and Homeland Security Investigations will compile and provide to the Office of the Director, the Office of the Deputy Director, and the Office of Policy and Planning (OPP), a written report: (1) identifying each enforcement action taken in the prior week, including the applicable priority criterion, if any; (2) providing a narrative justification of the action; and (3) identifying the date, time, and location of the action.

In addition, each Friday the Executive Associate Director for Enforcement and Removal Operations will provide to the Office of the Director, the Office of the Deputy Director, and OPP, a written report: (1) identifying each removal in the prior week, including the applicable priority criterion, if any; (2) providing a narrative justification of the removal; and (3) identifying the date, time, and location of the removal.

These reporting requirements will be assessed periodically during this interim period to ensure that they are both productive and manageable.

The weekly reports will be made available to the Office of the Secretary.

Questions

Questions regarding this interim guidance or the Interim Memo should be directed to OPP through the chain of command and Directorate or Program Office leadership. Answers to frequently asked policy questions will be published on OPP's inSight page on an ongoing basis. Please note, however, that case-specific questions should generally be addressed by Directorate or Program Office leadership.

No Private Right Statement

These guidelines and priorities are not intended to, do 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.

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

September 30, 2021

MEMORANDUM TO: Tae D. Johnson
Acting Director
U.S. Immigration and Customs Enforcement

CC: Troy Miller
Acting Commissioner
U.S. Customs and Border Protection

Ur Jaddou
Director
U.S. Citizenship and Immigration Services

Robert Silvers
Under Secretary
Office of Strategy, Policy, and Plans

Katherine Culliton-González
Officer for Civil Rights and Civil Liberties
Office for Civil Rights and Civil Liberties

Lynn Parker Dupree
Chief Privacy Officer
Privacy Office

FROM: Alejandro N. Mayorkas
Secretary

SUBJECT: Guidelines for the Enforcement of Civil Immigration Law

This memorandum provides guidance for the apprehension and removal of noncitizens.

I am grateful to you, the other leaders of U.S. Immigration and Customs Enforcement, and our frontline personnel for the candor and openness of the engagements we have had to help shape this guidance. Thank you especially for dedicating yourselves – all your talent and energy – to the noble law enforcement profession. In executing our solemn responsibility to enforce immigration

law with honor and integrity, we can help achieve justice and realize our ideals as a Nation. Our colleagues on the front lines and throughout the organization make this possible at great personal sacrifice.

I. Foundational Principle: The Exercise of Prosecutorial Discretion

It is well established in the law that federal government officials have broad discretion to decide who should be subject to arrest, detainers, removal proceedings, and the execution of removal orders. The exercise of prosecutorial discretion in the immigration arena is a deep-rooted tradition. The United States Supreme Court stated this clearly in 2012:

> "A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all."

In an opinion by Justice Scalia about twelve years earlier, the Supreme Court emphasized that enforcement discretion extends throughout the entire removal process, and at each stage of it the executive has the discretion to not pursue it.

It is estimated that there are more than 11 million undocumented or otherwise removable noncitizens in the United States. We do not have the resources to apprehend and seek the removal of every one of these noncitizens. Therefore, we need to exercise our discretion and determine whom to prioritize for immigration enforcement action.

In exercising our discretion, we are guided by the fact that the majority of undocumented noncitizens who could be subject to removal have been contributing members of our communities for years. They include individuals who work on the frontlines in the battle against COVID, lead our congregations of faith, teach our children, do back-breaking farm work to help deliver food to our table, and contribute in many other meaningful ways. Numerous times over the years, and presently, bipartisan groups of leaders have recognized these noncitizens' contributions to state and local communities and have tried to pass legislation that would provide a path to citizenship or other lawful status for the approximately 11 million undocumented noncitizens.

The fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them. We will use our discretion and focus our enforcement resources in a more targeted way. Justice and our country's well-being require it.

By exercising our discretionary authority in a targeted way, we can focus our efforts on those who pose a threat to national security, public safety, and border security and thus threaten America's well-being. We do not lessen our commitment to enforce immigration law to the best of our ability. This is how we use the resources we have in a way that accomplishes our enforcement mission most effectively and justly.

II. Civil Immigration Enforcement Priorities

We establish civil immigration enforcement priorities to most effectively achieve our goals with the resources we have. We will prioritize for apprehension and removal noncitizens who are a threat to our national security, public safety, and border security.

A. Threat to National Security

A noncitizen who engaged in or is suspected of terrorism or espionage, or terrorism-related or espionage-related activities, or who otherwise poses a danger to national security, is a priority for apprehension and removal.

B. Threat to Public Safety

A noncitizen who poses a current threat to public safety, typically because of serious criminal conduct, is a priority for apprehension and removal.

Whether a noncitizen poses a current threat to public safety is not to be determined according to bright lines or categories. It instead requires an assessment of the individual and the totality of the facts and circumstances.

There can be aggravating factors that militate in favor of enforcement action. Such factors can include, for example:

- the gravity of the offense of conviction and the sentence imposed;
- the nature and degree of harm caused by the criminal offense;
- the sophistication of the criminal offense;
- use or threatened use of a firearm or dangerous weapon;
- a serious prior criminal record.

Conversely, there can be mitigating factors that militate in favor of declining enforcement action. Such factors can include, for example:

- advanced or tender age;
- lengthy presence in the United States;
- a mental condition that may have contributed to the criminal conduct, or a physical or mental condition requiring care or treatment;
- status as a victim of crime or victim, witness, or party in legal proceedings;
- the impact of removal on family in the United States, such as loss of provider or caregiver;
- whether the noncitizen may be eligible for humanitarian protection or other immigration relief;
- military or other public service of the noncitizen or their immediate family;

- time since an offense and evidence of rehabilitation;
- conviction was vacated or expunged.

The above examples of aggravating and mitigating factors are not exhaustive. The circumstances under which an offense was committed could, for example, be an aggravating or mitigating factor depending on the facts. The broader public interest is also material in determining whether to take enforcement action. For example, a categorical determination that a domestic violence offense compels apprehension and removal could make victims of domestic violence more reluctant to report the offense conduct. The specific facts of a case should be determinative.

Again, our personnel must evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly. The overriding question is whether the noncitizen poses a current threat to public safety. Some of the factors relevant to making the determination are identified above.

The decision how to exercise prosecutorial discretion can be complicated and requires investigative work. Our personnel should not rely on the fact of conviction or the result of a database search alone. Rather, our personnel should, to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances of the conduct at issue. The gravity of an apprehension and removal on a noncitizen's life, and potentially the life of family members and the community, warrants the dedication of investigative and evaluative effort.

C. Threat to Border Security

A noncitizen who poses a threat to border security is a priority for apprehension and removal.

A noncitizen is a threat to border security if:

(a) they are apprehended at the border or port of entry while attempting to unlawfully enter the United States; or

(b) they are apprehended in the United States after unlawfully entering after November 1, 2020.

There could be other border security cases that present compelling facts that warrant enforcement action. In each case, there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action. Our personnel should evaluate the totality of the facts and circumstances and exercise their judgment accordingly.

III. Protection of Civil Rights and Civil Liberties

We must exercise our discretionary authority in a way that protects civil rights and civil liberties. The integrity of our work and our Department depend on it. A noncitizen's race, religion, gender, sexual orientation or gender identity, national origin, or political associations shall never be factors in deciding to take enforcement action. A noncitizen's exercise of their First Amendment rights also should never be a factor in deciding to take enforcement action. We must ensure that enforcement actions are not discriminatory and do not lead to inequitable outcomes.

This guidance does not prohibit consideration of one or more of the above-mentioned factors if they are directly relevant to status under immigration law or eligibility for an immigration benefit. For example, religion or political beliefs are often directly relevant in asylum cases and need to be assessed in determining a case's merit.

State and local law enforcement agencies with which we work must respect individuals' civil rights and civil liberties as well.

IV. Guarding Against the Use of Immigration Enforcement as a Tool of Retaliation for the Assertion of Legal Rights

Our society benefits when individuals – citizens and noncitizens alike – assert their rights by participating in court proceedings or investigations by agencies enforcing our labor, housing, and other laws.

It is an unfortunate reality that unscrupulous employers exploit their employees' immigration status and vulnerability to removal by, for example, suppressing wages, maintaining unsafe working conditions, and quashing workplace rights and activities. Similarly, unscrupulous landlords exploit their tenants' immigration status and vulnerability to removal by, for example, charging inflated rental costs and failing to comply with housing ordinances and other relevant housing standards.

We must ensure our immigration enforcement authority is not used as an instrument of these and other unscrupulous practices. A noncitizen's exercise of workplace or tenant rights, or service as a witness in a labor or housing dispute, should be considered a mitigating factor in the exercise of prosecutorial discretion.

V. The Quality and Integrity of our Civil Immigration Enforcement Actions

The civil immigration enforcement guidance does not compel an action to be taken or not taken. Instead, the guidance leaves the exercise of prosecutorial discretion to the judgment of our personnel.

To ensure the quality and integrity of our civil immigration enforcement actions, and to achieve consistency in the application of our judgments, the following measures are to be taken before the effective date of this guidance:

A. Training

Extensive training materials and a continuous training program should be put in place to ensure the successful application of this guidance.

B. Process for Reviewing Effective Implementation

A review process should be put in place to ensure the rigorous review of our personnel's enforcement decisions throughout the first ninety (90) days of implementation of this guidance. The review process should seek to achieve quality and consistency in decision-making across the entire agency and the Department. It should therefore involve the relevant chains of command.

Longer-term review processes should be put in place following the initial 90-day period, drawing on the lessons learned. Assessment of implementation of this guidance should be continuous.

C. Data Collection

We will need to collect detailed, precise, and comprehensive data as to every aspect of the enforcement actions we take pursuant to this guidance, both to ensure the quality and integrity of our work and to achieve accountability for it.

Please work with the offices of the Chief Information Officer; Strategy, Policy, and Plans; Science and Technology; Civil Rights and Civil Liberties; and Privacy to determine the data that should be collected, the mechanisms to collect it, and how and to what extent it can be made public.

D. Case Review Process

We will work to establish a fair and equitable case review process to afford noncitizens and their representatives the opportunity to obtain expeditious review of the enforcement actions taken. Discretion to determine the disposition of the case will remain exclusively with the Department.

VI. Implementation of the Guidance

This guidance will become effective in sixty (60) days, on November 29, 2021. Upon the effective date, this guidance will serve to rescind (1) the January 20, *2021 Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* issued by then-Acting Secretary David Pekoske, and (2) the *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* issued by Acting ICE Director Tae D. Johnson.

We will meet regularly to review the data, discuss the results to date, and assess whether we are achieving our goals effectively. Our assessment will be informed by feedback we receive from our law enforcement, community, and other partners.

This guidance is Department-wide. Agency leaders as to whom this guidance is relevant to their operations will implement this guidance accordingly.

VII. Statement of No Private Right Conferred

This guidance 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.

DHS ENFORCEMENT PRIORITIES UPDATE

SEPTEMBER 30TH 2021

On September 30, 2021 DHS issued new enforcement priorities that affect immigration enforcement across the country: Guidelines for the Enforcement of Civil Immigration Law.

WHAT YOU NEED TO KNOW:

This new policy does not take effect until November 29, 2021. Until then, DHS will continue following the interim priorities as constrained by the Fifth Circuit's September 15th ruling. See our resource for more information on the interim priorities: https://www.ilrc.org/enforcement-priorities-litigation-update-september-2021.

ENFORCEMENT PRIORITIES:

There are three general priority categories (substantially the same as before) that DHS will target for enforcement actions:

1. **National Security** - people the agency alleges are involved in terrorism or espionage, or related activities, or who otherwise poses a danger to national security.
2. **Border Security** - people apprehended trying to enter unlawfully and people apprehended who entered unlawfully after Nov. 1, 2020.
3. **Public Safety** - people who pose a current threat to public safety, "typically because of serious criminal conduct."

DETAILS FOR "PUBLIC SAFETY" CATEGORY:

Assessing whether someone is a public safety threat is now entirely in the discretion of DHS officers. This means that no particular behavior, criminal conviction, or other conduct automatically makes someone a public safety threat or a priority for enforcement action.

Instead, DHS offers the following undefined aggravating and mitigating factors to make this determination (this list is provided, but agents may consider other factors, including the "broader public interest"):

- Aggravating factors that weigh toward taking enforcement action:
    - The gravity of the offense and sentence imposed;
    - Nature and degree of harm caused by the offense;
    - Sophistication of the criminal offense;
    - Use or threatened use of a firearm or dangerous weapon;
    - A serious prior criminal record.
- Mitigating factors that weigh in favor of the immigrant, and against taking enforcement action:
    - Advanced or tender age;
    - Lengthy presence in the United States;
    - Mental condition that may have contributed to the conduct, physical or mental condition requiring care or treatment;
    - Status as a victim of crime or a witness/victim or party in legal proceedings;

- Impact of the removal on family in the US, such as loss of caregiver or provider;
- Whether they are eligible for humanitarian protection or other immigration relief;
- Military or public service of the noncitizen or their immediate family;
- Time since an offense and evidence of rehabilitation;
- Conviction was vacated **or expunged**;
- A person's exercise of workplace or tenant rights, or service as a witness in a labor or housing dispute.

The memo directs officers to "obtain and review the entire criminal and administrative record and other investigative information" to assess the case and states that agents should not rely on the fact of a conviction or a database search alone. In practice, however, ICE doesn't identify mitigating factors on their own, and is unlikely to look carefully. Advocates should be prepared to monitor carefully and present their own evidence. The guidance also refers to respecting civil rights and guarding against the use of immigration enforcement as a tool of retaliation, but provides very little detail of how these principles apply.

TAKEAWAYS:

- This new policy does not take effect until **November 29, 2021**.
- These new enforcement priorities leave a LOT of room for ICE agents to make their own decisions. Not only are there no strict brightline rules as were outlined in previous memos, the new priority guidelines do not even provide a definition of 'serious criminal conduct'. ICE officers can take actions without any supervisor input or approval.
- Several states have challenged the DHS priorities policies - this litigation is ongoing and it remains to be seen how these new enforcement priorities will interact with the litigation.

DIFFERENCES FROM THE INITIAL POLICIES ANNOUNCED BY THE BIDEN ADMINISTRATION IN JANUARY 2021:

- These are 'permanent priorities' that will remain policy indefinitely, although the administration technically has power to change them again at any time. In contrast, the first set of priorities announced in January were specifically an interim policy, eventually to be replaced.
- There is no longer any pre-approval process for ICE agents to get authorization from supervisors before taking enforcement actions.
- The new enforcement priorities no longer identify people with aggravated felonies or gang-related convictions as specific priorities. However in practice ICE may continue to take enforcement action in those cases under this guidance.

WHAT ELSE?

This memo lays out some guidance, but there are a lot of questions and details left unknown. Secretary Mayorkas has said that more details will be fleshed out in future trainings.

For 90 days after this policy is implemented (starting Nov. 29, 2021), DHS will be reviewing enforcement decisions to monitor implementation. During this period it will be important for advocates to monitor ICE and CBP implementations as well.

Please share what you're seeing on the ground and how the priorities are being implemented. Report immigration enforcement activity in your community here: https://bit.ly/ICETracker.

DHS ENFORCEMENT PRIORITIES UPDATE

SEPTEMBER 2021

*The **DHS Enforcement Priorities** **remain in effect** in most situations. Although lawsuits and court decisions have caused some confusion, as of September 15, 2021, all DHS components should be following the Biden enforcement priorities, with a few exceptions that we explain below.*

BACKGROUND:

In the beginning of the Biden administration, DHS issued new immigration enforcement priorities. These were explained in the DHS' January 20th "Pekoske Memo" and ICE's February 18th "Johnson Memo." Together, these memos created three general categories of people to be prioritized for enforcement-related actions if they were deemed to be either a 1) national security, 2) border security, or 3) public safety threat. That means that people outside these priority categories should not be targeted for enforcement, but should get prosecutorial discretion. For example, these categories would guide ICE's decisions on whether to issue detainers, make immigration arrests, initiate removal proceedings, detain or release someone, or execute removal orders. For more explanation of these policies, see: https://www.ilrc.org/glance-feb-18th-interim-ice-johnson-memo.

Several states filed lawsuits challenging the legality of these policies. The lawsuits led by Arizona and Florida have failed so far (though Arizona and Florida have appealed the decisions and they remain pending). In a third lawsuit brought by Texas and Louisiana, a federal court issued a nationwide preliminary injunction on August 19, preventing DHS from applying the enforcement priorities guidance.

CURRENT LEGAL STATUS:

On September 15, the Fifth Circuit in *Texas v. United States* issued a partial stay of the August 19 nationwide preliminary injunction. This means that the Pekoske and Johnson memos are back in effect as governing policy, except for in two situations.

The two exceptions: 1) people subject to ICE detainers who also fall under the rules for mandatory detention, and 2) with people who were ordered removed within the last 90 days. The Fifth Circuit blocked DHS from releasing these people from custody.

However, even if someone does fall within these exceptions, the Fifth Circuit was clear that its decision does not mandate ICE to arrest or deport anyone. That means that even though ICE can't rely on the enforcement priorities policies to justify it, ICE still retains the ability to decide not take enforcement actions in any given case. This is especially true if advocates can show strong equities, like community ties, rehabilitation, or other strong factors in individual cases.

WHAT RULES APPLY NOW?

All DHS officials should still be following the enforcement priorities and should be avoiding enforcement actions and/or granting prosecutorial discretion according to the Pekoske and Johnson memos, unless the

person falls under the exceptions identified above.

In May, ICE's Office of the Principal Legal Advisor (the head of ICE attorneys) issued a memo on how ICE attorneys should exercise prosecutorial discretion under the Pekoske and Johnson memos in the context of removal proceedings. ICE attorneys in removal proceedings should continue to follow this OPLA directive

Additionally, on August 11, ICE issued new policy guidance about prosecutorial discretion for people who are victims of crimes. Because this policy was not based on the Pekoske and Johnson memos enjoined by the court, this policy is unaffected by the litigation.

WHAT ABOUT SANCTUARY POLICIES?

This litigation is about what DHS is allowed or required to do; it does not affect existing sanctuary laws. Even if a person is an enforcement priority or must be detained according to the court's decision, that does not mean that local law enforcement has an obligation to assist ICE or transfer someone to ICE. Local law enforcement must continue to follow state and local laws.

TAKEAWAY: *As of September 15, the injunction is partially stayed (suspended) and the Enforcement Priorities are still in effect. Advocates and practitioners can and should continue pursuing prosecutorial discretion and challenging ICE decisions via the ICE case review process or in immigration court and via advocacy with local ICE field offices based on the Pekoske, Johnson, and OPLA memos.*

OVERVIEW OF IMMIGRATION CHANGES UNDER THE BIDEN HARRIS ADMINISTRATION

NDNY-FCBA'S CLE COMMITTEE EVENT 11/18/2021

MARY E. ARMISTEAD, ESQ.

STAFF ATTORNEY

HUMAN TRAFFICKING VICTIMS PROGRAM

THE LEGAL PROJECT

THIS PROGRAM IS SUPPORTED BY AN AWARD FROM THE U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIME, GMS AWARD 2020-VT-BX-0085. THE OPINIONS, FINDINGS, CONCLUSIONS OR RECOMMENDATIONS EXPRESSED ARE THOSE OF THE AUTHOR(S) AND DO NOT NECESSARILY REPRESENT THE OFFICIAL POSITION OR POLICIES OF THE U.S. DEPARTMENT OF JUSTICE.

WHO DO IMMIGRATION LAWS APPLY TO?

- Any non-citizen (immigrants and nonimmigrants)
- This includes many different types of status:
  - Lawful Permanent Residents (green card holder)
    - Conditional Residents (conditional green card holders/ two year green card holders)
  - Nonimmigrants (visitor, student, or work visas)
  - Those with humanitarian immigration status (e.g. asylum)
  - Undocumented persons

WHY DOES IMMIGRATION STATUS MATTER?

Immigration Status affects whether a person:

- Has a right to work legally
- Has a right to get a social security number
- May be eligible for public benefits
- Is vulnerable to removal from the U.S.
- Has permission to leave and return to the U.S.
- Has access to higher education
- Has ability to petition for relatives

REGARDLESS OF IMMIGRATION STATUS

All persons, regardless of immigration status, have access to:

- Police assistance and criminal prosecution of abusers
- Victim's assistance
- Protection orders
- Child custody and support
- Obtaining public benefits for their US citizen children
- Emergency medical care

PATHWAYS TO IMMIGRATION STATUS

- Family (480,000/year)
  - Immediate relatives
    - Spouse, child (under 21 and unmarried), or parent of a US Citizen
  - Preference Relatives
    - Older or married children and siblings of US Citizens OR Spouse, children, or parent of LPR

- Employment (140,000/year)
  - Primarily for skilled/educated workers (only 10,000 per year for unskilled workers)

- Diversity Visa (55,000/year)

- Humanitarian Status
  - Refugees (cap set by President annually) and Asylees (no cap)
  - VAWA self-petition (abused spouses/children of USCs or LPRs) (family cap)
  - U-Visa (certain crime victims) (10,000) and T-Visa (human trafficking victims) (5,000)
  - Special Immigrant Juvenile Status (EB4 category)
  - Cancellation of Removal (e.g. for non-LPRS, 4,000 cap)

IMMIGRATION AGENCIES AND THEIR ROLES

- Executive Office for Immigration Review (EOIR): institutional home of Immigration Courts (ICs), wherein immigration judges (IJs) preside over removal hearings, and the Board of Immigration Appeals (BIA), which reviews IJ decisions & administrative decisions by DHS officers
- Immigration and Customs Enforcement (ICE): responsible for locating, arresting, and charging individuals who are within the US without documentation
- Customs and Border Patrol (CBP): responsible for patrolling the border to ensure it is secure, including counterterrorism, customs, immigration, trade, and agriculture
- United States Citizenship and Immigration Services (USCIS): oversees lawful immigration to the US and is charged with processing immigrant visa petitions, naturalization petitions, & asylum & refugee applications

TRUMP ENFORCEMENT PRIORITIES

- Enforcement Priorities have been historically used to prioritize certain non-citizens for removal
- Trump issued "Enforcement Priorities" through EO on 1/25/17 ("Enhancing Public Safety in the Interior of the United States")
  - So broad as to render the term meaningless
  - Prioritized for removal the following immigrants:
    - Those convicted, charged with (still pending), or has committed acts constituting any criminal offense
    - Those who have engaged in fraud or misrepresentation in any official matter/application before a government agency
    - Those who have abused any program related to receipt of public benefits
    - Those subject to a final order of removal
    - Those, in the judgement of an immigration officer, the individual poses a risk to public safety or national security

BIDEN INTERIM ENFORCEMENT PRIORITIES

- Biden administration issued interim Enforcement Priorities immediately (1/20/21) (currently effective, with exceptions)
  - 1/20/21 "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities" (Pekoske Memo) and 2/18/21 "Interim Guidance: Civil Immigration Enforcement and Removal Priorities" (Johnson Memo)
- Prioritizes for removal:
  - Those who pose a national security risk
    - terrorism/espionage-related activity or "otherwise necessary" – but does not include general criminal activity
  - Those who pose a border security risk
    - entered unlawfully after and not present in US prior to 11/1/2020
  - Those who pose a public safety risk
    - convicted of an aggravated felony or gang-related crimes
    - others deemed to pose public safety risk
    - but officers must consider extensiveness, seriousness, and recency of criminal activity and mitigating factors, including family circumstances, health and medical factors, ties to the community, evidence of rehabilitation, and potential immigration relief
- Nationwide preliminary injunction imposed 8/19/21
- Lifted, with limited exceptions, 9/15/21
  - Exceptions: (1) subject to ICE detainers and mandatory detention criteria and (2) people ordered removed within last 90 days

BIDEN FINAL ENFORCEMENT PRIORITIES

- Final Enforcement Priority memo issued 9/30/21 (becomes effective 1/29/21, replacing interim memo)
  - "Guidelines for the Enforcement of Civil Immigration Law"
- Very similar to interim Enforcement Priorities, but with some critical differences re: public safety threats
- Prioritizes for removal:
  - Those who pose a national security risk
    - terrorism/espionage-related activity or "otherwise necessary" – but does not include general criminal activity
  - Those who pose a border security risk
    - entered unlawfully after and not present in US prior to 11/1/2020
  - Those who pose a public safety risk
    - Entirely in the discretion of DHS officer—no conviction necessary; no particular conduct/conviction leads to an automatic determination
    - "typically because of serious criminal conduct"
    - aggravating and mitigating factors to consider (see next slide)

BIDEN FINAL ENFORCEMENT PRIORITIES: PUBLIC SAFETY

- Aggravating factors that weigh toward taking enforcement action:
  - The gravity of the offense and sentence imposed
  - Nature and degree of harm caused by the offense
  - Sophistication of the criminal offense
  - Use or threatened use of a firearm or dangerous weapon
  - A serious prior criminal record
- Mitigating factors that weigh in favor of the immigrant, and against taking enforcement action:
  - Advanced or tender age;
  - Lengthy presence in the United States;
  - Mental condition that may have contributed to the conduct, physical or mental condition requiring care or treatment;
  - Status as a victim of crime or a witness/victim or party in legal proceedings;
  - Impact of the removal on family in the US, such as loss of caregiver or provider;
  - Whether they are eligible for humanitarian protection or other immigration relief;
  - Military or public service of the noncitizen or their immediate family;
  - Time since an offense and evidence of rehabilitation;
  - Conviction was vacated or expunged;
  - A person's exercise of workplace or tenant rights, or service as a witness in a labor or housing dispute.

ENFORCEMENT IN PROTECTED AREAS

- Memo issued 10/27/21 (currently effective)
  - "Guidelines for Enforcement in or Near Protected Areas"
- Purpose: to ensure that enforcement activity does not interfere with access to essential services or engagement in essential activities– locations where such activities occur are "Protected Areas"
  - Enforcement is prohibited in the Protected Areas and near the Protected Areas
- Protected Areas:
  - "Whether an area is a 'protected area' requires us to understand the activities that take place there, the importance of those activities to the well-being of people and the communities of which they are a part, and the impact an enforcement action would have on people's willingness to be in the protected area and receive or engage in the essential services or activities that occur there. It is a determination that requires the exercise of judgment."
  - Examples (non-exclusive):
    - Schools and other places where children congregate.
    - Medical and mental health facilities (including places for vaccines and testing).
    - Places of worship or religious study (regardless of whether it is a structure dedicated to those activities or temporarily in use for them).
    - Social Service establishments and Community Centers.
    - A place where disaster or emergency response relief is being provided
    - Place where funerals, weddings, rosaries, or other religious or civil ceremony occur.
    - Places where there is an ongoing parade, demonstration, or rally.

ENFORCEMENT IN PROTECTED AREAS: EXCEPTIONS

- Exceptions
  - "[T]here might be limited circumstances under which an enforcement action needs to be taken in or near a protected area."
  - Prior approval required unless exigent circumstances
    - If exigent circumstances, must consult post-action
  - Examples (non-exclusive):
    - The enforcement action involves a national security threat.
    - There is an imminent risk of death, violence, or physical harm to a person.
    - The enforcement action involves the hot pursuit of an individual who poses a public safety threat.
    - The enforcement action involves the hot pursuit of a personally observed border-crosser.
    - There is an imminent risk that evidence material to a criminal case will be destroyed.
    - A safe alternative location does not exist.
  - Removes prior exception: "at or near an international border," which meant that there were no areas protected from enforcement in border towns—now protected

ENFORCEMENT IN PROTECTED AREAS: COURTHOUSES

- Addressed in 4/47/21 memo (currently effective) (unchanged by 10/27/21 memo)
  - "Civil Immigration Enforcement Actions in or near Courthouses"
- "Executing civil immigration enforcement actions in or near a courthouse may chill individuals' access to courthouses and, as a result, impair the fair administration of justice. At the same time, there may be legitimate need to execute a civil immigration enforcement action in or near a courthouse."
- A civil immigration enforcement action may be taken in or near a courthouse if:
  - it involves a national security threat
  - there is an imminent risk of death, violence, or physical harm to any person
  - Threat to public safety if:
    - it involves hot pursuit OR
    - it is necessary because a safe alternative location does not exist or would be too difficult to achieve at an alternative location
      - Must have prior approval
  - there is an imminent risk of destruction of evidence material to a criminal case
- **BUT SEE**! New York Protect Our Courts Act (12/15/20)
  - Prohibits civil immigration enforcement in or around NY courts, including City and other Municipal courts

PROSECUTORIAL DISCRETION (PD)

- Trump detailed "Prosecutorial Discretion" through EO on 1/25/17 ("Enhancing Public Safety in the Interior of the United States")
  - Virtually barred PD by ICE attorneys/Office of the Principal Legal Advisors (OPLA, e.g. "prosecutors")
  - Biden revoked immediately (1/20/21) (EO: "Revision of Civil Immigration Enforcement Policies and Priorities")
- 5/27/21 memo: (no longer effective—see below)
  - "Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities"
  - Gives 6 ways OPLA can exercise PD for those who do <u>not</u> fall under the 3 "Enforcement Priority" categories
    - includes dismissing or administratively closing cases, stipulating to issues, and joining motions
  - Lists 5 types of cases that "generally will merit dismissal in the absence of serious aggravating factors":
    - military service members and their immediate relatives
    - noncitizens likely to be granted temporary or permanent relief
    - noncitizens presenting compelling humanitarian factors
    - noncitizens whose cases implicate significant law enforcement or other government interests
    - long-term lawful permanent residents
  - Certain provisions of memo enjoined 8/19/21; OPLA stated they would still review PD requests, but not rely on memo
  - 8/23/21: New guidance on PD (see next slide)

8/23/21 PROSECUTORIAL DISCRETION (PD) GUIDANCE

- "Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor (OPLA)"
- Exercise PD on a case-by-case basis, based on the totality of the circumstances, considering factors such as the following:
  - Length of residence in the U.S.
  - Service in the U.S. military
  - Family or community ties in the U.S.
  - Circumstances of arrival in the U.S and the manner of entry
  - Prior immigration history
  - Work and education history in the U.S
  - Status as a victim, witness, or plaintiff in civil or criminal proceedings
  - Compelling humanitarian factors (including on the part of close family members), including:
    - Serious medical condition, Age, Pregnancy, Status as a child, and Status as a primary caregiver of a seriously ill relative in the US
  - If charged or convicted of a crime, consider factors such as:
    - The extensiveness, seriousness, and recency of the criminal activity
    - Indicia of rehabilitation
    - Extenuating circumstances involving the offense or conviction
    - The time and length of the sentence imposed, if any
    - The length of time since the offense or conviction occurred
    - Whether subsequent criminal activity supports a determination that the noncitizen poses a threat to public safety

NOTICE TO APPEAR (NTA) MEMO: RESCINDED

- 6/28/18: memo related to USCIS commencing enforcement again non-citizens with denied applications
  - "Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens"
  - USCIS should issues NTAs upon denying a status-impacting application, including humanitarian forms of immigration relief (but not employment based petitions)
    - i.e. place those with denied status-impacting applications into removal proceedings
    - USCIS has never before acted as an enforcement arm of immigration
    - Chilling effect on applications, especially humanitarian
- Rescinded 1/20/21
  - "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities" (Pekoske Memo)

VICTIM-CENTERED APPROACH

- 8/10/21: ICE Directive regarding enforcement against crime victims
  - ICE Directive 11005.3 "Using a Victim-Centered Approach with Noncitizen Crime Victims"
  - "[A]pplying a victim-centered approach minimizes any chilling effect that civil immigration enforcement actions may have on the willingness and ability of noncitizen crime victims to contact law enforcement, participate in investigations and prosecutions, pursue justice, and seek benefits."
  - Directs ICE to:
    - generally refrain from civil immigration enforcement actions against noncitizen crime victims or witnesses, absent exigent circumstances (either (1) national security concerns; or (2) an "articulable risk of death, violence, or physical harm")
      - Crime victims and witnesses include:
        - victims and witnesses during the pendency of any known criminal investigation or prosecution
        - human trafficking victims issued "Continued Presence"
        - applicants for and beneficiaries of victim-based immigration benefits (both primary and derivative), including T nonimmigrant status, U nonimmigrant status, VAWA relief, and Special Immigrant Juvenile classification
    - coordinate with USCIS to seek expedited adjudication of certain victim-based immigration applications and petitions
      - Return files to USCIS promptly
      - Request expedited processing from USCIS is ICE will detain victim
    - identify whether noncitizens encountered by ICE are crime victims and provide relevant information
      - Proactively inquire and look for indicia to determine whether a person is a crime victim
      - Give information for reporting to relevant law enforcement agencies

EXPEDITED REMOVAL

- Potential Changes to Expedited Removal—returning to Obama-era limitations?
  - Expedited Removal is statutorily allowed for:
    - 2 types of aliens/noncitizens:
      - (1) Arriving aliens/noncitizens
      - (2) To all or a subset of aliens/noncitizens who
        - (a) entered without inspection and
        - (b) have been in the U.S. for less than 2 years (within AG discretion,)
    - If they trigger either of these inadmissibility grounds:
      - (1) Failure to have documentation
      - (2) Willfully misrepresenting a material fact to obtain an immigration benefit

  - Trump administration exercised, for the first time, the full limit of expedited removal
    - All previous administration had applied only to a subset of the second class
      - E.g. Obama administration had limited second class to (a) within 100 miles of the border and (b) been in the U.S. for less than 2 weeks
  - 10/14/21 statement by DHS ospokesperson: "DHS's review of expanded expedited removal is ongoing. This particular application of expedited removal [against certain undocumented immigrants] will not be used moving forward until the Department's review is completed"

AT THE BORDER

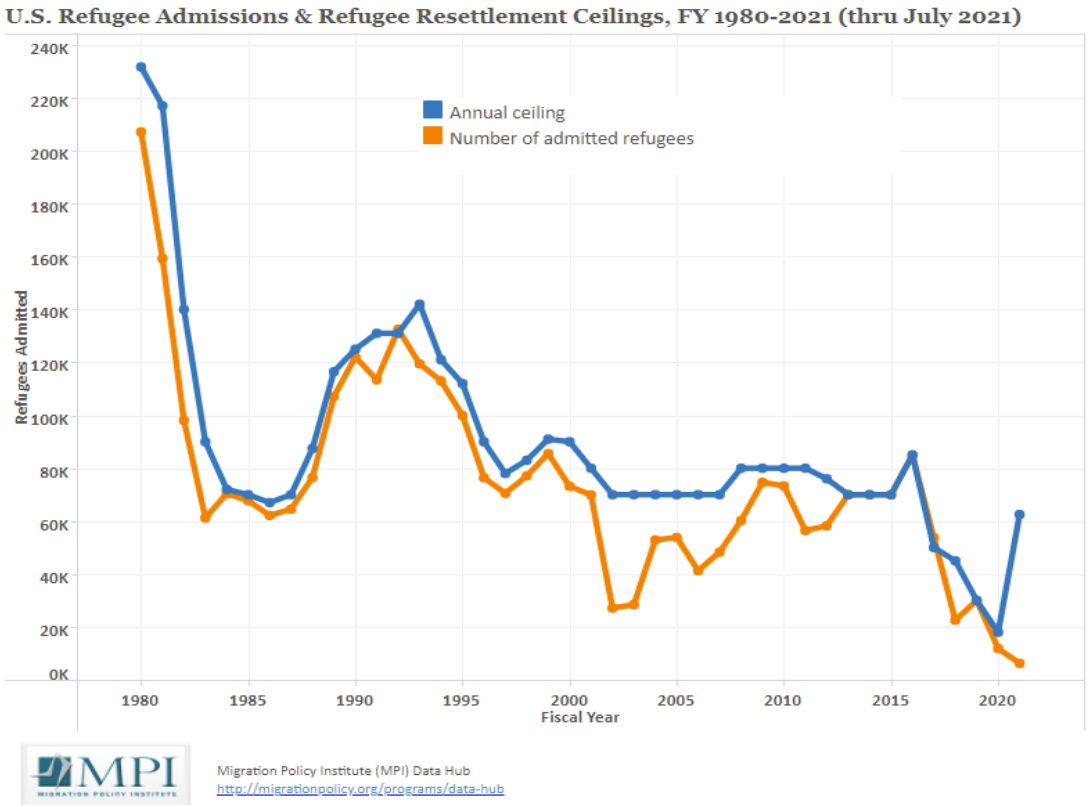
- Travel (aka Muslim/African) Bans Executive Order 13780 (3/6/17), and Proclamations 9645 (9/24/17), 9723 (4/10/18), and 9983 (1/31/2021)
  - Rescinded 1/20/21 "Proclamation on Ending Discriminatory Bans on Entry to The United States"
- COVID Travel Bans
  - Rescinded 11/8/21 for all countries previously barred (over 30) between January 2020 and April 2021
  - Vaccinated travelers may enter—only those with specified vaccines
    - Jansen/J&J; Pfizer-BioNTech; Moderna; AstraZeneca; Covaxin; Covishield; BIBP/Sinopharm; Sinovac
- Border wall funding halted
  - but seeking funding for surveillance/aircrafts

ASYLEES AND REFUGEES

- Refugee cap raised for FY 2021 (Oct. 2020-Sept. 2021)
  - Trump set to a historic low of 15,000
  - Biden changed to 62,500 in May 2021
    - But only 11,411 actually admitted

- Trump administration's "Death to Asylum" regulations enjoined;
- New regulations proposed by Biden Administration
  - See "An analysis of the Biden Administration's new proposed asylum rules: by Tahirih Justice Center (materials) for damaging aspects of proposed rule

- *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) rescinded by *Matter of L-E-A-*, 28 I&N Dec. 304 (A.G. 2021)
  - Lifting limitations on family-based asylum claims
- *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) and *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021) rescinded by *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021)
  - Lifting restriction on domestic violence-based asylum claims



MIGRANT PROTECTION PROTOCOL (MPP) (AKA "REMAIN IN MEXICO" POLICY)

- Announced Dec. 2018: effective Jan. 2019
  - Sent asylum seekers back to Mexico to await removal proceedings
  - Trump administration stopped processing all asylum seekers beginning in March 2020 pursuant to Title 42 (see next slide)
- Biden administration attempts to unwind
  - 1/20/21: DHS suspended new enrollment in MPP
  - Starting 2/26/21: process those with pending MPP cases to enter U.S.
  - Starting June 2021: process those who were ordered removed while in MPP to enter U.S.
  - 8/15/21: N.D.T.X. ordered Biden administration to "enforce and implement MPP in good faith until such a time as it has lawfully been rescinded in compliance with the APA" – Supreme Court refused request to stay
  - 9/29/21: Biden administration will issue a new memorandum terminating MPP, but will simultaneously negotiate with Mexico to reinstate MPP pursuant to court order
  - 10/28/21: second compliance report stating may restart MPP as soon as mid-November, but Mexico has yet to agree to accept MPP individuals

TITLE 42

- Provision included in the 1944 Public Health Service Act to permit federal health officials to ban people and goods from entering the country in the case of a pandemic
- Invoked by Trump administration beginning March 2020 only at border points of entry
  - Does not apply to U.S. citizens, lawful permanent residents, and their spouses and children, nor U.S. military or those with valid travel documents
  - 9/11/20: final regulation confirmed use to preclude asylum seekers
    - violates U.S. Non-Refoulement obligations
- Beginning Feb. 2021, Biden administration exempted unaccompanied minors
- Used to expel thousands of Haitian asylum seekers in September 2021

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

April 27, 2021

MEMORANDUM FOR U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE)
U.S. CUSTOMS AND BORDER PROTECTION (CBP)

FROM: Tae Johnson
Acting Director
U.S. Immigration and Customs Enforcement

Troy Miller
Acting Commissioner
U.S. Customs and Border Protection

SUBJECT: Civil Immigration Enforcement Actions in or near Courthouses

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Purpose: This memorandum provides interim guidance that governs our civil immigration enforcement actions in or near courthouses. It is effective immediately and will be replaced after the Secretary issues his final guidance after engaging with you.

This memorandum supersedes and revokes ICE Directive 11072.1, entitled "Civil Immigration Enforcement Inside Courthouses," that was issued on January 30, 2018.

I. Core Principle

The courthouse is a place where the law is interpreted, applied, and justice is to be done. As law enforcement officers and public servants, we have a special responsibility to ensure that access to the courthouse – and therefore access to justice, safety for crime victims, and equal protection under the law – is preserved.

Executing civil immigration enforcement actions in or near a courthouse may chill individuals' access to courthouses and, as a result, impair the fair administration of justice. At the same time, there may be legitimate need to execute a civil immigration enforcement action in or near a courthouse. This memorandum is designed to address these interests, which can sometimes be in tension with one another. It provides guidance as to when and how civil immigration enforcement actions can be executed in or near a courthouse so as not to unnecessarily impinge upon the core principle of preserving access to justice.

II. Scope of this Memorandum

This memorandum does not apply to criminal immigration enforcement actions.[1] It applies to any civil immigration enforcement action in or near a courthouse that involves an enforcement encounter between ICE or CBP personnel and an individual in the courthouse other than a courthouse official or employee. It applies, for example, to civil apprehensions, service of subpoenas, searches, seizures, interviews, and surveillance. It does not apply, for example, to the collection of records from court offices or participation in community meetings held in the courthouse. This policy also does not apply to arrests that occur in jails connected to courthouses where the individual arrested is being released from the custody of state, local, or federal law enforcement partners at the conclusion of any criminal sentence. This policy does not preclude arrests conducted at DHS facilities/offices regardless of their location.
For the purposes of this memorandum, a courthouse includes any municipal, county, state, federal, tribal, or territorial courthouse, including immigration courts.

"Near" the courthouse means in the close vicinity of the courthouse, including the entrance and exit of a courthouse, and in adjoining or related areas such as an adjacent parking lot or transportation point (such as a bus stop right outside a courthouse). It does not include adjacent buildings or houses that are not part of the courthouse or otherwise are not used for court-related business.

III. Limited Circumstances for Courthouse Enforcement

A civil immigration enforcement action may be taken in or near a courthouse if (1) it involves a national security threat, or (2) there is an imminent risk of death, violence, or physical harm to any person, or (3) it involves hot pursuit of an individual who poses a threat to public safety, or (4) there is an imminent risk of destruction of evidence material to a criminal case.[2]

In the absence of hot pursuit, a civil immigration enforcement action also may be taken in or near a courthouse against an individual who poses a threat to public safety if: (1) it is necessary to take the action in or near the courthouse because a safe alternative location for such action does not exist or would be too difficult to achieve the enforcement action at such a location, and (2) the action has been approved in advance by a Field Office Director, Special Agent in Charge, Chief Patrol Agent, or Port Director.[3]

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[1] While this memorandum does not apply to criminal immigration enforcement actions, personnel should determine whether such an action truly needs to be taken in or near the courthouse given its potentially adverse impact upon access to justice.

[2] For purposes of determining whether an enforcement action pertains to an individual who is a national security or public safety enforcement and removal priority, department personnel are directed to consider the interim guidance issued by ICE Acting Director Tae Johnson on February 18, 2021, titled, "Interim Guidance: Civil Immigration Enforcement and Removal Priorities."

[3] DHS personnel shall continue to follow the certification compliance requirement in INA Section 239(e) and DHS Instruction 002-02-001.1, *Implementation of Section 1367 Information Provisions* when a noncitizen's appearance at a courthouse involves a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, human trafficking, or stalking in which the noncitizen has been battered or subject to extreme cruelty, or if the noncitizen may be eligible for T or U nonimmigrant status. Please refer to DHS Instruction 002-02-001.1, Section VI.A.3 for specific instructions for how DHS personnel shall comply with this requirement.

A "safe alternative location for such action" means one that is safe for DHS personnel, the subject of the enforcement action, and the public.

To the fullest extent possible, an enforcement action in the courthouse will be taken in a non-public area of the courthouse, outside of public view, be conducted in collaboration with courthouse security personnel, utilize the courthouse's non-public entrances and exits, and be conducted at the conclusion of the judicial proceeding that brought the individual to the courthouse.

IV. Training

Each Field Office Director, Special Agent in Charge, Chief Patrol Agent, and/or Port Director must ensure that all employees under his or her supervision are trained annually on this policy and that such training is documented and reviewed by agency counsel.

V. Reporting

Civil immigration enforcement actions that are planned or have been taken in or near a courthouse will be documented in relevant ICE or CBP electronic systems of record, which can be searched and validated.

ICE and CBP will each provide a monthly report to the Secretary, and to the Office for Civil Rights and Civil Liberties upon request, detailing all planned or executed civil immigration enforcement actions in or near courthouses, including the basis under this policy for each enforcement action.

VI. No Private Right of Action

The guidance set forth in this memorandum 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.

This memorandum provides management guidance to ICE and CBP personnel exercising discretionary law enforcement functions and does not affect the statutory authority of ICE or CBP employees. Nor is this memorandum to be construed as indicating tolerance for any violation of law in or near a courthouse.

Office of the Principal Legal Advisor

U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

May 27, 2021

MEMORANDUM FOR: All OPLA Attorneys

FROM: John D. Trasviña
Principal Legal Advisor

JOHN D TRASVINA

Digitally signed by JOHN D TRASVINA
Date: 2021.05.27 07:04:19 -07'00'

SUBJECT: Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities

On January 20, 2021, President Biden issued Executive Order (EO) 13993, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 20, 2021), which articulated foundational values and priorities for the Administration with respect to the enforcement of the civil immigration laws. On the same day, then-Acting Secretary of Homeland Security David Pekoske issued a memorandum titled, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Interim Memorandum).

The Interim Memorandum did four things. First, it directed a comprehensive Department of Homeland Security (DHS or Department)-wide review of civil immigration enforcement policies. Second, it established interim civil immigration enforcement priorities for the Department. Third, it instituted a 100-day pause on certain removals pending the review.[1] Fourth, it rescinded several existing policy memoranda, including a prior U.S. Immigration and Customs Enforcement (ICE) Office of the Principal Legal Advisor (OPLA) memorandum, as inconsistent with EO 13993.[2] The Interim Memorandum further directed that ICE issue interim guidance implementing the revised enforcement priorities and the removal pause.

On February 18, 2021, ICE Acting Director Tae D. Johnson issued ICE Directive No. 11090.1,

[1] On January 26, 2021, a federal district court issued a temporary restraining order (TRO) enjoining DHS and its components from enforcing and implementing Section C of the Interim Memorandum titled, *Immediate 100-Day Pause on Removals*. *See Texas v. United States*, --- F. Supp. 3d ---, 2021 WL 247877 (S.D. Tex. 2021); *see also Texas v. United States*, 2021 WL 411441 (S.D. Tex. Feb. 8, 2021) (extending TRO to February 23, 2021). On February 23, 2021, the district court issued an order preliminarily enjoining DHS from "enforcing and implementing the policies described in . . . Section C." *Texas v. United States*, 2021 WL 723856 (S.D. Tex. Feb. 23, 2021). In light of the expiration of the 100-day period described in Section C, that case has been dismissed as moot. Similarly, in light of the preliminary injunction, and the fact that the 100-day period described in the Interim Memorandum has now expired, this interim OPLA guidance does not implement Section C of the Interim Memorandum.

[2] The Interim Memorandum revoked, as inconsistent with EO 13993, the memorandum from former Principal Legal Advisor Tracy Short, *Guidance to OPLA Attorneys Regarding the Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement* (Aug. 15, 2017). OPLA attorneys should no longer apply that prior guidance.

Interim Guidance: Civil Immigration Enforcement and Removal Priorities (Johnson Memorandum). And, on May 27, 2021, Acting General Counsel Joseph B. Maher issued a memorandum titled, *Implementing Interim Civil Immigration Enforcement Policies and Priorities* (Maher Memorandum). In accordance with these memoranda, and pending the outcome of the Secretary's review and any resulting policy guidance, I am providing this additional interim direction to OPLA attorneys to guide them in appropriately executing the Department's and ICE's interim enforcement and removal priorities and exercising prosecutorial discretion.

Prosecutorial discretion is an indispensable feature of any functioning legal system. The exercise of prosecutorial discretion, where appropriate, can preserve limited government resources, achieve just and fair outcomes in individual cases, and advance the Department's mission of administering and enforcing the immigration laws of the United States in a smart and sensible way that promotes public confidence. In performing their duties, including through implementation of this memorandum, OPLA attorneys should remain mindful that "[i]mmigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when justice is done."[3] As a result, they are both authorized by law and expected to exercise discretion in accordance with the factors and considerations set forth in the Interim Memorandum, the Johnson Memorandum, the Maher Memorandum, and in this guidance at all stages of the enforcement process and at the earliest moment practicable in order to best conserve prosecutorial resources and in recognition of the important interests at stake.

I. Enforcement and Removal Priority Cases

The Johnson Memorandum identifies three categories of cases that are presumed to be enforcement and removal priorities for ICE personnel. Subject to preapproval from supervisory personnel, other civil immigration enforcement or removal actions also may be deemed priorities. OPLA attorneys assigned to handle exclusion, deportation, and removal proceedings are directed to prioritize agency resources consistent with those presumed priorities and other matters approved as priorities under the Johnson Memorandum or by their Chief Counsel. The presumed priority categories are:

1. **National Security**. Noncitizens[4] who have engaged in or are suspected of

[3] *Matter of S-M-J-*, 21 I&N Dec. 722, 727 (BIA 1997) (en banc). In remarks delivered at the Second Annual Conference of United States Attorneys more than 80 years ago, Attorney General Robert H. Jackson said, "[n]othing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done." Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18, 18-19 (1940).

[4] Consistent with ICE guidance, this memorandum uses the word "noncitizen" to refer to individuals described in section 101(a)(3) of the Immigration and Nationality Act (INA). *See* Memorandum from Tae Johnson, ICE Acting Director, *Updated Terminology for Communications and Materials* (Apr. 19, 2021). OPLA attorneys should familiarize themselves with this ICE guidance and use the appropriate terminology set forth therein when engaged in outreach efforts, drafting internal documents, and communicating with stakeholders, partners, and the general

terrorism or espionage or terrorism-related or espionage-related activities, or whose apprehension, arrest, or custody, is otherwise necessary to protect the national security of the United States.[5]

2. **Border Security**. Noncitizens who were apprehended at the border or a port of entry while attempting to unlawfully enter the United States on or after November 1, 2020, or who were not physically present in the United States before November 1, 2020.

3. **Public Safety**. Noncitizens who have been convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the Immigration and Nationality Act (INA), or who have been convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or who are not younger than 16 years of age and intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization; **and** are determined to pose a threat to public safety.[6]

Neither the presumed priorities nor the guidance regarding other priority cases subject to preapproval are intended to require or prohibit taking or maintaining a civil immigration enforcement or removal action against any individual noncitizen. Rather, OPLA attorneys are expected to exercise their discretion thoughtfully, consistent with ICE's important national security, border security, and public safety mission. Civil immigration enforcement and removal efforts involving a noncitizen whose case fits within the three areas just listed are presumed to be a justified allocation of ICE's limited resources. Enforcement and removal efforts may also be justified in other cases, under appropriate circumstances.[7] Prioritization of finite agency

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public. Formal legal terminology (e.g., "alien," "alienage") should continue to be used by OPLA attorneys when appearing before judicial and quasi-judicial tribunals, and when quoting or citing to sources of legal authority or other official documents like immigration forms.

[5] For purposes of the national security presumed enforcement priority, the terms "terrorism or espionage" and "terrorism-related or espionage-related activities" should be applied consistent with (1) the definitions of "terrorist activity" and "engage in terrorist activity" in section 212(a)(3)(B)(iii)-(iv) of the INA, and (2) the manner in which the term "espionage" is generally applied in the immigration laws. In evaluating whether a noncitizen's "apprehension, arrest, and/or custody, or removal is otherwise necessary to protect" national security, officers and agents should determine whether a noncitizen poses a threat to United States sovereignty, territorial integrity, national interests, or institutions. General criminal activity does not amount to a national security threat.

[6] In evaluating whether a noncitizen currently "pose[s] a threat to public safety," consideration should be given to the extensiveness, seriousness, and recency of the criminal activity, as well as to mitigating factors, including, but not limited to, personal and family circumstances, health and medical factors, ties to the community, evidence of rehabilitation, and whether the individual has potential immigration relief available. *See* Johnson Memorandum at 5.

[7] As reflected in the Johnson Memorandum, Field Office Director (FOD) or Special Agent in Charge (SAC) approval is generally required in advance of civil immigration enforcement or removal actions taken by ICE officers and agents in cases *other than* presumed priority cases. Where exigent circumstances and public safety concerns make it impracticable to obtain pre-approval for an at-large enforcement action (e.g., where a noncitizen poses an imminent threat to life or an imminent substantial threat to property), approval should be requested within 24 hours following the action. *See* Johnson Memorandum at 6.

resources is a consideration in all civil immigration enforcement and removal decisions, including but not limited to the following:

- Deciding whether to issue a detainer, or whether to assume custody of a noncitizen subject to a previously issued detainer;
- Deciding whether to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
- Deciding whether to focus resources only on administrative violations or conduct;
- Deciding whether to stop, question, or arrest a noncitizen for an administrative violation of the civil immigration laws;
- Deciding whether to detain or release from custody subject to conditions or on the individual's own recognizance;
- Deciding whether to settle, dismiss, oppose or join in a motion on a case, narrow the issues in dispute through stipulation, or pursue appeal in removal proceedings;
- Deciding when and under what circumstances to execute final orders of removal; and
- Deciding whether to grant deferred action or parole.

This non-exhaustive list of civil immigration enforcement and removal decisions identifies opportunities at every stage of the process to ensure the most just, fair, and legally appropriate outcome, whether that outcome is a grant of relief, an order of removal, or an exercise of discretion that allows the noncitizen to pursue immigration benefits outside the context of removal proceedings. This memorandum provides interim guidance regarding the following enforcement decisions within OPLA's purview: filing or canceling an NTA; moving to administratively close or continue proceedings; moving to dismiss proceedings; pursuing appeal; joining in a motion to grant relief or to reopen or remand removal proceedings and entering stipulations; and taking a position in bond proceedings, as discussed below.[8] While discretion may be exercised at any stage of the process and changed circumstances for an individual denied prosecutorial discretion at one stage may warrant reconsideration at a later stage, discretion generally should be exercised at the earliest point possible, once relevant facts have been established to properly inform the decision.

[8] While resources should be allocated to the presumed priorities enumerated above, "nothing in [the Interim M]emorandum prohibits the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities herein." Interim Memorandum at 3. *See also* Johnson Memorandum at 3 ("[I]t is vitally important to note that the interim priorities do not require or prohibit the arrest, detention, or removal of any noncitizen."); Maher Memorandum at 3 ("Neither the presumed priorities nor the guidance regarding other priority cases subject to preapproval are intended to require or prohibit taking or maintaining a civil immigration enforcement action against an individual noncitizen."). OPLA may dedicate its resources to pursuing enforcement action against a noncitizen who does not fall into one of the presumed enforcement priorities where the FOD or SAC has approved taking enforcement action in the case, where the NTA-issuing agency has exercised its own discretion to prioritize the noncitizen for enforcement under the Interim Memorandum, or where the Chief Counsel, in their discretion, decides that OPLA resources should be committed to the case.

This memorandum is intended to provide guidance pending completion of the DHS-wide comprehensive review of civil immigration enforcement and removal policies and practices contemplated in the Interim Memorandum. To that end, additional guidance will be forthcoming.

II. Prosecutorial Discretion

OPLA will continue to fulfill its statutory responsibility as DHS's representative before the Executive Office for Immigration Review (EOIR) with respect to exclusion, deportation, and removal proceedings. *See* 6 U.S.C. § 252(c). In that capacity, prosecutorial discretion plays an important role in OPLA's enforcement decision making. The following general guidance on prosecutorial discretion should inform how OPLA attorneys apply the enforcement priorities of DHS and ICE.

OPLA attorneys may exercise prosecutorial discretion in proceedings before EOIR, subject to direction from their chain of command and applicable guidance from DHS. In exercising such discretion, OPLA attorneys will adhere to the enduring principles that apply to all of their activities: upholding the rule of law; discharging duties ethically in accordance with the law and professional standards of conduct; following the guidelines and strategic directives of senior leadership; and exercising considered judgment and doing justice in individual cases, consistent with DHS and ICE priorities.

Prosecutorial discretion is the longstanding authority of an agency charged with enforcing the law to decide where to focus its resources and whether or how to enforce, or not to enforce, the law against an individual. In the context of OPLA's role in the administration and enforcement of the immigration laws, prosecutorial discretion arises at different stages of the removal process, takes different forms, and applies to a variety of determinations. As the Supreme Court explained more than two decades ago when discussing the removal process, "[a]t each stage the Executive has discretion to abandon the endeavor . . . ."[9]

OPLA's policy is to exercise prosecutorial discretion in a manner that furthers the security of the United States and the faithful and just execution of the immigration laws, consistent with DHS's and ICE's enforcement and removal priorities. While prosecutorial discretion is not a formal program or benefit offered by OPLA, OPLA attorneys are empowered to exercise prosecutorial discretion in their assigned duties consistent with this guidance. Among other decisions, the exercise of discretion also generally includes whether to assign an attorney to represent the department in a particular case. *See* 8 C.F.R. § 1240.2(b) (creating expectation that DHS will assign counsel to cases involving mental competency, noncitizen minors, and contested removability, but that otherwise, "in his or her discretion, whenever he or she deems such assignment necessary or advantageous, the General Counsel *may* assign a [DHS] attorney to any other case at any stage of the proceeding") (emphasis added). OPLA Chief Counsel are permitted to exercise this discretion on my behalf, in appropriate consultation with their chain of command.

In determining whether to exercise prosecutorial discretion, OPLA should consider relevant aggravating and mitigating factors. Relevant mitigating factors may include a noncitizen's length

[9] *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999).

of residence in the United States; service in the U.S. military; family or community ties in the United States; circumstances of arrival in the United States and the manner of their entry; prior immigration history; current immigration status (where lawful permanent resident (LPR) status generally warrants greater consideration, but not to the exclusion of other noncitizens depending on the totality of the circumstances); work history in the United States; pursuit or completion of education in the United States; status as a victim, witness, or plaintiff in civil or criminal proceedings; whether the individual has potential immigration relief available; contributions to the community; and any compelling humanitarian factors, including poor health, age, pregnancy, status as a child, or status as a primary caregiver of a seriously ill relative in the United States. Relevant aggravating factors may include criminal history, participation in persecution or other human rights violations, extensiveness and seriousness of prior immigration violations (e.g., noncompliance with conditions of release, prior illegal entries, removals by ICE), and fraud or material misrepresentation. Where a criminal history exists, OPLA should consider the extensiveness, seriousness, and recency of the criminal activity, as well as any indicia of rehabilitation; extenuating circumstances involving the offense or conviction; the time and length of sentence imposed and served, if any; the age of the noncitizen at the time the crime was committed; the length of time since the offense or conviction occurred; and whether subsequent criminal activity supports a determination that the noncitizen poses a threat to public safety. These factors are not intended to be dispositive or exhaustive. Discretion should be exercised on a case-by-case basis considering the totality of the circumstances.

Requests for prosecutorial discretion may be made in accordance with the instructions provided in Section IX of this guidance. Where a request for prosecutorial discretion is made, the OPLA attorney handling the case must document that request in PLAnet, identifying the requester and the substance of the request and uploading any supporting documentation consistent with standard operating procedures (SOPs).[10] Based on my experience working with you over the past few months, I believe strongly in the professionalism, legal skill, and judgment of OPLA's attorneys, working through their supervisors to advise our clients and manage an enormous workload with limited resources. I trust and expect that all OPLA field attorneys, under the leadership of our Chief Counsel, will work strenuously to ensure the timely and appropriate exercise of discretion in meritorious removal cases. That being said, given the tremendous importance of achieving just and correct outcomes on these issues, it is entirely permissible for any OPLA attorney to raise prosecutorial discretion decisions through their chain of command to OPLA headquarters (HQ) for additional review or discussion.

Appropriate exercises of prosecutorial discretion are in the mutual interest of both the person benefitting from the exercise of discretion and the government itself. This mutual interest is no less significant because a noncitizen does not affirmatively request prosecutorial discretion. In the absence of an affirmative request for prosecutorial discretion by a noncitizen or a noncitizen's representative, OPLA attorneys should nonetheless examine the cases to which they are assigned to determine independently whether a favorable exercise of discretion may be

[10] If the case involves classified information, the OPLA attorney must transmit such information only in accordance with the DHS Office of the Chief Security Officer Publication, *Safeguarding Classified & Sensitive But Unclassified Information Reference Pamphlet* (Feb. 2012, or as updated), and all other applicable policies governing the handling of classified information.

appropriate. This affirmative duty to evaluate assigned cases is central to an OPLA attorney's job. Chief Counsel should include in their local SOPs ways to address these cases including how OPLA attorneys should document their affirmative consideration of prosecutorial discretion in PLAnet.

III. Notices to Appear

When a legally sufficient, appropriately documented NTA has been issued by a DHS component consistent with the component's issuing and enforcement guidelines,[11] it will generally be filed with the immigration court and proceedings litigated to completion unless the Chief Counsel exercises prosecutorial discretion based on their assessment of the case.[12] As prosecutorial discretion is expected to be exercised at all stages of the enforcement process and at the earliest moment practicable, it may be appropriate for the Chief Counsel to conclude that a legally sufficient, appropriately documented administrative immigration case warrants non-filing of an NTA. (b)(5)

(b)(5)

(b)(5) Where an NTA is issued but not filed with the immigration court pursuant to this section, OPLA should document the reasoning for this position in PLAnet and the OPLA Field Location should work with its local Enforcement and Removal Operations (ERO) Field Office to cancel the NTA and inform the noncitizen of the cancellation.[13]

IV. Administrative Closure and Continuance of Proceedings

In the past, OPLA had broad authority to exercise prosecutorial discretion by agreeing to administrative closure of cases by EOIR. However, due to conflicting court of appeals decisions

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[11] This includes NTAs submitted to OPLA by ICE operational components as well as U.S. Citizenship and Immigration Services (USCIS) and U.S. Customs and Border Protection (CBP) for review. "Appropriately documented" in this context means that, in OPLA's litigation judgment, sufficient information has been provided by the NTA-issuing component to carry any DHS burden of proof. *See* INA § 240(c), 8 C.F.R. § 1240.8.

[12] Separate and apart from the enforcement priority framework outlined in the Interim Memorandum and Johnson Memorandum, certain noncitizens have an established right to be placed into removal proceedings. *See, e.g.*, 8 C.F.R. §§ 208.14(c)(1) (requiring referral for removal proceedings of a removable noncitizen whose affirmative asylum application is not granted by USCIS); 216.4(d)(2) (requiring NTA issuance to noncitizen whose joint petition to remove conditional basis of LPR status is denied by USCIS); 216.5(f) (same; USCIS denial of application for waiver of the joint petition requirement). In other cases, USCIS may issue an NTA on a discretionary basis to a noncitizen who wishes to pursue immigration benefits before the immigration court. Although such cases do not fall within the priority framework, absent an affirmative request by the noncitizen *prior to the merits hearing* for the favorable exercise of prosecutorial discretion to dismiss removal proceedings, OPLA attorneys should generally litigate them to completion. If such noncitizens are ordered removed, requests for prosecutorial discretion would then most properly be made to ERO for evaluation in accordance with the Department's and ICE's stated priorities.

[13] The NTA cancellation regulation vests immigration officers who have the authority to *issue* NTAs with the authority to also cancel them. 8 C.F.R. § 239.2(a). The regulation expresses a preference for certain NTAs to be cancelled by the same officer who issued them "unless it is impracticable" to do so. *Id.* § 239.2(b). Given the enormous size of the EOIR docket, current OPLA staffing levels, and complexities associated with routing any significant number of NTAs back to specific issuing officers stationed around the country, it would be impracticable to require OPLA attorneys to do so. By contrast, the local ERO Field Offices with which OPLA Field Locations routinely interact are well suited to assist with this function promptly and efficiently.

on the validity of *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) (limiting administrative closure by EOIR adjudicators to circumstances where a previous regulation or judicially approved settlement expressly authorizes such an action), the availability of administrative closure as a form of prosecutorial discretion for ICE and a tool of docket management for EOIR is limited in certain jurisdictions for certain types of cases.[14] Nevertheless, OPLA retains authority to handle pending cases on EOIR's docket by deciding whether to agree to a continuance for "good cause shown" under 8 C.F.R. § 1003.29, *see also Matter of L-A-B-R-*, I&N Dec. 405 (A.G. 2018) (interpreting this regulation), and whether to seek, oppose, or join in a motion for dismissal of proceedings pursuant to 8 C.F.R. § 1239.2(c).

The presumed priorities outlined above will be a significant factor informing the position that OPLA attorneys take in response to continuance motions made by noncitizens in removal proceedings. Indeed, given the comprehensive review of immigration enforcement and removal policies and practices directed by Section A of the Interim Memorandum, OPLA attorneys are authorized to take the general position that "good cause" exists in cases in which noncitizens who fall outside the presumed priorities seek to have their cases continued to await the outcome of that comprehensive review.[15] Continuing cases in these circumstances may conserve OPLA resources in cases where the ultimate arrest, detention, and removal of a noncitizen are unlikely. Accordingly, while immigration judges (IJs) will make case-by-case assessments whether continuance motions are supported by "good cause shown" under 8 C.F.R. § 1003.29, and OPLA attorneys should assess each continuance motion on its own terms, in the absence of serious aggravating factors, the fact that a noncitizen is not a presumed priority should weigh heavily in favor of not opposing the noncitizen's motion. Before opposing a continuance in such cases, OPLA attorneys should confer with their supervisors. The reason for opposing the motion should also be documented in PLAnet.

V. Dismissal of Proceedings

With approximately 1.3 million cases on the immigration courts' dockets nationwide, and the varied procedural postures of such cases, including many set for future merits hearings on relief or protection from removal, OPLA will cover, at a later date and in a comprehensive fashion, how to address the potential dismissal of proceedings consistent with its limited resources and DHS and ICE guidance. The size of the court backlog and extraordinary delays in completing cases impede the interests of justice for both the government and respondents alike and undermine public confidence in this important pillar of the administration of the nation's

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[14] *Compare Hernandez-Serrano v. Barr*, 981 F.3d 459 (6th Cir. 2020) (agreeing with *Castro-Tum*), *with Arcos Sanchez*, 2021 WL 1774965, --- F.3d --- (3d Cir. 2021) (rejecting *Castro-Tum* and finding that EOIR regulations giving broad case management authority to its adjudicators includes administrative closure authority), *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020) (Coney Barrett, J.) (same), *and Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019) (same). Notwithstanding this variation in circuit law, administrative closure remains available under *Castro-Tum* for T and V nonimmigrant visa applicants. *See* 8 C.F.R. §§ 1214.2(a) (expressly allowing for administrative closure for noncitizens seeking to apply for T nonimmigrant status), 1214.3 (same; V nonimmigrant status).

[15] This does not imply that "good cause" cannot exist in cases of noncitizens who fall into the presumed priority categories or are otherwise a civil immigration enforcement or removal priority. OPLA attorneys retain discretion to, as appropriate, agree to continuances in such cases.

immigration laws. In advance of future guidance, cases that generally will merit dismissal in the absence of serious aggravating factors include:

1. Military Service Members or Immediate Relatives Thereof[16]

A favorable exercise of prosecutorial discretion (i.e., concurrence with or non-opposition to a motion for dismissal of proceedings without prejudice) generally will be appropriate if a noncitizen or immediate relative is a current or former member (honorably discharged) of the Armed Forces, including the U.S. Army, Air Force, Navy, Marine Corps, Coast Guard, and Space Force, or a member of a reserve component of the Armed Forces or National Guard, particularly if the individual may qualify for U.S. citizenship under sections 328 or 329 of the INA.[17]

2. Individuals Likely to be Granted Temporary or Permanent Relief

When a noncitizen has a viable avenue available to regularize their immigration status outside of removal proceedings, whether through temporary or permanent relief, it generally will be appropriate to move to dismiss such proceedings without prejudice so that the noncitizen can pursue that relief before the appropriate adjudicatory body.[18] This may be appropriate where, for instance, the noncitizen is the beneficiary of an approved Form I-130, Petition for Alien Relative, and appears prima facie eligible for either adjustment of status under INA section 245 or an immigrant visa through consular processing abroad, including in conjunction with a provisional waiver of unlawful presence under 8 C.F.R. § 212.7(e), immediately or in the near future; appears prima facie eligible to register for Temporary Protected Status (TPS);[19] or is a child who appears prima facie eligible to pursue special immigrant juvenile status under INA section 101(a)(27) and 8 C.F.R. § 204.11. In such a circumstance, the exercise of prosecutorial discretion itself can help to promote the integrity of our immigration system by enhancing the ability of certain noncitizens to come into compliance with our immigration laws.

3. Compelling Humanitarian Factors

The favorable exercise of prosecutorial discretion—including agreeing to dismissal of proceedings without prejudice—generally will be appropriate when compelling humanitarian factors become apparent during NTA review or litigation of the case. While some factors will weigh more heavily than others, this can include cases where, for instance, the noncitizen has a serious health condition, is elderly, pregnant, or a minor; is the primary caregiver to, or has an

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[16] *See* Email from Kenneth Padilla, DPLA, Field Legal Operations, to all OPLA attorneys, *Refresher Guidance Regarding United States Veterans and Military Service Members in Removal* (Nov. 18, 2019).

[17] Relatedly, OPLA attorneys must continue to follow ICE guidance related to the evaluation of claims to U.S. citizenship. *See* ICE Directive 16001.2, *Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE* (Nov. 10, 2015).

[18] DHS regulations expressly contemplate joint motions to terminate removal proceedings in appropriate cases in which the noncitizen is seeking to apply for U nonimmigrant status. *See* 8 C.F.R. § 214.14(c)(1)(i).

[19] Stipulation to TPS in such cases may also be an option, in the exercise of discretion. *Cf. Matter of D-A-C-*, 27 I&N. Dec. 575 (BIA 2019) (discussing discretionary authority of IJs to grant TPS); Section VII, *infra*.

immediate family or household member who is, known to be suffering from serious physical or mental illness; is a victim of domestic violence, human trafficking, or other serious crime;[20] came to the United States as a young child and has since lived in the United States continuously; or is party to significant collateral civil litigation (e.g., family court proceedings, non-frivolous civil rights or labor claims).

4. Significant Law Enforcement or Other Governmental Interest

Where a noncitizen is a cooperating witness or confidential informant or is otherwise significantly assisting state or federal law enforcement, it may be appropriate in certain cases to agree to the dismissal of proceedings without prejudice. "Law enforcement" in this context includes not only conventional criminal law enforcement, but also enforcement of labor and civil rights laws. In exercising discretion related to law enforcement equities, OPLA attorneys should be guided by the perspectives of the relevant investigating agency components (e.g., the Office of Inspector General, Office for Civil Rights and Civil Liberties, Department of Justice Immigrant and Employee Rights Section, Department of Labor, National Labor Relations Board, Equal Employment Opportunity Commission, other federal agencies, ERO, Homeland Security Investigations, and any relevant state counterparts). Additionally, such law enforcement entities may have tools at their disposal that OPLA does not, including stays of removal, deferred action, T and U nonimmigrant status law enforcement certification, and requests for S nonimmigrant classification. In any event, national security, border security, and public safety are paramount in deciding whether to continue litigating removal proceedings.

5. Long-Term Lawful Permanent Residents

A favorable exercise of prosecutorial discretion should also be considered for LPRs who have resided in the United States for many years, particularly when they acquired their LPR status at a young age and have demonstrated close family and community ties. Dismissal of such cases that do not present serious aggravating factors will allow the noncitizen to maintain a lawful immigration status and conserve finite government resources.

When OPLA agrees to dismissal of removal proceedings as an exercise of prosecutorial discretion in the categories above, the reasoning for this position should be recorded in PLAnet.

VI. Pursuing Appeal

In our immigration system, DHS initiates removal proceedings while IJs and the Board of Immigration Appeals (BIA) exercise the Attorney General's delegated authority to adjudicate issues of removability and relief and protection from removal. OPLA attorneys continue to possess the discretion to take legally viable appeals of IJ decisions and make appropriate legal arguments in response to noncitizen appeals and motions.[21] Appellate advocacy should generally

[20] *See generally* ICE Directive No. 10076.1, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011).

[21] OPLA headquarters divisions should continue to coordinate with impacted DHS Office of the General Counsel (OGC) headquarters and component counsel offices when preparing briefs and motions in significant litigation.

focus on priority cases—national security, border security, and public safety. Of course, other considerations, such as significant aggravating and mitigating factors and the need to seek clarity on an important legal issue, are appropriate for OPLA attorneys to take into account, consistent with direction from their respective Chief Counsel.

Consistent with any local guidance issued by their respective Chief Counsel,[22] OPLA attorneys may waive appeal in a case that is not a priority. OPLA attorneys may also decline to appeal where there is little likelihood of success before the BIA. While OPLA attorneys may reserve appeal to ensure the articulation of a fully reasoned decision by an IJ to help inform whether the appeal should ultimately be perfected, OPLA attorneys may also waive appeal, where appropriate, in the interest of judicial efficiency and in recognition of limited resources.

OPLA Field Locations generally coordinate appellate advocacy before the BIA with the Immigration Law and Practice Division (ILPD).[23] OPLA Field Locations and ILPD should continue to work together, along with any other relevant OPLA HQ divisions, to craft strong and nationally consistent appellate work product. Again, in committing OPLA resources to perfecting appeal and drafting appellate pleadings, Field Locations and ILPD should focus their efforts on presumed priority cases. Furthermore, to ensure efficiency in litigation, OPLA attorneys should generally limit briefing schedule extension requests before the BIA and should not request briefing extensions in detained matters without prior approval from a supervisor. However, it is permissible to agree to briefing extension requests filed by non-detained noncitizens whose cases are not presumed priorities.

VII. Joining in Motions for Relief and Motions to Reopen and Entering Stipulations

In order to conserve resources and expedite resolution of a case—as well as where doing so would fulfill the duty to do justice and achieve the best outcome—OPLA attorneys have the discretion to join motions for relief (oral or written), consistent with any local guidance issued by their respective Chief Counsel. An OPLA attorney should be satisfied that the noncitizen qualifies for the relief sought under law and merits relief as a matter of discretion or qualifies

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[22] Chief Counsel should review existing local practice guidance to ensure that it conforms to current interim enforcement priorities and amend such guidance where necessary. Similarly, any new local practice guidance should conform to this memorandum and the presumed priorities.

[23] *See* Gwendolyn Keyes Fleming, *Promoting Excellence in OPLA's Advocacy Before the Board of Immigration Appeals* (Feb. 22, 2016); Email Message from Kenneth Padilla and Adam Loiacono, *Final Rule – Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure* (Jan. 22, 2021). (b)(5) (b)(5) (b)(5) Further, special procedures apply in the context of national security and human rights violator cases. *See* Email Message from Riah Ramlogan, *OPLA Supplemental Guidance on the Proper Handling of National Security and Human Rights Violator Cases* (May 28, 2015), *as supplemented and modified by* OPLA Memorandum, *Proper Handling of OPLA National Security (NS) Cases* (May 21, 2015) and OPLA Memorandum, *Proper Handling of OPLA Human Rights Violator (HRV) Cases* (May 21, 2015).

under law for protection from removal when agreeing to such motions.[24] Such decisions to join in motions should be made in a manner that facilitates the efficient operation of OPLA Field Locations in immigration court. The same applies with respect to narrowing disputed issues through stipulation in order to promote fair and efficient proceedings.

OPLA intends to address in future guidance when to join in motions to reopen cases with final removal orders. In the meantime, OPLA should continue addressing requests for joint motions to reopen on a case-by-case basis, giving favorable consideration to cases that are not priorities and where dismissal would be considered under Section V, *supra*.

VIII. Bond Proceedings

OPLA attorneys appearing before EOIR in bond proceedings must follow binding federal and administrative case law regarding the standards for custody redeterminations.[25] OPLA attorneys should also make appropriate legal and factual arguments to ensure that DHS's interests, enforcement priorities, and custody authority are defended. In particular, in bond proceedings OPLA attorneys should give due regard to custody determinations made by an authorized immigration officer pursuant to 8 C.F.R. § 236.1(c)(8), while not relinquishing the OPLA attorney's own responsibility to consider and appropriately apply the factors and considerations set forth in the Interim Memorandum, the Johnson Memorandum, the Maher Memorandum, and this guidance. Where a noncitizen produces new information that credibly mitigates flight risk or danger concerns, OPLA attorneys have discretion to agree or stipulate to a bond amount or other conditions of release with a noncitizen or their representative, and to waive appeal of an IJ's order redetermining the conditions of release in such cases.[26]

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[24] *See, e.g.*, INA §§ 208 (asylum), 240A(a) (cancellation of removal for certain permanent residents), 240A(b) (cancellation of removal and adjustment of status for certain nonpermanent residents), 240B (voluntary departure), 245 (adjustment of status), 249 (registry). Additionally, OPLA attorneys represent DHS in cases where noncitizens apply for withholding of removal under INA section 241(b)(3) and protection under the regulations implementing U.S. obligations under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). *See, e.g.*, 8 C.F.R. §§ 1208.16-.18. Withholding and CAT protection both impose significant burdens of proof (i.e., qualifying mistreatment must be "more likely than not" to occur). When a noncitizen moves to reopen their proceedings to pursue such non-discretionary protection, and the motion is supported by evidence that strongly suggests the noncitizen will be able to meet their burden, OPLA attorneys should ordinarily not oppose reopening and can also consider joining in such motions, as resources permit.

[25] *See, e.g.*, *Matter of R-A-V-P-*, 27 I&N Dec. 803, 804-05 (BIA 2020) (assessing whether respondent had met burden to demonstrate that he did not pose a risk of flight in INA section 236(a) discretionary detention case); *Matter of Siniauskas*, 27 I&N Dec. 207 (BIA 2018) (addressing interplay between flight risk and dangerousness considerations in INA section 236(a) discretionary detention case involving recidivist drunk driver); *Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007) (discussing general parameters of INA section 236(c) mandatory detention).

[26] DHS and EOIR regulations recognize that, as a prerequisite for even being considered for discretionary release by an ICE officer under INA section 236(a), a noncitizen "must demonstrate *to the satisfaction of the officer* that such release would not pose a danger to property or persons, and that the [noncitizen] is likely to appear for any future proceeding." 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8) (emphasis added). Additionally, prior to agreeing to non-monetary conditions of release, OPLA attorneys should consult with their local ERO Field Offices to ensure that such conditions are practicable (e.g., GPS monitoring, travel restrictions).

IJ custody redetermination decisions that are factually or legally erroneous are subject to appeal to the BIA. Decisions on whether to appeal or to continue to prosecute an appeal should be guided by the presumed priorities and the sound use of finite resources. *See* Section VI, *supra.* It may also be appropriate for an OPLA Field Location to seek a discretionary or automatic stay under 8 C.F.R. § 1003.19(i) in conjunction with a DHS bond appeal, particularly where issues of public safety are implicated. OPLA Field Locations should work closely with ILPD and other relevant OPLA HQ divisions to identify instances where use of this authority may be warranted.[27]

IX. Responding to Inquiries

Each OPLA Field Location should maintain email inboxes dedicated to receiving inquiries related to this memorandum, including requests for OPLA to favorably exercise its discretion, and socialize the existence and use of these mailboxes with their respective local immigration bars including non-governmental organizations assisting or representing noncitizens before EOIR. OPLA Field Locations and sub-offices should strive to be as responsive to such inquiries as resources permit.

X. Oversight and Monitoring

This memorandum serves as interim guidance, and OPLA's experience operating under this guidance will inform the development of subsequent guidance aligning with the outcome of the comprehensive review directed by the Interim Memorandum. It is therefore critical that prosecutorial discretion decision-making information be promptly and accurately documented in PLAnet and that SOPs be implemented to ensure consistent PLAnet recordkeeping. Field Legal Operations (FLO) should issue such SOPs within two weeks of this memorandum. FLO's regular review of PLAnet and the SOPs will form the basis of recommendations on process improvements, if and as necessary.

Official Use Disclaimer

This memorandum, which may contain legally privileged information, is intended *For Official Use Only*. It is intended solely to provide internal direction to OPLA attorneys and staff regarding the implementation of Executive Orders and DHS guidance. It is not intended to, does not, and may not be relied upon to create or confer any right or benefit, substantive or procedural, enforceable at law or equity by any individual or other party, including in removal proceedings or other litigation involving DHS, ICE, or the United States, or in any other form or manner whatsoever. Likewise, this guidance does not and is not intended to place any limitations on DHS's otherwise lawful enforcement of the immigration laws or DHS's litigation prerogatives.

[27] Existing OPLA guidance on automatic and discretionary stays remains in effect. *See, e.g.*, Barry O'Melinn, *Revised Procedures for Automatic Stay of Custody Decisions by Immigration Judges* (Oct. 26, 2006).

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

ICE Directive 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims

Issue Date: *August 10, 2021*
Superseded: 11005.2: *Stay of Removal Requests and Removal Proceedings Involving U Nonimmigrant Status (U Visa) Petitioners* (Aug. 2, 2019)

1. Purpose/Background. This Directive sets forth U.S. Immigration and Customs Enforcement (ICE) policy regarding civil immigration enforcement actions involving noncitizen[1] crime victims, including applicants for and beneficiaries of victim-based immigration benefits and Continued Presence.

The duty to protect and assist noncitizen crime victims is enshrined in, among other laws, the Violence Against Women Act (VAWA),[2] the Trafficking Victims Protection Act (TVPA),[3] and their respective reauthorizations. Congress created victim-based immigration benefits to encourage noncitizen victims to seek assistance and report crimes committed against them despite their undocumented status. When victims have access to humanitarian protection, regardless of their immigration status, and can feel safe in coming forward, it strengthens the ability of local, state, and federal law enforcement agencies, including ICE, to detect, investigate, and prosecute crimes.

Coupled with available humanitarian protections, applying a victim-centered approach minimizes any chilling effect that civil immigration enforcement actions may have on the willingness and ability of noncitizen crime victims to contact law enforcement, participate in investigations and prosecutions, pursue justice, and seek benefits. A victim-centered approach encourages victim cooperation with law enforcement, engenders trust in ICE agents and officers, and bolsters faith in the entire criminal justice and civil immigration systems.

2. Policy. ICE will exercise prosecutorial discretion in appropriate circumstances to facilitate access to justice and victim-based immigration benefits by noncitizen crime victims.[4]

[1] For purposes of this Directive, "noncitizen" means any person as defined in section 101(a)(3) of the Immigration and Nationality Act (INA).

[2] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 17 (1994).

[3] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

[4] *See* ICE Directive No. 10076.1, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011).

To that end, absent exceptional circumstances, ICE will refrain from taking civil immigration enforcement action against known beneficiaries of victim-based immigration benefits and those known to have a pending application for such benefits. In addition, when necessary and appropriate, ICE will coordinate with U.S. Citizenship and Immigration Services (USCIS) to seek expedited adjudication of victim-based immigration applications and petitions.

Additionally, ICE officers and agents may encounter noncitizen victims of crime who are not the beneficiary of victim-based immigration benefits and do not have pending applications for such benefits. Accordingly, in the course of their duties, ICE officers and agents must look for indicia or evidence that suggests a noncitizen is a victim of crime, such as being the beneficiary of an order of protection or being the recipient of an eligibility letter from the U.S. Department of Health and Human Services Office of Trafficking in Persons. The fact that someone is a victim of crime and, where applicable, may be eligible for victim-based immigration benefits for which they have not yet applied, is a discretionary factor that must be considered in deciding whether to take civil immigration enforcement action against the noncitizen or to exercise discretion, including but not limited to release from detention.

2.1. Applicants for and beneficiaries of victim-based immigration benefits. When a noncitizen has a pending or approved application or petition for a victim-based immigration benefit, absent exceptional circumstances, ICE will exercise discretion to defer decisions on civil immigration enforcement action against the applicant or petitioner (primary and derivative) until USCIS makes a final determination on the pending victim-based immigration benefit application(s) or petition(s), including adjustment of status for noncitizens with approved Special Immigrant Juvenile status, or, in the case of a T visa, U visa, or VAWA application, until USCIS makes a negative bona fide or prima facie determination.

2.2. Assisting law enforcement partners. Absent exceptional circumstances, during the pendency of any known criminal investigation or prosecution, ICE will not take civil immigration enforcement action against victims and witnesses without approval from Headquarters Responsible Officials and may, where applicable and appropriate, issue deferred action or a stay of removal to victims and witnesses. Where available information indicates a noncitizen may be a noncitizen crime victim or witness, ICE should identify victim status as soon as practicable when victim status is unknown or unclear.

3. Definitions. The following definitions apply for purposes of this Directive only.

3.1. Bona Fide Determination. A USCIS determination that a T and/or U visa petition has been initially reviewed and:

a) Is complete and properly filed;

b) Includes completed biometric and biographical background checks; and

c) Presents a prima facie case for approval of the benefit as the phrase is used in INA § 237(d)(1).

A U visa petitioner may receive deferred action from USCIS and employment authorization if USCIS finds the petition bona fide and the petitioner does not pose a risk to public safety or national security and merits a favorable exercise of discretion.

3.2. Civil Immigration Enforcement Action. A civil immigration enforcement or removal determination, decision, or action that includes, but is not limited to, a decision whether or not to:

a) Issue a detainer or assume custody of a noncitizen subject to a previous detainer;

b) Issue, reissue, serve, file, or cancel a Notice to Appear;

c) Focus resources on administrative violations or conduct;

d) Stop, question, or arrest a noncitizen for an administrative violation of the civil immigration laws;

e) Detain or release from custody subject to conditions;

f) Grant deferred action or parole; and

g) Execute a final order of removal (and under what circumstances).

3.3. Continued Presence. Continued Presence is an ICE-approved immigration designation requested by law enforcement nationwide for human trafficking victims. Continued Presence allows trafficking victims to lawfully remain in the United States temporarily and work during the investigation into the human trafficking-related crimes committed against them and during any civil action under 18 U.S.C. § 1595 filed by the victims against their traffickers.

3.4. Exceptional Circumstances generally exist only in the following circumstances:

a) The noncitizen poses national security concerns; or

b) The noncitizen poses an articulable risk of death, violence, or physical harm to any person.

3.5. Field Responsible Official (FRO). The highest-ranking official in any ICE field location. This includes Special Agents in Charge (SACs), Field Office Directors (FODs), ICE Attachés, and any other officials who have been designated, in writing, by the Director.

3.6. Headquarters Responsible Officials (HRO). The Executive Associate Directors (EADs) of Enforcement and Removal Operations (ERO), Homeland Security Investigations (HSI),

and Management and Administration (M&A); the Associate Director of the Office of Professional Responsibility (OPR); and the Assistant Directors, Officers, or equivalent positions who report directly to the Director, Deputy Director, or Chief of Staff.

3.7. Prima Facie Determination. A USCIS determination that a VAWA self-petition has been initially reviewed and:

a) Is complete and properly filed; and

b) Found to have addressed each of the eligibility requirements.

3.8. Victim-based Immigration Benefits. Immigration benefits adjudicated by USCIS for noncitizen crime victims and their qualifying family members, including T nonimmigrant status (T visa) for qualifying human trafficking victims, U nonimmigrant status (U Visa) for qualifying victims of crime, VAWA relief[5] for qualifying domestic violence victims, Special Immigrant Juvenile classification (SIJ) for qualifying children who have been abused, neglected, or abandoned by one or both parents.

3.9. Victim-centered Approach. An approach broadly adopted by federal law enforcement agencies whereby equal value is placed on the identification and stabilization of victims and on the deterrence, investigation, and prosecution of perpetrators. It should be applied to policymaking and civil immigration enforcement actions to the greatest extent possible, to the extent consistent with law. The goal of a victim-centered investigation and prosecution is to focus the investigation and prosecution around the victim while minimizing any undue stress, harm, and trauma to the victim.

3.10. Waiting List Determination. A USCIS decision on a U visa petition that is the functional equivalent of a full adjudication on the merits of the petition, including complete biometric and biographical background checks and adjudication of any accompanying waivers of inadmissibility. Once approved, a petitioner is placed on the waiting list when, due solely to the statutory cap, a U-1 nonimmigrant visa is not currently available. When a U visa petitioner is placed on the waiting list, by regulation, USCIS grants deferred action or parole to the noncitizen and any qualifying family members and may afford them employment authorization.[6]

4. Responsibilities.

4.1. HROs are responsible for:

a) Ensuring compliance with the provisions of this Directive;

[5] VAWA relief includes the VAWA Self-Petition, waiver of the joint filing requirement for Petition to Remove Conditions on Residence; VAWA Cuban Adjustment Act; VAWA Haitian Refugee Immigration Fairness Act; VAWA Nicaraguan Adjustment and Central American Relief Act; VAWA Suspension of Deportation; and VAWA Cancellation of Removal.

[6] 8 C.F.R. § 214.14(d).

b) Reporting to the ICE Office of the Director (through the Office of the Deputy Director), on a regular basis, the civil immigration enforcement actions of their FROs involving applicants for and beneficiaries of victim-based immigration benefits;

c) Preparing and/or providing for training relevant to carrying out the provisions of this Directive;

d) Assigning a headquarters-level point of contact (POC) for field personnel regarding victim-based immigration benefits, coordinating with USCIS, noncitizens, and noncitizens' attorneys or representatives in cases in which noncitizens have applied for such benefits; and

e) Developing directorate- or program-level policies and procedures as needed to ensure compliance with this Directive, and consulting with and obtaining approval from the Office of the Director, through the ICE Office of Policy and Planning, prior to issuing any such guidance.

4.2. FROs are responsible for:

a) Ensuring that personnel in their areas of responsibility (AORs) comply with this policy and related policies, guidance, and standard operating procedures;

b) Ensuring personnel in their AORs complete all required training, including any annual refresher training;

c) Assigning a POC within their AOR regarding victim-based immigration benefits, coordinating with USCIS, noncitizens, and noncitizens' attorneys or representatives in cases in which noncitizens have applied for such benefits;

d) Coordinating, through their field-level POCs, with the headquarters-level POCs assigned by the HROs;

e) Reporting monthly on civil immigration enforcement actions involving applicants for and beneficiaries of victim-based immigration benefits in their AORs to their HROs; and

f) Ensuring appropriate mechanisms exist for coordination with other ICE Directorates and Program Offices.

4.3. OPR SACs are responsible for signing vetted U visa certifications for noncitizen victims of crime related to OPR investigations.

4.4. HSI SACs are responsible for:

a) Signing Continued Presence requests, vetted T visa declarations for noncitizen trafficking victims, and U visa certifications for noncitizen victims of qualifying criminal activity related to HSI investigations;

b) Adjudicating requests for deferred action from noncitizen victims and witnesses of crime, including applicants for and beneficiaries of victim-based immigration benefits;

c) Seeking guidance from the Office of the Principal Legal Advisor (OPLA) if planning to deny a deferred action request from a noncitizen victim of crime when ICE is aware they are a victim, and their intent to pursue an immigration benefit, or pending or approved application for a victim-based benefit;

d) Forwarding requests for Continued Presence to the Center for Countering Human Trafficking; and

e) Developing local procedures to carry out this directive which must include procedures to respond, in appropriate cases, to noncitizens detained in ICE custody.

4.5. ERO FODs are responsible for:

a) Adjudicating stay of removal or deferred action requests for noncitizen victims and witnesses of crime, including applicants for and beneficiaries of victim-based immigration benefits, as well as victims and witnesses of crimes that occurred in ICE custody and for which the investigation is ongoing;

b) Seeking guidance from OPLA if planning to issue a denial to a stay of removal request from a noncitizen victim of crime when ICE is aware they are a victim, and their intent to pursue an immigration benefit, or pending or approved application for a victim-based benefit; and

c) Developing local procedures to carry out this directive which must include methods to identify victims of crime as encountered and in detention and referring them to appropriate law enforcement authorities as needed.

4.6. ICE Agents and Officers are responsible for:

a) Identifying victims of crime as encountered and in custody through proactively inquiring with noncitizens, where available information indicates a noncitizen may be a noncitizen crime victim or witness, about any prior victimization, any pending petitions or applications, and, where appropriate, accessing USCIS systems for evidence of any pending or approved victim-based applications or petitions, notifying supervisors of their status, properly recording this information, and referring victims to appropriate law enforcement authorities, as appropriate;

b) Implementing a victim-centered approach to civil immigration enforcement actions, including taking proactive steps to assist victims;

c) Coordinating with AOR POCs for noncitizens pursuing victim-based immigration benefits;

d) Using all appropriate prosecutorial discretion related to victims generally and, absent exceptional circumstances, refraining from taking civil immigration enforcement action against applicants for and beneficiaries of victim-based immigration benefits; and

e) Supporting victims in criminal investigations through deferred action, Continued Presence, T visa declarations, or U visa certifications, as appropriate.

5. Procedures/Requirements.

5.1. Identifying Applicants for and Beneficiaries of Victim-Based Immigration Benefits. Except where exigent circumstances exist that make it impracticable to do so, before ICE takes civil immigration enforcement action against a noncitizen, ICE officers and agents must consult available records and databases, including the Central Index System database (or any successor information technology system), to determine whether the noncitizen is a beneficiary of victim-based immigration benefits, or has a pending application or petition for such benefit.[7] When exigent circumstances exist that made consultation impracticable prior to taking a civil immigration enforcement action, ICE officers and agents must consult available records and databases as soon as practicable following the civil immigration enforcement action. A noncitizen may become a victim of crime at any point in the immigration enforcement lifecycle. Accordingly, whenever reviewing cases in the course of their duties, ICE officers and agents must routinely check for information suggesting that a noncitizen has become a victim of crime that could allow the noncitizen to apply for an immigration benefit; in such cases, ICE officers and agents must take actions appropriate and consistent with this Directive.

5.2 Returning A-Files to USCIS. Where an application or petition for a victim-based immigration benefit is pending, ICE should create a temporary A-File and return the original A-File to USCIS as soon as practicable so that USCIS can adjudicate the benefit request.

5.3 Adhering to 8 U.S.C. § 1367 Protections. ICE officers and agents are prohibited from disclosing any information, with limited exceptions, regarding applicants for and beneficiaries of Continued Presence, T visas, U visas, and VAWA relief. Additionally, ICE personnel cannot rely solely upon information provided by a prohibited source to take a civil immigration enforcement action against an applicant or beneficiary, without first

[7] DHS Directive No. 002-02, *Implementation of Section 1367 Information Provisions* (Nov. 1, 2013), DHS Instruction No. 002-02-001, *Implementation of Section 1367* (Nov. 7, 2013).

corroborating the information from an independent source. In all cases, officers and agents should consult and confirm current policy prior to disclosing any information.

5.4 Deferring to USCIS Adjudications. ICE will review noncitizen crime victims' USCIS notices and/or the CLAIMS database (or any successor information technology system) to determine whether USCIS has made a bona fide determination or waitlist determination, or approved or denied a victim-based immigration benefit. Recognizing that systems information may not be updated in real-time, where there is evidence that a noncitizen may be pursuing a victim-based immigration benefit that is not currently reflected in information technology systems available to ICE, officers or agents should work with their AOR POC to confirm whether any applications for such benefits exist. ICE generally will endeavor to act according to the status of the application as follows:

a) Pending applications. When encountering a noncitizen with a pending application or petition for a victim-based immigration benefit and the noncitizen is detained in ICE custody and their release is prohibited by law or exceptional circumstances exist, AOR POCs will request that USCIS expedite the decision and will notify USCIS if the noncitizen is subsequently released.

   Except where exceptional circumstances exist, or if USCIS has administratively closed a case for failure of the applicant to prosecute the application, a noncitizen with a pending victim-based application or petition who is subject to an administratively final removal order should generally be issued a stay of removal. In cases in which the noncitizen is in pending removal proceedings before the immigration court, ICE officers and agents should inform OPLA so that it may consider whether agreeing to a continuance of removal proceedings would be appropriate. These decisions should be reviewed where the noncitizen subsequently receives a criminal conviction that merits prioritization under current DHS or ICE civil immigration enforcement priorities or engages in acts that otherwise create exceptional circumstances.

   Where USCIS has granted deferred action to a noncitizen crime victim with pending removal proceedings or made a positive bona fide determination on their application, ICE officers and agents should notify OPLA so that it may consider whether seeking dismissal of proceedings would be appropriate. Where the noncitizen is subject to a final order, ERO should review the case for a discretionary stay of removal.

b) Waitlisted U visas and approved benefits. If USCIS waitlists a U visa petitioner or approves any victim-based immigration benefit, including approved VAWA and SIJ petitions and pending adjustment of status applications with USCIS, ICE should review the case for the exercise of prosecutorial discretion, however appropriate.

c) Denied benefits. If USCIS denies the benefit, ERO may continue to process the noncitizen for removal, consistent with current enforcement priorities.

d) Exceptions. ICE may request that USCIS conduct expedited adjudications for noncitizens who are detained in ICE custody and their release is prohibited by law or exceptional circumstances exist, to ensure that civil immigration enforcement action may continue as expeditiously as possible for those noncitizens determined to be a priority under civil immigration enforcement guidance.

5.5 Respecting ICE Continued Presence Authorization. As further defined in Section 3.3 above, Continued Presence is an ICE approved immigration designation requested by law enforcement nationwide for human trafficking victims. Absent exceptional circumstances, ICE agents and officers will not take civil immigration enforcement action against human trafficking victims with Continued Presence.

5.6 Detention. The fact that an individual is a victim of crime is a discretionary factor when weighing civil immigration enforcement decisions. Accordingly, ICE officers must consider any and all evidence that an individual has been a victim of crime—such as the receipt of victim-based immigration benefits or pending applications for such benefits, as well any other indicia or evidence that suggests the individual is a victim of crime (such as being the beneficiary of an order of protection or being the recipient of an eligibility letter from the Office of Trafficking in Persons)—in rendering custody determinations.

If USCIS approves a victim-based immigration benefit for a noncitizen detained in ICE custody, the noncitizen should be considered for release from detention so long as their release is not prohibited by law and no exceptional circumstances exist.

5.7 Implementing a Victim-Centered Approach to Civil Immigration Enforcement. ICE will adopt measures to proactively identify and assist victims, such as alerting OPLA attorneys to the victim status of a noncitizen in removal proceedings so that appropriate prosecutorial discretion may be considered, providing information about victim-based immigration benefits, and referring identified victims to appropriate law enforcement authorities. HQ and AOR POCs responsible for victim-based immigration benefits shall be responsible for ensuring that such measures are identified, developed, and introduced, as well as working to ensure that case-specific actions are carried out.

5.8 Approvals for Civil Immigration Enforcement Actions. ICE should pursue civil immigration enforcement action against beneficiaries of victim-based immigration benefits only in exceptional circumstances (as defined in Section 3.4), or where it does not appear that the criminal activity directly stems from their victimization, and with approval from the applicable HRO.

a) In deciding whether to take civil immigration enforcement action against a noncitizen applicant for or beneficiary of victim-based immigration benefits, the agent or officer must consider, in consultation with the HRO through the chain of command, whether the civil immigration enforcement action is otherwise an appropriate use of ICE's limited resources and fits within applicable ICE and DHS enforcement priorities and the victim-centered approach to enforcement.

b) In requesting approval, the agent or officer must submit a written justification through the chain of command to the HRO explaining why the action is appropriate in the context of this Directive.

The approval to carry out a civil immigration enforcement action against a particular noncitizen victim applies to that noncitizen alone and will not authorize civil immigration enforcement action against other noncitizens encountered during an operation.

c) If exigent circumstances make it impracticable to obtain preapproval for a civil immigration enforcement action, the agent or officer may conduct the civil immigration enforcement action and then must request approval from the HRO within 48 hours following the action with an explanation of the exigent circumstances, through the chain of command, as described above.

5.9 Identifying Noncitizen Crime Victims.

a) If ERO identifies a noncitizen crime victim who has not reported the crime to law enforcement and desires to do so, ERO will provide appropriate contact information for local, state or federal law enforcement authorities. When detained, ERO will ensure that the noncitizen has access to a private area in which to speak to law enforcement in person or telephonically about the crime.

1) ERO will document victim identification and any actions taken in the A-File and EARM, and note whether the noncitizen applied for, or intends to apply for, victim-based immigration benefits;

2) ERO officers will report the contact to a supervisor, per the processes established by the FRO in their AOR, and any Field Office designated POC for human trafficking, as applicable; and

3) ERO will provide the victim with information regarding legal services and victim-based immigration benefits.

5.10 Tracking and Reporting Civil Immigration Enforcement Actions Against Applicants for and Beneficiaries of Victim-Based Immigration Benefits to the Office of the Director.

a) All decisions to pursue civil immigration enforcement action against applicants for and beneficiaries of victim-based immigration benefits will be recorded in the appropriate case management systems.

b) Until systems are updated to provide automated reporting, the FROs will provide to HROs a monthly report of the number of civil immigration enforcement actions taken against applicants for and beneficiaries of U, T, VAWA, and SIJ benefits and accompanying narrative justification for the enforcement action taken.

c) The HROs will provide the monthly reports to the Office of the Director (through the Office of the Deputy Director).

5.11 Human trafficking victims. The fact that a human trafficking victim engages in criminal acts as a direct result of the human trafficking does not impact the fact that the noncitizen is a crime victim. ICE personnel will consider human trafficking victim status when making civil immigration enforcement actions regarding a victim who engaged in unlawful activity as a direct result of force, fraud, or coercion associated with being trafficked. Unlawful activity includes, but is not limited to, engaging in prostitution, entering the country without documentation, or working without documentation or false documents.[8] ICE personnel must consider the noncitizen's victim status in relation to their criminal actions when making decisions whether to take civil immigration enforcement action.[9]

5.12 Domestic violence charges. Some convictions for domestic violence may be result of self-defense by a victim of domestic violence against an abuser, and the context of any arrests should be carefully evaluated if such charges or convictions are a part of determining the existence of exceptional circumstances. Given the complexity of these situations, officers and agents are encouraged to consult with the charging law enforcement agency as well as the HQ POC before taking civil immigration enforcement action.

6. Training. ICE officers and agents must complete required training related to this Directive, including annual refresher training. Such training must include an overview of the victim-centered approach, including a description of victim-based immigration benefits, and an overview of what discretion might be appropriate in various circumstances.

7. Recordkeeping. All relevant documents produced or provided in accordance with this Directive must be maintained in EARM and PLAnet in accordance with an applicable National Archives and Records Administration (NARA) General Records Schedule (GRS) or a NARA-approved agency-specific records control schedule. If the records are not subject to a records schedule, they must be maintained indefinitely by the agency. In the event the records are subject to a litigation hold, they may not be disposed of under a records schedule until further notification.

8. Authorities/References.

8.1. *Victims of Trafficking and Violence Protection Act of 2000*, Pub. L. No. 106-386, 114 Stat. 1464.

8.2. *Violence Against Women and Department of Justice Reauthorization Act of 2005*, Pub. L. No. 109-162, Tit. VIII, 119 Stat. 3053-3077.

[8] White House, *National Action Plan to Combat Human Trafficking* (2020).

[9] 6 U.S.C. § 645(b)(2)(B).

8.3. *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*, Pub. L. No. 110-457, 122 Stat. 5044.

8.4. *Immigration and Nationality Act of 1952*, as amended, Pub. L. No. 82-414, 66 Stat. 163.

8.5. 8 U.S.C. § 1367, Penalties for disclosure of information.

8.6. 8 C.F.R. § 204.11, Special immigrant juvenile classification.

8.7. 8. C.F.R. § 204.2, Petitions for relatives, widows and widowers, and abused spouses and children.

8.8. 8 C.F.R. § 214.11, Alien victims of severe forms of trafficking in persons.

8.9. 8 C.F.R. § 214.14, Alien victims of certain qualifying criminal activity.

8.10. DHS Directive 002-02, *Implementation of Section 1367 Information Provisions* (Nov. 1, 2013).

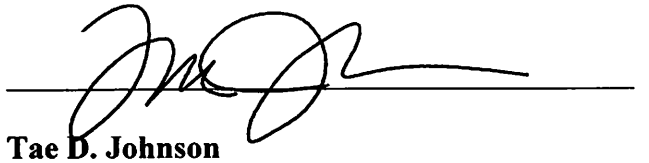
8.11. DHS Instruction Number 002-02-001, *Implementation of Section 1367* (Nov. 7, 2013).

8.12. ICE Directive 11090.1, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021).

8.13. ICE Directive 10076.1, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011).

8.14. Attachments. None.

9. No Private Right. This document provides only internal ICE policy guidance, which may be modified, rescinded, or superseded at any time without notice. It 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. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigative prerogatives of ICE.



Tae D. Johnson
Acting Director
U.S. Immigration and Customs Enforcement

Secretary

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

October 27, 2021

MEMORANDUM TO: Tae D. Johnson
Acting Director
U.S. Immigration and Customs Enforcement

Troy A. Miller
Acting Commissioner
U.S. Customs and Border Protection

Ur M. Jaddou
Director
U.S. Citizenship and Immigration Services

Robert Silvers
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Office of Strategy, Policy, and Plans

Katherine Culliton-González
Officer for Civil Rights and Civil Liberties
Office of Civil Rights and Civil Liberties

Lynn Parker Dupree
Chief Privacy Officer
Privacy Office

FROM: Alejandro N. Mayorkas
Secretary

SUBJECT: **Guidelines for Enforcement Actions in or Near Protected Areas**

This memorandum provides guidance for ICE and CBP enforcement actions in or near areas that require special protection. It is effective immediately.

This memorandum supersedes and rescinds John Morton's memorandum entitled, "Enforcement Actions at or Focused on Sensitive Locations" (number 10029.2, dated October 24, 2011), and David Aguilar's memorandum entitled, "U.S. Customs and Border Protection Enforcement Actions at or Near Certain Community Locations" (dated January 18, 2013).

I. Foundational Principle

In our pursuit of justice, including in the execution of our enforcement responsibilities, we impact people's lives and advance our country's well-being in the most fundamental ways. It is because of the profound impact of our work that we must consider so many different factors before we decide to act. This can make our work very difficult. It is also one of the reasons why our work is noble.

When we conduct an enforcement action – whether it is an arrest, search, service of a subpoena, or other action – we need to consider many factors, including the location in which we are conducting the action and its impact on other people and broader societal interests. For example, if we take an action at an emergency shelter, it is possible that noncitizens, including children, will be hesitant to visit the shelter and receive needed food and water, urgent medical attention, or other humanitarian care.

To the fullest extent possible, we should not take an enforcement action in or near a location that would restrain people's access to essential services or engagement in essential activities. Such a location is referred to as a "protected area."

This principle is fundamental. We can accomplish our enforcement mission without denying or limiting individuals' access to needed medical care, children access to their schools, the displaced access to food and shelter, people of faith access to their places of worship, and more. Adherence to this principle is one bedrock of our stature as public servants.

II. Protected Areas

Whether an area is a "protected area" requires us to understand the activities that take place there, the importance of those activities to the well-being of people and the communities of which they are a part, and the impact an enforcement action would have on people's willingness to be in the protected area and receive or engage in the essential services or activities that occur there. It is a determination that requires the exercise of judgment.

The following are some examples of a protected area. The list is not complete. It includes only examples:

- A school, such as a pre-school, primary or secondary school, vocational or trade school, or college or university.

- A medical or mental healthcare facility, such as a hospital, doctor's office, health clinic, vaccination or testing site, urgent care center, site that serves pregnant individuals, or community health center.

- A place of worship or religious study, whether in a structure dedicated to activities of faith (such as a church or religious school) or a temporary facility or location where such activities are taking place.

- A place where children gather, such as a playground, recreation center, childcare center, before- or after-school care center, foster care facility, group home for children, or school bus stop.

- A social services establishment, such as a crisis center, domestic violence shelter, victims services center, child advocacy center, supervised visitation center, family justice center, community-based organization, facility that serves disabled persons, homeless shelter, drug or alcohol counseling and treatment facility, or food bank or pantry or other establishment distributing food or other essentials of life to people in need.

- A place where disaster or emergency response and relief is being provided, such as along evacuation routes, where shelter or emergency supplies, food, or water are being distributed, or registration for disaster-related assistance or family reunification is underway.

- A place where a funeral, graveside ceremony, rosary, wedding, or other religious or civil ceremonies or observances occur.

- A place where there is an ongoing parade, demonstration, or rally.

We need to consider the fact that an enforcement action taken near – and not necessarily in – the protected area can have the same restraining impact on an individual's access to the protected area itself. If indeed that would be the case, then, to the fullest extent possible, we should not take the enforcement action near the protected area. There is no bright-line definition of what constitutes "near." A variety of factors can be informative, such as proximity to the protected area, visibility from the protected area, and people's behavioral patterns in and around the protected area. The determination requires an analysis of the facts and the exercise of judgment.

The fundamental question is whether our enforcement action would restrain people from accessing the protected area to receive essential services or engage in essential activities. Our obligation to refrain, to the fullest extent possible, from conducting a law enforcement action in or near a protected area thus applies at all times and is not limited by hours or days of operation.

Whether an enforcement action can be taken in or near a courthouse is addressed separately in the April 27, 2021 Memorandum from Tae Johnson, ICE Acting Director, and Troy Miller, CBP Acting Commissioner, entitled "Civil Immigration Enforcement Actions in or Near Courthouses," which remains in effect.

III. Exceptions and Limitation on Scope

The foundational principle of this guidance is that, to the fullest extent possible, we should not take an enforcement action in or near a protected area. The phrase "to the fullest extent possible" recognizes that there might be limited circumstances under which an enforcement action needs to be taken in or near a protected area. The following are some examples of such limited circumstances:

- The enforcement action involves a national security threat.
- There is an imminent risk of death, violence, or physical harm to a person.
- The enforcement action involves the hot pursuit of an individual who poses a public safety threat.
- The enforcement action involves the hot pursuit of a personally observed border-crosser.
- There is an imminent risk that evidence material to a criminal case will be destroyed.
- A safe alternative location does not exist.

This list is not complete. It includes only examples. Here again, the exercise of judgment is required.

Absent exigent circumstances, an Agent or Officer must seek prior approval from their Agency's headquarters, or as you otherwise delegate, before taking an enforcement action in or near a protected area. If the enforcement action is taken due to exigent circumstances and prior approval was therefore not obtained, Agency headquarters (or your delegate) should be consulted post-action. To the fullest extent possible, any enforcement action in or near a protected area should be taken in a non-public area, outside of public view, and be otherwise conducted to eliminate or at least minimize the chance that the enforcement action will restrain people from accessing the protected area.

Enforcement actions that are within the scope of this guidance include, but are not limited to, such actions as arrests, civil apprehensions, searches, inspections, seizures, service of charging documents or subpoenas, interviews, and immigration enforcement surveillance. This guidance does not apply to matters in which enforcement activity is not contemplated. As just one example, it does not apply to an Agent's or Officer's participation in an official function or community meeting.

This guidance does not limit an agency's or employee's statutory authority, and we do not tolerate violations of law in or near a protected area.

IV. Training and Reporting

Please ensure that all employees for whom this guidance is relevant receive the needed training. Each of your respective agencies and offices should participate in the preparation of the training materials.

Any enforcement action taken in or near a protected area must be fully documented in your Agency's Privacy Act-compliant electronic system of record in a manner that can be searched and validated. The documentation should include, for example, identification of the protected area; the reason(s) why the enforcement action was taken there; whether or not prior approval was obtained and, if not, why not; the notification to headquarters (or headquarters' delegate) that occurred after an action was taken without prior approval; a situational report of what

occurred during and immediately after the enforcement action; and, any additional information that would assist in evaluating the effectiveness of this guidance in achieving our law enforcement and humanitarian objectives.

V. Statement of No Private Right Conferred

This guidance 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.

The "Migrant Protection Protocols"

In December 2018, the Trump administration announced the creation of a new program called the "Migrant Protection Protocols" (MPP)[1]—often referred to as the "Remain in Mexico" program. The program went into effect in January 2019 and was used to send nearly 70,000 migrants back to Mexico before it was suspended, and then terminated, after President Biden took office.[2] In August 2021, a federal court in Texas ordered the Department of Homeland Security (DHS) to reinstate MPP—a decision which is currently on appeal.[3] On September 29, 2021, the Biden administration announced that it intends to issue a new memorandum terminating MPP, while it simultaneously negotiates with Mexico to reinstate MPP under court order.[4]

Under MPP, individuals who arrived at the southern border and asked for asylum (either at a port of entry or after crossing the border between ports of entry) were given notices to appear in immigration court and sent back to Mexico.[5] They were instructed to return to a specific port of entry at a specific date and time for their next court hearing.[6] MPP is distinct from a separate process known as "metering," whereby CBP officials turn asylum seekers away from ports of entry without processing them or providing any specific date or time to return.[7]

Representation rates for the 70,000 people subjected to MPP were exceedingly low. Data suggests that just 7.5% of individuals subject to MPP ever managed to hire a lawyer,[8] though the true representation rate may be even lower because that number includes individuals who were initially placed into MPP and then were later taken out of the program and allowed to enter the United States.

The lack of counsel, combined with the danger and insecurity that individuals face in border towns, made it nearly impossible for anyone subject to MPP to successfully win asylum. By December 2020, of the 42,012 MPP cases that had been completed, only 521 people were granted relief in immigration court.[9]

In March 2020, in response to the outbreak of COVID-19, all pending MPP hearings were suspended temporarily, and then later indefinitely.[10] This decision left tens of thousands of people in Mexico awaiting their hearings in a state of limbo. Despite the indefinite suspension of MPP hearings, the Trump administration continued to place over 6,000 people into MPP from March 2020 through January 2021.[11] Individuals placed into MPP during this period were primarily those who U.S. Customs and Border Protection (CBP) could not rapidly "expel" under a public health order known as "Title 42," which was also instituted in March.[12] These individuals were predominantly of nationalities that Mexico had refused to permit the United States to expel into its territory, including Cubans, Ecuadorians, Nicaraguans, and Venezuelans.[13]

On the campaign trail, President Biden promised to end MPP.[14] Hours after his inauguration, DHS officially

stopped placing any new people into MPP.[15] Over the next few months, the Biden administration began a process of “winding down” MPP, which included admitting nearly 13,000 people who had been waiting in Mexico and allowing them to seek asylum from within the United States.[16]

How the Migrant Protection Protocols Were Carried Out Under Trump

From January 2019, when the MPP process began, through December 2020, at least 70,000 people were returned to Mexico to await court hearings, according to the nonpartisan TRAC center.[17] The exact number of individuals subject to MPP since its inception has never been disclosed by DHS, although the department eventually began posting monthly data on MPP in August 2020 as required by Congress.[18]

The federal government placed people into MPP at seven U.S. border towns:[19]

1. San Ysidro, CA
2. Calexico, CA (individuals returned to Mexico at Calexico were required to travel to the San Ysidro port of entry for hearings)
3. Nogales, AZ (individuals returned to Mexico at Nogales were required to travel to the El Paso port of entry for hearings)
4. El Paso, TX
5. Eagle Pass, TX (individuals returned to Mexico at Eagle Pass were required to travel to the Laredo port of entry for hearings)
6. Laredo, TX
7. Brownsville, TX

Many individuals were sent to Mexico under MPP at a location far from where they arrived at the border. For example, some families who crossed the border near Yuma, Arizona, were transported by CBP to the Calexico port of entry hundreds of miles away to be returned to Mexico.[20] Similarly, individuals who crossed in the Border Patrol’s Big Bend Sector were transported hundreds of miles and sent back to Mexico in El Paso.[21]

In San Diego and El Paso, individuals who returned for court hearings arrived at the port of entry, were briefly “paroled” into the United States for the purpose of going to court, and then were transferred into the custody of Immigration and Customs Enforcement (ICE) for transport to the local immigration court.[22] According to a copy of ICE’s MPP Standard Operating Procedures obtained through a Freedom of Information Act request, in El Paso individuals were given just one hour after arriving at court to speak with their attorney.[23] In Laredo and Brownsville, individuals who returned for court hearings were taken to “tent courts” built next to the port of entry,

where they appeared in front of immigration judges through video teleconferencing equipment.[24]

According to the U.S. government's "guiding principles" for MPP, certain groups were considered exempt from the process:[25]

- Unaccompanied children
- Citizens or nationals of Mexico
- Individuals processed for expedited removal
- Individuals in "special circumstances," including:
  - Individuals with "known physical/mental health issues"
  - Individuals with criminal records or a history of violence
- Individuals determined by an Asylum Officer to be "more likely than not" to face torture or persecution in Mexico on the basis of race, religion, nationality, political opinion, or membership in a particular social group

The decision to send a person or family back under MPP was discretionary and was made by individual CBP officers or Border Patrol agents. Individuals who crossed the border at the same time were sometimes treated differently, with one person sent back under MPP and the other person permitted to seek asylum through the normal process. In some situations, this led to families being separated at the border, with one parent sent back to Mexico and the other parent and the child allowed to enter the United States.[26]

CBP also retained discretion to take any individual out of MPP on a case-by-case basis.[27] In addition, CBP had stated that it did not subject individuals to MPP who were from countries where Spanish is not the primary language (for example, Cameroon or India), although nothing in the MPP "guiding principles" required their exclusion.[28] In December 2019, Acting CBP Commissioner Mark Morgan threatened to end this exemption and send individuals from non-Spanish-speaking countries back to Mexico under MPP, emphasizing that the policy could be changed at any moment.[29] On January 29, 2020, DHS officially announced that it had expanded MPP to Brazilian nationals.[30]

CBP implemented its MPP "guiding principles" inconsistently across the border. For example, there were reports of CBP officers sending back individuals with serious medical issues in violation of the guidelines.[31] On December 7, 2020, DHS issued "supplemental guidance" on MPP.[32] The guidance made few substantive changes to the operation of MPP but confirmed a number of troubling practices by which DHS carried out the program, including forcing individuals to wait in Mexico during the course of any appeal of a positive decision in their case.[33]

Under MPP, CBP officers did not ask asylum seekers if they were afraid of returning to Mexico. A person who feared harm in Mexico was required to “affirmatively” assert that fear if they wanted to be taken out of MPP.[34] If an asylum seeker did so, the person had to be referred to an Asylum Officer for an interview about their fear.[35] Individuals generally were held in CBP custody for these interviews and were not allowed access to an attorney.[36] Some individuals reported being handcuffed throughout the interview process.[37]

Government estimates of the number of people who passed these interviews ranged from 1% to 13%.[38] After MPP began, some Asylum Officers who conducted these interviews spoke out about pressure to deny people and send them back to Mexico, calling the interviews “lip service.”[39] The labor union representing Asylum Officers filed an amicus brief with the Ninth Circuit Court of Appeals asking the court to strike down MPP as a directive that was “fundamentally contrary to the moral fabric of our nation and our international and domestic legal obligations.”[40]

In December 2019, an internal DHS analysis of MPP revealed serious flaws in the screening process that called into question whether asylum seekers were consistently provided even the limited protections available under the program.[41] These flaws included CBP’s reported use of “a pre-screening process that preempts or prevents a role for USCIS [U.S. Citizenship and Immigration Services] to make its determination,” and reports that “CBP officials pressure USCIS [Asylum Officers] to arrive at negative outcomes.”[42]

These findings were supported by a study of 607 people sent back to Mexico under MPP, which determined that just 40.4% of asylum seekers who expressed a fear of returning to Mexico to CBP were given the required fear-screening interview.[43]

Prior to the indefinite suspension of MPP hearings, many individuals were forced to wait months to have their asylum case decided or even receive an initial hearing.[44] During the time these asylum seekers remained in Mexico, it was extremely difficult to obtain counsel. According to an independent analysis of data obtained from the Executive Office for Immigration Review (EOIR)—the office that oversees the immigration courts—roughly 7.5% of asylum seekers in MPP had a lawyer.[45] Through the end of December 2020, just 5,285 people subject to MPP had secured lawyers out of 70,467 people who had been placed in MPP proceedings.[46]

Many asylum seekers placed into MPP experienced extreme danger in Mexico. Individuals sent to the Laredo or Brownsville courts had to reside or pass through the Mexican state of Tamaulipas, which the State Department classifies as the same level of danger as Syria, Afghanistan, and Iraq.[47] Many asylum seekers and families were kidnapped and assaulted after having been sent back to Mexico, sometimes within hours of crossing back over the border.[48]

According to Human Rights First, through February 2021, there were at least 1,544 publicly documented cases of rape, kidnapping, assault, and other crimes committed against individuals sent back under MPP.[49] Multiple people, including at least one child, died after being sent back to Mexico under MPP and attempting to cross the border again.[50]

The U.S. government did not provide support to individuals sent back to Mexico, leaving people to fend for themselves. Many were homeless during their time in Mexico.[51] In some locations on the border, the Mexican government created shelters that could house some—but not all—of the people sent back.[52] Private shelters also provided housing for some individuals sent back under MPP. In Matamoros, a tent camp sprang up in 2019 where thousands of asylum seekers eventually resided along the Rio Grande in squalid conditions with no running water or electricity.[53]

Given these issues, thousands of people subjected to MPP were unable to return to the border for a scheduled court hearing and were ordered deported for missing court.[54] Some missed hearings because the danger and instability of the border region forced them to abandon their cases and go home.[55] Others missed hearings because they were the victims of kidnapping or were prevented from attending because their court paperwork was stolen.[56]

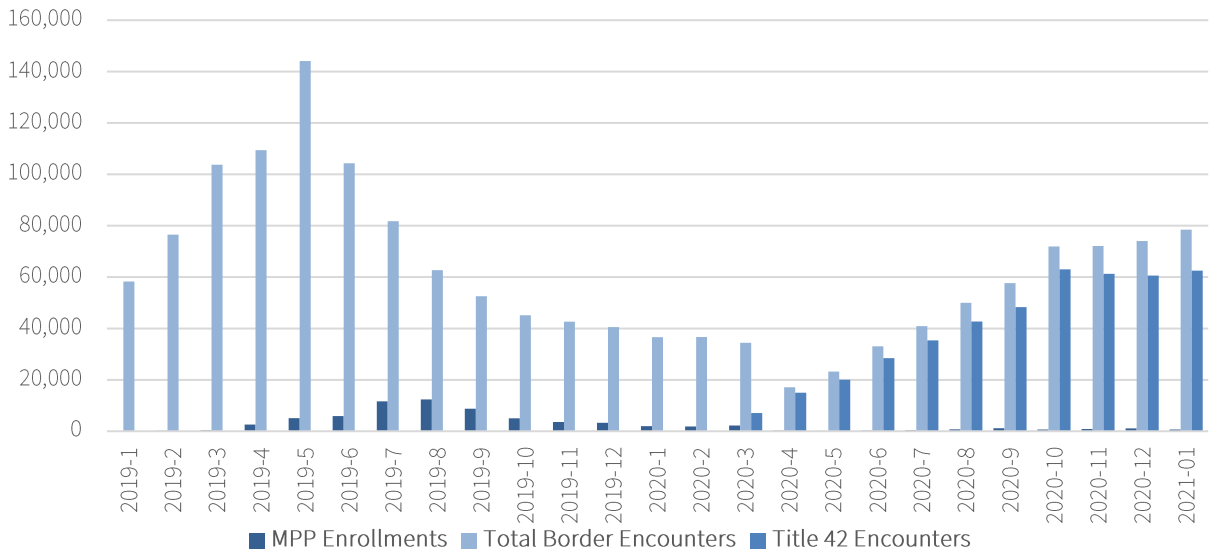
Complicating matters, the Mexican government and the United Nation's International Organization for Migration provided buses traveling from the U.S.-Mexico border to the Mexico-Guatemala border for individuals who chose to abandon their cases and go home. However, multiple reports indicated that some individuals sent back under MPP were coerced onto these buses and ended up hundreds of miles from the border with no way to get back for their court dates.[57] In total, 44% of all people sent back to Mexico under MPP were unable to return to court for a hearing.[58]

The Effect of the COVID-19 Pandemic on MPP

On March 23, 2020, in response to the COVID-19 pandemic, both DHS and EOIR suspended MPP hearings across the border, and the courts that carried out MPP hearings temporarily shut down.[59] From March through July, MPP hearings were periodically re-suspended, each time creating more uncertainty among those still waiting for a court date.[60] Finally, on July 17, 2020, DHS and EOIR formally admitted that the program would be indefinitely suspended during the pandemic.[61]

Despite the possibility that those with pending cases might have to wait 2-3 years in Mexico before a hearing, the Trump administration refused calls to admit those in MPP with pending cases. In total, CBP subjected over 6,000 people to MPP following the suspension of hearings,[62] sending them to Mexico to wait for an unknown period. During this time, MPP was almost entirely replaced by Title 42, with hundreds of thousands expelled under that policy during Trump's last months in office (Figure 1).

Figure 1: Enrollments in MPP Compared to Expulsions Under Title 42, January 2019 to January 2021



Source: U.S. Customs and Border Protection data.[63]

Along with worsening conditions in shelters at the border and pandemic-related restrictions imposed across Mexico, the indefinite suspension of MPP led many people with pending cases to abandon their hope of seeking protection.

Many of those subject to MPP returned to their home countries,[64] while others tried to enter the United States again.[65] At least 700 children who were part of families subject to MPP were sent across the border alone by their parents.[66] In total, DHS has said that nearly 25% of all people subject to MPP eventually tried to cross the border a second time.[67]

Developments Under the Biden Administration

On January 20, 2021, the same day that President Biden took office, DHS suspended all new enrollments in MPP, preventing any new people from being sent back to Mexico.[68]

Beginning in February 2021, the Biden administration began formally winding down MPP. The first phase of this "wind down" involved processing those waiting in Mexico who had pending MPP cases—a process which started on February 26, 2021.[69] In order to be processed, individuals had to first go through a registration process administered by the United Nations High Commissioner for Refugees (UNHCR), which verified that individuals

were eligible for processing under the MPP wind-down.[70] To access this process, those in Mexico had to register through “Conecta,” a service set up by UNHCR.[71] Individuals also needed a negative COVID-19 test prior to being processed into the United States.[72]

By early March, the infamous refugee camp in Matamoros had been emptied out and nearly all inside processed into the United States and allowed to pursue asylum.[73] In June, the Biden administration announced that it would also process into the United States individuals subject to MPP who had been ordered deported for missing their court hearings.[74] Over the next five months, just over 13,000 people were processed into the United States.[75]

On August 15, as part of a lawsuit brought by the states of Texas and Missouri, a federal judge ordered the Biden administration to “enforce and implement MPP *in good faith* until such a time as it has been lawfully rescinded in compliance with the APA [Administrative Procedure Act] and until such a time as the federal government has sufficient detention capacity to detain all [noncitizens] subject to mandatory detention under Section 1255 without releasing any [noncitizens] *because of* a lack of detention resources.”[76] Despite the extraordinary and unprecedented nature of this decision, which forced the Executive branch to engage in diplomatic negotiations with Mexico, the Supreme Court refused to temporarily halt the order while it went through the appeals process.[77]

Following that decision, in September the Biden administration disclosed that it had begun internal deliberations about reinstating MPP and was engaged in diplomatic negotiations with the government of Mexico, and that no person could be sent back to Mexico without that country’s cooperation.[78]

While the case proceeds through the appeal process, the fate of tens of thousands of people subject to MPP who are still in Mexico remains in limbo.

American Immigration Council

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New ICE "Victim-Centered" Policy Protects Noncitizens Eligible for Humanitarian Relief

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Topics: Humanitarian Relief, Prosecutorial Discretion

A policy issued by U.S. Immigration and Customs Enforcement, or ICE, acting director Tae D. Johnson provides important protections to noncitizen crime victims, including those with pending or approved applications for certain humanitarian immigration benefits. The Aug. 10, 2021 ICE directive, titled "Using a Victim-Centered Approach with Noncitizen Crime Victims," states that "applying a victim-centered approach minimizes any chilling effect that civil immigration enforcement actions may have on the willingness and ability of noncitizen crime victims to contact law enforcement, participate in investigations and prosecutions, pursue justice, and seek benefits." *Id*. at 1. As described further below, the policy directs ICE personnel to (1) generally refrain from civil immigration enforcement actions against certain noncitizens who are victims of or witnesses to crime, (2) coordinate with U.S. Citizenship and Immigration Services, or USCIS, to seek expedited adjudication of certain victim-based immigration applications and petitions, and (3) identify whether noncitizens encountered by ICE are crime victims and provide noncitizen victims with relevant information.

1. Protections Against Enforcement for Noncitizen Crime Victims

The policy directs ICE officials to refrain from taking civil immigration enforcement action, absent "exceptional circumstances," against noncitizens who fall within certain victim/witness categories. The protected categories include:

- (1) victims and witnesses during the pendency of any known criminal investigation or prosecution, *id*. at 2;
- (2) human trafficking victims issued "Continued Presence," *id*. at 9; and
- (3) applicants for and beneficiaries of victim-based immigration benefits (both primary and derivative), including T nonimmigrant status, U nonimmigrant status, VAWA relief, and Special Immigrant Juvenile classification, *id*. at 2, 4.

For noncitizens who fall within the third category, the policy states that ICE will generally defer enforcement decisions "until USCIS makes a final determination on the pending victim-based immigration benefit application(s) or petition(s), including adjustment of status for noncitizens with approved Special Immigrant Juvenile status, or, in the case of a T visa, U visa, or VAWA application, until USCIS makes a negative bona fide or prima facie determination." *Id*. at 2. For those noncitizens with pending victim-based applications who have a final removal order, the policy directs that, absent exceptional circumstances, they "should generally be issued a stay of removal." *Id*. at 8. If a noncitizen has a pending victim-based application but has already been removed, a companion "Frequently Asked Questions" document states that they may be an appropriate candidate for parole. If a noncitizen's victim-based immigration application is approved (or, where USCIS waitlists a petitioner for U nonimmigrant status), the policy directs ICE to "review the case for the exercise of prosecutorial discretion," id. at 8, including considering release if the noncitizen is in ICE custody, "so long as their release is not prohibited by law and no exceptional circumstances exist." *Id*. at 9.

Under the policy, exceptional circumstances are generally limited to situations where the noncitizen poses either (1) national security concerns; or (2) an "articulable risk of death, violence, or physical harm to any person." Id. at 3. If an ICE officer wishes to pursue immigration enforcement against a noncitizen with a pending or approved victim-based immigration application, they must first obtain pre-approval by submitting a written justification to a headquarters responsible official explaining why the proposed action complies with this policy. *Id*. at 9.

Generally, the memo states that a noncitizen's victim status "is a discretionary factor that must be considered in deciding whether to take civil immigration enforcement action against the noncitizen or to exercise discretion, including but not limited to release from detention." *Id*. at 2. Civil immigration enforcement actions include decisions whether or not to: detain a noncitizen; issue, serve, file, or cancel a Notice to Appear; grant deferred action or parole; and execute a final order of removal. *Id*. at 3.

2. Coordination with USCIS

The policy requires ICE to coordinate with USCIS in cases where a noncitizen has a pending victim-based immigration application or petition. The policy directs ICE to return the noncitizen's original A-file to USCIS as soon as practicable so that USCIS can adjudicate the request. *Id*. at 7. And, in cases where ICE does not release a noncitizen with a pending victim-based application from custody, ICE must ask USCIS to expedite the adjudication. *Id*. at 8.

3. Identification of Crime Victims

The policy requires ICE officers to "proactively inquir[e] with noncitizens, where available information indicates a noncitizen may be a noncitizen crime victim or witness, about any prior victimization, any pending petitions or applications, and, where appropriate, access[] USCIS systems for evidence of any pending or approved victim-based applications or petitions." Id. at 6. ICE officers must "must look for indicia or evidence that suggests a noncitizen is a victim of crime, such as being the beneficiary of an order of protection or being the recipient of an eligibility letter from the U.S. Department of Health and Human Services Office of Trafficking in Persons." *Id*. at 2. If ICE identifies a noncitizen as a crime victim and the noncitizen has not yet reported the crime to law enforcement, the policy directs ICE to provide the noncitizen with contact information for relevant law enforcement agencies and information regarding legal services and victim-based immigration benefits. *Id*. at 10.

Tips for Practitioners

Practitioners should consider the following tips in advocating for noncitizen victims using the ICE memo:

- Assuming it is in the client's interest to do so, affirmatively raise clients' victim status with ICE at the earliest possible opportunity. Practitioners may also wish to provide clients with a letter that explains their victim status and that they are represented by counsel, and advise clients to carry this letter with them in the event they are detained by ICE.
- Carefully review the memo, which is quite detailed, in order to craft tailored prosecutorial discretion requests to ICE.
- Consider seeking various forms of prosecutorial discretion contemplated by the memo, including release from detention, stays of removal, deferred action, and parole.
- If the initial request for prosecutorial discretion under this memo is unsuccessful, elevate the request to the Field Office Director, and if that is unsuccessful, to the Senior Reviewing Officer. This fact sheet provides general information about the ICE case review process.
- Where relevant, also consider seeking prosecutorial discretion with respect to immigration court removal proceedings from the ICE Office of the Principal Legal Advisor, including, as relevant, dismissal of proceedings, joint motions to administratively close, or joint motions to reopen.

Overall, this policy imposes additional duties on ICE officers before they may detain or take other immigration enforcement action against a noncitizen. The victim-centered approach mandated by this policy stands in stark contrast to the indiscriminate detention and enforcement against noncitizens conducted by the previous administration.

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[Assistance for Afghans Toolkit]

Posted on September 22, 2021

CLINIC is monitoring the situation in Afghanistan and would like to provide the following information:

Asylum and Refugee Law, Humanitarian Relief

[The Board of Immigration Appeals Recognizes Tardiness May Present Exceptional Circumstances for Reopening an In Absentia Removal Order]

Posted on July 28, 2021

The Board of Immigration Appeals, or BIA, issued a published decision establishing that the "exceptional circumstances" in absentia reopening provision may encompass situations that led to a respondent's late arrival to court and, therefore, absence at a removal hearing. This decision provides a non-exhaustive list of factors and corroborative evidence for immigration judges to consider when adjudicating late arrival in absentia motions to reopen on a case-by-case basis.

Removal Proceedings, Litigation, Asylum and Refugee Law, Humanitarian Relief

[All About Cuban Adjustment: FAQs for Legal Practitioners]

Posted on July 21, 2021

The FAQ explores the process of applying for adjustment under the CAA and the availability of benefits pending adjudication.

Humanitarian Relief

and sustain a network of nonprofit programs that serve close to 500,000 immigrants every year. We cultivate projects that support and defend vulnerable immigrant populations by:

- providing direct representation for asylum seekers at the U.S.-Mexico border and educating them about their rights;
- reuniting formerly separated families;
- increasing legal representation for those in removal proceedings and in detention;
- providing public education on immigration law and policies; and
- advocating for fair and just immigration policies that acknowledge the inherent dignity and value of all people.

History has taught us that people who step up can make a difference. **We hope you will join us.**

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About the Catholic Legal Immigration Network, Inc.

Embracing the Gospel value of welcoming the stranger, CLINIC promotes the dignity and protects the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs. We are based out of Silver Spring, Maryland (Washington, D.C. metropolitan area), with an office in Oakland, California, and additional staff working from locations throughout the country. Questions and inquiries can be sent to national@cliniclegal.org.

National Office

8757 Georgia Avenue, Suite 850, Silver Spring, MD 20910
Main Phone: (301) 565-4800 / Main Fax: (301) 565-4824

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December 10, 2020

Trump Administration Enacts Rule Gutting Protection for Refugees and Asylum Seekers

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WASHINGTON - In the waning days of the current administration, the Trump U.S. Departments of Homeland Security and Justice have rammed through a sweeping final rule, set to go into effect on January 11, 2021, that guts what remains of protection for refugees seeking asylum in the United States. This rule is a clear violation of the Immigration and Nationality Act, the intent of Congress, and the treaty obligations of the United States.

"The rule is in flagrant and egregious conflict with laws enacted by the U.S. Congress; it impermissibly attempts to rewrite and erase laws passed by Congress to provide asylum to refugees who face persecution," said **Eleanor Acer, senior director of refugee protection at Human Rights First.** "The rule will deny asylum to refugees who qualify for it under U.S. law and treaties and cause the United States to send families, children and adults seeking refuge back to deadly dangers. The rule is yet another Trump administration policy that will separate refugee families to punish them for seeking U.S. asylum. The rule will prevent refugees from reuniting with their children and spouses, blocking them from bringing them to safety in the United States as derivative asylees even when refugees prove that they qualify for protection from return to persecution – presenting them with the impossible choice of permanent separation from their children and spouse, or returning to a country where their lives and freedom are at risk."

Under the rule, the Trump administration is likely to, among many other harmful actions:

- Deny asylum to refugees who changed planes in or transited through another country on their way to the United States simply because they did not apply for asylum en route, even in cases where they know they would not have been safe or protected in that country or that country lacked a functioning asylum system;

- Deny asylum to refugees who improperly entered the United States despite the fact that a U.S. federal court has already ruled (https://www.cnn.com/2019/08/02/politics/read-ruling-trump-asylum-ban/index.html) that an asylum ban on such grounds is inconsistent with U.S. law, and even though Article 31 of the 1951 Refugee Convention (https://www.unhcr.org/en-us/3b66c2aa10) specifically prohibits penalties for such entry;

- Deny asylum to a woman who is harmed for gender-based violence, on the grounds that feminism is not political opinion (claims based on resistance to forced abortion would, however, continue to be recognized);

- Deny asylum to LGBTQ refugees who pass through transit countries, seek protection due to persecution based on gender, or when fleeing persecution based on laws criminalizing same-sex relationships if an adjudicator deems the laws infrequently enforced;

- Deny asylum to children who flee to the United States to escape forced conscription by terrorist or other non-governmental armed groups;

- Deny protection to refugees who have been tortured by a police officer or member of the military or others acting on behalf of a government, if an adjudicator deems the officer to be a "public official who is not acting under color of law," in contravention of circuit court precedents recognizing that governments — some of which use shadowy forces to maintain deniability in going after their opponents — may also turn a blind eye to officials who torture people for their own purposes;

- Allow an immigration judge to deny asylum without a hearing on the grounds that the claim did not appear to meet the new and highly controversial legal requirements imposed by this regulation, or other restrictions already adopted by the Trump administration;

- Bar refugees from asylum based on firm resettlement even though they were not actually offered permanent residence in another country if an adjudicator decides they somehow "could have" sought some status in that country, regardless of their safety in or ties to that country;

- Redefine persecution to deny asylum to refugees even though they have been repeatedly detained for their political or religious views or other protected characteristic if an adjudicator deems those detentions "brief" and to deny asylum to people who managed to escape threats unless those threats can meet a new and unrealistically high standard that would deny protection to many who fled and faced very real dangers;

- Redefine "political opinion" in ways so poorly written as to be incomprehensible, guaranteeing the denial of many claims eligible for protection under the Refugee Convention and Protocol, the Immigration and Nationality Act, and existing court precedent, as well as years of unnecessary litigation over what exactly this regulation says;

- Bar refugees from even applying for asylum by increasing the complexity of credible fear screenings, applying the administration's many new bars to asylum at the preliminary screening stage without sufficient opportunity to prepare or present evidence, and treating a terrified or confused asylum seeker's failure to indicate whether or not he or she wants an immigration judge to review the credible fear denial as a refusal of such review;

- Make it harder for asylum seekers in expedited removal proceedings to pass fear screenings and have a chance to apply for withholding of removal when they have been barred from asylum by this administration's existing illegal changes to the asylum process;

- Block asylum seekers from regular immigration court hearings in an attempt to deny them other forms of relief for which they may be eligible, such as adjustment of status (a September 23 proposed rule (https://www.govinfo.gov/content/pkg/FR-2020-09-23/pdf/2020-21027.pdf) would give these asylum-seekers only 15 days (https://www.humanrightsfirst.org/press-

release/human-rights-first-decries-proposed-rules-designed-put-pressure-asylum-seekers-limit) to file asylum applications after their first immigration court hearing);

- Create new grounds for declaring asylum applications "frivolous," an extreme sanction that can ban someone from any other immigration benefit for life.

Human Rights First (https://www.humanrightsfirst.org/resource/comment-procedures-asylum-and-withholding-removal-credible-fear-and-reasonable-fear-review) and nearly 90,000 (https://beta.regulations.gov/docket/EOIR-2020-0003) individuals and organizations submitted public comments on the proposed rules. Remarkably, the Departments of Homeland Security and Justice reviewed these tens of thousands of comments, finalizing these regulations, which span 419 pages. The final rules are substantially the same as the notice of proposed rulemaking making only what the Departments describe as “non-substantive” changes and correcting “inadvertent” errors in the proposed rule’s text.

“The new rule will have life and death consequences for refugees and their families,” said Acer. “It turns U.S. asylum adjudications into a Kafkaesque system for denying asylum to the very refugees that Congress created laws to protect. The rule also imposes impossible choices on asylum adjudicators by attempting to force them to violate laws enacted by Congress and turn refugees back to persecution.”

Human Rights First’s comments on the proposed rule are available here (https://www.humanrightsfirst.org/sites/default/files/HRFAsylumRegulationComment07.15.2020.pdf). Human Rights First provides pro bono legal representation for refugees seeking asylum in the United States, in partnership with volunteer lawyers at many of the nation’s leading law firms. Our pro bono refugee clients have fled persecution in Cameroon, China, Cuba, El Salvador, Guatemala, Eritrea, Honduras, Iraq, Nicaragua, Syria, Venezuela and other countries where their lives and freedom are at risk.

OUR IMPACT

“Human Rights First is a premier institution devoted to the noblest of all causes.” — *Senator John McCain (R-AZ)*

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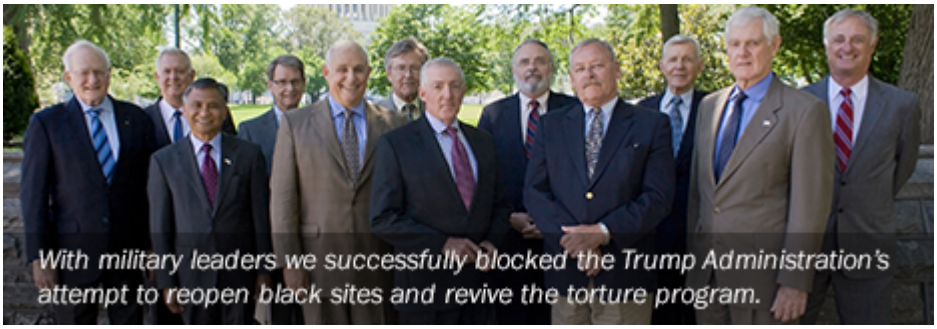

Keeping the Door Closed on Torture

The Protect Our Courts Act is Now Law in New York State!

Community FAQ

What is the Protect Our Courts Act?

The Protect Our Courts Act, also known as **POCA**, is a new law in New York State that keeps Immigration and Customs Enforcement (ICE) officers from making civil arrests in and around New York State Courts, including City and other Municipal Courts.

What problem does it solve?

Over the past decade, ICE has strengthened its ties to local police and prison systems. This trend is clear in New York State, where ICE has escalated its community raids, including arrests and surveillance at courthouses. Through our hotline, the **Immigrant Defense Project** (IDP) has been receiving troubling reports of ICE making courthouse arrests, **noting a 1700% increase in arrests** and attempted arrests between 2017 and 2018.

This practice not only led to cruel and troubling stories of ICE creating courthouse traps that led to people getting arrested at courthouses, but also created fear within immigrant communities where many people ended up avoiding going to courts for various reasons.

In response, IDP and partners drafted the Protect Our Courts Act (POCA), a piece of legislation that makes sure that **everyone in New York has equal access to our state courthouses.**

How did POCA become a state law?

The #ICEOutOfCourts Coalition was born in 2017 and through coalition efforts led by IDP, POCA was introduced in the NYS legislature. POCA finally passed in July 2020 with overwhelming and bipartisan support, and in December 2020 Governor Cuomo signed it into law!

How are people now protected?

In New York State, ICE can no longer arrest people at state, city and municipal courthouses, and they can no longer arrest people going to or leaving from state, city and municipal courthouses without judicial warrants.

What's a judicial warrant?

A judicial warrant is a warrant signed by a judge. ICE typically doesn't have a signed judicial warrant. They typically do have administrative warrants, which are warrants signed by their own supervisors. However, without a judicial warrant, ICE cannot arrest people at courts, or people going to or leaving courts.

Can ICE arrest me at a courthouse from now on?

No. Now without a judicial warrant, ICE cannot arrest anyone at any state, city or other municipal courts.

Can ICE use courthouses as surveillance from now on?

ICE officers now have to identify themselves to court personnel if they come to a courthouse. They also have to state their reason for being at the courthouse, including if they are there to surveil, observe, or arrest a particular person. Court personnel are also required to communicate ICE's intent to surveil, observe, or arrest someone to the judge. However, ICE can still surveil people outside of the courthouse building, even though they cannot make an arrest without a judicial warrant.

Are all the courthouses included under POCA?

No, federal courts, including immigration courts are not included in the protections offered by POCA. However, state, city and other municipal courts are protected under POCA. These can include, criminal courts, family courts, and traffic courts, to name a few.[1]

Can I be arrested by ICE going to or leaving court?

POCA protects people going to and leaving state, city and municipal courts.

How can I prove I was on my way to court or leaving court?

Usually courts have records of people attending court for various reasons. It is always good to keep documents from court that list your court date, such as an appointment notice. If an ICE agent stops you on your way to or from court, stay silent, do not say your name or anything else, and ask, am I free to go? You can also tell the agent "I am going to attend (or I am leaving) court" but do not provide other information about your court appearance and remain silent.

Check out IDP's Know Your Rights resources for more information on what to do if ICE approaches you on the street.

What happens if ICE arrests me or tries to arrest me at court from now on? Or if I am going to or leaving court?

The New York State Attorney General is authorized to bring legal action if the Protect Our Courts Act is violated. You can consult a lawyer about your options if ICE violates your rights under POCA. You can contact your local public defender office, or if you are in removal proceedings, consult with an attorney about challenging the removal proceedings based on the violation of your rights.

[1] Some courts included in the protections of the Protect Our Courts Act are: the New York Supreme Court, Appellate Division; Supreme Court, County Court, Family Court, Surrogate's Court, Court of Claims, NYC Criminal Court, NYC Civil Court, District Court (Nassau and Suffolk Counties), Justice Court (including "Town Court" and "Village Court"), Traffic Violations Bureau, NYC Office of Administrative Trials and Hearings (OATH), such as the Taxi and Limousine Tribunal.

Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor (OPLA)

Prosecutorial Discretion (PD) is the longstanding authority of an agency charged with enforcing the law to decide where to focus its resources and whether or how to enforce, or not to enforce, the law against an individual. As the Department of Homeland Security's (DHS) representative before the Executive Office for Immigration Review (EOIR) in exclusion, deportation, and removal proceedings, OPLA relies upon PD and other factors to guide its decision making.

OPLA attorneys may exercise PD in proceedings before EOIR, subject to direction from their Chief Counsel and applicable guidance from DHS. In exercising such discretion, OPLA attorneys adhere to the enduring principles that apply to all of their activities: upholding the rule of law; discharging duties ethically in accordance with the law and professional standards of conduct; following the guidelines and strategic directives of senior leadership; and exercising considered judgment and doing justice in individual cases.

In the context of OPLA's role in the administration and enforcement of the immigration laws, PD arises at different stages of the removal process, takes different forms, and applies to a variety of determinations, including, for instance, agreeing to continuances, stipulating to bond, joining in noncitizen motions to the immigration court, and agreeing to dismiss cases pursuant to 8 C.F.R. § 1239.2(c).

OPLA exercises PD on a case-by-case basis considering the totality of the circumstances. In determining whether to exercise PD, OPLA may consider such factors as:

- The noncitizen's length of residence in the United States;
- The noncitizen's or the noncitizen's family's service in the U.S. military;
- The noncitizen's family or community ties in the United States;
- Circumstances of the noncitizen's arrival in the United States and the manner of his or her entry;
- The noncitizen's prior immigration history;
- The noncitizen's work and education history in the United States;
- The noncitizen's status as a victim, witness, or plaintiff in civil or criminal proceedings; and
- Compelling humanitarian factors present in the noncitizen's case (including on the part of the noncitizen's close family members), including:
    - Serious medical condition,
    - Age,
    - Pregnancy,
    - Status as a child, and
    - Status as a primary caregiver of a seriously ill relative in the United States.

Where a noncitizen has been charged or convicted of a crime in the United States or abroad, OPLA attorneys may also consider such factors as:

- The extensiveness, seriousness, and recency of the criminal activity;
- Indicia of rehabilitation;
- Extenuating circumstances involving the offense or conviction;
- The time and length of the sentence imposed, if any;
- The length of time since the offense or conviction occurred; and
- Whether subsequent criminal activity supports a determination that the noncitizen poses a threat to public safety.

These factors are not intended to be dispositive or exhaustive, as PD is inherently case-specific. The more forthcoming a noncitizen is in submitting information related to his or her request for PD (including information detailing both the equities in the case and potentially negative considerations), the more readily OPLA attorneys will be able to assess the totality of the circumstances and make informed discretionary judgments.

Submitting a PD Request to OPLA

While OPLA attorneys routinely examine the cases to which they are assigned to determine whether the exercise of PD may be warranted, generally speaking, a noncitizen should make an affirmative request to OPLA if he or she seeks to receive a favorable exercise of PD. To ensure noncitizens understand this process,

OPLA works with the ICE Office of Partnership and Engagement to schedule virtual town halls around the country for stakeholders to discuss OPLA's PD guidance, address questions, and provide local standard operating procedures (SOPs) for noncitizens to submit requests for PD to each OPLA field location.

The SOPs developed for each OPLA field location will include a local email address for submission of PD requests. The SOPs will also include details about what should be included in a PD submission, including:

- The type of PD sought (joint motion to dismiss, continuance, stipulation for relief, bond reduction, etc.);
- The reason(s) why PD may be warranted; and
- Supporting documentation to aid in evaluating the case, including a comprehensive list of any criminal history with arrests and convictions.

The OPLA field location will convey its position on any PD request back to the requester. If the Chief Counsel intends to agree to the PD request, depending on the type of PD exercised and where appropriate, the field location may provide the requester a motion to sign for filing.

For unrepresented noncitizens, OPLA will not require any prescribed format for PD requests. OPLA welcomes assistance from the private immigration bar and pro bono groups to unrepresented noncitizens in the submission of PD requests.

There is no application fee associated with requesting that OPLA consider PD in a specific case. Attempts to charge an application fee for this purpose could be an indicator of an unfair business practice. An individual can report evidence of unfair business practices to local licensing authorities, including the relevant state bar.

OPLA Field Location Map and PD Email Addresses

Below, please find a listing of the relevant email addresses that can be used when submitting a PD request to OPLA. Some OPLA field locations may prefer to receive PD requests via ICE eService. Both attorneys and pro se noncitizens can register for ICE eService here. If you have questions about how to submit a PD request, please contact your local OPLA office.

Main Field Location	Sub-Office	Email Address for PD Requests
Atlanta		ICE-OPLA-ATL-PD@ice.dhs.gov
	Charlotte	ICE-OPLA-ATL-CLT-PD@ice.dhs.gov
	Stewart	ICE-OPLA-ATL-SDC-PD@ice.dhs.gov
	Summit	ICE-OPLA-ATL-SFB-PD@ice.dhs.gov
Baltimore		ICE-OPLA-BAL-PD@ice.dhs.gov
Boston		ICE-OPLA-BOS-PD@ice.dhs.gov
	Hartford	ICE-OPLA-BOS-HAR-PD@ice.dhs.gov

Main Field Location	Sub-Office	Email Address for PD Requests
Buffalo		ICE-OPLA-BUF-PD@ice.dhs.gov
	Batavia	ICE-OPLA-BUF-BTV-PD@ice.dhs.gov
Chicago		ICE-OPLA-CHI-PD@ice.dhs.gov
	Kansas City	ICE-OPLA-CHI-KAN-PD@ice.dhs.gov
Dallas		ICE-OPLA-DAL-PD@ice.dhs.gov
Denver		ICE-OPLA-DEN-PD@ice.dhs.gov
	Salt Lake City	ICE-OPLA-DEN-SLC-PD@ice.dhs.gov
Detroit		ICE-OPLA-DET-PD@ice.dhs.gov
	Cleveland	ICE-OPLA-DET-CLE-PD@ice.dhs.gov
El Paso		ICE-OPLA-ELP-PD@ice.dhs.gov
Honolulu		ICE-OPLA-HHW-PD@ice.dhs.gov
Houston		ICE-OPLA-HOU-PD@ice.dhs.gov
	Conroe	ICE-OPLA-HOU-CON-PD@ice.dhs.gov
Los Angeles		ICE-OPLA-LOS-PD@ice.dhs.gov
	Adelanto	ICE-OPLA-LOS-ADE-PD@ice.dhs.gov
	Las Vegas	ICE-OPLA-LOS-LVG-PD@ice.dhs.gov
	North Los Angeles	ICE-OPLA-LOS-NLA-PD@ice.dhs.gov
	Van Nuys	ICE-OPLA-LOS-VNS-PD@ice.dhs.gov
Miami		ICE-OPLA-MIA-PD@ice.dhs.gov
	Broward Transitional Center	ICE-OPLA-MIA-BTC-PD@ice.dhs.gov
	Krome	ICE-OPLA-MIA-KSPC-PD@ice.dhs.gov
	Puerto Rico & the U.S. Virgin Islands	ICE-OPLA-MIA-PR-VI-PD@ice.dhs.gov

Main Field Location	Sub-Office	Email Address for PD Requests
Minneapolis-St. Paul		ICE-OPLA-SPM-PD@ice.dhs.gov
New Orleans		ICE-OPLA-NOL-PD@ice.dhs.gov
	Jena	ICE-OPLA-NOL-JNA-PD@ice.dhs.gov
	Memphis	ICE-OPLA-NOL-MEM-PD@ice.dhs.gov
	Oakdale	ICE-OPLA-NOL-OAK-PD@ice.dhs.gov
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	Florence	ICE-OPLA-PHO-FLO-PD@ice.dhs.gov
	Tucson	ICE-OPLA-PHO-TUC-PD@ice.dhs.gov
San Antonio		ICE-OPLA-SNA-PD@ice.dhs.gov

Main Field Location	Sub-Office	Email Address for PD Requests
	Harlingen	ICE-OPLA-SNA-HLG-PD@ice.dhs.gov
	Pearsall	ICE-OPLA-SNA-STIPC-PD@ice.dhs.gov
	Port Isabel	ICE-OPLA-SNA-PIDC-PD@ice.dhs.gov
San Diego		ICE-OPLA-SND-PD@ice.dhs.gov
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	Otay Mesa	ICE-OPLA-SND-OTM-PD@ice.dhs.gov
San Francisco		ICE-OPLA-SFR-PD@ice.dhs.gov
	Sacramento	ICE-OPLA-SFR-SAC-PD@ice.dhs.gov
Seattle		ICE-OPLA-SEA-PD@ice.dhs.gov
	Portland	ICE-OPLA-SEA-POO-PD@ice.dhs.gov
	Tacoma	ICE-OPLA-SEA-TAC-PD@ice.dhs.gov
Washington, D.C.		ICE-OPLA-WAS-PD@ice.dhs.gov

PD Email Limited Data Security Waiver

Those engaging in email exchange with OPLA's prosecutorial discretion (PD) email addresses acknowledge and agree to a limited waiver of data security that shall only attach to the electronic service and transmittal of documents that may contain sensitive personally identifiable information (SPII). Senders to the email addresses should be aware, however, that ICE cannot ensure that information transmitted outside of the DHS network will remain secure during transmission. This waiver applies to both your receipt of information transmitted by ICE and the transmission of information from you to ICE. Please also be advised that (1) from the time information leaves the DHS network until receipt by your email system and (2) during the time that information is being transmitted by your email system to the DHS network, the information contained within the email, including but not limited to SPII, is not necessarily secure against interception. You are strongly encouraged to encrypt any documents containing SPII prior to sending it to OPLA via email and to send passwords under separate email. By participating in use of the PD email addresses, you expressly agree to assume the risk that SPII may be intercepted during transmission to or from the DHS network and, as a result, be obtained by or disclosed to third-parties.

Additional Information and Resources

- *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021)
- *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021) (redacted for public release)
- ICE ERO Case Review Site for Individuals in Custody and/or with Final Orders of Removal

Updated: 08/23/2021

ADDRESS

500 12th St SW
Washington, DC 20536

Report Crimes: Call 1-866-DHS-2-ICE

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Tool Kit for Prosecutors

Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities

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Tahirih Updates

An analysis of the Biden Administration's new proposed asylum rules

August 19th, 2021

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On August 18, the Department of Homeland Security and the Department of Justice released a proposed rule (https://public-inspection.federalregister.gov/2021-17779.pdf?utm_medium=email&utm_campaign=pi+subscription+mailing+list&utm_source=federalregiste that would reshape the process for individuals seeking asylum in the United States. While the proposal has some positive impacts on immigrant survivors of gender-based violence, some aspects of the proposed rule will also be harmful. Here are some of the ways this proposed rule will impact Tahirih clients and all survivors of gender-based violence.

The Good

Asylum officers, who are trained to conduct interviews in trauma-informed manner, can now rule on individuals' asylum applications.

When people seeking asylum arrive in the United States, they are often given an interview to determine whether they have a "credible fear" of persecution in their home country. If they do, they are typically placed in proceedings in immigration court in which the

government opposes their application for relief.

The proposed rule would instead allow asylum officers with U.S. Citizenship and Immigration Services (USCIS)—not immigration court judges—to hear the asylum claims of many people found to have a credible fear of persecution. Asylum officers receive training on trauma and its effects, and when an asylum officer decides an asylum application, they must conduct a non-adversarial interview with the person seeking asylum. These interviews are often less traumatic for survivors of gender-based violence than adversarial hearings in immigration court.

A survivor's credible fear interview will be treated as their asylum application.

Congress has required anyone seeking asylum to file an application for asylum within one year of entering the United States. The application is technical, requires people seeking asylum to describe the trauma they experienced, and must be completed in English. The result is that many people seeking asylum, especially those who do not have legal representation, find it impossible to complete the application by the deadline. Under the proposed rule, some people who are found to have a credible fear of persecution in their home countries will automatically satisfy the one-year deadline and start the waiting period for work authorization, because the record of their credible fear interview will be treated as their asylum application.

Due process protections

The proposed rule would also provide some due process protections in connection with the asylum interviews newly conducted by USCIS. People seeking asylum would be entitled to legal counsel or other representation; the government would provide an interpreter for anyone who cannot complete the interview effectively in English; and people would be able to submit additional evidence in support of their asylum applications until shortly before their interview.

Increasing capacity to process asylum claims

The proposed rule states an intent to hire 800 new employees at USCIS, in part to allow the agency to hear 75,000 asylum claims each year. This is a necessary step, because USCIS—which already decides some asylum applications and applications for many other types of relief—is faced with very large and increasing backlogs of undecided applications. Funding for these new employees should, however, come from Congress rather than from increasing the fees paid by survivors and others seeking relief, many of whom cannot afford even the current application fees.

The Bad

Expansion of expedited removal

The proposed rule seeks to greatly expand the use of expedited removal. Expedited removal —a process by which people can be immediately deported to their home country without ever being able to apply for asylum—has almost no procedural safeguards. It has resulted in the deportation of countless survivors with legitimate asylum claims to danger and violence simply because they lack detailed knowledge of how to prove an asylum case under U.S. law and never had the opportunity to consult with a legal representative.

Restriction on survivors to presenting evidence in support of their asylum applications.

Anyone who has an asylum interview with USCIS under the rule that results in a denial of relief can seek to have an immigration judge decide their asylum application anew. But even though the immigration judge's decision will come months, or even years, after the asylum officer's decision, the rule would place strict restrictions on the submission of new evidence to the immigration judge and omit a full evidentiary hearing. Given that survivors fleeing for their lives do not stop to collect paperwork, and that it can take a significant amount of time for survivors or their representatives to gather evidence from family members or others in their home country, these restrictions would result in claims being decided without a full record—and in still more erroneous denials of asylum.

Eliminates the option to seek reconsideration of certain asylum cases

The proposed rule would remove an important procedural protection. Now, if an asylum officer finds that someone does not have a credible fear of persecution in their home country, that person can both ask USCIS to reconsider that determination *and* ask an immigration judge to review the determination. The proposed rule would eliminate the option to seek reconsideration from USCIS.

People seeking asylum also often seek lesser relief, either "withholding of removal," which prevents their deportation to their home country, or relief under the Convention Against Torture (CAT). Under the proposed rule, when an asylum officer denies asylum to a client but also grants withholding of removal or CAT relief, the person seeking relief cannot ask an immigration judge to review only the denial of asylum. They must either ask the immigration judge review the entire case—including the asylum officer's grant of non-asylum relief—or live with the asylum officer's decision. Because people who receive withholding of removal or relief under the Convention Against Torture may not become lawful permanent residents and may not bring family members to the United States, the rule would force survivors of serious trauma to make the impossible choice between risking their own newfound assurance of safety and facing permanent separation from their children and spouse.

What's Missing

The proposed rule does not say either *when* or *where* USCIS asylum officers would hold interviews under the new procedure. These omissions are worrying. Although the proposed rule states that people seeking asylum can bring legal representatives to their interview with USCIS, that right is meaningful only if a person is in a location with an adequate number of lawyers and finds one willing to take their case at low or no cost.

Similarly, the ability to present an asylum case to USCIS is meaningful only if the person seeking asylum has sufficient opportunity to gather evidence and prepare their case. Under the proposed rule, USCIS could—either when the rule becomes final or at any point after that—therefore set timelines and hearing locations that stack the deck in favor of deportations.

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- # Latest News
  - Tahirih's Statement on New MPP Termination Memo (https://www.tahirih.org/news/tahirihs-statement-on-new-mpp-termination-memo/)

    Today, the Biden administration issued a memo that attempts to end, for a second time, the 'Remain-in-Mexico' policy, also knows as the Migrant Protection Protocols, which was implemented in 2019 and forced thousands of individuals to wait in Mexico while their asylum cases are processed.

    October 29, 2021

- End State Violence Against Trans & Queer Migrants (https://www.tahirih.org/news/end-state-violence-against-trans-queer-migrants/)

  This LGBTQ+ History Month, Tahirih's Queer & Trans Caucus demands an immediate end to the state-sponsored violence that trans, nonbinary, two-spirit, and queer immigrants face at the hands of our immigration and criminal punishment systems.

  October 28, 2021

Survivor Voices

-  (https://www.tahirih.org/survivor-voices/clara/)

  Clara (https://www.tahirih.org/survivor-voices/clara/)

  "I no longer have to hide in the shadows, I no longer live with uncertainty, I can finally work legally and provide for my son and daughter— I'm home, I'm safe, I'm free."

  October 25, 2021

-  (https://www.tahirih.org/survivor-voices/maria/)

  Maria (https://www.tahirih.org/survivor-voices/maria/)

  "We can overcome unthinkable situations. Every mother should have the opportunity to fight for justice for themselves and their family. We deserve to be heard and we deserve to be free of violence."

  February 23, 2021