

Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities



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A Road Map

The ICE Mission

- Strategic Plan (Goals and Objectives)
- Priorities
- Criteria for Review

Application of Hypothetical Scenarios



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The ICE Mission

ICE's primary mission is to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration.



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ICE's Four Primary Goals

- Prevent terrorism and enhance security
- Protect the borders against illicit trade, travel, and finance
- Protect the borders through smart and tough interior immigration enforcement
- Construct an efficient, effective agency



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ICE Priorities Relating to Civil Immigration Enforcement

Priority #1

- Aliens who pose a danger to national security or risk to public safety

Priority #2

- Recent illegal entrants

Priority #3

- Aliens who are fugitives or otherwise obstruct immigration controls



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Fiscal Year 2011 Removals

In Fiscal Year (FY) 2011, ICE removed approximately 386,443 aliens. Of the total number of aliens removed, 202,169 had a criminal conviction, which is nearly 55 percent of the aliens. In total, 90 percent of the removals in FY 2011 fell within one of ICE's enforcement priorities. ICE removed more aliens than at any other point in our nation's history.



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A Few Words About Prosecutorial Discretion

What is it?

“Prosecutorial discretion is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone In the immigration context, the term applies not only to the decision to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions”

INS Commissioner Doris Meissner memorandum, *Exercising Prosecutorial Discretion* (November 17, 2000).



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A Few Words About Prosecutorial Discretion (Cont.)

Courts recognize that prosecutorial discretion applies in the civil, administrative arena just as it does in criminal law. The Supreme Court “has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).



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A Few Words About Prosecutorial Discretion (Cont.)

Prosecutorial Discretion limits:

“The doctrine of prosecutorial discretion applies to enforcement decisions, not benefit decisions . . . [A] grant of an immigration benefit, such as naturalization or adjustment of status, is a benefit decision that is not a subject for prosecutorial discretion.”

INS General Counsel Bo Cooper memorandum, *INS Exercise of Prosecutorial Discretion* (July 11, 2000).



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A Few Words About Prosecutorial Discretion (Cont.)

The June 17, 2011 memorandum from Director John Morton includes a non-exhaustive list of factors that should prompt particular care and consideration. Each case may present additional factors that may impact the discretionary determination. These factors must be considered on a case-by-case basis based on the totality of the circumstances presented by the individual case.

ICE Director John Morton memorandum, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011).



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A Few Words About Prosecutorial Discretion (Cont.)

ICE may exercise prosecutorial discretion at any stage of an enforcement proceeding. It is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding.

ICE Director John Morton memorandum, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011).



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Factors to Consider

The following should prompt (positive) particular care and consideration:

- Veterans and members of the U.S. armed forces;
- Long-time lawful permanent residents;
- Minors and elderly individuals;
- Individuals present in the United States since childhood;
- Pregnant or nursing women;
- Victims of domestic violence, human trafficking, or other serious crimes;
- Individuals who suffer from a serious mental or physical disability; and
- Individuals with serious health conditions.



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Additional Factors to Consider

The following should prompt (negative) particular care and consideration:

- Individuals who are suspected terrorists or pose a clear risk to national security;
- Felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
- Known gang members, human rights violators, or other individuals who pose a clear danger to public safety; and
- Individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.



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Case Pending in Federal Court

When considering the exercise of prosecutorial discretion in a case that is pending before a Circuit Court or District Court, the ICE attorney should engage and work closely with the Department of Justice (DOJ) Office of Immigration Litigation or U.S. Attorney Office attorney assigned to the case to ensure that all ICE and DOJ equities are known and addressed.



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Enforcement Priorities vs. Non-Enforcement Priorities

Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review



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The following cases are **enforcement priorities** and should generally be pursued in an **accelerated manner** before EOIR. These cases involve an alien—

- who is a suspected terrorist or national security risk;
- who has a conviction for—
 - a felony or multiple misdemeanors,
 - illegal entry, re-entry, or immigration fraud, or
 - a misdemeanor violation 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 threat to public safety;



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Enforcement Priorities (Cont.)

- who is a gang member, human rights violator, or other clear threat to public safety;
- who entered the country illegally or violated the terms of their admission within the last three years;
- who has previously been removed from the country;
- who has been found by an immigration officer or immigration judge to have committed immigration fraud; or
- who otherwise has an egregious record of immigration violations.



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The following cases are generally **not enforcement priorities** and should be carefully considered for prosecutorial discretion on a case-by-case basis. These cases involve an alien—

- who is a member in good standing of the Coast Guard or Armed Forces of the United States, an honorably discharged veteran of the Coast Guard or Armed Forces of the United States, or the spouse or child of such a member or veteran;
- who is a child, has been in the United States for more than five years, and is either in school or has successfully completed high school (or its equivalent);
- who came to the United States under the age of sixteen, has been in the United States for more than five years, has completed high school (or its equivalent), and is now pursuing or has successfully completed higher education in the United States;



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Not Enforcement Priorities (Cont.)

- who is over the age of sixty-five and has been present in the United States for more than ten years;
- who is a victim of domestic violence in the United States, human trafficking to the United States, or of any other serious crime in the United States;
- who has been a lawful permanent resident for ten years or more and has a single, minor conviction for a non-violent offense;
- who suffers from a serious mental or physical condition that would require significant medical or detention resources; or



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Not Enforcement Priorities (Cont.)

- who has very long-term presence in the United States, has an immediate family member who is a United States citizen, and has established compelling ties and made compelling contributions to the United States.



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Exercising Prosecutorial Discretion Administrative Closure

The criteria set forth in the *Guidance to ICE Attorneys Reviewing CBP, USCIS, and ICE Cases Pending Before the Executive Office for Immigration Review*, should prompt particular care and consideration and are intended to aid attorneys in identifying the cases most likely to be either eligible or ineligible for a favorable exercise of discretion. Based on this review, ICE attorneys should decide whether the proceedings before EOIR should continue or whether prosecutorial discretion in the form of **administrative closure** is appropriate. This guidance in no way replaces or supersedes existing policies or previous memoranda from Director Morton that address specific types of cases where the exercise of prosecutorial discretion may be considered.



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Special Rule for Asylum Cases

ICE attorneys may agree to the administrative closure of removal proceedings of an individual who filed an asylum application in the individual jointly requests administrative closure with the immigration judge. Upon the filing of such a joint request, however, the individual will be subject to 8 C.F.R. § 208.7(a)(2) which tolls the 180-day clock for employment authorization eligibility



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One last thing before the hypothetical scenarios ...

“The decision [to exercise prosecutorial discretion] should be based on the totality of the circumstances, not on any one factor considered in isolation. General guidance such as this cannot provide a ‘bright line’ test that may easily be applied to determine the ‘right’ answer in every case. In many cases, minds reasonably can differ, different factors may point in different directions, and there is no clearly ‘right’ answer.”

INS Commissioner Doris Meissner memorandum, *Exercising Prosecutorial Discretion* (November 17, 2000).



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Hypothetical Scenarios

The following are practical scenarios intended to promote discussion and debate. They are composites of typical cases encountered by OCCs. They are meant as a training tool to identify and analyze positive and negative factors to aid you in deciding whether or not to exercise prosecutorial discretion.

For each hypothetical scenario, consider the June 17, 2011 memorandum and the *Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review*.



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Scenario 1

An alien present without inspection is encountered by ERO Criminal Alien Program (ERO-CAP) after being arrested by a state trooper for driving without a license. Within a day, she pays her state bond and is turned over to ICE custody pursuant to a detainer.

She tells the ERO officer that this is her first arrest since entering the United States in May 1993 somewhere outside of Nogales, Arizona. She has a 13-month-old son who was born in the United States. She states that she has never been arrested before; however, her RAP sheet reveals other arrests since 1993 for driving without a license, driving without registration, and failure to display tags. She also has a 1995 conviction for shoplifting. ERO determines bond at \$7,500.



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Scenario 2

An alien from the United Kingdom entered the United States in 2008 with an F-1 visa to study at the College of Higher Learning. Since entering the country, the alien has not enrolled in the school. Instead, he began working as a chef in a local restaurant, where his culinary skills have earned him and the restaurant many accolades and publicity. He is currently living with and taking care of his USC (naturalized) brother who suffers from advanced Parkinson's disease. The alien has no criminal history.

He is now in removal proceedings and he tells the court that his brother filed an I-130 last week.



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Scenario 3

An ICE Special Agent is working on an investigation that is rapidly reaching the grand jury stage. It targets a large-scale operation specializing in the production and distribution of fraudulent documentation. If successful, this case will dismantle the distributor for the bulk of fake IDs in the community.

The key witness is currently in removal proceedings for entering the United States without inspection. He has no criminal history but became aware of this operation after he received a fraudulent EAD card. His testimony can link the key players and explain the basic operation as well as the initial predication for the investigation. This alien is scheduled for a removal hearing in one week and GEMS indicates that, if no applications are filed, he will be ordered removed.

What can be done if the Special Agent contacts the OCC *after* an order is entered?



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Scenario 4

An LPR since 1985 applied for naturalization. While the N-400 was being adjudicated, the LPR was diagnosed with pancreatic cancer. USCIS denied the petition and referred the matter to HSI based on evidence that the LPR was convicted of theft over \$1,000 in 1984 and failed to disclose this on his application to adjust status. He has been taken into ICE custody.

Other than the theft, for which he received a suspended sentence of one year, he has had no other law enforcement contacts in the United States. He is married to an LPR and the couple has three USC children. For the past 20 years he has been a small business owner, regularly pays taxes, and has been involved with community theater. As HSI is preparing to serve an NTA, they are informed that the alien has just been informed by his doctor that the cancer has advanced and he has one year left to live at most.



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Scenario 5

An LPR who entered the United States legally in 1988 as the son of an LPR is encountered by ERO-CAP following a conviction for carrying an illegal firearm.

The alien is placed into proceedings, charged with a firearms offense pursuant to INA § 237(a)(2)(C), and is subject to mandatory detention. Reviewing the I-213, the trial attorney learns that the alien is married to a USC who is currently serving in the U.S. Coast Guard. They have a 5-year-old USC daughter who is in good health. The alien is currently employed as the manager of a sandwich shop and shares equal childcare responsibilities with his wife. He has no prior criminal history.

In advance of the master calendar hearing, the alien's attorney requests that prosecutorial discretion be exercised and his case either be terminated or fast-tracked toward a stipulated grant of cancellation of removal.



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Scenario 6

An alien was granted adjustment of status in 1998 based on an approved I-130 filed by his USC brother. The alien owns a home in the United States and has several USC family members. While the alien has made several casual and brief trips to his native country in the past, since 2009, he has not actually resided in this country. The alien recently entered the United States at a local airport and, after an interview in secondary, was paroled into the United States but charged with abandoning his LPR status.

At the initial master calendar hearing, his attorney asks to approach the bench and explains that the alien had intended to reside in the United States but had been unable to do so because he had been employed by the United Nations Children's Fund (UNICEF) for the past several years and was unable to quit his position.

His attorney has filed a motion to terminate proceedings.



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Scenario 7

An LPR since 1984 is encountered by ERO-CAP after serving a 6-year sentence for a federal conviction relating to transportation of individuals across state lines with the intent of having them engage in prostitution.

The alien is now in ICE custody and charged as an aggravated felon. While he has a fairly extensive juvenile record with local law enforcement (now sealed), this is his first conviction as an adult. Prior to getting involved in prostitution, the alien received an honorable discharge from the U.S. Army, where he served two tours in Iraq and was injured during combat.

His attorney tells the trial attorney that the alien has no memory of his early years in his native Palau because he and his parents came to the United States when he was 2 years old.

His attorney also states that the alien is needed to take care of his ailing LPR father because his LPR mother cannot bear the burden alone.

A formal request for PD is delivered to the OCC.



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Scenario 8

A Mariel Cuban, who has since adjusted to LPR status, has just been convicted of assault on a police officer and sentenced to 10 years in state prison.

Aside from this conviction, the alien has several citations and convictions stemming from marijuana possession and distribution. ICE had appropriately placed a detainer on him.

The Department of Corrections (DOC) has just informed ICE that, due to advanced renal failure, DOC has determined that humanitarian parole is appropriate to allow the alien to receive requisite medical treatment. In addition, the DOC reported some strange behavior recently that is indicative of early signs of dementia.

The alien is now coming into ICE custody. What is the appropriate course of action for the OCC?



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Scenario 9

An alien, currently 20 years old, entered the United States without inspection in January 2004. In 2010, she was placed in removal proceedings when she was discovered attempting to purchase a fraudulent LPR card. The alien has no criminal record and has a USC one-year-old daughter. The alien has a non-life-threatening medical condition that is being treated with antibiotics and her daughter suffers from tonsillitis and asthma. Although the alien is a graduate of a U.S. high school, she recently lost her job. She claims she was confused regarding the proper process to obtain immigration status. There are no forms of relief available to the alien.

The alien's attorney requests that ICE exercise prosecutorial discretion and administratively close her removal proceedings.



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Scenario 10

An alien entered the United States without inspection in January 1996. In 2001, he was issued an NTA and was placed in removal proceedings. The alien received an in absentia order of removal in 2003. In 2010, an immigration judge granted a motion to reopen the alien's immigration case, based on lack of notice. The alien has no criminal record and has twin USC one-year-old daughters. His wife currently has no immigration status. The alien is a soccer coach at a local elementary school. Through no fault of his own, the alien's immigration case has been delayed for several years. There are no forms of relief available to the alien.

The alien's attorney requests that ICE exercise prosecutorial discretion and administratively close her removal proceedings.



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