



AMERICAN IMMIGRATION COUNCIL

**PRACTICE ADVISORY<sup>1</sup>**

September 1, 2011

**DHS REVIEW OF LOW PRIORITY CASES FOR PROSECUTORIAL DISCRETION**

By Alexa Alonzo<sup>2</sup> and Mary Kenney

On August 18, the Obama Administration and DHS announced the establishment of a high-level joint Department of Homeland Security (DHS)-Department of Justice (DOJ) working group charged with ensuring that DHS and DOJ resources are focused on the highest immigration enforcement priorities, namely, national security, public safety, border security and the integrity of our immigration system. See Napolitano Letter and Backgrounder.

- The working group will conduct a case-by-case review of the approximately 300,000 cases currently pending before the immigration courts, the BIA and federal courts of appeals. Those removal cases that are identified as “low priority” will be administratively closed and the respondents will be eligible to apply for work authorization with USCIS.
- The working group will also initiate a case-by-case review to ensure that new cases placed in removal proceedings meet DHS’s enforcement priorities and will issue guidance to prevent, on a case-by-case basis, low priority cases from entering the system.
- Additionally, the working group will issue department-wide guidance on prosecutorial discretion, including for cases that already have final orders of removal.
- In taking low priority cases out of the system, additional resources will be focused on those posing a threat to public safety. In essence, the announcement provides mechanisms for nationwide implementation of the two June 17, 2011 memoranda on prosecutorial discretion issued by John Morton, Director of ICE. See “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens” (“Exercising Prosecutorial Discretion”) and “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs” (“Victims, Witnesses and Plaintiffs”).

### **What will happen to cases deemed low priority?**

Cases currently before the immigration courts and the BIA will be reviewed and those that are deemed low priority will be administratively closed. Removal cases currently pending in federal court will also be reviewed and low priority cases will be considered for an exercise of prosecutorial discretion, although it is not clear what this will be.

It is unclear what will happen from this point forward to new cases determined to be low priority. DHS has indicated that the working group will initiate a case-by-case review to ensure that new cases placed in removal proceedings meet DHS's enforcement priorities. It is not clear for how long this review will last or how extensive it will be. The working group also will issue guidance to prevent, on a case-by-case basis, low priority cases from entering the system. If a case is identified as "low priority" it remains to be seen whether no enforcement action will be taken (i.e., removal proceedings will not be initiated) or whether these new cases will be placed into removal proceedings and then administratively closed.

### **Will individuals whose cases have been administratively closed receive EADs?**

DHS has stated that all individuals whose cases have been administratively closed will be eligible to apply for an employment authorization document (EAD) with USCIS. The legal basis for the EAD, what factors might be used to grant or deny an EAD application under this policy, and the validity period of the EAD have not been clarified. It is quite possible, however, that the basis for issuing the EAD will be 8 C.F.R. § 274.12(c)(14), which allows an individual who has been granted deferred action to apply for an EAD.

### **What are DHS's enforcement priorities?**

In the June 17, 2011 Morton memo, Exercising Prosecutorial Discretion, and a subsequent question and answer guide (FAQ) regarding the August 18 announcement, DHS has made clear that its enforcement priorities are national security, public safety, border security, and repeat immigration law violators.

According to the FAQ, DHS will have "zero tolerance" for those apprehended at the border. It specifically states that removal cases involving recent border crossers will not be included in the review of cases carried out by the working group. It is not clear how DHS – and in particular CBP and ICE – will define who is a "recent border crosser."

### **What are low priority cases?**

Low priority cases will be identified under the factors set forth in the June 17, 2011 Morton memo, Exercising Prosecutorial Discretion. The memo lists numerous factors that DHS should weigh in deciding whether a case is low priority or not. While DHS has made clear that no category of cases will receive a blanket exercise of favorable prosecutorial discretion, the memo does identify certain categories of individuals who are to receive particular attention. These include veterans; long-time permanent residents; minors and the elderly; individuals who have been present since childhood; individual

with serious disabilities or health issues; women who are nursing or pregnant; and victims of domestic violence or other serious crimes. The memo also identifies more general factors to be considered in all cases. DHS has stated that they will be weighing the totality of the circumstances in each case. For a full discussion of the factors in the Morton memo, *see* the Legal Action Center's practice advisory, Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client.

**Is it possible for cases with criminal convictions to be considered low priority?**

The June 17, 2011 Morton memo, Exercising Prosecutorial Discretion, makes clear that cases will be reviewed on a case-by-case basis and considered based on the totality of the circumstances presented in each individual case. There is no bright-line rule that would automatically disqualify any case. However, the memo does contain a list of negative factors that will be looked at with particular care. This list includes "serious felons, repeat offenders, and individuals with a lengthy criminal record of any kind," as well as "known gang members."

**What is the difference between administrative closure and termination of the Notice to Appear (NTA)?**

Administrative closure is a procedural convenience used to temporarily remove a case from the immigration court's calendar. Under current law, a case cannot be administratively closed if both parties do not agree to the closure. *Matter of Gutierrez*, 21 I&N Dec. 479, 480 (1996). A person whose case has been administratively closed remains in removal proceedings, and either party can request that the case be placed back on the court's calendar at any time.

A case that is administratively closed remains pending, although inactive. Termination means that the case has ended and the respondent is no longer in removal proceedings. Upon termination, the individual will revert to the same status he or she was in prior to commencement of proceedings. If the government wants to place the individual back into removal proceedings after a case is terminated, it would have to file a new Notice to Appear.

Should an individual (other than an "arriving alien") whose case has been administratively closed eventually become eligible for adjustment of status, he or she will need to have the removal proceedings terminated before USCIS will have jurisdiction over the adjustment application.

**When will the working group review of the 300,000 cases begin?**

Specifics as to how the working group review will be conducted or the timeframe for the review process are not known, although DHS states in the FAQ that it will take the working group several months to review all pending cases. In the meantime, ICE attorneys will be asked to review the cases on their docket and close those that are "low priority" cases.

### **What should I be doing now?**

The DHS FAQ indicates that both removal proceedings and removals will continue while the working group carries out its review. During this time, however, ICE attorneys and officers have been told to consider all cases in light of DHS enforcement priorities. Thus, you should continue to make requests for prosecutorial discretion. Requests should be made in writing and include as much supporting documentation as possible.<sup>3</sup> For currently pending cases that will be subject to review, this will ensure that there is favorable information in the client's file when the working group review takes place. It does not appear that respondents or their attorneys will know in advance when the review of their cases will take place.

Moreover, although the working group will be conducting a systematic review of all pending cases, other avenues for requesting prosecutorial discretion remain open. ICE attorneys and officers still retain the authority to exercise prosecutorial discretion and given this announcement, may be more amenable to exercising it favorably than in the past. Additionally, the announced review process does not include cases with final removal orders, and so no systematic review of these cases is expected. For that reason, individual advocacy for prosecutorial discretion on behalf of these clients is all the more important.

You should also ensure that your clients understand that their obligations under the immigration laws remain the same. There has been a lot of confusion and misinformation over what the August 18th announcement is and is not. It is important that your clients understand that the announcement is not an amnesty. We have, for example, heard of individuals granted voluntary departure believing that they do not have to leave, which is simply wrong. The August 18th announcement has no impact on an existing voluntary departure order; anyone under such an order who fails to timely depart will face the consequences.<sup>4</sup>

Additionally, individuals should not seek to turn themselves into immigration authorities to get an EAD. As the DHS FAQ explains, such action carries a high risk that the individual will be placed in removal proceedings and may be ordered removed. For helpful guidance for clients, *see* [AILA Consumer Advisory](#).

### **What can I do to assist AILA and LAC in monitoring implementation of the new guidance?**

In order to monitor how the new guidance is being implemented in the field, we need to hear your experiences with your local office. Please complete this [survey](#) and tell us about your cases. This will help with our ongoing liaison and advocacy efforts with DHS. Thank you!

## Endnotes:

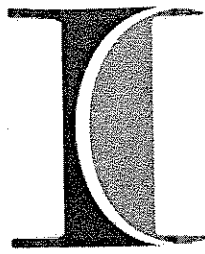
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<sup>3</sup> For more on preparing a request for prosecutorial discretion, *see* [Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client](#).

<sup>4</sup> For more on these consequences, *see* the Legal Action Center's practice advisory [Voluntary Departure: Automatic Termination and the Harsh Consequences of Failing to Depart](#).



# LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY<sup>1</sup>  
November 30, 2010

## PROSECUTORIAL DISCRETION: HOW TO GET DHS TO ACT IN FAVOR OF YOUR CLIENT

By Mary Kenney

### Introduction

This practice advisory explains what prosecutorial discretion is, who has authority to exercise it, and how it is exercised most often in immigration cases. The advisory also suggests ways that attorneys can influence the favorable exercise of prosecutorial discretion by Department of Homeland Security (DHS) officers, whether from Immigration and Custom Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS) or Customs and Border Patrol (CBP).<sup>2</sup>

Essentially, a DHS officer's decision to favorably exercise prosecutorial discretion for a client is a decision to forego enforcement of the immigration laws against the client. This discretion can be exercised with respect to investigations, arrests, detention, parole, the initiation of removal proceedings, and even the execution of final removal orders. In some cases, a favorable grant of prosecutorial discretion may be the only relief available to a client.

Since 2000, the legacy Immigration and Naturalization Service (INS) and current DHS components have issued more than a dozen guidance memoranda that address prosecutorial discretion. These memos are discussed in the practice advisory and summarized in the attachment at the end of the practice advisory.

<sup>1</sup> Copyright (c) 2010 American Immigration Council. [Click here](#) for information on reprinting this practice advisory. This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. The Legal Action Center thanks Maurice Goldman, Matthew Guadagno and Shoba Sivaprasad Wadhia for their assistance with this practice advisory.

<sup>2</sup> For a more in-depth discussion of prosecutorial discretion, see Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J., No. 2, 2010.

In general, these memoranda encourage officers to exercise this discretion in a variety of settings and set forth guidelines for doing so. In particular, recent ICE memoranda clearly explain that ICE does not have the resources to enforce the immigration laws against all noncitizens present in the U.S. without authorization, and instead direct officers to focus on certain agency priorities. Unfortunately, officers in the field too often fail to follow this guidance. As a result, it is essential that attorneys specifically request favorable prosecutorial discretion and build a case for this relief on behalf of clients, just as you would any other type of relief.

### **What is prosecutorial discretion?**

“Prosecutorial discretion” is the authority of a law enforcement agency or officer charged with enforcing a law to decide whether to enforce the law in a particular case. A law enforcement officer who decides *not* to enforce the law against a person has *favorably* exercised prosecutorial discretion. Examples of the favorable exercise of prosecutorial discretion in the immigration context include a grant of deferred action; a stay of removal; or a decision not to issue a Notice to Appear (NTA).

Prosecutorial discretion applies in the law enforcement context only; that is, only in situations in which a person is suspected of having violated the law (whether civil or criminal). Both ICE and USCIS officers have the authority to exercise prosecutorial discretion. In immigration cases, prosecutorial discretion primarily is exercised with respect to removal proceedings (including the decision whether to place a person in proceedings); detention; parole; and the execution of removal orders. Prosecutorial discretion is not the same as the discretion that a USCIS officer exercises when deciding an affirmative application for an immigration benefit, such as adjustment of status, since such a decision is not about whether to *enforce* a law against a person. However, if after the officer denies an adjustment application, he agrees not to issue an NTA against an applicant who might be subject to removal, he has favorably exercised prosecutorial discretion.

Prosecutorial discretion can be exercised on either an agency-wide basis or by an individual officer or employee. When ICE adopts priorities streamlining its enforcement efforts, for example, it is exercising prosecutorial discretion as an agency with respect to how to spend its resources. Administrative advocacy and liaison efforts often seek to influence the agency-wide exercise of prosecutorial discretion by advocating for adoption of more favorable enforcement practices and policies. For example, in response to coordinated advocacy efforts, USCIS adopted a new policy establishing a procedure for surviving spouses and children of deceased U.S. citizens to apply for deferred action. *See* Donald Neufeld, “Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children” (June 15, 2009), <http://www.uscis.gov/USCIS/Laws/Memoranda/2009/June%202009/surviving-spouses-deferred-action-guidance.pdf>. In contrast, a DHS officer who decides to cancel an NTA as improvidently issued, *see* 8 C.F.R. § 239.2(a)(6), is exercising favorable prosecutorial discretion on an individual basis.

Prosecutorial discretion is not addressed in either the immigration statute or regulations (although there may be statutory or regulatory authority for some of the decisions made). Rather, prosecutorial discretion is the inherent discretionary authority that the agency has with respect to how it enforces the law. *See* Bo Cooper, General Counsel, INS, “INS Exercise of Prosecutorial Discretion” (undated) (discussing the origins of prosecutorial discretion and its application in immigration proceedings). Both courts and the Board of Immigration Appeals (BIA) have long recognized the agency’s authority to exercise prosecutorial discretion. *See, e.g., Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-92 (1999) (finding that the INS retains inherent prosecutorial discretion as to whether to bring removal proceedings); *Matter of Yauri*, 25 I&N Dec. 103, 110 (BIA 2009) (noting that DHS has prosecutorial discretion over deferred action and citing cases); *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000) (finding that the former INS had prosecutorial discretion to decide whether to commence removal proceedings against a person subsequent to IIRIRA).

However, prosecutorial discretion only can be exercised within the bounds of the agency’s – or an officer’s – legal authority to act. Where the Immigration and Nationality Act (INA) makes a determination/action mandatory, the agency or officer generally does not have discretion to act in ways contrary to that mandate. For example, DHS has stated that the mandatory detention statute, INA § 236(c), eliminates an officer’s prosecutorial discretion to release a person subject to such detention. *See* Doris Meissner, Commissioner, “Exercising Prosecutorial Discretion” (Nov. 17, 2000) (“Meissner memo”). Note, however, that this would not prevent an officer from exercising prosecutorial discretion and *not* issuing an NTA against a person who – if and when the NTA were issued – would be subject to mandatory detention. *Id.* at 6. Arguably, and for the same reasons, an officer also might be able to cancel an NTA in a compelling case before it is filed with the court and thus eliminate the basis for mandatory detention. Thus, while it is always important to keep in mind the limits of an officer’s statutory authority when seeking prosecutorial discretion, it is also important to think creatively about potential solutions not prohibited by law – especially in particularly compelling cases.

Finally, prosecutorial discretion is not only a humanitarian tool of the agency. It also serves other agency purposes. As a practical matter, understanding these purposes will assist you in arguing that your client is a good candidate for favorable prosecutorial discretion. Important among these purposes is that the agency’s ability to exercise prosecutorial discretion – by declining to prosecute certain cases or types of cases – assists it in focusing its limited resources on higher priorities. DHS estimates that ICE only has resources to remove, annually, less than 4% of noncitizens who are in the U.S. without authorization. John Morton, Assistant Secretary, ICE, “Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens” (June 2010). Consequently, ICE has set as its highest enforcement and removal priorities national

security, public safety and border security. *Id.*<sup>3</sup> In accord, DHS has explained that the first question behind all prosecutorial discretion decisions should be whether the enforcement action advances the agency's goals. Meissner memo, at 4-6.

### **Over what types of immigration decisions can an immigration officer exercise prosecutorial discretion?**

In the immigration context, DHS officers have the authority to favorably exercise prosecutorial discretion at all stages of any enforcement process. This discretion can be exercised with respect to investigations, arrests, detention, parole, the initiation of removal proceedings, and even the execution of final removal orders. The following provides examples of the types of prosecutorial discretion decisions that an immigration officer can make at three discrete stages of a case: 1) prior to filing an NTA with the immigration court; 2) while the noncitizen is in removal proceedings; and 3) after a removal order has been issued. Note that this list is not exhaustive but intended to illustrate the range of decisions subject to discretionary action by agency personnel.

1. **Prior to filing an NTA.** An officer can exercise prosecutorial discretion over:
  - Whether to issue an NTA or refrain from doing so;<sup>4</sup>
  - What charges to include in an NTA;
  - Whether to agree to cancel an NTA before it is filed with the court;<sup>5</sup>
  - Whether to agree to pre-hearing voluntary departure;
  - Whether to parole under § 212(d)(5) a person in the U.S. who was never admitted or paroled (i.e., a grant of “parole-in-place”) but who otherwise is eligible to adjust so that she can pursue that relief;

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<sup>3</sup> Unfortunately, ICE's conduct in the field often is not consistent with the agency's national priorities. See, e.g., Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J., No. 2, 2010; Michele Waslin, “ICE's Enforcement Priorities and the Forces that Undermine Them” (November 2010), <http://www.immigrationpolicy.org/special-reports/ice%E2%80%99s-enforcement-priorities-and-factors-undermine-them>; Shoba Sivaprasad Wadhia, “Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion” (November 2010), <http://www.immigrationpolicy.org/special-reports/reading-morton-memo-federal-priorities-and-prosecutorial-discretion>.

<sup>4</sup> See 8 C.F.R. §§ 239.1(a) and 1239.1(a) for a listing of officers who can issue an NTA.

<sup>5</sup> Before an NTA is filed with the court, any officer with authority to issue an NTA also has the authority to cancel the NTA as “improvidently issued,” due to changed circumstances, or for other reasons. 8 C.F.R. § 239.2(a). Note that ICE attorneys (known as Assistant Chief Counsels or trial attorneys) do not have authority to issue an NTA and thus do not have authority to cancel one. However, an ICE attorney can advise her client to cancel the NTA. See William Howard, Principal Legal Advisor, ICE, “Prosecutorial Discretion” (Oct. 24, 2005), at 4-5. Additionally, once the NTA is filed with the immigration court, the trial attorney can move to dismiss proceedings. *Id.* at 5; see also 8 C.F.R. § 1239.2(c).

- Whether to parole an arriving alien into the United States, rather than detain the alien under § 235(b);
  - Whether to grant a noncitizen deferred action;
2. **While the noncitizen is in removal proceedings.** An officer can exercise prosecutorial discretion over:
- Whether to agree to join a motion to administratively close or terminate a removal case;
  - Whether to agree to a continuance for the person to become eligible for relief at a later date (i.e., when priority dates recede);
  - Whether to amend the NTA to change or remove certain charges;
  - Whether to agree not to oppose a grant of relief;
  - Whether to agree to limit the issues to be heard or the evidence presented;
  - Whether to appeal an immigration judge decision that ruled in favor of a noncitizen;
3. **After issuance of a removal order.** An officer can exercise prosecutorial discretion over:
- Whether to not oppose a motion to reopen;
  - Whether to join in a proposed joint motion to reopen;
  - Whether to stay the execution of a removal order;
  - Whether to place the individual on supervised release, rather than detain the individual;
  - Whether to grant a noncitizen deferred action; and
  - Whether to agree to a remand if a case is before a court of appeals on a petition for review.

**What is deferred action status and is it a favorable grant of prosecutorial discretion?**

Deferred action is a DHS decision not to pursue enforcement against a person for a specific period of time, in the exercise of the agency’s prosecutorial discretion. The grant of deferred action by USCIS does not confer lawful immigration status or alter the person’s existing immigration status. *See ICE, “Detention and Deportation Officer’s Field Manual”* (updated Mar. 27, 2006). While deferred action does not affect any already existing period of unlawful presence, periods of time in deferred action *do* qualify as periods of stay authorized by the Secretary of DHS for purposes of INA §§ 212(a)(9)(B) and (C)(i)(I). *See Donald Neufeld, Acting Assoc. Dir., USCIS, “Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act”* (May 6, 2009), [http://www.uscis.gov/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/revision\\_redesign\\_AFM.PDF](http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF). Note, however, that deferred action cannot be used to establish eligibility for any immigration benefit that requires maintenance of lawful status.

An individual with deferred action may apply for an Employment Authorization Document (EAD) if she can establish an economic necessity for employment. 8 C.F.R. §

274(a).12(c)(14). Thus, it can be a significant benefit to a person without other options for relief.

The following are factors relevant to DHS' decision whether to grant deferred action:

1. The likelihood of the person's departure or removal, including the:
  - likelihood that DHS ultimately will be able to remove the person;
  - likelihood that the alien will depart without formal proceedings (e.g., minor child who will accompany deportable parents);
  - age or physical condition affecting ability to travel;
  - the likelihood that another country will accept the alien;
  - likelihood that the alien will be able to qualify for some form of relief which would prevent or indefinitely delay removal.
2. Sympathetic factors: The presence of sympathetic factors which, because of a desire on the part of administrative or judicial authorities to reach a favorable decision, could result in a distortion of the law with unfavorable implications for future cases.
3. Priority given to a class of deportable noncitizens: Whether or not the individual is a member of a class of deportable noncitizens whose removal has been given a high enforcement priority (e.g., dangerous criminals, smugglers, drug traffickers, terrorists, war criminals, habitual immigration violators).
4. Cooperation with other agencies: Whether the person's continued presence in the U.S. is desired by local, state, or federal law enforcement authorities for purposes of ongoing criminal or civil investigation or prosecution.

ICE, "Detention and Deportation Officer's Field Manual" (updated Mar. 27, 2006).

**Who can make the decision to favorably exercise prosecutorial discretion in a given case?**

The immigration officer or employee with the authority to exercise prosecutorial discretion will vary depending on the issue and the office involved. Generally, an immigration officer/employee has this authority over any prosecutorial discretion decision that falls within his job, subject to his chain of command. Meissner memo, at 1, 5.

As a practical matter, practitioners should get to know officers within their local DHS offices, to learn who has authority over what types of decisions and who is most cooperative. It is also important to know who the supervisors are, as they may have the final say over a decision. While some DHS personnel may not have the authority to make the decision, they still could be influential. For example, Assistant Chief Counsels (also known as trial attorneys) are not authorized to cancel an NTA, or to grant deferred action or a stay of removal. *See* William Howard, Principal Legal Advisor, ICE,

“Prosecutorial Discretion” (Oct. 24, 2005). Nonetheless, someone from the local Office of the Chief Counsel may be able to help favorably resolve a case, and certainly ICE attorneys can advise their clients, the agency, about steps to take in a case. *Id.* Moreover, ICE attorneys do have authority over other determinations, such as whether to consent to administratively close a removal case or whether to join a motion to reopen. *Id.*

Additionally, other immigration attorneys in the locale can assist greatly in guiding you to the correct person at the relevant DHS office. Local attorneys also can introduce you to local procedures that may be necessary to follow.

**What policy memos or other guidance on the exercise of prosecutorial discretion exist and what authority do they provide for local officers to act?**

Over the years, both legacy INS and components within DHS have issued numerous memoranda that discuss various aspects of prosecutorial discretion. At the end of this practice advisory is a list of agency guidance that discusses prosecutorial discretion in different contexts, with a short description of each memorandum. This list may not be exhaustive, so be sure to look for additional policy or procedural guidance supporting the exercise of prosecutorial discretion, including guidance that does not explicitly mention “discretion.”

**What factors will be considered in a prosecutorial discretion decision?**

The factors that will influence a decision on prosecutorial discretion will vary according to the nature of the case. However, there are some general guidelines about important factors that the agency will consider in most, if not all cases. These factors include:

- Immigration status, with lawful permanent residents getting the most favorable consideration;
- Length of residence in the United States;
- Humanitarian concerns, such as medical problems of the noncitizen or a family member, entry into the U.S at a young age, lack of ties to the home country, and extreme youth or age;
- Eligibility for (or likely future eligibility for) relief from removal;
- Criminal history and history of rehabilitation;
- Immigration history;
- Military service with honorable discharge;
- Effect of the exercise of prosecutorial discretion on the individual’s future admissibility under INA § 212;
- Community ties (both positive and negative);
- Cooperation with law enforcement authorities, past or current;
- Likelihood of eventually removing the person; and
- Resources available to DHS.

Meissner memo, at 7-8.<sup>6</sup> The decision should be based upon the totality of the factors in the particular case. *Id.* While not listed in the Meissner memo, press attention – whether favorable to your client or adverse to DHS – also can influence the decision.

**What role can an attorney play in influencing an immigration officer to exercise favorable prosecutorial discretion?**

- 1. Ask that favorable prosecutorial discretion be exercised in your client’s case.** Despite the language in the Meissner memo encouraging immigration officers to consider the favorable exercise of prosecutorial discretion on their own, this often does not happen.<sup>7</sup> Thus, an attorney can play an important role in requesting a specific type of favorable action in a case, and advocating for this result. It is not sufficient to simply ask for a favorable exercise of prosecutorial discretion. Instead, ask specifically for what it is that you want the officer to do (e.g., grant deferred action; terminate proceedings; grant a stay of removal; etc.).
- 2. Put together a package of materials to support your request for prosecutorial discretion.** Make your request in the form of a written letter and attach to it material that will demonstrate that your client is deserving of prosecutorial discretion. Include all the facts that an immigration officer will need to make an informed decision, but be as concise as possible.
- 3. Use the agency memoranda to support your request.** The exercise of favorable prosecutorial discretion is not mandatory in any circumstance. However, the memoranda do provide authority for an officer and/or local office to act favorably and may help convince them to do so if they are wavering. For example, where a client in removal proceedings has an adjustment application pending before USCIS (because, e.g., she is an “arriving alien” and only USCIS has jurisdiction over the application), argue that the removal case should be terminated pursuant to the August 20, 2010 Morton memo. *See* John

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<sup>6</sup> There also are factors that cannot be considered, including the individual’s race, religion, sex, ethnicity, national origin, or political association, activities or beliefs (unless the above is relevant to the person’s immigration status or case in another way); the officer’s own personal feelings regarding the individual; or the possible effect of the decision on the officer’s own professional or personal circumstances.

<sup>7</sup> Moreover, be aware that despite its overall encouraging tone, the Meissner memo also cautions against “attempts to exploit prosecutorial discretion as a delay tactic, as a means merely to revisit matters that been thoroughly considered and decided, or for other improper tactical reasons.” Meissner Memo, at 10. For this reason, attorneys may want to be judicious in selecting the cases in which they advocate for this relief. Asking for it in cases in which it clearly is not warranted could undermine your future efforts to get this relief in meritorious cases.

Morton, Assistant Secretary, ICE, “Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens” (June 2010).

Another example is found in the Howard memo, which contains the following advice to local ICE counsel: “[w]here a motion to reopen for adjustment of status or cancellation of removal is filed on behalf of an alien with substantial equities, no serious criminal or immigration violations, and who is eligible to be granted the relief except that the motion is beyond the 90-day limitation contained in 8 C.F.R. § 1002.23, *strongly consider* exercising prosecutorial discretion.” William Howard, Principal Legal Advisor, ICE, “Prosecutorial Discretion” (Oct. 24, 2005) (emphasis added).

4. **Highlight the positive factors in your client’s case.** Review the criteria supporting favorable action that are listed in the relevant memos and highlight the applicable criteria for the officer. The Meissner memo suggests some possible “triggers” for local offices to consider – namely, factors that could warrant closer review for favorable prosecutorial discretion. Meissner memo, at 11. These triggers are all obvious meritorious factors, but nevertheless worth repeating: lawful permanent residents; individuals with serious health conditions; juveniles; the elderly; adopted children of U.S. citizens; U.S. military veterans; noncitizens with lengthy presence in the U.S. (i.e., 10 years or more); or noncitizens who have been in the U.S. since childhood. Develop other favorable equities, just as you would in a case seeking a discretionary benefit or relief from removal from DHS.
5. **Address any problems or inadequacies in the case or the evidence.** It is better to address such problems directly because otherwise it could appear that you were trying to hide information from the officer, which could undercut the credibility of your other arguments. Moreover, when there is negative information, you should not only disclose it, but also provide mitigating information. For example, when there is a conviction, provide evidence of completion of probation or parole.
6. **Provide the evidence that the officer needs to support the decision.** A decision to exercise prosecutorial discretion in a given case requires an individualized determination based upon the facts and the law. Meissner memo, at 6. The more developed the facts are with respect to the factors favoring your client, the stronger the request will be. Thus, where time permits, an attorney can play an important role in providing the immigration officer with evidence demonstrating why a favorable exercise of discretion is warranted in a case. Where there is a relevant memo, review the criteria to be considered in support of favorable prosecutorial discretion and offer evidence demonstrating that these criteria are satisfied.

7. **If removal proceedings have been initiated, consider seeking a continuance of the proceedings so that you can discuss prosecutorial discretion options with ICE counsel.** An immigration judge may be inclined to grant a continuance in order for the parties to discuss prosecutorial discretion options. For example, an attorney was granted a continuance after he argued that his client did not fall within the enforcement priorities outlined in the June 30, 2010 Morton memo and that he wanted an opportunity to advocate for ICE to favorably exercise prosecutorial discretion and join him in a motion to dismiss.<sup>8</sup>
8. **Ensure that all details of any plan for favorable action for your client are completely worked out and are committed to writing.** For example, if deferred action will not benefit your client unless she also is granted an EAD, be sure to include this in your advocacy for your client, and if agreed to, in the written summary of the final grant of deferred action.
9. **Consider having your client contact his or her Senator or Congressional representative for additional support.** Your client can provide the elected official with a copy of the request for favorable prosecutorial discretion that you submitted to DHS. Some officials will be receptive to this and their staff members will follow up with the local DHS office.

**How will I know if the officer decided to exercise prosecutorial discretion in my client's favor or not?**

The Meissner memo requires that when a decision is made to favorably exercise prosecutorial discretion, it must be documented in the file, including the specific decision taken and its factual and legal basis. Meissner memo, at 11. Additionally, when the decision is favorable, the officer must notify the individual in writing of the action to be taken in her case and the consequences. Normally, notice should be by letter to the individual and the attorney of record. *Id.* Officers are cautioned to make clear in the letter that the favorable exercise of prosecutorial discretion does not confer any immigration status, ability to travel to the United States (unless the alien applies for and receives advance parole),<sup>9</sup> immunity from future removal proceedings, or enforceable

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<sup>8</sup> An ICE attorney has the authority under the regulations to move to dismiss a case for all of the reasons that an NTA can be cancelled. *See* 8 C.F.R. § 1239.2(c) (citing 8 C.F.R. § 239.2). These reasons include, among others, that the noncitizen is not deportable or inadmissible; that the NTA was improvidently issued; and that circumstances have changed such that it is no longer in the best interest of the government to continue the case.

<sup>9</sup> Although your client may be eligible for advance parole, be sure to check his or her vulnerability to the three or ten year inadmissibility bars before suggesting this option.

right or benefit. If, however, there is a potential benefit that is linked to the action (for example, the availability of employment authorization for beneficiaries of deferred action), this should be identified in the letter. *Id.* at 11-12. It is a good idea to remind the officer of this notice requirement, since otherwise it may be overlooked.

The Meissner memo, however, does not require notice to the individual if the officer decides not to favorably exercise prosecutorial discretion. *Id.* Thus, an individual who has requested the favorable action could be left hanging (or worse, arrested or deported) – not knowing if the request is still pending or if it has been denied. Practically, the only way to know definitively if a decision has been made is to periodically call the officer.

**If my client receives a favorable grant of prosecutorial discretion not to be placed into removal proceedings or to stay execution of a final order, what impact does this have on his or her encounters with DHS in the future?**

It is important to remember, and to fully explain to your client, that a favorable grant of prosecutorial discretion does not confer lawful immigration status on the client. *See* Meissner memo, at 12. In many cases, all that such a grant will do is provide a reprieve – of indefinite duration – from adverse action. For example, if ICE agrees not to place a client in removal proceedings, this does not give the individual any different status than that which she previously had. Additionally, there is always the chance that if the circumstances that led ICE to refrain from initiating proceedings change, ICE will initiate removal proceedings. Similarly, where favorable action is taken by the agency – for example a stay of execution of removal, a grant of deferred action, or parole – that action is not permanent and can be reversed if the circumstances change. However, the Meissner memo advises that where an individual granted favorable prosecutorial discretion comes to the attention of an agency officer at a future date, the officer should abide by the earlier decision as a matter of agency policy, absent new facts or changed circumstances. *Id.*

**If DHS refuses to exercise prosecutorial discretion in my client's favor, can I appeal this decision or otherwise challenge it?**

As noted earlier, none of the DHS guidance on prosecutorial discretion requires that an immigration officer favorably exercise his or her prosecutorial discretion in any particular case, even the most compelling ones. Instead, the immigration officer has discretion to make the decision, and this discretion is bounded only by his or her authority under the law, the DHS guidelines on the exercise of prosecutorial discretion, and any supervisory review to which the officer is subject. In fact, the Meissner memo goes so far as to state that an immigration officer is not required even to consider a noncitizen's request for the exercise of prosecutorial discretion – much less required to rule favorably on it. *See* Meissner memo, at 10 (noting that there is no legal right to the exercise of prosecutorial discretion). This is in stark contrast to the duty of an immigration judge, who must consider all issues raised in a case.

Unfortunately, there is no formal appeal process to challenge the denial of a request for the exercise of favorable prosecutorial discretion. However, there are internal supervisory channels through which to informally appeal a decision or seek reconsideration, so this is an avenue worth exploring in many cases. If your request is denied, you need to learn the proper chain of command at ICE or USCIS and work your way up the ladder. This also is information that your local AILA chapter may develop through liaison efforts. (See below).

Additionally, as a general matter, there is no federal court review over the exercise of (or the failure to exercise) prosecutorial discretion. See e.g. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (finding that there is a rebuttable presumption under the Administrative Procedures Act that a decision not to prosecute is not reviewable by the courts); see also INA § 242(g); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (finding that 8 U.S.C. § 1252(g) was directed against attempts to impose judicial constraints on prosecutorial discretion). Thus, once an agency decides not to exercise prosecutorial discretion, it generally will not be possible to challenge this decision in federal court.<sup>10</sup>

**Are there other steps I can take in particularly compelling cases if DHS refuses to favorably exercise prosecutorial discretion?**

In select cases you may want to consider less conventional tactics in an attempt to influence ICE in granting deferred action or using other prosecutorial discretion. Use of the media (both conventional and social), local and national advocacy organizations and your client’s congressional representative can be beneficial to the overall cause. In recent months, this sort of strategy has worked in select cases involving DREAM Act eligible persons. There is no specific procedure in employing this sort of strategy. However, it is recommended that you consider this as a last resort and only in cases where your client has compelling facts to his or her case and understands the risks involved.

Some suggested strategies include:

- Set up a Facebook group titled “Stop the Deportation of \_\_\_\_\_” and invite as many contacts as possible to help support the cause;
- Contact local and national immigration advocacy groups to get them to post Action Alerts on their websites on where the public can call or fax ICE officials in support of the client;

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<sup>10</sup> There are a few narrow exceptions to this general rule of nonreviewability. For example, in *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007), the court held that res judicata prevented the government from initiating new proceedings to remove the respondent for conduct that had been the basis of earlier terminated proceedings because the new charge could have been brought in the original proceeding. The court rejected the government’s argument that its actions were protected as prosecutorial discretion, finding that the government had ample opportunity to exercise prosecutorial discretion during the initial proceeding.

- Speak to local or national media contacts about the case and try to get stories written;
- Engage local human rights organizations or religious groups to assist in forwarding the cause; and
- Hold local press conferences and have your client speak about his or her plight.

**How can my local chapter advocate for more consistent use of prosecutorial discretion?**

There are several ways that AILA chapters (or similar groups that engage in advocacy with local ICE and/or USCIS offices) can push for more consistent, regular and humane use of prosecutorial discretion locally. First, AILA chapters can get information about procedures that local offices follow with respect to these decisions, such as who within the office has the authority to make such decisions initially; who must sign off on them; and what procedures exist for an attorney to request the exercise of prosecutorial discretion. If it is not possible to get information through liaison channels, local AILA chapters can request this information through Freedom of Information Act requests.

In addition, efforts can be made to get the local offices to adopt more favorable policies with respect to the exercise of discretion and to include consideration of favorable prosecutorial discretion as a matter of routine. Additionally, and also consistent, OPLA indicated it wanted to know “if there is a pattern and practice” of an OCC not agreeing to exercise prosecutorial discretion such as by joining motions to reopen. “AILA-ICE Liaison Minutes” (Oct. 30, 2009) at § III. <http://www.aila.org/content/default.aspx?docid=31603>. Thus, local AILA chapters also can track the willingness of their local DHS offices to engage in favorable prosecutorial discretion. Where an office is out of compliance with national policies, the local chapter can work with the national AILA office to remedy this.

**ATTACHMENT  
SUMMARY OF DHS GUIDANCE ON PROSECUTORIAL DISCRETION**

*DHS (or legacy INS) guidance:*

**Doris Meissner, Commissioner, INS, “Exercising Prosecutorial Discretion” (Nov. 17, 2000).** Still followed by DHS, this is the most comprehensive of its memoranda on prosecutorial discretion. Importantly, this memo stresses that immigration officers not only have the authority to favorably exercise prosecutorial discretion but that they should consider doing so in cases that warrant it at the earliest point possible. Thus, this memo provides general authority to support an argument that an immigration officer should act favorably in your client’s case. The Meissner memo also sets forth the principles that should motivate prosecutorial discretion decisions; the process to be followed by agents in exercising this discretion; and factors that can be considered in decision-making.

**Bo Cooper, General Counsel, INS, “INS Exercise of Prosecutorial Discretion” (undated).** This memorandum sets forth the legal basis for legacy INS’s exercise of prosecutorial discretion in its enforcement activities. The memo is not policy guidance itself, but instead intended to lay the foundation for development of such guidance. It summarizes what prosecutorial discretion is; why law enforcement officers have prosecutorial discretion; how it applies in the immigration context; the limits on prosecutorial discretion; practical difficulties relating to the exercise of prosecutorial discretion in immigration cases; and finally, how it relates to detention, including mandatory detention.

*ICE guidance:*

**John Morton, Assistant Secretary, ICE, “Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions” (Aug. 20, 2010).** This memo explains a new policy for handling removal cases in which there is a pending or approved application or petition with USCIS. Adopted “as a matter of prosecutorial discretion” and to promote efficient use of resources, the policy allows for the dismissal of removal cases in which there is a pending or approved application or petition with USCIS and ICE determines, as a matter of law and in the exercise of discretion, that the individual is eligible for relief. Certain criteria must be met in all cases. Additionally, in detained cases, the trial attorney must consult with local ICE officers regarding adverse factors that may weigh against dismissal. Note that all local Offices of Chief Counsel are instructed to adopt local standard operating procedures to implement this policy. If you do not already have a copy of your local office’s procedure, you could ask for one, seek a copy through your local AILA liaison, or file a FOIA request.

**John Morton, Assistant Secretary, ICE, “Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens” (June 2010).** This memorandum identifies priorities for the apprehension, detention and removal of noncitizens, which are to be applied in all ICE programs. It identifies and discusses the top three ICE priorities

as 1) noncitizens who pose a danger to national security or a risk to public safety; 2) recent illegal entrants; and 3) noncitizens who are fugitives or otherwise obstruct immigration controls.<sup>11</sup> The memo indicates that ICE resources should primarily be committed to advancing these priorities and that, given the limited resources of the agency, ICE employees should exercise sound judgment and discretion consistent with these priorities in carrying out enforcement.

**Peter S. Vincent, Principal Legal Advisor, ICE, “Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal” (Sept. 25, 2009).** This memo provides field guidance with respect to persons with pending U visa petitions who either are 1) subject to a final administrative order of removal and request a stay of removal or 2) are in removal proceedings. Explaining that ICE officers have discretion to stay removal where an individual with a pending U visa petition demonstrates prima facie eligibility for the visa, the memo explains how ICE is to coordinate with USCIS to obtain a prima facie determination of eligibility. The memo also discusses factors that ICE officers should consider in exercising their discretion where prima facie eligibility is shown.

**Julie L. Myers, Assistant Secretary, ICE, “Prosecutorial and Custody Discretion” (Nov. 7, 2007).** This memo concerns the exercise of prosecutorial discretion with respect to arrest and custody decisions related to nursing mothers.

**John P. Torres, Director, ICE, “Discretion in Cases of Extreme or Severe Medical Concern” (Dec. 11, 2006).** This memo reiterates the importance of ICE officers exercising prosecutorial discretion when making custody determinations with respect to adults and juveniles transferring from hospitals, social services or other law enforcement agencies who have severe medical conditions (including psychiatric). The memo explains that officers have a responsibility to identify and respond to cases presenting meritorious health claims in which detention may not be in ICE’s best interest. The memo explains the procedures to be followed and provides guidance on how to make a determination about the seriousness of the medical problem.

**ICE, “Detention and Deportation Officer’s Field Manual” (updated Mar. 27, 2006).**

-**Chapter 20.8, “Deferred Action.”** This chapter describes generally the standard and procedures for determining whether to grant deferred action.

-**Chapter 20.9, “Exercising Discretion.”** This chapter describes generally the standards and procedures for exercising prosecutorial discretion.

**William Howard, Principal Legal Advisor, ICE, “Prosecutorial Discretion” (Oct. 24, 2005).** This memo, which is still followed, focuses on when and how prosecutorial discretion can be used by trial attorneys. It explains how the exercise of prosecutorial discretion is critical to managing work overload and adhering to priorities. It also details various ways in which trial attorneys can and should consider exercising prosecutorial

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<sup>11</sup> According to the memo, numbers 2 and 3 are equal priorities to one another, but fall below number 1.

discretion and provides numerous examples. The memo indicates that proceedings should not be instituted, or if instituted, should be dismissed where an adjustment of status is clearly approvable based on an approvable I-130 or I-140 and the case is appropriate for adjudication by USCIS. Similarly, the memo also suggests that remands should be considered to allow a person to apply for naturalization; and that alternatives to removal should be considered in cases in which there are compelling humanitarian factors. Finally, among other types of discretionary action available to trial attorneys, the memo discusses motions to reopen and provides examples of when it would be appropriate for ICE to join these.

**William Howard, Principal Legal Advisor, ICE, “Exercising Prosecutorial Discretion to Dismiss Adjustment Cases” (Oct. 6, 2005).** This memo discusses when trial attorneys can exercise prosecutorial discretion to file or join a motion to dismiss a case without prejudice to allow USCIS an opportunity to adjudicate an adjustment of status application. It is not clear whether this memo has been superseded by the August 20, 2010 memo by John Morton that covers a similar topic. This memo is intended to preserve ICE resources in cases in which it appears that an adjustment application would be clearly approvable. The memo lays out the criteria that must be met before a trial attorney can exercise prosecutorial discretion and move to dismiss a case.

**Marcy M. Forman, Acting Director, Office of Investigations, ICE, “Issuance of Notice to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service” (June 21, 2004).** This memo explains that ICE officers can exercise prosecutorial discretion with respect to the issuance of an NTA, an administrative order of removal or a reinstatement of a final removal order when the noncitizen has military service with the U.S. The memo stipulates that the Special Agent in Charge of each field office is required to sign off on any of these actions in these cases, after review of the A file. It also sets out general guidelines for consideration of prosecutorial discretion in these cases, and emphasizes that all such cases should be reviewed for eligibility for naturalization under INA § 328 and 329 (special naturalization provisions for members of the military).

#### *USCIS Guidance*

**Michael Aytes, Assoc. Dir. for Domestic Operations, USCIS, “Disposition of Cases Involving Removable Aliens” (July 11, 2006).** This memo revises guidance to USCIS officers on how to process and prioritize cases in which the person appears to be removable. The memo explains that deciding whether a person is removable and whether to issue an NTA is an integral part of the adjudications process. Prosecutorial discretion comes into play with respect to whether to issue an NTA in a case that does not involve egregious public safety, national security, a regulatory requirement to issue an NTA, or fraud (each of which is discussed in the memo). In all other cases, USCIS has discretion not to issue an NTA in compelling cases, to recommend deferred action or to reinstate a person’s nonimmigrant status.

**Johnny N. Williams, Exec. Assoc. Comm'r, INS, "Supplemental NSEERS Guidance for Call-In Registration" (Jan. 8, 2003)** . This memo provides guidance on exercising prosecutorial discretion and issuing NTAs in cases of call-in registrants.

**William R. Yates, Deputy Exec. Assoc. Comm'r, INS, "Procedures for Handling Naturalization Applications of Aliens Who Voted Unlawfully or Falsely Represented Themselves as U.S. Citizens by Voting or Registering to Vote" (May 7, 2002)**. This memorandum provides guidance on handling naturalization applications of persons who have unlawfully voted or falsely represented themselves as U.S. citizens in association with registering to vote or by voting. The memo lays out a six step process for adjudicating these cases. As part of this process, and after determining that a person is removable for having unlawfully voted or for making a false claim to U.S. citizenship when registering to vote, the officer is to determine whether the case merits the exercise of prosecutorial discretion using the Meissner memo as guidance. Where a case does warrant this exercise, the officer is to proceed with the adjudication of the naturalization application.



# Homeland Security

## INSTRUCTION SHEET FOR AN UNACCOMPANIED ALIEN CHILD IN IMMIGRATION COURT TO SUBMIT AN I-589 ASYLUM APPLICATION TO U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS)

Alien #: \_\_\_\_\_

Date: \_\_\_\_\_

Name: \_\_\_\_\_

ICE Attorney: \_\_\_\_\_

You are receiving these instructions from a representative of Immigration and Customs Enforcement (ICE) because you appear to be an unaccompanied alien child, you are in Immigration Court, and you have indicated your intent to file a Form I-589, Application for Asylum and for Withholding of Removal. You may submit an I-589 application to USCIS only if you have received these instructions from ICE.

### Attachments to this UAC Instruction Sheet:

In addition to these instructions, this packet contains a blank Form I-589 application, Instructions for the I-589, and a USCIS Form AR-11 (Alien's Change of Address Card). You may request from the Immigration Court the List of Free Legal Service Providers.

### Definition of an unaccompanied alien child:

As defined at 6 U.S.C. § 279(g)(2), an unaccompanied alien child means:

a child who—

(A) has no lawful immigration status in the United States;

(B) has not attained 18 years of age; and

(C) with respect to whom—

(i) there is no parent or legal guardian in the United States; or

(ii) no parent or legal guardian in the United States is available to provide care and physical custody.

### Filing Instructions:

**If you are an unaccompanied alien child and you are filing an asylum application, you must file your asylum application with USCIS.**

### Send these 4 items to the address below:

- (1) The completed, signed original and two copies of your Form I-589 application. For more details on how to complete the Form I-589 application and the documents to include in your application, see the Instructions for the I-589, included in this packet and available at [http://www.uscis.gov/files/form/I-589\\_Inst.pdf](http://www.uscis.gov/files/form/I-589_Inst.pdf);
- (2) A Form G-28 (Notice of Entry of Appearance as Attorney or Representative) if you are represented;
- (3) Any documentation you have to indicate that you are an unaccompanied alien child; and

(4) A copy of this UAC Instruction Sheet.

**USCIS Nebraska Service Center  
UAC I-589  
P.O. Box 87589  
Lincoln, NE 68501**

In extenuating circumstances where expeditious processing is required, the Director of the local USCIS Asylum Office may consent to your filing the Form I-589 application directly with the Asylum Office. The contact information is below and is available at [https://egov.uscis.gov/crisgwi/go?action=offices.type&OfficeLocator.office\\_type=ZSY](https://egov.uscis.gov/crisgwi/go?action=offices.type&OfficeLocator.office_type=ZSY).

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|---|
| <p><b>Arlington Asylum Office:</b> Arlington, VA; phone # 703-235-4100.<br/><b>Chicago Asylum Office:</b> Chicago, IL; phone # 312-353-9607.<br/><b>Houston Asylum Office:</b> Houston, TX; phone # 281-774-4830.<br/><b>Los Angeles Asylum Office:</b> Anaheim, CA; phone # 714-808-8000.<br/><b>Miami Asylum Office:</b> Miami, FL; phone # 305-960-8600.<br/><b>Newark Asylum Office:</b> Lyndhurst, NJ; phone # 201-531-0555.<br/><b>New York Asylum Office:</b> Rosedale, NY; phone # 718-723-5954.<br/><b>San Francisco Asylum Office:</b> San Francisco, CA; phone # 415-293-1234.</p> |
|---|

After the above items are received by USCIS, **you will receive:**

- A **USCIS receipt notice** in the mail indicating that USCIS has received your asylum application, and
- An **Application Support Center (ASC) notice**, indicating your unique receipt number and providing instructions for you to appear for an appointment at a nearby ASC for collection of biometrics (such as your photograph, fingerprints, and signature). If you do not receive this notice in 3 weeks, call (800)375-5283. You must take both the ASC notice and the USCIS receipt notice to your ASC appointment.

### **Next steps:**

**You must then:**

- Provide a copy of your USCIS receipt notice to the ICE Office of Chief Counsel and to the Immigration Judge at your next hearing.
- If you have a hearing scheduled before the Immigration Court, you must appear. At the hearing, ICE may seek to continue your case in order to allow USCIS to adjudicate your asylum application.
- If you change your address after filing a Form I-589 application, you must submit a Form AR-11 (Alien's Change of Address Card) to USCIS and you must submit a Form EOIR-33 (Alien's Change of Address Form/Immigration Court) to Immigration Court. The Form AR-11 is included in this packet, and is available on the internet at <http://www.uscis.gov/files/form/ar-11.pdf>. The Form EOIR-33 is available on the internet at <http://www.usdoj.gov/eoir/eoirforms/eoir33/ICadr33.htm>.

***Important: If you fail to file a Form I-589 application, USCIS cannot adjudicate your asylum application and an Immigration Judge may proceed with your removal proceedings.***



U.S. Department of Justice

Executive Office for Immigration Review

Office of the Chief Immigration Judge


Chief Immigration Judge

5107 Leesburg Pike, Suite 2500  
Falls Church, Virginia 22041

May 22, 2007

MEMORANDUM

TO: All Immigration Judges  
All Court Administrators  
All Judicial Law Clerks  
All Immigration Court Staff

FROM: David L. Neal   
Chief Immigration Judge

SUBJECT: Operating Policies and Procedures Memorandum 07-01: Guidelines for  
Immigration Court Cases Involving Unaccompanied Alien Children

This Operating Policies and Procedures Memorandum (OPPM) replaces OPPM 04-07, dated September 16, 2004.

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I. Introduction

This OPPM provides guidance and suggestions for adjudicating cases where the respondent is an unaccompanied alien child (defined later). The suggestions focus primarily on assisting the judge in ensuring that the respondent understands the nature of the proceedings, effectively presents evidence about the case, and has appropriate assistance.

When the respondent is a child, the immigration judge faces fundamental challenges in adjudicating the case: does the respondent understand the nature of the proceedings; can the respondent effectively present evidence about the case; and is there anyone who can properly advocate for the respondent’s interests? Issues of age, development, experience and self-determination impact how a court deals with a child respondent.

Organizations involved in handling children’s asylum claims have developed special guidance for adjudicators. Canada’s Immigration and Refugee Board was the first to draft such guidance, Child Refugee Claimants: Procedural and Evidentiary Issues (1996). The following year the United Nations High Commissioner for Refugees issued Policies and Procedures for Unaccompanied Children Seeking Asylum. Finally, in 1998 the former Immigration and Naturalization Service (INS) distributed Guidelines for Children’s Asylum Claims to its asylum officers. Copies of these guidelines have been distributed to all Immigration Courts, and judges have been encouraged to consult them as appropriate.

None of these documents specifically addresses the issues that arise when children’s asylum claims are presented in an adversarial setting. Therefore, in developing guidelines for the kinds of cases that we handle, the Office of the Chief Immigration Judge (OCIJ) sought additional guidance primarily from materials developed for juvenile and family courts. The guidelines that follow are based upon the asylum-specific documents mentioned above and the writings of judges and litigators in other areas of the law.

## II. Definition of unaccompanied alien child

The definition of the term “child” may differ depending on the context in which it is used. These guidelines use the terms “child” and “children” in a way that is slightly different from the definitions provided in the Immigration and Nationality Act (INA or Act). The Act defines a “child” as an unmarried person under 21 years of age. Sections 101(b)(1) and 101(c)(1). The regulations follow this statutory definition. The regulations also define a “juvenile” as an alien under the age of 18. 8 C.F.R. § 1236.3. The regulations also use (but do not define) the word “minor” when describing aliens under 14 years of age. 8 C.F.R. § 1236.2.

The Homeland Security Act of 2002 transferred responsibility for detained alien children from the former INS to the Department of Health and Human Services (HHS) and the Department of Homeland Security (DHS). It also introduced a new term -- unaccompanied alien child -- to define a child who has no lawful immigration status in the United States, has not attained 18 years of age, and who has no parent or legal guardian in the United States, or no parent or legal guardian in the United States available to provide care and physical custody. The Office of Refugee Resettlement (ORR) within HHS is responsible for unaccompanied alien children, while DHS is responsible for accompanied children.

These guidelines use the term “unaccompanied alien child” as defined in the Homeland Security Act of 2002 -- that is, a person under 18, without a parent or legal guardian in the United States or without a parent or legal guardian in the United States who is available to provide care and physical custody. Once a person attains the age of 18, or has a parent or legal guardian in the United States who is available to provide care and physical custody, he or she would not fall within the definition. All references to “child” or “children” in these guidelines should be construed to mean an “unaccompanied alien child” as defined in the Homeland Security Act of 2002.

## III. Basic principles

Several principles are central to these guidelines:

- A. Authority. Every immigration judge is expected to employ child sensitive procedures whenever a child respondent or witness is present in the courtroom. However, it is equally true that all such cases are not alike, and the procedures appropriate for a very young child may differ significantly from those appropriate for a teenager. These guidelines are suggestions that should be applied as circumstances warrant. All immigration judges understand that special attention is required for

cases involving child witnesses or unaccompanied alien child respondents. An immigration judge should decide, on a case by case basis, whether special attention is required.

- B. Best interest of the child. Issues of law -- questions of admissibility, eligibility for relief, etc. -- are governed by the Immigration and Nationality Act and the regulations. The concept of “best interest of the child” does not negate the statute or the regulatory delegation of the Attorney General’s authority, and cannot provide a basis for providing relief not sanctioned by law. Rather, this concept is a factor that relates to the immigration judge’s discretion in taking steps to ensure that a “child-appropriate” hearing environment is established, allowing a child to discuss freely the elements and details of his or her claim.
  
- C. Legal and personal representation. Neither the INA nor the regulations permit immigration judges to appoint a legal representative or a guardian ad litem. Immigration judges should encourage the use of appropriate pro bono resources whenever a child respondent is not represented. Where a list of pro bono services is available, an immigration judge should provide it to a child if the child is not represented. Likewise, although there is no independent court role for a personal representative or guardian ad litem, if such services are made available to respondents they have the potential to increase a child’s understanding of the proceedings and to improve the child’s communication with his or her legal representative.
  
- D. Applicability to all immigration judges. All judges must be able to handle cases involving unaccompanied alien children. Circumstances in a particular court may require specialized dockets for children’s cases, and responsibility for such dockets may be assigned to certain judges. However, all immigration judges are trained to handle these cases. It is the responsibility of every immigration judge to be familiar with these guidelines and related training materials.
  
- E. Additional considerations. While these guidelines are written for cases involving unaccompanied alien children, some provisions will apply in other cases where children are accompanied by a parent or guardian or where children testify as witnesses. Additionally, the guidelines mention, but do not address in detail, other topics that apply whenever a child is present as a respondent or witness. These topics include: the effect of age and development on a child’s ability to participate in the proceedings; gender; mental health (including possible post-traumatic stress syndrome); general cultural sensitivity issues; and appropriate questioning and listening techniques for child witnesses. OCIJ has provided training to immigration judges on some of these issues and will continue to do so in the future. These guidelines should be viewed as one component of that training.

#### IV. Ensuring an appropriate courtroom setting

Claims in Immigration Court are raised in an adversarial setting. Recognizing that cases involving unaccompanied alien children may make special demands on all parties, consideration should be given in appropriate circumstances to some modifications to the ordinary courtroom operations and configuration. These modifications may include:

- A. Courtroom orientation. The courtroom is usually an unfamiliar place for children. Many family and juvenile court experts recommend allowing children to visit an empty courtroom prior to their scheduled hearing. Under the supervision of court personnel, the children should be permitted to explore the courtroom, sit in all the locations (including, especially, the judge's bench and the witness stand), and to practice answering simple questions in preparation for testimony. To the extent that resources permit, court administrators should be receptive to requests by legal representatives or custodians for unaccompanied alien children to visit our courts prior to the initial hearing. Additionally, they should be open to other ways to familiarize unaccompanied alien children with court operations.
- B. Scheduling unaccompanied alien children's cases. Wherever possible, courts should conduct cases involving unaccompanied alien children on a separate docket or at a fixed time in the week or month. If the number of cases do not warrant a separate docket, courts should try to schedule children's cases at a specific time on the regular docket, but separate and apart from adult cases. Such a docket or schedule will improve the ability of custodians to transport the children and of legal service providers to assist them. Similarly, courts should keep detained dockets for adults and children completely separate. Courts should try to ensure our dockets do not have the effect of forcing unaccompanied alien children to be transported or held with detained adults. When docketing these cases, immigration judges should be mindful to weigh both the child's need for time to prepare his or her case and the impact of prolonged custody on the child's mental health and well-being.
- C. Courtroom modifications. Immigration judges do not have the luxury of equipping their courtrooms with special furniture designed on a child's scale. However, judges can and should permit reasonable modifications: allowing counsel to bring pillows or booster seats for young respondents; permitting young respondents to sit in one of the pews with an adult companion or permitting the companion to sit at counsel's table; allowing a young child to bring a toy, book or other personal item into the courtroom; permitting the child to testify while seated next to an adult or friend, rather than in the witness stand; etc. Simple, common sense adjustments need not alter the serious nature of the proceedings. They can, however, help foster an atmosphere in which a child is better able to present a claim and to participate more fully in the proceedings.
- D. Assessing the use of video conferencing. It is important to note that Congress made no distinction between hearings conducted in person and hearings conducted by

video conference. Video conference generally will be appropriate unless circumstances dictate otherwise. Therefore, when handling cases involving unaccompanied alien child respondents, if under ordinary circumstances the hearing would be conducted by video conference, immigration judges should determine if particular facts are present in the case to warrant an exception from the usual practice.

- E. Allowing the use of telephone conference. Where practicable, alien children, whether unaccompanied or not, should be allowed to appear through telephone conference for master calendar hearings and status conferences when they do not reside within close proximity to the immigration court. Either party may request that an alien child appear telephonically. Judges may query the parties as to whether a telephonic appearance by an alien child would be more appropriate than an in-person appearance.
- F. Removing the robe. Like the courtroom, the robe is a symbol of the judge's independence and authority. For this reason, OPPM 94-10, "Wearing of the Robe During Immigration Judge Hearings," provides that a robe shall be worn in every proceeding when any of the parties is present with the immigration judge. While most unaccompanied alien children will be far more interested in the judge's behavior than the judge's attire, the robe may be disconcerting for younger respondents. If a judge determines in a particular case that dispensing with the robe would add to the child's ability to participate, OPPM 94-10 is modified to permit the judge to remove the robe for that case.

#### V. Ensuring appropriate courtroom procedures

There is a consistency in the published recommendations for improvements in handling children's cases. Many of these recommendations come not from child psychologists but from lawyers and judges. Although most suggestions pertain to juvenile and family court cases, they have applicability in immigration cases as well, despite the added complexities of language and cultural differences. By carefully controlling how the proceedings are conducted, immigration judges can effectively discharge their obligation under the INA and the regulations in a way that takes full account of the best interest of the unaccompanied alien child. The following suggestions have relevance to most, if not all, cases where children are respondents:

- A. Explain the proceedings at the outset. Judges should consider making a brief opening statement at the beginning of each proceeding, or at the commencement of a specialized docket for children's cases, to explain the purpose and nature of the proceeding, to introduce the parties and discuss each person's role, and to explain operational matters such as tape recording, note taking, telephonic or video conference appearances, etc. Where approved instructive materials are available, such as a video prepared for unaccompanied alien children in proceedings, the courts should make a reasonable effort to make those materials available to unaccompanied alien children.

- B. Pay particular attention to the interpreter. Judges should allow time for the interpreter and the unaccompanied alien child to establish some rapport by talking about unrelated matters before testimony is taken. Judges should also watch for any indication that the child and the interpreter are having difficulty communicating. Any statement to be translated should be made in English at an age-appropriate level and translated at that level for the child respondent.
- C. Be aware of time. As in any case, the judge should give the parties a full opportunity to present or challenge evidence. However, stress and fatigue can adversely impact the ability of an unaccompanied alien child to participate in his or her removal proceedings. Where appropriate, immigration judges should seek not only to limit the number of times that children must be brought to court, but also to resolve issues of removability and relief without undue delay. As appropriate, judges should require the parties to narrow issues through pre-trial conference and stipulations. Additionally, if a child is called to testify, judges should seek to limit the amount of time the child is on the stand. Similarly, judges should recognize that, for emotional and physical reasons, children may require more frequent breaks than adults.
- D. Prepare the child to testify. As with any witness, a judge should be confident that the child is competent to testify in the proceedings, including whether the child is of sufficient mental capacity to understand the oath and give sworn testimony. The explanation of the oath should vary with the age of the witness: promise “to tell the truth” or promise “to tell what really happened” etc. Children should be told that it is all right for them to say, “I don’t know” if that is the correct answer, and to request that a question be asked another way if the child does not understand it. Explain also that the child witness should not feel at fault if an objection is raised to a question.
- E. Employ child-sensitive questioning. Language and tone are especially important when children are witnesses. Proper questioning and listening techniques will produce a more complete and accurate record. Although the Immigration Court process is adversarial, judges should ask and encourage the parties to phrase questions in age-appropriate language and tone. Attachment A contains a detailed set of instructions from the DHS guidelines. Immigration judges should consult these suggestions and adapt them to the courtroom setting to the extent possible.
- F. Make proper credibility assessments. Judges should recognize that children, especially young children, usually will not be able to present testimony with the same degree of precision as adults. Do not assume that inconsistencies are proof of dishonesty, and recognize that a child’s testimony may be limited not only by his or her ability to understand what happened, but also by his or her skill in describing the event in a way that is intelligible to adults. Judges should be mindful that children are highly suggestible and their testimony could be influenced by their desire to please judges or other adults.

- G. Control access to the courtroom. As a general matter, it is best to have as few people in court as possible. Children may be reluctant to testify about painful or embarrassing incidents, and the reluctance may increase with the number of spectators or other respondents.

## VI. Motions

Certain motions, as appropriate, should be adjudicated in a manner that enables unaccompanied alien children to effectively present their evidence and obtain appropriate assistance. Accordingly, immigration judges should adjudicate motions to change venue and requests for continuances as follows.

- A. Motions to change venue. In cases involving alien children, whether unaccompanied or not, unopposed motions for change of venue may be granted without requiring a pleading or the filing of an application for relief. Accordingly, the pleading and issue resolution mandates set forth in OPPM 01-02, section V. B., may be waived in cases involving unaccompanied alien children.
- B. Requests for continuances. When considering requests for continuances, immigration judges should be mindful that cases involving alien children are exempt from case completion goals and aged case completion deadlines. Such cases, however, must be noted with case identifier “J” or “UJ” in ANSIR or CASE to be exempted from completion goals and aged case completion deadlines.

## VII. Coding unaccompanied alien child cases

It is important that the Immigration Courts code these cases so that they can readily be identified. Courts for many years have used the J-code in ANSIR to designate cases involving children. However, the J-code alone does not permit us to distinguish children who are with a parent or legal guardian from unaccompanied alien children.

Beginning immediately, court administrators should assign the J-code in ANSIR or CASE only to cases where a child in proceedings has a parent or legal guardian in the United States who is providing care and physical custody. Those children, obviously, will not be in the custody of the Office of Refugee Resettlement. If, on the other hand, a child in proceedings meets the definition of an unaccompanied alien child -- has no parent or guardian in the United States or no parent or legal guardian in the United States available to provide care and physical custody -- the court administrator should use a new ANSIR or CASE code, UJ. In most if not all instances, those unaccompanied alien children will be in the custody of DHS or the custody of ORR. The UJ code should remain on the record unless the child is released from DHS custody or ORR custody to a sponsor, parent or legal guardian. If the court staff or the judge become aware that the child has been released from DHS custody or ORR custody to a sponsor, parent or legal guardian, the case should be re-coded J-1. The J-1 code should also be used if an unaccompanied alien child attains the age of 18 while still in

proceedings. These new codes should be used for all new case filings. Additionally, for pending cases court staff should change the case identifier from J to UJ if the respondent meets the definition of an unaccompanied alien child.

The use of these three codes is temporary until the new CASE system is operational in all courts. Although it is an interim procedure, it will permit us to report on the number and disposition of unaccompanied alien children cases in our courts.

#### VIII. Training

Immigration judges can play an active part in training programs for pro bono attorneys. Mock trials, “Model Hearings,” and other efforts are effective ways of increasing the available pool of representatives. When judges are invited to participate, these requests should be promptly forwarded to OCIJ for approval. Recognizing that docket demands must come first, this office is committed to assisting in such efforts.

## Attachment A

The following suggestions are drawn from the Guidelines for Children's Asylum Claims issued by the Immigration and Naturalization Service (now the Department of Homeland Security) in 1998. Specifically, they are found in the section entitled "Child-Sensitive Questioning -- And Active Listening -- Techniques."

As a general rule, use short, clear, age appropriate questions and sentences, avoiding long or compound questions. Use one or two syllable words in questions and avoid three or four syllable words. For example, it is better to ask "Who was the person?" rather than "Identify the person." Use simple, straight-forward questions: "What happened?" Avoid multi-word verbs: "Might it have been the case ... ?" Ask the child to define the use of a term or phrase in the question posed in order to check the child's understanding.

Choose easy words over hard ones: use expressions like "show," "tell me about," or "said" instead of complex words like "depict," "describe," or "indicate."

Tolerate pauses, even if they are long.

Ask the child to describe the concrete and observable, not the hypothetical or abstract. Use visual terms (e.g., gun), instead of categorical terms (e.g., weapon). Reduce questions to their most basic and concrete terms.

Avoid the use of technical legal terms in questions, such as "persecuted" or "persecution." Instead of "Were you persecuted?", ask "Were you hurt?"

Use the active voice when asking a question (e.g., "Did the man hit your father?"). Avoid the passive voice (e.g., "Was your father hit by the man?").

Avoid "front-loading" questions. Front-loading involves using a number of qualifying phrases before asking the crucial part of the question (i.e., questions that list several previously established facts before asking the question at hand). For example, "When you were in the house, on Sunday the third, and the man with the gun entered, did the man say ... ?" should be avoided.

Keep each question simple and separate. For example, a question like "Was your mother killed when you were 12?" should be avoided. The question asks about the child's mother and the child's age at the same time.

Generally, avoid leading questions whenever possible. Research reveals that children may be more highly suggestible than adults. Leading questions may influence them to respond inaccurately.

Use open-ended questions to encourage narrative responses. Children's spontaneous answers, although typically less detailed than those elicited by specific questioning, can be helpful in understanding the child's background. Try not to interrupt the child in the middle of a narrative response.

If you are asking questions more than once, explain to the child why you are doing so. Make clear to the child that he or she should not change or embellish earlier answers and explain that you are asking repeated questions to make sure you understand the story correctly. Repeated questioning is often interpreted (by adults as well as children) to mean that the first answer was regarded as a lie or wasn't the answer that was desired.

Coercion has no place in any hearing. Children are never to be coerced into answering questions during the hearing. For example, telling a child that she cannot leave the hearing until she answers the questions posed by counsel or the judge should never occur.

Do not expect children to be immediately forthcoming about events which have caused great pain.

Before asking how many times something happened, the immigration judge should determine the child's ability to count. Children may try to answer without the requisite skill, resulting in irrelevant, inconsistent, misleading, or erroneous responses.

Children may not know the specific circumstances that led to their flight from their home countries and, even if they know the circumstances, they may not know the details of the circumstances. The child may also have limited knowledge of conditions in the home country, as well as his or her vulnerability in that country. Even older children may not have mastered many of the concepts relating to conventional systems of measurement for telling time (minutes, hours, calendar dates).

Imprecise time and date recollection may be a common problem for children. Many aliens, however, note events not by specific date but by reference to cyclical (rainy season, planting season, etc.) or relational (earthquakes, typhoons, religious celebrations, etc.) events. In response to the question "When were you hurt?", it may not be uncommon for a child to state "During harvest season two seasons ago" or "shortly after the hurricane." To be sure, these answers may appear vague, but they may be the best and most honest testimony the child has to offer.

It should be noted that children can not be expected to present testimony with the same degree of precision as adults with respect to context, timing, and details.



March 25, 2009

HQRAIO 120/12a

## Memorandum

TO: All Asylum Office Staff

FROM: Joseph E. Langlois /s/  
Chief, USCIS Asylum Division

SUBJECT: Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over  
Asylum Applications Filed by Unaccompanied Alien Children

### I. Purpose

This memorandum provides notification and guidance to the USCIS Asylum Offices regarding the “initial jurisdiction” provision of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Public Law 110-457, which was signed into law on December 23, 2008 and became effective 90 days thereafter, on March 23, 2009.

The implementing procedures discussed herein have been established in consultation with Immigration and Customs Enforcement (ICE) and the Executive Office for Immigration Review (EOIR) based on a joint understanding. These procedures will be incorporated into the Affirmative Asylum Procedures Manual, though potentially following modification upon monitoring and evaluation. Federal regulations will ultimately be promulgated in order to reflect the procedures established for USCIS initial jurisdiction.

This guidance should be reviewed at each Asylum Office’s next training.

## **II. Background**

The TVPRA makes a number of changes that affect unaccompanied alien children (UACs)<sup>1</sup> who file for asylum. Among the statutory changes, section 235(d)(7)(B) of the TVPRA provides asylum officers with “initial jurisdiction over any asylum application filed by” a UAC. This means that UACs will have an opportunity to file for asylum with USCIS, even if the UAC has been issued a Notice to Appear (NTA). This initial jurisdiction provision is effective on March 23, 2009. It applies to all UACs who file for asylum on or after March 23, 2009, as well as to the asylum claims filed by UACs with pending proceedings in Immigration Court or cases on appeal to the Board of Immigration Appeals (BIA) or on petition for review in federal court (see attached USCIS News Release and USCIS Fact Sheet for more information).

UACs who are apprehended by Customs and Border Protection, ICE, or another federal entity must be placed into the custody of the Office of Refugee Resettlement (ORR) within the U.S. Department of Health and Human Services within 48 or 72 hours. *See* TVPRA §§ 235(a)(4); 235(b)(3). Those UACs are generally issued an NTA before an Immigration Judge of EOIR, within the U.S. Department of Justice (DOJ), for removal proceedings under section 240 of the Immigration and Nationality Act. During removal proceedings, a UAC may request asylum. Until the TVPRA’s initial jurisdiction provision went into effect, such UACs defensively filed their Form I-589 applications for asylum with the Immigration Court in removal proceedings. With the initial jurisdiction provision of the TVPRA taking effect, UACs in removal proceedings will now file their Form I-589 application with USCIS. ICE will provide those UACs in Immigration Court intending to file for asylum with “Instructions for an unaccompanied alien child in immigration court to submit a Form I-589 asylum application to USCIS” (“UAC Instruction Sheet”) (attached). The anticipated process is that ICE will request a continuance to provide time for the UAC to file the Form I-589 with USCIS and have the asylum case adjudicated. There may be cases, however, that are administratively closed or terminated without prejudice.

The Asylum Offices may encounter filings from UACs in a number of different procedural postures.

1. A UAC who has never been in removal proceedings may affirmatively file for asylum under pre-existing procedures.
2. A UAC may be placed in removal proceedings in Immigration Court on or after March 23, 2009, and seek to file for asylum.

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<sup>1</sup> As defined at 6 U.S.C. § 279(g)(2), an unaccompanied alien child means:  
a child who—

- (A) has no lawful immigration status in the United States;
- (B) has not attained 18 years of age; and
- (C) with respect to whom—
  - (i) there is no parent or legal guardian in the United States; or
  - (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

3. A UAC whose case was referred to Immigration Court after having been affirmatively adjudicated by USCIS may not re-file with USCIS, as USCIS already had initial jurisdiction of the case.
4. A UAC in pending removal proceedings, with a case on appeal to the BIA, or with a petition for review in federal court as of December 23, 2008, who has never submitted a Form I-589, may file for asylum with USCIS.
5. For an individual in pending removal proceedings, with a case on appeal to the BIA, or with a petition for review in federal court as of December 23, 2008, who has previously submitted a Form I-589 while a UAC, USCIS may have initial jurisdiction.

For scenario #2, concerning a UAC placed in removal proceedings on or after March 23, 2009, ICE will provide UACs intending to file for asylum with the UAC Instruction Sheet. The interpretation of and procedures concerning scenarios #4 and #5 are still under development. The litigating authority before EOIR or the federal courts may provide UACs in scenarios #4 and #5 with the UAC Instruction Sheet if it is determined that USCIS should have initial jurisdiction. Where there is a pre-existing Form I-589, the existing Form I-589 should be transferred to USCIS. Such cases would then be processed according to standards for processing new filings by UACs in removal proceedings, discussed below.

### **III. Field Guidance**

This guidance focuses on the Asylum Offices' handling of I-589s by UACs in removal proceedings who are filing pursuant to the TVPRA.

#### **A. Location of UAC filings with USCIS**

The UAC Instruction Sheet communicates a new requirement for UACs to file the Form I-589 with the Nebraska Service Center (NSC). The outer envelope of the filing should be addressed with the heading "UAC I-589." In extenuating circumstances where expeditious processing is required, the Director of the local Asylum Office may consent to the UAC filing the Form I-589 application directly with the Asylum Office. Pre-existing guidance in the Affirmative Asylum Procedures Manual should inform the Director's decision as to whether to accept the direct filing, rather than have the applicant file with the NSC. Additionally, with regard to whether to accept the direct filing, the Director may consider whether the UAC continues to be in ORR custody as a factor meriting expeditious processing.

#### **B. Documentation in RAPS to indicate the applicant is a UAC**

At the time of receipt of a UAC's Form I-589 application, the NSC will verify whether the UAC is in removal proceedings. In such cases, the NSC will enter the special group code "KRD" (formerly Guam Kurd – presently defensive unaccompanied child) into the Refugees, Asylum and Parole System (RAPS). While this special group code was formerly utilized to refer to Guam Kurds, as it is no longer in use for new filings, it is now being converted to refer to UACs in removal proceedings. This special group code serves the purpose of taking the case off of the automatic scheduler, so that the Asylum Office can determine whether special arrangements for

the interview location need to be arranged. Additionally, the Asylum Office will have access to a weekly report of all minor principal applicants, which will differentiate those UACs who are in removal proceedings (i.e., in the special group KRD) from other minor principal applicants.

### **C. Determination as to whether the applicant is a UAC**

USCIS typically does not have jurisdiction to accept the filing of a Form I-589 filed by an applicant in removal proceedings. Because section 235(d)(7)(B) of the TVPRA places initial jurisdiction of asylum applications filed by UACs with USCIS, even for those UACs in removal proceedings, USCIS will need to determine whether an applicant in removal proceedings is a UAC at the time of filing such that USCIS has initial jurisdiction. The NSC, as the entity where most UACs will file, will make an initial determination as to jurisdiction. It will accept the filing of an applicant in removal proceedings where the filing includes the UAC Instruction Sheet indicating that the applicant is a UAC. The NSC will also accept the filing of an individual under 18 years of age and in removal proceedings, even if there is no UAC Instruction Sheet included in the filing.<sup>2</sup> Cases of UACs in removal proceedings will be entered into RAPS with the special group code KRD. For individuals in removal proceedings who are over 18 years of age and who do not submit a UAC Instruction Sheet, the Service Centers will follow existing procedures.

The Asylum Offices play an important role in determining whether the applicant is a UAC such that USCIS properly has jurisdiction. Where the Asylum Office receives a direct filing from an applicant in removal proceedings, it must make the determination that the applicant is a UAC. Even where the NSC accepts the filing, the Asylum Office at the time of interview should evaluate whether the applicant was a UAC at the time of filing.

Inclusion of the UAC Instruction Sheet in the filing should serve as evidence that the applicant is a UAC. Nonetheless, at the time of direct filing or of interview, the Asylum Office may need to review other factors to determine whether the applicant is a UAC. For instance, while the applicant may have been a UAC at the time of receiving the UAC Instruction Sheet from ICE, the applicant must be a UAC at the time of filing the Form I-589 in order for USCIS to have initial jurisdiction.

#### **1. Age**

The Asylum Office should confirm that the applicant was under 18 years of age at the time of filing the Form I-589. Where the file includes a Form I-213, the apprehending agent's notation of the date of birth, this serves to indicate the age that the applicant claimed to be at the time of apprehension. Where there is evidence that the applicant was in ORR custody, this also indicates that the applicant was under 18, at least at the time of apprehension. Some applicants may include the ORR Interim Placement Authorization document with their filing. Unless there is clear, contradictory evidence in the file, jurisdiction should not be refused on the basis of age.

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<sup>2</sup> For purposes of accepting a filing under these procedures, the NSC will use the date of birth listed on the Form I-589.

## ***2. Unaccompanied Status***

The Asylum Office should also confirm that the applicant was unaccompanied at the time of filing the Form I-589. Where, at the time of filing, the applicant has no parent or legal guardian in the U.S. who is available to provide care and physical custody, the applicant is unaccompanied. *See* 6. U.S.C. § 279. *See also* Joseph E. Langlois, Asylum Division Chief, USCIS. *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS*, Memorandum for Asylum Office Directors, etc. (Washington, DC: 14 August 2007), at 5. Legal guardianship refers to a formal (legal/judicial) arrangement. A child is unaccompanied even if he or she is in the informal care and physical custody of other adults, including family members. For instance, if a UAC is released from ORR custody to a sponsor who is not a parent or legal guardian, the child continues to be unaccompanied.

### **D. Transfer of file**

An A-file will already exist for UAC applicants for asylum with USCIS who are concurrently in removal proceedings. The NSC will create a T-file and transfer the file to the Asylum Office. Additionally, RAPS will automatically initiate the A-file transfer request from the ICE Office of Chief Counsel to the Asylum Office. ICE may contact the Asylum Office to confirm that the file is being transferred due to the applicant being a UAC.

### **E. Scheduling of UAC interviews**

The Asylum Office will manually schedule special group KRD applicants for interview, based on the weekly minor principal applicant report. While manually scheduling interviews for those UACs in ORR custody, the Asylum Office should suppress the mailing of the interview notice and instead send a manually generated notice to inform the UAC of the appropriate interview location. This will permit the Asylum Office to determine the optimal interview location for UACs in ORR custody, as further discussed below. The Asylum Office should not schedule an applicant for interview until the A-file has been received.

Arranging for interviews of UACs in removal proceedings may take time, either due to arranging for an interview in a circuit ride location or in an alternate location. Interview scheduling should be done as expeditiously as possible for UACs, particularly for those who are in ORR custody at the time of filing. Additionally, for UACs in removal proceedings, the Asylum Office should attempt to schedule the asylum interview to occur prior to the next scheduled hearing date in Immigration Court.

### **F. Interview locations**

Most UACs can be scheduled for interview at an Asylum Office or a pre-existing circuit ride location. Special arrangements may need to be made for certain UACs in ORR custody. While ORR is responsible for transportation of UACs in their custody to the asylum interview, it may be necessary for the Asylum Office to arrange for a new circuit ride location to interview those

UACs in ORR facilities not located within an hour of a current interview location (see attached map). Those ORR facilities for which special arrangements for a new USCIS interview location may need to be made include: Harlingen, TX; Corpus Christi, TX; San Antonio, TX; and Vincennes, IN. Additionally, while the general preference is for the interview to occur in a USCIS office, we recommend that those UACs in an ORR secure facility be interviewed at the secure facility, in order for proper security arrangements to be in place. Contact information for ORR's Division of Unaccompanied Children's Services and its facilities will be posted on the Asylum Virtual Library.

### **G. Interpreters**

The Asylum Division is able to provide telephonic interpreters for those UACs in ORR custody who cannot fulfill the general requirement under 8 C.F.R. § 208.9(g) to provide an interpreter for the asylum interview. The Asylum Office should follow standard procedures for arranging for telephonic interpretation. If any issues or questions arise, contact the Headquarters Asylum point of contact for the interpreter contract.

### **H. Handling of case upon entry of final decision**

Where the Asylum Office decides to grant asylum to a UAC in removal proceedings, standard grant procedures are followed. The Asylum Office will serve the grant on the applicant and place a copy of the grant letter in the file, per standard procedures. Additionally, the Asylum Office UAC point of contact (see below) should contact the local ICE Office of Chief Counsel in order to alert them to the nature of the decision, so that ICE can move the Immigration Court to terminate proceedings.

Where the Asylum Office decides that a UAC in removal proceedings is not eligible for a grant of asylum, case processing will depend on the individual's procedural posture before EOIR. The Asylum Office should coordinate with ICE for the transfer of the A-file to ICE.

1. If the UAC's removal proceedings are still pending, due to the hearing date having been continued for good cause pending USCIS adjudication of the asylum claim, the Asylum Office will be unable to issue an NTA, as an active NTA already exists. The Asylum Office should proceed in issuing a referral notice, but not issue an NTA.
2. If the UAC's removal proceedings are still pending, due to the case having been administratively closed pending USCIS adjudication of the asylum claim, the Asylum Office should proceed in issuing a referral notice, but not issue an NTA.
3. If the UAC's removal proceedings were terminated without prejudice pending adjudication by USCIS of the asylum claim, standard referral procedures should be followed by the Asylum Office, including issuance of the NTA.

Until further notice, the Asylum Office will not serve a court packet on the Immigration Court for those UACs whom the Asylum Office refers for whom there is an active NTA (i.e., scenarios #1 and 2 above). Nonetheless, the Asylum Office should prepare the court packet and the A-file as usual. After the file has been transferred to Immigration Court, ICE will serve court packet on

the Immigration Court. Additionally, the Asylum Office should ensure that a copy of the CSTA screen in RAPS is attached to the outside of the A-file before transferring it to ICE.

### **I. UAC points of contact for each office**

Each Asylum Office should designate a UAC point of contact (POC). This person will be responsible for interacting with local ICE Office of Chief Counsel, local EOIR Immigration Court staff, and ORR DUCS staff. The POC may also manage the interview scheduling process for the Asylum Office's UAC cases.

We recommend that the POC coordinate with the local ICE Office of Chief Counsel to inform ICE of the UAC's asylum application, to arrange for ICE to forward the A-file to the Asylum Office, and to verify whether the UAC's case is continued, administratively closed, or terminated pending the asylum interview. Following the entry of a decision, the Asylum Office UAC POC should contact ICE to alert them to the decision and to arrange for transfer of the file, where necessary.

Additionally, the Asylum Office UAC POC may need to coordinate with the Asylum Office POC for clock issues in order to interact with EOIR to resolve any asylum clock issues that arise.

If you have any questions concerning the guidance contained in this memorandum, please contact Mary Margaret Stone at 202-272-1651.

#### Attachments (4):

1. DHS UAC Instruction Sheet (internal use only).
2. USCIS Update: USCIS Initiates Procedures for Unaccompanied Alien Children in Removal Proceedings Seeking Asylum (March 25, 2009).
3. USCIS Questions and Answers: USCIS Initiates Procedures for Unaccompanied Alien Children in Removal Proceedings Seeking Asylum (March 25, 2009).
4. Map of current ORR DUCS facilities and USCIS asylum interview locations (internal use only).



**U.S. Department of Justice**

Executive Office for Immigration Review

*Office of the Chief Immigration Judge*

Chief Immigration Judge

5107 Leesburg Pike, Suite 2500  
Falls Church, Virginia 22041

March 10, 2008

**MEMORANDUM**

**TO:** All Immigration Judges  
All Court Administrators  
All Attorney Advisors and Judicial Law Clerks  
All Immigration Court Staff

**FROM:** David L. Neal   
Chief Immigration Judge

**SUBJECT:** Operating Policies and Procedures Memorandum 08-01: Guidelines for  
Facilitating Pro Bono Legal Services

This Operating Policies and Procedures Memorandum (OPPM) replaces the guidance contained in the February 22, 1995 memorandum entitled “Pro Bono Activities.”

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## **I. Introduction**

Pro bono representation benefits both the respondent and the court, providing respondents with welcome legal assistance and the judge with efficiencies that can only be realized when the respondent is represented. A capable pro bono representative can help the respondent navigate court rules and immigration laws and thereby assist the court in understanding the respondent's circumstances and interests in relief, if any is available. Pro bono representation in immigration court thus promotes the effective and efficient administration of justice. This Interim OPPM provides guidance on how immigration courts and court administrators can encourage and facilitate pro bono legal services for respondents.<sup>1</sup>

## **II. Meaning of “Pro Bono”**

As a general rule, a “pro bono representative” is an attorney or other representative specified in 8 C.F.R. § 1292.1 who provides legal representation without any present or future expectation of remuneration from the respondent (other than filing fees and nominal costs). Uncompensated initial consultations or initial court appearances, with the ultimate intention or goal of compensation by the respondent, are contrary to the spirit of pro bono representation. While an attorney or representative may be regularly compensated by an employing firm or organization, representation should be provided solely and honestly for the public good.

## **III. Facilitating Pro Bono Representation**

### **A. Pro Bono Liaison Judge and Pro Bono Committee**

A judge in each court should be designated the “pro bono liaison judge,” who represents the judges of that court in interactions with outside entities regarding matters involving pro bono representation.

In addition to designating a pro bono liaison judge, courts of appropriate size and location should consider creating a pro bono committee. Committees may include, as appropriate, other judges, the court administrator, attorney advisors, judicial law clerks, and/or other interested court staff. Each court with a pro bono committee should consult its Assistant Chief Immigration Judge (ACIJ) regarding the judge and staff composition of its committee and the length of each committee member’s term. For continuity’s sake, the pro bono liaison judge and/or committee members should serve terms of one year or longer. Ideally, the pro bono liaison judge position (and the pro bono

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<sup>1</sup> This Interim OPPM was generated from the recommendations by the EOIR Committee on Pro Bono, which consisted of immigration judges, court administrators, the Acting Chairman of the Board of Immigration Appeals, the Coordinator of the Legal Orientation and Pro Bono Program, and other EOIR staff. The committee met with non-profit organizations, bar associations, private law firms, the Department of Homeland Security, the Office of Refugee Resettlement in the Department of Health and Human Services, and the United Nations High Commissioner for Refugees. The Office of the Chief Immigration Judge expresses its gratitude for the committee’s hard work and dedication.

committee membership as well) should rotate between judges, but the decision to rotate a liaison judge or committee member is left to the ACIJ and that court.

The pro bono liaison judge, together with the court administrator, should meet regularly with local pro bono legal service providers to discuss improving the level and quality of pro bono representation at the court. Such meetings should be used to develop and refine local procedures to encourage pro bono representation, bearing in mind the particular needs and circumstances of each court. Pro bono liaison judges should encourage and, insofar as appropriate, facilitate discussion between government and pro bono counsel. They should also consult with the EOIR Legal Orientation & Pro Bono Program (LOPBP) to strengthen the agency's public outreach and to better coordinate the agency's support of pro bono representation.

## **B. Training for Pro Bono Counsel**

Pro bono training conferences, the Model Hearing Program (coordinated through the LOPBP), and similar efforts are effective ways to increase the available pool of pro bono representatives. Judges and pro bono committee members are encouraged to play an active part in pro bono training programs on immigration courtroom practice and procedure, where appropriate and authorized. When a judge is interested in participating in such a program, the judge must promptly forward the invitation (and any additional information) to his or her ACIJ for supervisory authorization and thereafter request approval from the EOIR Ethics Office. Judges should not accept invitations prior to receiving authorization and approval.

## **C. Courtroom Practices**

Although EOIR is committed to completing cases promptly, the particular needs of pro bono representatives who appear before the immigration courts should also be taken into consideration. Judges are strongly encouraged to be flexible with pro bono representatives, particularly in the scheduling of hearings and in the setting of filing deadlines.

### **1. Pro Bono Appearances**

Judges should ask representatives appearing pro bono to identify themselves as such. Pro bono representatives should be asked to annotate the Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court (Form EOIR-28) to reflect pro bono representation. Absent that annotation, judges should ask representatives to identify themselves orally on the record as appearing pro bono (e.g., "Jane Doe, appearing pro bono on behalf of John Smith").

When a pro bono representative enters an appearance, the court should enter the words "pro bono" in the comments field in CASE. An accurate electronic record is critical to track and to verify genuine pro bono representation.

## **2. Scheduling of Pro Bono Cases**

Judges should be mindful of the inherent difficulties in the recruiting of pro bono representatives and the burdens pro bono representatives assume for the public good. To facilitate pro bono representation, judges are encouraged to give pro bono representatives priority scheduling at master calendars when requested.

With respect to individual calendars, judges should be cognizant of the unique scheduling needs of law school clinics operating on an academic calendar and pro bono programs which require sufficient time to recruit and train representatives. Because clinics and pro bono entities often face special staffing and preparation constraints, judges should be flexible and are encouraged to accommodate appropriate requests for a continuance or to advance a hearing date.

## **3. Pre-Hearing Statements and Conferences**

Pursuant to 8 C.F.R. § 1003.21, judges may require pre-hearing statements, including stipulations of fact. Pre-hearing statements can be especially valuable in pro bono cases, where the representative's time and resources might be limited. Judges should also encourage pre-hearing conferences between the parties to narrow the issues and to prompt the timely submission of evidence, which foster both more efficient proceedings and more efficient use of limited pro bono resources.

## **4. Appearance by Telephone or Video Conference**

As discussed above, judges should be mindful of the difficulties and burdens facing pro bono representatives. Accordingly, judges should be flexible when a pro bono representative seeks to appear telephonically or through video conferencing (also known as televideo and VTC).

As respondents are often detained in locations that are not readily accessible, video conferencing is an attractive means for a pro bono representative to communicate with his or her client. Where EOIR video conferencing is available in conjunction with a scheduled hearing and the request to use the equipment is reasonable, courts may allow representatives to use EOIR video conferencing equipment to communicate briefly with respondents. However, courts should be careful that the use of video conferencing by representatives not disrupt court operations, and courts must be vigilant and responsible regarding the expenses associated with the use of any telecommunication equipment.

## **D. Legal Orientations and Group Rights Presentations**

Judges and courts are encouraged to support legal orientations and group rights presentations, whether or not funded by the LOPBP. Non-profit organizations that provide such programs can greatly assist local pro bono efforts to disseminate critical legal information, prepare respondents for master calendar hearings, screen respondents for eligibility for relief, and identify cases for referral to pro bono counsel. These programs serve a vital role in providing detained respondents with access to basic legal services. They also provide a benefit to the court in that respondents better understand the proceedings when they enter the courtroom.

Judges and court administrators can facilitate orientation and rights presentations in a variety of ways. For example, liaison judges and court administrators should be attentive to operational issues for the presenters of these programs. Also, where appropriate, reasonable, and available, immigration courtrooms and EOIR video conferencing equipment may be made available to pro bono organizations to conduct presentations. Furthermore, within the bounds of reason and propriety, courts could share information that will help presenters to assemble detainees and to tailor their presentation to the specific audience.

Given the value of such programs, courts should encourage and facilitate the development of orientation and rights presentations for non-detained respondents as well.

#### **E. Access to Respondent Information**

Upon reasonable request, immigration court records should be made available to pro bono organizations and representatives, where court resources allow and the sharing of information is not prohibited by law (e.g., attorney-client privilege, the Privacy Act, 8 C.F.R. § 1208.6). Courts should support pro bono operations in their efforts to identify potential pro bono cases and, with respondents' written authorization, may share non-classified information prior to a formal entry of appearance.

If a court is concerned that an organization or representative is requesting information for a motive or purpose other than the identification of pro bono clients, the court should consult its supervising ACIJ and, as appropriate, the LOPBP Coordinator.

#### **F. Self-Help Legal Materials**

Self-help legal materials prepared by the LOPBP are valuable to anyone appearing without counsel. These materials, which are regularly reviewed and updated by the LOPBP contractor staff and EOIR's Office of the General Counsel, have the ability to increase respondents' understanding of immigration laws, removal proceedings, and the implications of their pleadings.

Approved materials are available from the LOPBP and, insofar as it is practical, courts should make these available to the public as well. Courts could make materials available upon request at the filing window and/or, if the materials are available electronically, distribute or post flyers specifying where those materials are located on the Internet.

Please note that the LOPBP welcomes comments and suggestions from judges, court administrators, attorney advisors, judicial law clerks, and other court staff on how to improve existing self-help legal materials. However, anyone in the courts who develops self-help legal materials for their location must first provide a draft to the LOPBP and the appropriate ACIJ for approval.

### **G. Minor Respondents**

Given the particular vulnerability of minor respondents, judges are strongly encouraged to facilitate pro bono representation whenever minors are involved. Judges are reminded to employ the child-friendly practices described in OPPM 07-01 (Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children). Many of those practices can and should be applied to any case involving a minor, whether unaccompanied, accompanied, detained, or non-detained.

### **IV. Handling Pro Bono Cases Ethically**

It is incumbent on every judge to facilitate pro bono representation. Equally important, however, is that every judge must be careful to stay within the bounds of ethics and propriety.

When encouraging pro bono representation, judges should be mindful neither to pressure representatives to appear pro bono nor to penalize representatives who do not wish to handle pro bono cases. Pro bono representation should be truly voluntary, and attorneys and other representatives should not feel compelled to appear on specific cases.

As issues regarding Department ethics and agency policy frequently arise in this area, individual judges, pro bono liaison judges, and pro bono committees should consult their supervising ACIJ and the EOIR Ethics Office. Such consultations will ensure that new programs and/or new practices are permissible. Judges are also encouraged to review their current practices and consult headquarters personnel as appropriate.

### **V. Conclusion**

The best practices listed above are certainly not exhaustive. Judges, court administrators, attorney advisors, judicial law clerks, and all court staff are invited to submit suggestions — both to the Office of the Chief Immigration Judge and to the LOPBP — on how to encourage and facilitate pro bono representation.

## CHAPTER 12

### CLIENT RELATIONS<sup>1</sup>

#### §12.1 Introduction

The process of applying for asylum is not particularly complex. Often, the most difficult challenge for the attorney is in interviewing and obtaining accurate, consistent, and thorough information from the client pertaining to the case. As the client usually has little or nothing in the way of documentation or other material evidence supporting the asylum claim, you must rely upon your client's own uncorroborated account of the facts.

Several factors may hinder obtaining your client's story. Your client may not speak English. She may be poorly educated. He most likely comes from a cultural background that is substantially different from yours in significant ways which may impede free communication. He may not trust his own legal system, let alone that of the U.S. Almost certainly, she will not be familiar with the U.S. legal system and so she will not, initially at least, understand why you are asking all the questions that you are and how the judge or asylum officer will decide her case. Finally, he may not trust you at first, since you are a stranger, or someone of a different race, or someone connected to the legal system.

The challenges resulting from these factors should not be underestimated. At best, these problems lead to misunderstandings and overly long interviews. At worst, they cause the client to tell stories that he or she thinks you want to hear or to fail to tell you the whole truth. The result may be a confused story, factual discrepancies, and a non-credible witness often leading to a less-than-enthusiastic representation.

Please understand that almost all of these difficulties can be overcome with a better understanding of the general culture and of the personal experiences of your client. The following discussion of these barriers should provide you with some solutions.

Bear in mind that much of this chapter may not be applicable to your situation at all. Many asylum seekers are educated, at ease with U.S. culture, comfortable with attorneys and courts, and very confident about their case and situation. Even if this applies to your client, this chapter should be reviewed carefully.

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<sup>1</sup> This chapter was co-authored by Larry Katzman and Eleanor Hoague

## §12.2 Language Barriers

If your client is less than fluent in English, the quality of the interpreter is critical. Your client may also be illiterate in her native language. If your client does not understand you fully, or misunderstands you, or vice-versa, it can result in disastrous mistakes.

If your client speaks a second, more common language, such as Spanish, do not allow the Immigration Court to provide an interpreter in this secondary language; insist on her primary language. Also, differences in dialect can be critical to a correct interpreter. Have the court obtain a court interpreter in your client's native tongue who is familiar with the client's dialect.

Be aware that in many cultures, close friends as well as distant family members are frequently called by terms such as uncle or aunt, brother or sister and even child. Cousins may be referred to as brothers and sisters. Do not take your client's descriptions of family at face value. Ask for the lineal relationship. It may prevent unpleasant surprises – and fertile areas for cross examination – at the asylum hearing or interview.

Even if your client does speak English, there are certain precautions you should take. For instance, do not count on your client's understanding of legal or sophisticated terminology. Instead of asking whether he understands a certain word or question, which he may be too embarrassed to admit, it might be more effective to ask him to explain his or her understanding of a given word or question.

Speak slowly and clearly. Even if your client comes from an English-speaking country, your accent or pace of your speech may be difficult for her to understand. If she is nervous or deep in thought, this may only add to the difficulties.

Unless your client is as fluent as a native-born English speaker, you must require that the Immigration Court provide an interpreter for him at the asylum hearing. This is usually requested at the Master Calendar hearing. If you are not certain that an interpreter has been requested, call the court at least 3 weeks prior to the asylum hearing and make certain that arrangements have been made. Note that for affirmative asylum interviews, **you must provide an interpreter.** Please arrange with your interpreter as soon as you receive a date and time for the interview for him to be present.

## §12.3 Using An Interpreter

Your relationship to your client depends very much upon how you use your interpreter. Your primary relationship should remain with your client at all times and your interpreter should, technically, be nothing more than a voice box. Otherwise, you risk creating distance and mistrust between you and your client.

Here are some simple rules of thumb which should be strictly followed:

- **Speak directly to the client.** Speak directly to your client in the second person ("How old are you?") rather than through the interpreter in the third person ("Ask him how old he is"). This causes less confusion for the interpreter and results in the one-on-one relationship that you seek with your client.
- **Look at your client.** You are interviewing your client, not the interpreter. Your client should be seated where you can see him directly.
- **Use simple words.** If technical words must be used, educate your client about their meaning. For instance, avoid the tendency to use the word 'persecution' since it is a legal term of art that is not commonly used or understood at all, or in the context in which you, as an attorney, understands it. There may also be no such word in that language. Instead, ask fact-oriented questions, such as "Were you tortured, hurt, etc.?"
- **Use simple and short questions.** If your client gives you a birthdate and age that don't match, ask, "Were you born in 1971? That makes you 21 years old. Could you be 22? Or maybe were you born in 1972?". Never ask lengthy or complex questions. They are difficult to interpret and often confuse the client. Also, do not use the negative form of questioning, e.g. "Isn't it true . . ." or "Didn't you tell me . . .". This cross-examination form of question is confusing and may tend to make your client uncomfortable.
- **Do not talk in English to your interpreter in front of your client.** Discuss the process and any other information with the interpreter before or after the interview. However, sometimes the interpreter may have some valuable information for you, such as, that the client is not understanding your question, or that there is an important bit of political, cultural, or geographic information which you should be aware of that impacts your client's understanding or response. In this event, if you engage in a short conversation with the interpreter (in English), be sure to summarize the conversation for the client immediately afterward. This way, she will not suspect you of talking 'about her'.
- **Try to sit across from your client.** And ask the interpreter to sit next to your client. This lessens the impression that you and the interpreter are colluding, prevents head-turning, and promotes better communication..
- **Have the interpreter interpret verbatim.** Don't let him paraphrase or summarize your questions or the client's responses. This could result in critical information and the client's own feelings about, and perception of, the facts being lost. If you suspect that this is happening, stop the interview and reiterate the need to interpret accurately and verbatim.

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- **Remind your client to speak in short phrases.** It is much easier for the interpreter if your client pauses for interpretation, breaking up his answer into parts. This is an unnatural way to speak and so your client may need reminding of this several times. Train your interpreter to put up her hand in a stop fashion whenever a break in the response is needed.
- **Have the interpreter bring a dictionary.** Make sure that your interpreter has brought a dictionary between English and the other language being spoken for reference. Also, he should have access to a pad and pen to jot down words or phrases, times, dates, numbers, names, etc.
- **Have your client inform you when he does not understand a question.** You should explain and remind your client several times that, at appointments with you and, especially, at the asylum hearing or interview, she should say when she has not heard a question, does not understand a question, when she does not know, and when she does not remember the facts being asked. Clients are often hesitant to say this because they feel that their attorney or the judge expects an answer, often any answer, rather than one of these responses. The client needs to be educated as to what the consequences could be otherwise (you may not understand all the facts surrounding the case, the judge or asylum officer may decide that the client is lying or embellishing and will thus lose the case).

## §12.4 Cultural Barriers

### A. Social Class

It is highly likely that your client comes from a culture in which class distinction is much more open and accepted than in the U.S.. The boss-peasant hierarchical system still exists in much of the world and may well have been a part of his reality since birth. Members of the lower class are expected to be deferent and obedient to the upper class.

Moreover, in many cultures, there is a subtle but real superiority practiced by urban residents on rural peasants. It is assumed that people who live in the countryside are poorer, less educated, and less sophisticated. The fact that lawyers in most societies are highly educated, wealthy, connected with the government, and urban dwellers may aggravate the cultural gap between your client and you at the beginning.

As a result, your client may be excessively polite, silent, and reluctant to speak openly with you about her private affairs and painful memories. It may mean that she will provide false, misleading, or incomplete answers.

Therefore it is imperative that during the course of your relationship, your client feel comfortable enough to tell you the truth. Here are some techniques to try:

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- Keep the first appointment brief. Offer a soft drink or light snacks, perhaps. Talk about the weather, family, whether it was difficult to find your office, and other small talk. Discuss any similar experiences you may have had with your client, such as factory work, or travel to his country. Ask some background (biographical) information, perhaps, but only get into any substantive areas if you think that your client is comfortable.
- Be respectful in your manner and body language.
- Ask short, simple questions and ask them slowly, as discussed above, rather than rapid-fire, repetitive, aggressive forms of questioning.

### **B. Political Reality**

Your client may have seen, heard of, or endured atrocities which are truly inconceivable to us. They know that the government (or non-governmental groups or forces) cannot be trusted and that even in nominally democratic systems, free expression and openness are dangerous and often considered revolutionary.

Although your client is in the U.S., he is poignantly aware that his family and friends may still be in danger in his home country and that he might be returned there by the U.S. government in the near future. These facts often make clients fearful and thus reluctant to give testimony (or even provide information to you) which could be viewed negatively by authorities at home.

Many refugees are relatively unsophisticated in terms of discussing politics or the political situation in which they were involved. Often, a person may have done certain things or acted in certain ways that indicate his or her political belief, but be unable to articulate them as beliefs. Similarly, a client may not be able to distinguish clearly between the Right and the Left in the context of her country's politics. You must bear in mind that this does not lessen her well-founded fear of persecution. (Note that if, by contrast, your client is well-educated or sophisticated, utilize their knowledge to educate you about the historical, cultural, geographical, and political aspects of their country and case.)

The following may assist you in determining the true nature of your client's political beliefs and actions:

- Do not let apparently inappropriate responses to atrocities make you question the veracity of your client. Post-traumatic stress disorder (PTSD) can manifest itself in a variety of ways. These include blocking out a memory altogether, flat emotionless descriptions of horrific events, failure to return to an attorney after having described a particularly awful event, etc. (Note that NWIRP looks for indications of PTSD in its screening interview and, if possibly present, may send the client to a psychologist or psychiatrist for evaluation and, parenthetically, for potential expert testimony at the asylum hearing). If you see any of these signs, please notify NWIRP.

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- Even if PTSD does not exist, your client may not believe his or her experience is out of the ordinary or merits discussion. Ask specific questions about their experiences and probe beyond the initial response.
- Talk about the political (or religious or racial, whatever is the basis of your client's problems) situation in the country to show that you have understanding of the situation there. Question your client in relation to that knowledge (e.g., "I heard that the government moved all the Indians out of certain towns into the cities. Do you know anything about this? Did this happen to your family or friends?")
- Ask questions related both to acts (e.g., "Did you ever fight with the guerillas?" "Was anyone in your family hurt by members of the rival clan?") and questions pertaining to beliefs (e.g., "Do you support the fundamentalists?").
- Ask questions about the persecutors in terms of the client's feelings (e.g., "Do you like what the X party was doing?" "Is the army good to your village? Why? How?").
- Learn what the political (or religious, racial, etc.) factions are in the country and ask questions in relation to groups or specific situations (e.g., "Did you fight with the farmers or the government?").
- Once you have determined that your client committed acts or had beliefs that are indeed political (or had certain religious or racial attributes or beliefs, etc.) for which she was persecuted, educate your client that this is a political opinion (if that is the basis of the claim). This is critical as he or she may be asked in depth about political opinion, persecution, acts which were political, etc.
- Use the background, knowledge, and experience with persons from your client's country including your interpreter and your expert witness to learn more about that country. Avoid, however, asking your interpreter to give opinions about your client's story or the asylum claim's possible success. Be sure to discuss issues with the interpreter when the client is not present.

### **C. Time and Date Issues**

Many clients come from countries where time and dates are less important than in our culture. This will mean not only that arrival on time for an appointment or hearing cannot be assured, but also that the account of data related to times and dates may not be reliable or may change

Another potential problem with persons from some countries or cultures is that a different calendar is used than the one in the U.S. For instance, in the PRC (China), babies are considered to be one year old at birth. So a client may tell you and the judge that he is 25 years old yet his birthdate on his birth certificate or passport may indicate that his age is 24. Ethiopia uses a calendar that is about 6 ½ years different from ours. This could obviously lead to apparent discrepancies when he is asked about the dates of certain events.

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Since the immigration judge and asylum officer will place a great deal of weight on the credibility of your client, it is imperative that your client's story not change in major or inexplicable ways relative to specific dates or times.

Here are some tips on fixing dates and times in your client's story:

- Interview your client on at least three different occasions before filling out the asylum application and written declaration accompanying it. If your client is not geared toward remembering dates or even seasons or years, try to tie dates to the occurrence of an event your client remembers well. Examples include birth of a particular child, the first full moon after her father's death, etc. Then jog your client's memory of dates by referring to those events.
- Even if your client remembers exact dates well, it is usually safer to put down general dates instead. So, rather than putting down "October 16, 1990", put down "October, 1990" or "the Fall of 1990") since the judge or INS Trial Attorney might otherwise choose to cross-examine on the exact date offered by your client.
- If differences in dates arise between the asylum application and testimony, try to explain them at the beginning of the hearing or asylum interview. Presenting and explaining these discrepancies openly and in an 'up front' manner will go a long way toward preventing the judge or asylum officer from finding the client not to be credible and provide the INS trial attorney fewer grounds for cross examination.
- Explain the importance of being on time for interviews or hearings. Emphasize again and again the fact that lateness or forgetfulness may result in his being deported. If necessary, make arrangements for your client to be at the hearing early, possibly arriving at your office two hours or more before the hearing or interview. If your client is arriving from out of town, be sure that he is in Seattle the day before the hearing or interview. It sounds parental, but your client's life may depend on it.

#### D. Sexism

Many male clients come from countries and societies that are deeply sexist. They may consider a female attorney to be cute, a joke, not be taken seriously, a sex object. While this is rare, you should be aware of the possibility. You can try various techniques such as wearing a wedding band. Don't lecture him or try to change your client's view, at least during your representation of him. His attitudes are deeply embedded and not subject to rapid change.

- However, if your client is abusive, or you feel frightened, or he is not cooperative because he does not have faith in your intellectual and professional abilities or for any other reasons, you need to reconsider your representation of this individual. You have no obligation to put or keep yourself in a scary, uncomfortable, or unproductive situation.
- Having said that, however, please note that female attorneys rarely experience anything like this. Most clients, male and female, are grateful and anxious to help and be cooperative in any way that they can.

### §12.5 Interview Strategies

As discussed above, the need to develop trust and rapport with your client cannot be over-emphasized. Nothing, but nothing, substitutes for time spent talking to your client over a series of several interviews.

Take these steps at the initial interview:

- Greet your client at the street-level lobby if your building has elevators. The client may never have used an elevator before, or may not know that "Suite 2612" is an office and is located on the 26<sup>th</sup> floor.
- Introduce yourself and the interpreter. Offer the client and interpreter something to drink and, if you choose, a light refreshment.
- Explain that you are an attorney and that you will be representing her at no cost on behalf of the Northwest Immigrant Rights Project. You should also mention the name of the NWIRP staff person who referred the case to you. Explain that the interpreter is also working at no cost.
- Give the interpreter and client some moments to talk (small-talk and chit-chat) and get to feel comfortable with each other. Then ask your client whether she feels comfortable with the interpreter, and whether she can understand him well. You might also take some minutes to ascertain whether the two speak the same dialect, or come from the same region, tribe, or clan, or whatever other factors may affect their ability to relate to, and understand, each other.
- Explain to your client that you are not connected with the INS, the government or any group or agency in any way and that you seek only to help him obtain asylum. Assure him that everything that is said in the room is confidential and will not be told to anyone else without his permission. The same applies to the notes you will be writing, and to anyone else in your office, as well. Make sure to also explain the confidentiality to the interpreter while also letting the client know that this is what you are doing.
- Explain the asylum process. Describe the procedure and probable time-frames involved, depending upon whether the case is an affirmative one or in court proceedings. Explain what is needed to win the case, what the judge or asylum officer must be convinced of and what the difficulties (and well as strengths) of the case are. This should all be discussed in simple, non-legal terms. Refer to the Appendix in Chapter 3 both for information on what to explain and for hand-outs to give to your client.
- Ask the client if he has any questions before proceeding.
- Engage in small talk, about family, the weather, your travels in your client's country, etc. You might show photos of your family and ask to see photos of hers.

- Explain in general terms what the legal process is, including approximate timelines, likelihood that he will be able to obtain an employment authorization, etc. Describe, again generally, what you will need to know from your client. Ask if he has any questions.
- Tell your client that you have been able to read the notes that NWIRP wrote while they were talking to her and that it has given you a sense of why she left her family and country and/or is afraid to return now.
- Then, if it flows, start asking questions about the client's family, here in the US and at home, his or her political or religious situation, etc. Leave this general, without getting into much substantive information (unless it feels very comfortable) and do not count on its accuracy. Try to avoid taking comprehensive notes at this first interview. Never tape record any of your interviews unless it is absolutely necessary. (Note that if your client lives a long way from Seattle, there is often great time and expense (missed work, babysitter, bus or car fare) involved. You may thus need to balance the ideal situation of going slowly in the first and perhaps second interview with the need to accomplish as much as possible at each meeting. The same applies if there is a filing deadline fast approaching.)
- Be sure to offer the client and interpreter breaks every 45 minutes or so.
- At the end, you should set up a time and date for the next meeting and discuss generally with your client and interpreter which days of the week or times of the day are better for them. Offer to validate parking for either that drove to the appointment, if you can offer such service.
- In subsequent meetings, you will want to have drafted the asylum application and declaration to review with your client. For other tips on client credibility and on case preparation, see Chapter 13.

## **§12.6 Turning Your Client Into An Advocate**

### **A. Why Your Client's Help is So Important**

Asylum cases are very winnable but assistance from your client can be one of the biggest factors in the ultimate outcome. Unlike many clients in non-immigration fields of law, asylum clients usually have no evidence, records, witnesses, understanding of what is expected of them, or what the decision on their fate will turn on.

It is up to you, as the attorney, to transform this situation into one in which you two form a winning team. Your client, even if he is an illiterate, uneducated rural peasant who had never traveled further than twenty miles from his home before fleeing to the U.S., is not helpless. Don't 'baby' him by keeping him in the dark about the asylum procedure and how his case can be won or by not being clear and direct with him about what you need to win the case. He is able to help you win the case if you give him proper

understanding, guidance and clear expectations. However, one must be cognizant of potential psychological problems that may prevent full participation in the case.

Your client can do, at the very least, three things to help win the case. First, he can provide you with full and accurate information. Second, he can help you to help him to be a credible witness at the hearing or asylum interview. Third, he can help you obtain crucial documentation from his country. All three of these are discussed either previously in this chapter or in Chapter 13.

### **B. What to Expect and Demand of Your Client**

You will want to do all the things previously discussed in this chapter that can help to assure a trusting client. These items include achieving rapport with her and explaining the legal process and what the judge or asylum officer will need to be convinced of in order to grant the request for asylum. Aside from those, here are the things you can expect of your client.

1. **Assist you in documentation of the case.** Can your client get a letter from someone at home who can attest to the problems he had or would have upon return? If so, you should help draft the requesting letter, outlining the areas you need information about. Are there records or documents that he can attempt to obtain through family or friends back home? Examples include hospital records, birth or death certificate, membership card (in a church, labor union, political party, etc.), photographs, and newspaper articles. Please be sure to allow plenty of time for receipt of these items and keep a copy of requesting letters to demonstrate the attempts if they prove to be futile.
2. **Assist you in understanding the context of the claim.** As discussed previously, take advantage of your client's knowledge and background if she is educated and sophisticated and keeps up on current conditions.
3. **Be a credible witness.** Also discussed before, the emphasis must be on helping to explain any discrepancies and indicating when the client does not understand or hear the question or does not know or remember the information being sought by the question.
4. **Stay out of trouble.** You may need to emphasize to your client several times the crucial importance of committing no crimes, not leaving the U.S. including not going to Canada (at least, without obtaining advance parole to re-enter the country, see Chapter 11), not taking or possessing any drugs or illegal substances, not possessing any firearms, not engaging in any employment without an employment authorization, and not possessing any false documents of any sort. Any of these could have severely damaging effects on the client's asylum claim and other immigration remedies.
5. **Stay in touch with you.** This may need to be done through the interpreter, if there is one. Much time, perhaps a period of years, may pass between submission of the asylum application and the asylum interview, or between interview and hearing, or during the pendency of an appeal. Drill into your client's head that she should

contact you whenever she changes her address (as there is an obligation to promptly notify the appropriate body), needs to renew her work authorization, and, in any event, every six months. You must know how to reach her quickly if you receive an interview notice, for example, or a decision from the Board of Immigration Appeals.

6. **Carry identification at all times.** Persons with pending asylum applications or appeals cannot be removed or deported from the U.S., unless criminal convictions or other problems act to render them ineligible prior to adjudication. (See Chapter 5) Thus, if an asylum applicant is stopped by an INS or Border Patrol officer and asked for information about her status, she can inform the officer that she has a pending asylum application. If she has an employment authorization card, she should offer to show this.<sup>1</sup>
7. **Take preparation for the hearing and/or interview seriously.** There is a tendency to feel that since so much time was spent in preparing the application packet, that no more work is necessary. But there is no substitute for refreshing of memories and other preparatory work on the eve of the hearing or interview. This should also include a mock cross examination.

**NOTE:** Attachments to Chapter 3 include hand-outs in English and Spanish that attorneys can give to their clients which explains the process of applying for asylum and some information about legal rights.

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<sup>2</sup> The INS and Border Patrol may question anyone on the street about their status. Aliens are always free to refuse to answer questions and many persons do this, even if they have some status (whether an employment card through a pending application or green card, etc.) either out of principle or because persons accompanying them have no status.



AMERICAN IMMIGRATION COUNCIL

**PRACTICE ADVISORY<sup>1</sup>**  
Updated: December 12, 2011

**DHS REVIEW OF LOW PRIORITY CASES FOR PROSECUTORIAL DISCRETION**

By The Legal Action Center and Alexsa Alonzo<sup>2</sup>

Over the last several months, the Department of Homeland Security (DHS) has made a series of announcements regarding its intent to eliminate low priority cases from the immigration court dockets and instead focus on its highest immigration enforcement priorities—national security, public safety, border security, and the integrity of our immigration system. First, on June 17, 2011, ICE Director John Morton issued two memoranda encouraging the expanded exercise of prosecutorial discretion in all phases of immigration enforcement.<sup>3</sup> Subsequently, on August 18, 2011, DHS announced the establishment of a joint DHS-Department of Justice (DOJ) working group charged with reviewing the approximately 300,000 cases pending before the Executive Office for Immigration Review (EOIR) to identify candidates for administrative closure. Most recently, on November 17, 2011, DHS issued three documents detailing how the agency will implement the review process.

The November 17 documents describe new procedures DHS will use to implement its prosecutorial discretion policy as well as new standards and criteria to be used by ICE officials. At the same time, however, the November announcements also leave many questions unanswered about the scope and logistics of the review process. Additionally, some guidance included in the November documents is inconsistent with the June 17 memo. Accordingly, this practice advisory not only summarizes DHS's current policies on prosecutorial discretion but also explains some of the ambiguities and contradictions that the recent announcements have created.

**OVERVIEW OF THE AUGUST AND NOVEMBER ANNOUNCEMENTS**

**August 18, 2011 Announcement.** See [Napolitano Letter](#) and [Backgrounder](#).

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<sup>2</sup> Alexsa Alonzo is an Associate Director of Advocacy with the American Immigration Lawyers Association (AILA).

<sup>3</sup> See [Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens](#) and [Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs](#). For a detailed analysis of these memoranda, see the Legal Action Center's practice advisory, [Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client](#).

In August, DHS announced the establishment of a high-level joint DHS-DOJ working group to review removal cases currently pending before the immigration courts, the Board of Immigration Appeals (BIA), and the federal courts of appeals. Removal cases identified as “low priority” will be administratively closed and the respondents may be eligible to apply for an employment authorization document (EAD) with USCIS. The working group also will initiate a case-by-case review to ensure that new cases placed in removal proceedings meet DHS’s enforcement priorities, and will issue guidance to prevent, on a case-by-case basis, low priority cases from entering the system. Additionally, the working group will issue department-wide guidance on prosecutorial discretion, including for respondents who already have final orders of removal.

**November 17, 2011 Document, *Next Steps in the Implementation of the Prosecutorial Discretion Memorandum and the August 18 Announcement on Immigration Enforcement Priorities* (“Next Steps Document”).**

This unattributed document describes ICE’s plans to implement the review process announced on August 18. First, it explains that the agency has launched a “comprehensive training program on the appropriate use of the June 17, 2011 Prosecutorial Discretion Memorandum.” The document describes the training as “scenario-based” and states that all ICE enforcement officers and attorneys will have completed the training by January 13, 2012.

Second, the document describes the launch of two pilot programs. The first (“Pilot 1”), is a nationwide fast-track review process running through January 13, 2012. The purpose of this pilot is to “prevent[ ] *new* low priority cases from clogging the immigration court dockets.” (emphasis added) As such, ICE attorneys are directed to review all “*incoming* cases in immigration court”<sup>4</sup> (emphasis added) and all cases appearing on the master calendar docket using the Prosecutorial Discretion Memorandum<sup>5</sup> and “a set of more focused criteria”<sup>6</sup> to identify cases “most clearly eligible and ineligible for a favorable exercise of discretion.”

The second pilot (“Pilot 2”), set to run from December 4, 2011, to January 13, 2012, is intended to test processes for the systematic review of *all* cases pending in the immigration court. Unlike Pilot 1, Pilot 2 will be launched in only two jurisdictions (Baltimore and Denver). In this pilot program, a team of attorneys from ICE, USCIS, and CBP will review cases on the non-detained dockets in the two immigration courts. It is unclear whether the attorneys will be from local DHS offices or from elsewhere. The review will be based on the factors outlined in the June 17 memo, as well as “a set of more focused criteria.”<sup>7</sup> During Pilot 2, EOIR will shift judges from the non-detained dockets in the Denver and Baltimore immigration courts to the detained dockets

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<sup>4</sup> Presumably “incoming cases in immigration court” refers to cases in which NTAs have been issued but not filed with EOIR.

<sup>5</sup> The memo is not specified but presumably this is a reference to the June 17, 2011, memorandum issued by ICE Director John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*. (“June 17 Memo”). It is unclear whether this also encompasses the second memo issued on June 17, 2011, focusing on victims, witnesses, and plaintiffs.

<sup>6</sup> The focused criteria are not specified, but presumably this is a reference to the Guidance to ICE Attorneys discussed in this practice advisory.

<sup>7</sup> It is unclear whether the criteria are the same as or different from the criteria in the Guidance to ICE Attorneys, discussed below.

to expedite the processing of detained cases.<sup>8</sup> AILA members who practice in the Baltimore and Denver immigration courts should contact the local chapters for specific guidance relating to implementation of the pilot project.

Once both pilot projects end, DHS will assess the data and implement the processes on a nationwide basis. Importantly, during the duration of the pilot projects, ICE officers are not precluded from favorably exercising prosecutorial discretion in cases outside the pilot projects. Indeed, the memo specifically directs ICE employees to continue applying the full range of factors set forth in the June 17 memo during this pilot period.

**November 17, 2011 Memorandum from Principal Legal Advisor Peter Vincent,  
Case-by-Case Review of Incoming and Certain Pending Cases (“OPLA memo”).**

This memorandum provides details about Pilot 1, the fast-track review of incoming cases and cases on the master calendar docket (described above). However, unlike the description of Pilot 1 contained in the *Next Steps Document* above, the categories of cases to be reviewed also includes non-detained cases with merits hearings scheduled through June 2012. The OPLA memo specifies that in conducting its review, each Office of the Chief Counsel (OCC) should focus on criteria from the June 17 memo and the *Guidance to ICE Attorneys* (“Guidance” described below).<sup>9</sup> According to the OPLA memo, the criteria in the Guidance are intended to help attorneys identify those cases most likely eligible or ineligible for favorable discretion. The type of discretion contemplated is administrative closure.<sup>10</sup>

To implement the OPLA memo, each OCC is directed to immediately draft and implement a standard operating procedure (SOP) establishing a process for the review. Each SOP must be approved by headquarters<sup>11</sup> and must include several specified provisions, such as a supervisory review, a notice process in cases where OCC decides to exercise discretion, and a national security and public safety check. The OCC also must establish an electronic mailbox for receipt of additional documents from respondents, and establish a system to inform respondents when a favorable exercise of prosecutorial discretion has been made. (AILA members should keep in contact with their local chapter to learn the email address to which documentation can be sent.)

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<sup>8</sup> See Notice from Brenda L. Cook, Administrator for Baltimore Immigration Court, AILA InfoNet Doc. No. 11112963; Notice from Alec Revell, Administrator for Denver Immigration Court, AILA InfoNet Doc. No. 11120169.

<sup>9</sup> The OPLA memo also directs attorneys to consider the following memos: *Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (republished on March 2, 2011); *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* (August 20, 2010); and *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011). For a discussion of these memos, see the Legal Action Center’s practice advisory, *Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client*.

<sup>10</sup> The memo explains that in other places in the OPLA memo and the Guidance to ICE Attorneys, case dismissal is also mentioned. It is unclear exactly what this reference to case dismissal means. Under existing policy, certain cases with applications or petitions for relief pending with USCIS may be entitled to have their cases dismissed and the memo could simply be referencing this. See *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* (August 20, 2010). It also is possible that the memo is referring to cases that fall within Pilot 1 in which an NTA is served but not filed yet.

<sup>11</sup> Reportedly, as of the date of this Practice Advisory, the SOP from the Denver ICE office is being reviewed by DHS headquarters. It is likely that this and other office’s SOPs will issue in the near future.

For cases where discretion is favorably exercised, the OCC is to file a joint motion for administrative closure or make an oral motion before the immigration court.

The OPLA memo also says that OPLA will issue a revised policy for the review of cases following the initial implementation period (from November 17, 2011, through January 13, 2012), incorporating any needed changes to the process. Finally, the memo notes that “at all stages of the immigration enforcement process, attorneys should consider . . . the full range of factors set forth in the [June 17 memo],” thus indicating that ICE attorneys are to continue to consider all cases for prosecutorial discretion, including those that do not fall within this fast-track review (Pilot 1).

**November 17, 2011, *Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review* (“Guidance to ICE Attorneys” or “Guidance”).**

This unattributed document was likely an internal ICE document intended to accompany the OPLA memo as further instruction to OCC regarding the fast-track review process. The Guidance to ICE Attorneys is referenced in the OPLA memo and sets out focused criteria for exercising prosecutorial discretion through this process.<sup>12</sup> The Guidance divides cases into “enforcement priorities” and “not enforcement priorities.” Cases in the first category “should generally be pursued in an accelerated manner before EOIR.” By contrast, cases in the second category should be carefully considered for prosecutorial discretion.

According to the Guidance, the enforcement priorities include individuals with nearly any type of criminal conviction, without regard to how long ago the offense occurred or the circumstances of the crime. Individuals with *any* felony conviction or multiple misdemeanor convictions, as well as individuals with a *single misdemeanor violation* involving DUI, violence or threats, assault, or flight from the scene of an accident are all included in this category. Other misdemeanor convictions mentioned are those involving sexual abuse or exploitation, drug distribution or trafficking, or “other significant threat to public safety.” In addition to those with criminal convictions, this category also includes persons who entered without inspection or violated the terms of their visas during the last three years; are gang members/human rights violators or otherwise pose a “clear threat to public safety”; were previously removed from the country; committed immigration fraud; or “who otherwise has an egregious record of immigration violations.”

Cases that are “not enforcement priorities” include (1) current members or veterans of the military or the spouse or children of such members; (2) youths who have been in the United States for more than five years and have pursued educational opportunities in the United States; (3) individuals over 65 in the United States for 10 years or longer; (4) crime victims; (5) individuals who have been LPRs for 10 years or longer who have a single, “minor” conviction for a non-violent offense; (6) individuals with serious mental or physical conditions but only if

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<sup>12</sup> The OPLA memo makes clear that this Guidance is to be used during the Pilot I fast track review of cases. Whether the guidance also is to be used in all other review of cases for prosecutorial discretion is unclear. The reference in the guidance to cases pending before the BIA would indicate a broader application than just the Pilot I fast track cases.

the condition “would require significant medical or detention resources”; and (7) individuals who have a “very long-term presence” in the United States, an immediate family member who is a U.S. citizen, have established compelling ties to the United States, and have made compelling contributions to the United States.

According to the Guidance, when an ICE attorney decides to exercise prosecutorial discretion, he or she must notify a supervisory charging official at CBP, USCIS, or ICE of the decision. If the supervisory official disagrees with the decision, the dispute is to be taken to the ICE Chief Counsel. If local resolution proves impossible, the matter is to be elevated to the Deputy Director of ICE.

Finally, the Guidance reminds ICE attorneys that decisions to exercise prosecutorial discretion are to be made on a case-by-case basis under the totality of the circumstances, and reaffirms that “the cornerstone for assessing whether prosecutorial discretion is appropriate in any circumstance” is the June 17 memo. Presumably, this paragraph refers to cases that do not fall within this fast-track review, such as cases with merits hearing after June 2012, cases which fall outside the criteria set forth in the Guidance for ICE Attorneys, and requests for motions to reopen. However, when and how these other reviews are to take place is unclear. This paragraph and other similar statements in the Next Steps Document and the OPLA Memo may engender confusion as the pilots move forward.

## QUESTIONS AND ANSWERS

### What are DHS’s enforcement priorities?

In the June 17, 2011 memo and a subsequent question and answer guide (FAQ) regarding the August 18 announcement, DHS explained that its enforcement priorities are national security, public safety, border security, and recent and repeat immigration law violators. These terms were not fully defined. However, the June 17 memo did explain that, while criminal history is a factor to be considered in all cases, “particular care and concern” is warranted only in those cases involving serious felons, repeat offenders, those with lengthy criminal records, or known gang members. Similarly, the June 17 memo explained that while past immigration history was a factor to be considered in all cases, “particular care and concern” is warranted only in cases of “egregious” immigration violators.

The documents issued on November 17 say that the June 17 memo sets forth the standard to be followed. Despite this, these documents contain contradictory information regarding how those with criminal histories or past immigration violations are to be considered. For example, the FAQ stated for the first time that DHS will have “zero tolerance” for those apprehended at the border and that removal cases involving recent border crossers will not be included in the review of cases carried out by the working group. The November Guidance goes one step further, stating that noncitizens who entered the country illegally or violated the terms of their admission *within the last three years* are deemed high priority. Because not all individuals who violated the terms of their admission within the last three years are either repeat immigration law violators or “egregious immigration violators,” this new guidance appears on its face to conflict with the June 17 memo. As a result, it is unclear to what extent an individual who entered illegally within

the last three years but who has compelling equities will be considered for prosecutorial discretion.

Similarly, the recent guidance conflicts with the June 17 memo by labeling “criminal aliens” as a high priority when the memo limits the high priority category to serious felons, repeat offenders and those with lengthy criminal histories. It is unclear to what extent an individual’s prior criminal history, no matter if minor or from the distant past, will preclude prosecutorial discretion from this point on.

### **What are low priority cases?**

Under the June 17 memo, low priority cases are to be identified in accord with a list of factors that DHS should weigh in all cases. While the June 17 memo made clear that no category of cases will receive a blanket exercise of favorable prosecutorial discretion, the memo does identify categories of individuals who are to receive particular care and attention due to certain favorable factors. These include: veterans; long-time permanent residents; minors and the elderly; individuals who have been present since childhood; individual with serious disabilities or health issues; women who are nursing or pregnant; and victims of domestic violence or other serious crimes. In all cases, DHS is to weigh the totality of the circumstances. For a full discussion of the factors in the June 17 memo, *see* the LAC practice advisory, Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client.

The November Guidance states that the June 17 memo applies and that the totality of the circumstances should be considered in all cases. Despite these general statements, however, the Guidance appears to deem at least two categories of individuals “high priority” that were not identified in the June 17 memo as such: all individuals with a criminal history (apparently without regard to the severity of past crimes) and individuals who violated the terms of their admission within the last three years. It remains to be seen whether these become categorical designations such that DHS will not exercise prosecutorial discretion in any case that falls within them.

### **Is it possible for cases with criminal convictions to be considered low priority?**

The June 17, 2011 memo makes clear that cases will be reviewed on a case-by-case basis and considered based on the totality of the circumstances presented in each individual case. There is no bright-line rule that would automatically disqualify any case. However, the memo does contain a list of negative factors that will be looked at with particular care. This list includes “serious felons, repeat offenders, and individuals with a lengthy criminal record of any kind,” as well as “known gang members.”

Nonetheless, the November Guidance lists as enforcement priorities any noncitizen with a felony conviction or multiple misdemeanor convictions, or a single misdemeanor conviction involving “violence, threats, or assault”; “sexual abuse or exploitation”; “driving under the influence of alcohol or drugs”; “flight from the scene of an accident”; “drug distribution or trafficking”; or “other significant threat to public safety.” The November Guidance thus includes as “high priority” cases unlikely to receive a favorable exercise of prosecutorial discretion many deportable offenses that would not be classified as such under the June 17 memo. As a

consequence, longtime LPRs whose cases might otherwise be considered “positive” might instead be deemed an enforcement priority based upon a prior criminal conviction. In cases such as this, attorneys should emphasize the positive factors in the case that are found in the June 17 memo and argue that the list of crimes in the November Guidance is not dispositive where favorable factors are strong.

### **What will happen to cases deemed low priority?**

According to the August 18 announcement, all cases currently before the immigration courts and the BIA will be reviewed and those that are deemed low priority will be administratively closed. Removal cases currently pending in federal court also will be reviewed, and low priority cases will be considered for a favorable exercise of prosecutorial discretion, although it is not clear what this will be. The November 17 documents provide some explanation about how DHS will proceed with the review, and we anticipate that DHS will provide additional guidance in 2012 following the completion and assessment of the pilot projects. At this point, it is unclear whether DHS will forgo initiating removal proceedings in new cases that are identified as low priority, or whether proceedings will be initiated and then administratively closed.

For matters presently before USCIS, a memorandum released by the agency in early November provides additional guidance regarding the exercise of prosecutorial discretion in the referral of cases to immigration court through Notices to Appear.<sup>13</sup>

### **What is the difference between administrative closure and termination of proceedings?**

Administrative closure is a procedural mechanism used to temporarily remove a case from the immigration court’s calendar. Under current law, a case cannot be administratively closed unless both parties agree to the closure. *Matter of Gutierrez*, 21 I&N Dec. 479, 480 (BIA 1996). A person whose case has been administratively closed remains in removal proceedings, and either party can request that the case be placed back on the court’s calendar at any time.

By contrast, termination of proceedings means that the case has ended and the respondent is no longer in removal proceedings. Upon termination, the individual will revert to the same status he or she was in prior to commencement of proceedings. If the government wants to place the individual back into removal proceedings after a case is terminated, it must file a new Notice to Appear (NTA).

Should an individual (other than an “arriving alien”) whose case has been administratively closed eventually become eligible for adjustment of status, he or she must have the removal proceedings terminated to enable USCIS to exercise jurisdiction over the adjustment application.

### **Will individuals whose cases have been administratively closed receive EADs?**

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<sup>13</sup> See USCIS Policy Memorandum, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens* (Nov. 7, 2011), AILA InfoNet Doc. No. 11110830.

In its [FAQ](#) following the August 18 announcement, DHS stated, “Per longstanding federal law, individuals affected by an exercise of prosecutorial discretion will be able to request work authorization, including paying associated fees, and their requests will be separately considered by USCIS on a case-by-case basis.”

The November 17 OPLA memo states that administrative closure is the primary form of prosecutorial discretion that will be exercised for incoming and certain pending cases. Despite what was said in the August 18 FAQ, it is not clear whether individuals whose cases are administratively closed will be able to apply for work authorization. In early December – at stakeholder meetings in Baltimore and Denver in connection with the pilot projects – DHS said that those whose cases are administratively closed will only be able to apply for employment authorization documents (EAD) if they have an independent basis for work authorization (e.g., a pending adjustment or asylum application).

AILA and other advocates are seeking additional guidance on the issuance of EADs and are advocating for EAD eligibility for those without an independent basis for work authorization. Until further guidance is provided, those who do not have an independent basis to apply for work authorization should consider requesting deferred action, which does allow the recipient to apply for an EAD (8 C.F.R. § 274.12(c)(14)).

Importantly, the Guidance states that respondents with pending asylum applications who agree to administrative closure will have their asylum clock stop upon the filing of the joint request. Consequently, asylum applicants who have not met the 180-day waiting period for EAD eligibility may want to consider the impact of administrative closure on their eligibility for work authorization before they agree to any offer of this from DHS.

### **What should I be doing now?**

With the exception of non-detained cases rescheduled by the Baltimore and Denver immigration courts, both removal proceedings and removals are expected to continue while the working group carries out its review. During this time, ICE attorneys and officers have been told to consider all cases in light of DHS enforcement priorities. Thus, you should continue to make requests for prosecutorial discretion. Requests should be made in writing and include as much supporting documentation as possible, and should be sent to the email address established by the local ICE office to receive requests for prosecutorial discretion.<sup>14</sup> (AILA members should keep in contact with their local chapter to learn the email address to which documentation can be sent.) For pending cases that will be subject to review, this will ensure that there is favorable information in the client’s file when the working group review takes place. It does not appear that respondents or their attorneys will know in advance when the review of their cases will take place. To learn more about local implementation of the guidance, attorneys may wish to consult their local AILA chapters to arrange meetings with ICE officials in their jurisdiction.

Moreover, although the working group will conduct a systematic review of all pending cases, other avenues for requesting prosecutorial discretion remain open. ICE attorneys and officers

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<sup>14</sup> For more on preparing a request for prosecutorial discretion, see [Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client](#).

still retain the authority to exercise prosecutorial discretion and now may be more amenable to exercising it favorably than in the past. Additionally, the announced review process does not include cases with final removal orders, so no systematic review of these cases is expected. For that reason, individual advocacy for prosecutorial discretion on behalf of these clients is all the more important.

You should also ensure that your clients understand that their obligations under the immigration laws remain the same. There has been much confusion and misinformation over the significance of the August and November announcements. It is important that your clients understand that the announcement is not an amnesty. For example, some individuals granted voluntary departure have been reported to believe that they no longer need to leave the country. This is simply wrong. The August and November announcements have no impact on an existing voluntary departure orders; anyone under such an order who fails to timely depart will face the consequences.<sup>15</sup>

Additionally, individuals should not seek to turn themselves into immigration authorities to obtain an EAD or otherwise test the extent to which DHS is favorably exercising prosecutorial discretion. As the DHS FAQ explains, such action carries a high risk that the individual will be placed in removal proceedings and may be ordered removed. For helpful guidance for clients, see [AILA Consumer Advisory](#).

**What can I do to assist AILA and LAC in monitoring implementation of the new guidance?**

In order to monitor how the new guidance is being implemented in the field, we need to hear your experiences with your local office. Please complete this [survey](#) and tell us about your cases. Doing so will help our ongoing liaison and advocacy efforts with DHS. Thank you!

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<sup>15</sup> For more on these consequences, see the Legal Action Center's practice advisory [Voluntary Departure: Automatic Termination and the Harsh Consequences of Failing to Depart](#).