


## Appendix I



U.S. Department of Justice  
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, DC 20530

January 19, 2000

The Honorable Barney Frank  
U.S. House of Representatives  
Washington, DC 20515

Dear Congressman Frank:

Thank you for your November 4, 1999, letter to the Attorney General and the Commissioner of the Immigration and Naturalization Service (INS) regarding the INS' use of prosecutorial discretion to ameliorate certain harsh consequences associated with the 1996 immigration reforms. Separate, identical letters of reply have been sent to your 27 cosigners.

The INS has long exercised prosecutorial discretion in its enforcement activities. Before the 1996 amendments to the Immigration and Nationality Act (INA), however, the law also provided immigration judges with broad discretionary authority to grant relief from deportation to many aliens placed in deportation proceedings as a result of their criminal convictions or other grounds of deportation. This discretionary authority to grant substantive relief and confer permanent legal status — an authority entirely separate and distinct from INS prosecutorial discretion — was sharply curtailed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3069. The IIRIRA eliminated both the possibility of relief from deportation and the possibility of bond for many criminal and other aliens placed in deportation and/or removal proceedings who previously would have been eligible for relief.

Consequently, the IIRIRA rendered the exercise of prosecutorial discretion by the INS the only means for averting the extreme hardship associated with certain deportation and/or removal cases. Currently INS officers are equipped with substantial rules and guidance regarding the exercise of discretionary functions. Still, the Department of Justice (DOJ) and the INS believe that INS officers would benefit from additional guidance in the area of prosecutorial discretion. The INS is now working to develop this guidance, which will promote consistency and address the initiation or termination of removal proceedings in cases with the potential for extreme hardship. Unfortunately, prosecutorial discretion guidelines —

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without carefully drafted substantive amendments to the INA — remain an inadequate tool to alleviate the excessively harsh consequences of the 1996 amendments in truly exceptional cases.

Before the 1996 amendments, the INA afforded immigration judges ample authority to review and grant relief in compelling deportation cases involving what your letter refers to as "unjustifiable hardship." Most significantly, many long-time lawful permanent residents (LPRs) without serious felony histories could apply for a waiver of virtually all deportation grounds. Also, in seeking relief from deportation, a respondent could attempt to prove that his or her positive equities (e.g., family ties in the United States, evidence of hardship if deportation occurs) outweighed relevant negative factors (e.g., seriousness and recentness of crimes). This allowed an immigration judge to assess all of the circumstances of a case before rendering a decision.

Congress in 1996 enacted far-reaching immigration amendments that eliminated relief from deportation for a large number of criminal aliens. The IIRIRA significantly expanded the definition of "aggravated felony" for deportation purposes and barred LPRs from obtaining any relief from deportation if they had been convicted of an aggravated felony, regardless of the date of conviction. While these amendments have substantially assisted the INS in removing dangerous criminal aliens from the United States, we share your concern that the execution of the revised immigration laws has at times severely impacted certain long-time LPRs who committed relatively less serious crimes some time ago and who do not appear to pose a current risk to public safety. Not surprisingly, these limitations on the availability of relief for aliens subject to removal proceedings have focused increased attention on the INS' use of prosecutorial discretion.

Your letter specifically asks whether the INS believes that the 1996 amendments to the INA eliminated this discretion. The IIRIRA did not alter the INS' fundamental authority to exercise prosecutorial discretion. Indeed the new §242(g) of the INA, 8 U.S.C. §1252(g) (Supp. IV 1998), specifically recognizes the INS' prosecutorial discretion to decide whether or not to commence a removal proceeding. In fact, by expanding the classifications of criminal aliens for whom no statutory relief from removal exists, the IIRIRA rendered the exercise of prosecutorial discretion the only means for averting the extreme hardship associated with certain removal cases.

In enforcing the immigration laws, INS officers are equipped with substantial rules and guidance regarding the exercise of discretionary functions. Part 239 of the INS regulations in chapter 8 of the Code of Federal Regulations identifies the INS officers who are authorized to commence removal proceedings and states the reasons that can support cancellation of notices to appear, including that the circumstances of the case have changed to such an extent that continuation is no longer in the

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best interests of the Government. Immigration officers also receive guidance and training regarding specific discretionary decisions such as when to grant voluntary departure, deferred action, or stays of removal.

The INS exercises prosecutorial discretion with respect to many enforcement decisions. For example, the INS exercises prosecutorial discretion when deciding whether to initiate a removal case, to allow an alien to withdraw an application for admission, to grant voluntary departure, or to defer enforcement action. Similarly, the INS may parole an inadmissible alien into the United States for "urgent humanitarian reasons or significant public benefit." We also agree that more can be done to encourage these uses of prosecutorial discretion to avoid unnecessary hardship.

However, I would be remiss if I left the impression that prosecutorial discretion can solve the problems set forth in your letter. As an initial matter, the fact that the INS may forego commencing a removal proceeding does not cure the underlying immigration violation. Unlike the criminal laws, the immigration laws do not contain generally applicable statutes of limitation that allow past violators to move on with their lives after a sufficient time without fear of further enforcement consequences. On the contrary, a removable alien (even an LPR) against whom the INS does not initiate removal proceedings will likely confront problems long into the future. For example, an immigrant who travels outside the United States and attempts to re-enter may not be admissible. Even if the INS finds "urgent humanitarian reasons or [a] significant public benefit" for parole, the alien will remain in a legal limbo thereafter, paroled but ineligible for permanent admission to the country.

Another concern with the exercise of prosecutorial discretion is that if a law enforcement agency provides instructions or regulations on the exercise of prosecutorial discretion that are unduly formalized or rigid, such guidance may potentially be considered to establish a substantive process for conferring an immigration benefit. Stated differently, certain criminal aliens seeking to avoid removal could attempt to use such guidance to obtain judicial review of discretionary enforcement decisions appropriately within the province of the Executive Branch.

Finally, although Congress reaffirmed in the IIRIRA the INS' prosecutorial discretion to commence removal proceedings against an alien, it did the opposite with respect to the agency's discretion to release criminal aliens once the INS institutes proceedings. Under INA §236(c), Congress expressly limited the discretion the INS otherwise would have had to release lawfully admitted aliens, aliens who cannot be removed, and aliens cooperating with a criminal investigation even if these individuals have committed relatively minor crimes and pose neither a danger to the community nor a flight risk.

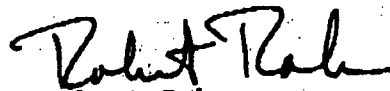
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Additional INS prosecutorial discretion guidance cannot eliminate all controversy about immigration enforcement decisions. Immigration officers entrusted with the difficult responsibility of enforcing our immigration laws consistently, fairly and thoroughly will continue to be required to make difficult decisions, often without the optimal time and information with which to do so. Guidelines on prosecutorial decisions — no matter how comprehensive or how carefully implemented — remain an inadequate substitute for the more thorough evidentiary processes previously available under the INA, wherein an experienced immigration judge could review evidence and elicit testimony.

For these reasons, I urge you to reject the notion that prosecutorial discretion, even wisely exercised, can provide an adequate substitute for sound administrative adjudication. We will continue to develop guidelines to make the most of this limited tool. Nevertheless, we also need your support for remedial legislation. As always, I remain committed to working with Congress to ensure the highest standards of deliberation and justice in the design and implementation of our Nation's immigration laws.

I appreciate your concern and your comments, and trust that you will not hesitate to contact me if I can be of assistance.

Sincerely,



Robert Raben  
Assistant Attorney General