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PRACTICE ADVISORY¹

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PROSECUTORIAL DISCRETION REQUESTS UNDER THE JOHNSON ENFORCEMENT PRIORITIES MEMORANDUM

By the American Immigration Council and the American Immigration Lawyers Association

On November 20, 2014, Homeland Security Secretary Jeh Johnson issued new guidance on the Department's civil immigration enforcement priorities. The new memorandum, entitled [Policies for the Apprehension, Detention and Removal of Undocumented Immigrants](#) (hereinafter, "Enforcement Memo"), governs the activities of U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). The Enforcement Memo, which went into effect on January 5, 2015, specifies the categories of noncitizens at greatest risk of deportation, provides guidance on the exercise of prosecutorial discretion by immigration officers and the use of detention space, and imposes new data tracking requirements.

The [preliminary injunction](#) in *State of Texas, et al v. United States, et al.*, No. 1-14-CV-254 (S.D.Tex.), which temporarily blocks the implementation of two forms of prosecutorial discretion—the expanded Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) initiatives—[does not enjoin](#) the new enforcement priorities set forth in the Enforcement Memo. Individuals who do not fall within the enforcement priorities—including all or substantially all potential expanded DACA and DAPA requestors as well as many other individuals—should continue to pursue prosecutorial discretion when faced with enforcement action. However, given the preliminary injunction, which binds not only DHS and its component agencies but also EOIR, counsel should focus prosecutorial discretion requests on why the client is not an enforcement priority and what positive equities the client has that warrant a favorable exercise of prosecutorial discretion—**not** whether the client is eligible for expanded DACA or DAPA.

I. Enforcement Priorities

The Enforcement Memo explains that, because of limited resources, DHS should focus its immigration enforcement efforts on cases that fall within the following priorities:

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Priority One focuses on “threats to national security, border security, and public safety.” Such individuals include: persons engaged in or suspected of terrorism or espionage, persons apprehended at the border while attempting to enter unlawfully, persons at least 16 years of age who intentionally participated in an organized gang, any person convicted of an offense for which an element was active participation in a criminal street gang (defined under federal law), and persons convicted of a felony in the convicting jurisdiction or an aggravated felony under the Immigration and Nationality Act.²

Priority Two focuses on “misdemeanants and new immigration violators.” Such individuals include: persons convicted of three or more misdemeanors arising out of separate incidents, not including minor traffic offenses and state convictions where immigration status is an element; significant visa “abusers”; persons who unlawfully entered or re-entered the United States and have not been continuously present in the United States since January 1, 2014; and persons convicted of a significant misdemeanor. A “significant misdemeanor” is defined as an offense of domestic violence,³ sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, driving under the influence, or any misdemeanor for which the person was sentenced to serve 90 days or more in jail, excluding suspended sentences.

Priority Three focuses on people who have committed “other immigration violations.” This category is limited to individuals who have been issued a final order of removal on or after January 1, 2014.

II. Exceptions

Even individuals who appear to fall within one of the enumerated enforcement priorities may ultimately be found not to be a priority and receive prosecutorial discretion based on the exceptions specified in the Enforcement Memo. Under a plain reading of the memo, if you demonstrate to the relevant DHS official that your client meets the applicable standard to be excepted from the priority category that seemingly applies to him or her, *your client is not an enforcement priority*.⁴ Below is a table setting forth the relevant DHS officials and the applicable standards that must be met to argue that an individual does not in fact fall within the priority in question.

² Earlier, now withdrawn agency guidance on prosecutorial discretion acknowledged that an “aggravated felony” includes serious, violent offenses in addition to less serious, non-violent offenses and that the former should be prioritized. This qualification was omitted from the Enforcement Memo.

³ In the case of significant misdemeanors involving domestic violence, DHS officials are directed to consider whether the convicted individual was also a victim of domestic violence, which should be a mitigating factor. Enforcement Memo at 4, n.1.

⁴ The Enforcement Memo provides that the “removal of [individuals in Priority 1] must be prioritized *unless* . . . in the judgment of an ICE Field Office Director, CBP Sector Chief or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and *should not therefore be an enforcement priority*.” Enforcement Memo at 3 (emphasis added). “Unless” clauses appear following *all* of the enumerated priority categories, though note that for Priorities 2 and 3, the Enforcement Memo requires a lesser showing than “compelling and exceptional factors[.]” *Id.* at 3-4. This language is set forth anew in subsection D of the Enforcement Memo, which is discussed below. *Id.* at 5.

Table 1: Exceptions to the Enforcement Priorities

	Priority 1	Priority 2	Priority 3
Who is the DHS decision maker?	ICE Field Office Dir. CBP Sector Chief CBP Dir. of Field Ops	ICE Field Office Dir. CBP Sector Chief CBP Dir. of Field Ops USCIS District Dir. USCIS Service Center Dir.	An immigration officer
What is the standard?	Compelling and exceptional factors that clearly indicate person is not a threat to national security, border security, or public safety.	Factors indicating person is not a threat to national security, border security, or public safety.	Not a threat to integrity of the immigration system or factors suggesting person should not be a priority.

Though attorneys have reported little success in persuading DHS that their clients merit an exception, counsel should continue to raise these arguments with the relevant officials and [report](#) problems to the American Immigration Lawyers Association and the American Immigration Council.

In deciding whether a person who appears to fall within one of the enumerated priorities should ultimately be found not to be a priority, DHS personnel are instructed to consider the following non-exhaustive list of factors:

- extenuating circumstances involving the offense of conviction;
- extended length of time since the offense of conviction;
- length of time in the United States;
- military service;
- family or community ties in the United States;
- status as a victim, witness or plaintiff in civil or criminal proceedings; and
- compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative.⁵

III. Relationship To Prior Guidance

The Enforcement Memo supersedes and rescinds several earlier memos on immigration enforcement priorities and operations.⁶ It leaves intact two recent memoranda on prosecutorial

⁵ Enforcement Memo at 6.

⁶ The new guidance rescinds and supersedes the following memoranda: John Morton, [Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens](#), March 2, 2011; John Morton, [Exercising Prosecutorial Discretion Consistent with the Civil Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens](#), June 17, 2011; Peter Vincent, [Case-by-Case Review of Incoming and Certain Pending Cases](#), November 17, 2011; [Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice](#)

discretion — a 2011 memorandum promulgated by former ICE Director John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, and a 2011 USCIS policy memorandum on *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear*.

Like prior guidance, the Enforcement Memo:

- Sets the agency’s civil immigration enforcement priorities as the standard for the exercise of prosecutorial discretion in most cases. However, it permits the apprehension, detention and removal of any noncitizen if an ICE Field Office Director determines that such enforcement action “would serve an important federal interest.”⁷
- Emphasizes the broad scope of options to exercise prosecutorial discretion by supplying a list of examples of the types of decisions that can be made. Notable among these are the decisions on:
 - Whether to issue, serve, file, or cancel a Notice to Appear (NTA) — Arguably, this gives an ICE officer the flexibility to allow a respondent to accrue the necessary continuous residence or continuous physical presence time for LPR and non-LPR cancellation, respectively;
 - Whom to stop, question, or arrest;
 - Whom to detain or release;
 - Whether to settle, dismiss, appeal or join in a motion on a case — This appears to apply at all stages of removal proceedings, including federal court appeals;
 - Whether to grant deferred action, parole, or a stay of removal.
- Sets forth the following relevant factors to be considered in determining whether an individual is an enforcement priority, although the list is not intended to be exhaustive and decisions must be based on the “totality of the circumstances.”
 - Extenuating circumstances involving the offense of conviction;
 - Extended length of time since the offense of conviction;
 - Length of time in the United States;
 - Military service;

Systems, December 21, 2012; *National Fugitive Operations Program: Priorities, Goals, and Expectations*, December 8, 2009.

⁷ Enforcement Memo, at 5. This standard recalls a November 12, 2000 memo from Legacy INS Commissioner Doris Meissner, which articulated the standard for prosecutorial discretion as whether a “substantial federal interest” was present. <http://www.legalactioncenter.org/sites/default/files/docs/lac/Meissner-2000-memo.pdf> (at 4-5). The Meissner Memo took the “substantial federal interest” standard from the United States Attorneys’ Manual (USAM), which requires government attorneys to weigh the following considerations, among others, to determine if such an interest exists:

- (1) Federal law enforcement priorities;
- (2) The nature and seriousness of the offense;
- (3) The deterrent effect of prosecution;
- (4) The person's culpability in connection with the offense;
- (5) The person's history with respect to criminal activity;
- (6) The person's willingness to cooperate in the investigation or prosecution of others; and
- (7) The probable sentence or other consequences if the person is convicted.

See U.S. Dep’t of Justice, USAM 9-27.230 (1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

- Family or community ties in the United States;
 - Status as a victim, witness or plaintiff in civil or criminal proceedings;
 - Compelling humanitarian factors such as poor health, age, pregnancy, a young child, or seriously ill relative.
- Encourages DHS officials to exercise discretion as early in a case or proceeding as possible.

IV. Detention

Unless an individual falls under one of the enforcement priorities or is subject to mandatory detention, he or she should only be detained under extraordinary circumstances. Thus counsel should advocate for the release of clients who are detained but who are not described in—or satisfy an exception to and thus do not fall within—the enforcement priorities. Officers and special agents must obtain approval from the ICE Field Office Director to detain someone who is known to be suffering from serious physical or mental illness; who is disabled, elderly, pregnant, or nursing; who demonstrates that he or she is the primary caretaker of children or an infirm person, or whose detention is not otherwise in the public interest.

V. Implementation

Since the Enforcement Memo was issued, ICE has committed to reviewing all pending cases of detained individuals in removal proceedings to determine whether they fall within the new enforcement priorities.⁸ ICE has indicated further that cases of non-detained individuals in removal proceedings who do not fall within the enforcement priorities may be administratively closed upon request. However, based on ICE's implementation of previous prosecutorial discretion memoranda, counsel should not wait for ICE to complete its review, and instead should approach the relevant ICE official and proactively identify clients who merit a favorable exercise of prosecutorial discretion. For more information on the process for seeking prosecutorial discretion from ICE, see the [ICE Immigration Action Webpage](#). Where ICE improperly denies prosecutorial discretion, counsel should escalate the request consistent with the AILA Practice Pointer entitled, [Escalating Requests for Prosecutorial Discretion](#), AILA Doc. No. 14052104.

For a more in-depth discussion of prosecutorial discretion in the immigration context and practical advice on how to advocate for a favorable exercise of prosecutorial discretion for your client, see American Immigration Council Practice Advisory, [Prosecutorial Discretion: How to Advocate for Your Client](#) (March 18, 2015). To seek assistance from the American Immigration Lawyers Association and the American Immigration Council in escalating a prosecutorial discretion request to DHS, please complete the designated [form](#).

⁸ See ICE Immigration Action Webpage, available at <http://www.ice.gov/immigrationaction>.