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MAY 2012

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The Immigration Policy Center's Perspectives are thoughtful narratives written by leading academics and researchers who bring a wide range of multi-disciplinary knowledge to the issue of immigration policy.

## **ABOUT THE AUTHOR**

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## **ABOUT THE IMMIGRATION POLICY CENTER**

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## INTRODUCTION

An unresolved issue in discussions about the Obama administration's expanded use of prosecutorial discretion is that in FY [2011](#)<sup>1</sup>, nearly half of all immigrants in removal proceedings appeared "*pro se*," or without legal representation. While immigration attorneys can explain the effect of these policies to their clients, *pro se* immigrants may be unaware that new policies are even in effect. Immigrant advocates have thus been rightly [concerned](#) about whether *pro se* immigrants in removal proceedings will benefit from Immigration and Customs Enforcement's (ICE) prosecutorial discretion policies.

Unlike immigrants who have legal representation, *pro se* immigrants do not have access to information specifically directed at them explaining the exercise of prosecutorial discretion, how to obtain it, or what it means. This compounds the already serious problem that most *pro se* immigrants do not have access to information about what relief might be available to them. Moreover, whether or not they are aware of possible options for relief, they may be unaware of the implications of either accepting or foregoing an offer of prosecutorial discretion from ICE.

Underlying all of these deficiencies is a fundamental inequity—immigrants who cannot hire or find scarce *pro bono* attorneys are not entitled to government-provided representation in a deportation process that has devastating consequences, including separation from family for decades or forever.

To prevent *pro se* immigrants from falling through the cracks, immigration authorities can take a number of steps to ensure they understand what prosecutorial discretion is, how they can seek it, and what they should do after receiving (or not receiving) an offer of it. First, ICE should advise *pro se* respondents prior to reviewing their files and explain how to submit documentation for agency officials to consider. Second, if ICE declines to offer a favorable exercise of discretion, agency officials should inform *pro se* respondents how they can "appeal" the decision to higher agency officials. Third, when ICE offers a favorable exercise of discretion, the agency should provide information explaining the consequences of accepting such an offer. And finally, prior to approving a favorable exercise of discretion, Immigration Judges should affirmatively confirm that *pro se* immigrants understand these consequences.

By adopting these recommendations, immigration officials can help alleviate one of the most fundamental inequities of the removal process: that the government does not provide attorneys to immigrants who cannot afford one.

## BACKGROUND

In June 2011, ICE Director John Morton released long-awaited memoranda emphasizing the importance of prosecutorial discretion and specifying a list of factors to be taken into consideration in determining whether to pursue removal in individual cases. The following November, the agency announced a nationwide initiative to eventually review all pending and incoming cases in immigration courts around the country, with a view toward suspending those cases that did not meet agency priorities. According to ICE, these policies are aimed at focusing immigration enforcement resources on higher priority cases and [unclogging](#) immigration court caseloads.<sup>2</sup>

In the first [phases](#) of implementation of the 2011 policies, ICE attorneys with the Office of Chief Counsel (OCC) were required to conduct a nationwide review of all [incoming](#) cases in Immigration Court and to conduct a review of all [pending](#) cases in two jurisdictions (Baltimore and Denver). “Incoming” cases includes cases already on the docket but still in the preliminary procedural stages as well as new cases before they are filed with immigration courts. Cases that were favorably reviewed would not be filed with the Immigration Court or would be eligible for “administrative closure” if already pending.

These pilots were set to end on January 13, 2012. ICE would then [“promptly”](#) review data from the review processes “to determine, on an expedited basis, the best methods to implement these processes on an ongoing basis nationwide.” ICE has not announced the results of the review. However, on April 3, [EOIR](#) announced its schedule for temporarily suspending hearings in the non-detained docket in seven additional courts (Seattle, Detroit, New Orleans, Orlando, Los Angeles, San Francisco and New York City) to enable ICE to conduct a review of cases in those courts, although ICE has made no official announcement of this expansion of the review process.

As of April 16, DHS attorneys had [reviewed](#) the cases of nearly 220,000 immigrants in deportation proceedings and had found more than 16,500 (approximately 7.5%) eligible for a favorable exercise of prosecutorial discretion. Of the cases reviewed, approximately 2,700 had been administratively closed. The data does not distinguish between persons represented by an attorney and those appearing *pro se*, so it is unknown to what extent cases of *pro se* immigrants have been administratively closed or under what circumstances.

## THE NEED FOR GREATER TRANSPARENCY WHEN DEALING WITH *PRO SE* IMMIGRANTS

### Understanding Administrative Closure

There has been a general lack of transparency as ICE implements its new prosecutorial discretion guidelines, but there has thus far been a complete dearth of information from ICE aimed specifically at *pro se* immigrants, explaining how reviews would be conducted, how to ask for a favorable exercise of discretion, and what an offer of prosecutorial discretion actually entails. The primary method of exercising prosecutorial discretion for immigrants in proceedings has been through an offer to agree to “administrative closure” of a case. But without an explanation of what that means, *pro se* immigrants may accept or reject an offer without understanding the options and limitations of administrative closure.

When a case is administratively closed, removal proceedings against the individual are not terminated. Instead, they are put on hold until either the government or the individual files a motion to have the case “recalendered.” In the interim, immigrants whose cases have been administratively closed remain in whatever immigration status they possessed prior to the initiation of proceedings. When a case is administratively closed, applications for relief (such as cancellation of removal or asylum) cannot be adjudicated unless the case is put back on the calendar.

Adding to the confusion, although ICE initially indicated that persons offered administrative closure would be eligible to obtain an employment authorization document (EAD), the Department of Homeland Security (DHS) currently maintains that administrative closure itself does not entitle an immigrant to work authorization. Instead, DHS currently entertains motion for work authorization only from those who filed applications for relief from removal prior to the case being administratively closed, if such applications provide an independent basis for work authorization.

Acceptance of administrative closure has significant consequences, especially if an immigrant has the possibility of applying for some form of relief before the judge, and “unclogging” the administrative court caseload does not necessarily translate into a beneficial result for an individual immigrant. At the same time, and despite the drawbacks, administrative closure may be a positive result for an immigrant who does not have a strong legal claim for relief but has equities which warrant staying in the U.S. Even if it means remaining in immigration limbo, many *pro se* immigrants would find administrative closure preferable to near-certain deportation. Without a full appreciation of the benefits and drawbacks of accepting an offer of administrative closure, however, *pro se* immigrants will not have the tools they need to determine the right course of action in their case.

## Making the case for Prosecutorial Discretion

To date, there has been little opportunity for *pro se* immigrants to influence—or even be aware of—the decision-making process regarding the exercise of prosecutorial discretion. The review process conducted by ICE has been decidedly lawyer-centric, relying on a file review conducted by ICE attorneys in the Office of Chief Counsel (OCC). In some cases, ICE may determine on its own accord (*sua sponte*) that an offer of administrative closure is warranted, or may be warranted if additional documents are made available. In other cases, an individual, usually represented by an attorney, may affirmatively ask for prosecutorial discretion and submit supporting documentation to ICE.

The *sua sponte* method depends on ICE making a determination on an immigrant’s eligibility for a favorable grant of discretion. But *pro se* immigrants would have no way of even knowing that OCC attorneys were considering their cases, unless OCC advised them. With respect to an affirmative request to ICE, *pro se* individuals do not have access to information (since ICE has not provided it) about how to present their cases to OCC attorneys.

Attorneys, on the other hand, may learn how to apply for prosecutorial discretion through meetings with ICE in which *pro se* immigrants do not participate, with procedures, criteria and results that [vary](#) by district. In some districts, such as Dallas, attorneys have received specific information about applying for an exercise of discretion, including the names of OCC attorneys conducting reviews, the email address for submitting a request and the information to be included on the subject line, and examples of documentation to be included with the request, such as a university transcript or short summary of medical issues from a doctor. On the other hand, in the El Paso District, where advocates report resistance from ICE to implementing the policies, the announced procedures are minimal. Either way, *pro se* immigrants are at a disadvantage.

As ICE has made clear, a favorable exercise of prosecutorial discretion can be [more](#) than a decision not to file a “Notice to Appear” in Immigration Court or to offer to administratively close a pending case. It includes canceling a detainer, releasing a detained immigrant on bond, joining a motion to terminate proceedings, or stipulated to a grant of immigration relief or deferred action. An attorney would know to ask for the broader – albeit difficult to obtain – range of prosecutorial discretion avenues beyond administrative closure. But information regarding the availability or even existence of the wider range is not necessarily available to *pro se* immigrants.

## Defining the Universe of Eligible Candidates

The overall lack of clarity in the prosecutorial discretion process is compounded for particular subsets of the overall *pro se* population. For instance, ICE has not been forthcoming with information about when and how it would review the cases of the overwhelmingly unrepresented detained population, of which about [84%](#) are unrepresented.

ICE initially announced that it would *not* review the cases of detained persons, but recently told Congress that it had in fact begun to review such cases. The agency has not made any public announcements to that effect, and attorneys serving detainees or providing know-your-rights presentations in some major immigration detention centers are unaware of any change in policy. In other places, such as Miami and Washington state, advocates have only learned of a review of detained cases in informal discussions with ICE attorneys, but with no details about the nature or timing of the reviews. ICE has not indicated which cases of detained persons are being reviewed or what the review entails, or if the review could lead to an offer of administrative closure or simply release on bond.

ICE has told advocates in Washington state that a review of the detained files has identified few cases that meet the criteria but without a transparent process, it is impossible to know what that means. ICE's reported expansion of the review of existing cases to additional cities does not include detained cases. In general, ICE has been consistently negative about the likelihood of detained persons being granted a favorable exercise of discretion. Similarly, ICE continues to exclude *pro se* immigrants from other aspects of its review. The agency has also told advocates that it has begun to review cases that are pending before the Board of Immigration Appeals, but will not review of the cases of *pro se* appellants.

## **CREATING A PROCESS THAT ACCOMMODATES THE *PRO SE* APPLICANT**

Reports from various immigration courts suggest that ICE and EOIR have not created a process that allows *pro se* immigrants to make a knowledgeable decision about whether or not to pursue, or to agree to an offer of, administrative closure. While the ICE Public Advocate has indicated that the agency may be preparing educational materials for *pro se* immigrants, nothing has been made public.

Miami advocates report that some non-detained *pro se* immigrants have been given a “soft” offer of prosecutorial discretion at master calendar hearings, with a request that they present supporting evidence within ten days. But ten days may not be enough time to gather information or to make an informed decision about whether an offer of administrative closure is worth accepting. Within that time period, for example, *pro se* immigrants in Miami are unlikely to be able to schedule a consultation with one of the few organizations providing free legal services. In addition, accepting such an “exploding” offer could effectively foreclose an immigrant from filing an application for relief that might independently warrant a grant of work authorization.

Acceptance of administrative closure requires delaying – and in some cases perhaps even abandoning – a claim for relief, without an evaluation of the strength of the claim or even being advised that a claim for relief might be possible. ICE has compounded the lack of information by issuing confusing and conflicting information about eligibility for work authorization, the



availability or non-availability of which could be a decisive factor in a decision to accept an offer of administrative closure.

ICE has also said that the offer of administrative closure is a one-time offer, so an immigrant who cannot meet the short time frame may not get another chance. ICE has recently indicated to some advocates that a second review may be possible if circumstances change, but has made no public announcement to this effect, and it is not clear if this is official policy or has been communicated to OCC attorneys who will decide whether an offer will be made.

ICE has told advocates in Miami that it is not the agency's responsibility to tell immigrants that they might be eligible for relief from deportation, which they give up during the period when their cases are administratively closed. And Immigration Judges seem to be under no obligation to do that either. While Immigration Judges are required to advise respondents at a master calendar hearing about relief that may be available to them, an offer of administrative closure could well be made before that hearing occurs. To date, EOIR has not issued any instructions to immigration judges requiring them to explain what administrative closure entails before they sign an order administratively closing a case. EOIR's Master Calendar [Checklist](#) for the Immigration Judge for Pro Se Respondents includes no information regarding administrative closure.

ICE's *sua sponte* offers made on the basis of largely biographical information in an immigration file (such as length of time in the country or absence of criminal convictions) could leave out immigrants whose equities have not yet been presented, such as a single mother with children with special needs.

The ICE memos outline a broader range of factors to consider than are likely to be evidenced in an immigration file. The November 17, 2011, [guidance](#) to ICE attorneys and the June 17 [Memorandum](#) outline a long list of factors to be taken into consideration, ranging from health conditions to contributions to the community to military service of an immediate relative. An additional June 17 [Memorandum](#) from John Morton regarding prosecutorial discretion for vulnerable immigrants allows for the exercise of prosecutorial discretion for victims and witnesses to crimes and persons enforcing civil rights or engaged in protected activities like union organizing or complaining about housing discrimination.

As a result, *pro se* immigrants whose immigration files have been deemed to provide an insufficient basis for administrative closure might not have the opportunity to present evidence of compelling factors listed in the above memos.

In at least one district, the local OCC has asked the local AILA chapter to prepare a pamphlet describing administrative closure. But that is not national policy, and in any event good legal advice is necessary to understand whether it is advisable in a particular case.



## RECOMMENDATIONS TO IMPROVE THE PROCESS FOR *PRO SE* IMMIGRANTS

The fact that immigrants are largely unrepresented in immigration proceedings can only be remedied by availability of counsel. But there are some steps that ICE and EOIR can take to mitigate against the unfairness.

- ICE must be totally transparent in when, how and under what circumstances it is reviewing files and granting or denying the exercise of discretion.
- ICE should develop uniform policies and practices so that access to the grant of prosecutorial discretion does not differ from jurisdiction to jurisdiction.
- ICE should develop materials to educate immigrants about its prosecutorial discretion policies, including how to affirmatively request prosecutorial discretion. These materials should be available online, in detention facilities, and in ICE field offices.
- ICE should advise *pro se* immigrants that their files are being reviewed for consideration of prosecutorial discretion, the criteria for a favorable grant, and how to supplement their files to present compelling factors.
- ICE should advise *pro se* immigrants when the agency has decided to not favorably exercise prosecutorial after a review of their file, and should allow *pro se* immigrants to object to the denial of prosecutorial discretion and to submit evidence in support of it.
- ICE should establish a checklist for information to be provided to *pro se* immigrants when an offer of administrative closure is made, including:
  - An explanation of administrative closure;
  - The availability or non-availability of work authorization;
  - The availability of forms of prosecutorial discretion other than administrative closure, for example, termination of proceedings, stipulating to a grant of relief, or an offer of deferred action.
- Prior to administratively closing a case, immigration judges should conduct a hearing to ensure that *pro se* immigrants understand the consequences of administrative closure, providing:
  - An explanation of administrative closure;
  - The availability of relief from removal and effect of not filing or abandoning a claim for relief;
  - The availability or non-availability of work authorization;
  - The availability of forms of prosecutorial discretion other than administrative closure, for example, termination, grant of relief or deferred action.

- USCIS should grant work authorization to persons whose cases have been administratively closed, likening administrative closure to a grant of deferred action.
- An independent review should be conducted of the effect of the prosecutorial discretion policies on the due process rights of *pro se* immigrants.

## ENDNOTES

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<sup>1</sup> According to the Executive Office for Immigration Review (EOIR), FY 2011 is the first year in which more than half of the immigrants in immigration proceedings were represented by counsel. EOIR recently revised its methodology for calculating the number of persons represented in immigration proceedings, however, and upwardly adjusted its calculations for FY 2007 to FY 2010. In FY 2010 and the years before, EOIR determined representation rates by looking at whether a particular respondent was represented at a particular proceeding. For example, if a respondent appeared *pro se* in FY 2007, but subsequently obtained counsel for a proceeding in FY 2008, the respondent would be considered “unrepresented” for the first proceeding but “represented” for the second proceeding. In the FY 2011 Statistical Yearbook, EOIR determined representation rates by looking at whether a particular respondent was represented at any point of a particular case. Thus, if a respondent appeared *pro se* in FY 2007, but subsequently obtained counsel for a proceeding in FY 2008, the respondent would be considered “represented” in both FY 2007 *and* FY 2008.

<sup>2</sup> June 17, 2011 [Memorandum](#) from John Morton regarding “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens;

June 17, 2011 [Memorandum](#) from John Morton regarding “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs;

August 18, 2011 [letter](#) from Janet Napolitano announcing a review of all administrative removal cases before the Executive Office for Immigration Review to identify cases that are high enforcement priority;

November 17, 2011 [Memorandum](#) from Peter S. Vincent regarding Case-by-Case Review of Incoming and Certain Pending Cases, accompanied by updated [Next Steps](#) in the Implementation of the Prosecutorial Discretion Memorandum  
Undated [Guidance](#) to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review