


AUG 15 2017



U.S. Immigration
and Customs
Enforcement

MEMORANDUM FOR: All OPLA Attorneys

FROM: Tracy Short
Principal Legal Advisor 

SUBJECT: Guidance to OPLA Attorneys Regarding the Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement

In coordination with the U.S. Department of Homeland Security (DHS), Office of the General Counsel (OGC), the Office of the Principal Legal Advisor (OPLA) provides this additional guidance to implement former Secretary John Kelly's February 20, 2017, memorandum, *Enforcement of the Immigration Laws to Serve the National Interest* (Interior Enforcement Memorandum).¹ This guidance builds upon Acting General Counsel Joseph Maher's August 10, 2017, memorandum, *Implementing the President's Immigration Enforcement Policies*, and further details the processes that OPLA attorneys will implement in executing the Department's enforcement priorities and exercising prosecutorial discretion.²

I. DHS's Enforcement Priorities:

In support of the Secretary's Interior Enforcement Memorandum, OPLA attorneys are directed to prioritize legal services supporting the timely removal of the following aliens:

1. Aliens described in sections 212(a)(2), (a)(3), and (a)(6)(C), 235(b) and (c), and 237(a)(2) and (a)(4) of the Immigration and Nationality Act (INA);
2. Aliens who have been convicted of any criminal offense;
3. Aliens who have been charged with any criminal offense that has not been resolved;
4. Aliens who have committed acts which constitute a chargeable criminal offense;

¹ Available at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf (outlining the role of DHS in implementing Executive Order No. 13,768, *Enhancing Public Safety in the Interior of the United States*, 82 Fed. Reg. 8799 (Jan. 25, 2017)).

² This memorandum incorporates the Acting General Counsel's memorandum, and all OPLA attorneys should be familiar with the memorandum when implementing this guidance.

5. Aliens who have engaged in fraud or willful misrepresentation in connection with any official matter before a government agency;
6. Aliens who have abused any program related to receipt of public benefits;
7. Aliens who are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or
8. Aliens who, in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

These priorities serve as a guide for OPLA attorneys to focus OPLA's limited resources in executing U.S. Immigration and Custom Enforcement's (ICE) mission. Cases within the categories prescribed should be prioritized over other cases, and resources should be focused accordingly. However, the fact that an individual alien does not fall within one of these categories does not preclude an enforcement action against that alien.

At the same time, in implementing this guidance, OPLA attorneys are reminded that the positions they take may affect the entire Department, including other components such as U.S. Citizenship and Immigration Services (USCIS) and U.S. Customs and Border Protection (CBP). Accordingly, OPLA must ensure appropriate coordination with other interested component counsel offices and DHS OGC headquarters divisions.

II. Cases Previously Administratively Closed for Prosecutorial Discretion:

Effective immediately, each Office of Chief Counsel (OCC) should review all cases previously administratively closed for prosecutorial discretion to determine whether the basis for administrative closure remains appropriate under DHS's enforcement priorities. These cases should be reviewed with consideration given to the underlying basis for administrative closure as well as protecting the public safety and national security interests of the United States.³ The OCCs should prioritize, on a case-by-case basis, filing motions to recalendar in administratively closed cases where there is a criminal history or evidence of fraud.

III. EOIR Docket Efficiency:

The efficient litigation of proceedings before the Department of Justice Executive Office for Immigration Review (EOIR) is a key strategic priority of DHS. *See* Memorandum from John Kelly, Secretary of Homeland Security, *Implementing the President's Border Security and Immigration Enforcement Improvements Policies* 6-7 (Feb. 20, 2017) (discussing the "unacceptable delay" in average case processing times before the immigration courts).⁴ Delays in the removal process frequently benefit the removable alien, and adversely impact the ability of

³ If the matter was administratively closed for any reason other than prosecutorial discretion (e.g., awaiting adjudication by USCIS), the decision on whether to file the motion to recalendar will be made by the Chief Counsel, or his or her designee, on a case-by-case basis after appropriate consultation with the relevant components, such as with USCIS regarding the status of that application and the likelihood of its approval.

⁴ Available at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

DHS to enforce the immigration laws. Accordingly, OPLA leadership at the headquarters and field levels should coordinate with EOIR to ensure that aliens who meet the above enforcement priorities remain on active immigration court dockets, and that their cases are completed as expeditiously as possible, particularly for detained aliens. (b)(5)

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Additionally, OPLA will also work with EOIR to develop docket efficiency initiatives to reduce the backlog of existing cases on both the detained and non-detained dockets.

IV. Witness Testimony:

To better prosecute removal proceedings, prior guidance regarding approval for witness testimony in removal proceedings is hereby rescinded.⁵ (b)(5)

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When a proposed witness is an employee of another DHS component agency (e.g., CBP or USCIS), (b)(5)

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V. Prosecutorial Discretion:

OPLA is the legal representative for ICE and is also the legal representative for DHS in all exclusion, deportation, and removal proceedings before EOIR. *See* 6 U.S.C. § 252(c). As such, prosecutorial discretion related to these proceedings is most directly exercised by the OCC attorneys appearing in immigration court every day, subject to direction from their chain of command and applicable ICE and DHS guidance. Opportunities to exercise prosecutorial discretion may arise at different stages of the removal process, and discretionary decisions can take different forms. Prosecutorial discretion is the longstanding authority of an agency charged with enforcing a law to decide where to focus its resources and whether or how to enforce, or not to enforce, the law against an individual. In the context of OPLA's role in the administration and enforcement of the immigration laws, prosecutorial discretion will take different forms and applies to a variety of determinations made every day.

It is OPLA's policy to exercise prosecutorial discretion in a manner that furthers the safety of the American people and the faithful execution of our Nation's immigration laws against all removable aliens. Prosecutorial discretion is an act of administrative leniency; it is not an

⁵ *See* Email Message from Riah Ramlogan, *ICE Employee Testimony in Immigration Court* (Aug. 6, 2013).

entitlement. No individual classes or categories of removable aliens are excluded from enforcement. The decision to favorably exercise prosecutorial discretion will be made on a case-by-case basis after considering prevailing ICE and DHS guidance, the Department's enforcement priorities, the individual facts presented, and any federal interest(s) implicated (e.g., federal court litigation-related considerations, de-confliction with law enforcement priorities of other agencies). OPLA attorneys are empowered to exercise prosecutorial discretion throughout the removal process consistent with this guidance.

There will be no formal process by which an alien's attorney or an interested party may affirmatively request a favorable exercise of prosecutorial discretion.⁶ OPLA attorneys already review each case many times throughout the removal process, thus eliminating the need for further review at the alien's request.

There is no appeal from a denial of prosecutorial discretion. The decision of the local Chief Counsel on prosecutorial discretion is, as a matter of practice, conclusive.⁷ Should any government official outside of an OPLA attorney's chain-of-command direct or request that OPLA make or revisit a prosecutorial discretion decision, the OPLA attorney should promptly refer that communication to his or her immediate supervisor(s) and, as determined by the Principal Legal Advisor or a Deputy Principal Legal Advisor,⁸ to appropriate OGC officials. Regardless of which government official makes such a request for prosecutorial discretion, it must be made in writing, and the OPLA attorney handling the case must document the request in PLAnet, identifying the specific official making the request, and uploading any supporting documentation consistent with existing standard operating procedures.⁹

Below, further guidance is provided for the exercise of prosecutorial discretion in certain contexts.

a. Declining to File a Notice to Appear (NTA), Administrative Closure, and Dismissal of Proceedings

When a legally sufficient NTA has been issued, it will be filed with the immigration court and proceedings against the alien will be litigated to completion by OPLA, unless *either* ICE leadership affirmatively indicates in writing that the agency has decided it will not expend

⁶ OPLA will no longer be required to monitor or use email inboxes dedicated solely for the submission of requests for prosecutorial discretion.

⁷ In exceptional circumstances, the (b)(5)

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⁸ Although most requests for prosecutorial discretion are directed to OPLA attorneys in the field, some requests may be directed to OPLA attorneys at headquarters. As such, OPLA attorneys are responsible for ensuring that these requests are elevated to the Deputy Principal Legal Advisor for FLO, Enforcement and Litigation, or General and Administrative Law, as appropriate.

⁹ If the case involves classified information, the OPLA attorney must transmit such information in accordance with the DHS *Safeguarding Classified & Sensitive But Unclassified Information Reference Pamphlet*, Office of the Chief Security Officer (Feb. 2012), and all other applicable policies.

detention or removal resources on the case,¹⁰ or the NTA-issuing agency does not object to exercising prosecutorial discretion based on information brought to the component's attention by OPLA. (b)(5)

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FLO shall be responsible for coordinating the resolution of any disputes between the NTA-issuing component and OPLA, referring matters to the Principal Legal Advisor and/or OGC, if necessary.

Cases in which the filing of an NTA with EOIR or continued litigation of removal proceedings may merit particularly careful consideration include:

1. Member or Immediate Relative of a Military Service Member¹⁴

If an alien is a member or immediate relative of a current or former member of the Armed Forces, including the United States Army, Air Force, Navy, Marine Corps, Coast Guard, or a member of a reserve component of the armed forces or National Guard, a favorable exercise of discretion may be appropriate, particularly where the individual may qualify to apply for U.S. citizenship under sections 328 or 329 of the INA.¹⁵

¹⁰ In this context, "ICE Leadership" refers to the ICE Director, ICE Deputy Director, or the Executive Associate Director or Deputy Executive Associate Director for Enforcement and Removal Operations (ERO).

¹¹ The list of mailboxes is available [HERE](#).

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¹⁴ To the extent not inconsistent with Secretary Kelly's memoranda, OPLA attorneys may continue to refer for guidance on this issue to Victor X. Cerda, *Issuance of Notices to Appear (NTA), Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service* (Sept. 3, 2004), and Marcy M. Forman, *Issuance of Notices to Appear, Administrative Orders of Removal, or Reinstatement of a Final Order of Removal on Aliens with Military Service* (June 21, 2004).

¹⁵ Relatedly, OPLA attorneys must follow ICE guidance related to the evaluation of claims to U.S. citizenship. See ICE Directive 16001.2, *Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE* (Nov. 10, 2015).

2. *Clearly Approvable and Meritorious Benefit Applications*

Where an alien has a clearly viable avenue available to obtain permanent legal immigration status from USCIS and has not already had that application adjudicated by USCIS (e.g., he or she is the beneficiary of a recently approved Form I-130, Petition for Alien Relative and appears *prima facie* eligible for adjustment of status; and USCIS appears likely to favorably adjudicate a Form I-485, Application to Register Permanent Residence or Adjust Status), it may be appropriate to give the alien an opportunity to allow that adjudication to proceed in lieu of removal proceedings. Only if such an alien does not fall within any of the enforcement priorities outlined in Section I, *supra*, the Chief Counsel, or his or her Deputy Chief Counsel, may agree to administrative closure or dismissal of the case, as this will conserve OPLA and EOIR resources.¹⁶ In cases where an alien with permanent collateral immigration relief available falls within a DHS enforcement priority and/or would need a waiver to qualify for such relief, declining to file the NTA or agreeing to administrative closure or dismissal will generally not be appropriate.¹⁷

3. *Extraordinary Humanitarian Factors*

The Chief Counsel may consider the exercise of prosecutorial discretion when extraordinary humanitarian factors become apparent during NTA review or litigation of the case and were clearly not considered by the NTA-issuing field office component. This may include a situation where the alien has significant mental health issues that make further litigation of a case before EOIR untenable, where an alien has a U.S. citizen child with a serious medical condition or disability, or where the alien or a close family member is undergoing treatment for a potentially life-threatening disease.

4. *Significant Law Enforcement Benefit*

Where an alien is a cooperating witness, confidential informant, or is otherwise significantly assisting state or federal law enforcement, it may be appropriate in certain cases to defer the initiation or completion of removal proceedings for a specified period. However, law enforcement equities will generally best be assessed by ERO in conjunction with any exercise of prosecutorial discretion it wishes to consider at the conclusion of removal proceedings (e.g., stay

¹⁶ When such cases were initiated by CBP or USCIS, (b)(5)

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¹⁷ OPLA attorneys should not exercise their prosecutorial discretion to agree to the administrative closure of removal proceedings for the purpose of allowing a removable alien to seek a provisional waiver of unlawful presence through the filing of Form I-601A, Application for Provisional Unlawful Presence Waiver. If an alien makes an administrative closure request for such a purpose and does not fall within DHS's current enforcement priorities, the assigned OPLA attorney may agree to a reasonable period of voluntary departure to enable the alien to leave the United States and apply for any immigration benefits and available waivers at a U.S. diplomatic mission abroad.

of removal, deferred action). In any event, the protection of the homeland and associated security considerations must be paramount in deciding whether to continue litigating removal proceedings.

b. Prosecutorial Discretion before EOIR in the Context of Appeals and Motions

In our immigration system, DHS initiates removal proceedings and immigration judges (IJs) and the Board of Immigration Appeals (BIA) exercise the Attorney General's delegated authority to adjudicate issues of removability and relief and protection from removal. IJ decisions are entitled to respect, but OPLA attorneys always possess the discretion to take legally viable appeals of IJ decisions and make appropriate legal arguments in response to alien appeals and motions.¹⁸ Specific scenarios that arise in the context of appeals and motions are discussed below.

1. Waiving Appeal of IJ Decisions

All OPLA attorneys may waive appeal on behalf of DHS when an IJ grants an application for relief or protection from removal. However, appeals should be waived in such instances only when OPLA has determined that the alien satisfied the legal standard of proof required and that the alien merited any favorable exercise of discretion received, particularly where derogatory information exists. Moreover, when no legally viable basis for appeal exists, OPLA attorneys may waive appeal in the event an IJ dismisses removal proceedings *sua sponte* or on an alien's motion. Where an OPLA attorney is not satisfied that the IJ's decision is proper, reserving appeal is appropriate because it ensures that the IJ formalizes his or her ruling in a full opinion that can be further considered by DHS. In particular, appeal should be reserved in cases involving detained aliens, criminal aliens, or aliens posing a national security or public safety risk to the United States, absent clear statutory or precedential basis for not appealing, or a determination that the facts of the individual case may adversely impact the likelihood of success on appeal or the overall development of the law. (b)(5)

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2. Appeals

Existing OPLA policy generally provides that OCCs prosecute appeals before the BIA in conjunction with the Immigration Law and Practice Division (ILPD).¹⁹ OCCs and ILPD should continue to work together, along with any other relevant headquarters divisions or sections to craft strong appellate written work product.²⁰ Collaboration between the OCCs and OPLA

¹⁸ OPLA headquarters divisions should coordinate with OGC headquarters and component counsel offices when preparing briefs and motions in significant litigation.

¹⁹ See Gwendolyn Keyes Fleming, *Promoting Excellence in OPLA's Advocacy Before the Board of Immigration Appeals* (Feb. 22, 2016). Special procedures apply in the context of national security and human rights violator cases. See Email Message from Riah Ramlogan, *OPLA Supplemental Guidance on the Proper Handling of National Security and Human Rights Violator Cases* (May 28, 2015).

²⁰ ILPD should, in turn, coordinate with OGC and other affected DHS component counsel offices, as appropriate.

headquarters helps to ensure legal sufficiency, national consistency, and strong advocacy. Quality appellate advocacy is important, but OPLA must also work to promote efficiency before EOIR. To this end, OPLA attorneys should generally limit briefing schedule extension requests before the BIA and, in detained matters, should not request briefing extensions without prior approval from a supervisor.

3. Remands

Generally, decisions to agree to remand cases (either from the BIA to the IJ or from the federal courts to EOIR) should not be based solely on humanitarian factors. OPLA should file or support a motion to remand only when the existing record needs to be further developed in order to properly assert or defend DHS's position or when dictated by a broader litigation strategy as determined by DHS.²¹

4. Motions to Reopen

As the Supreme Court has recognized, “[t]here is always a public interest in prompt execution of removal orders. . . . The continued presence of an alien lawfully deemed removable . . . ‘permit[s] and prolong[s] a continuing violation of United States law.’” *Nken v. Holder*, 556 U.S. 418, 436 (2009) (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999)). Accordingly, in the interest of administrative finality, motions to reopen should be opposed if submitted by a fugitive, an alien who has failed to comply with an order to present himself or herself to ICE, or an alien who has previously ignored a lawful removal order. Further, unless specifically directed otherwise in writing by their chain-of-command, OPLA attorneys should oppose motions to reopen absent a legal defect in the underlying removal order or extraordinary circumstances that would warrant adding another case to the immigration court docket.²²

²¹ The Department of Justice's (DOJ) Office of Immigration Litigation (OIL) issued guidance in 2005 on the issue of remands of removal proceedings from the federal courts to the BIA. *See* Thomas W. Hussey, *Remand of Immigration Cases, Revised* (Nov. 10, 2005). This is DOJ guidance that is not directly impacted by Secretary Kelly's memoranda, (b)(5) For reference, OIL's memorandum outlines the circumstances under which OIL will seek to remand a case, as well as OIL's remand procedures. The circumstances described in OIL's memorandum are expansive, and include the remand of cases where prosecuting the case “would be patently inappropriate (*i.e.*, where the case is a compelling candidate for the possible exercise of prosecutorial discretion).” If OIL seeks to remand a case as a matter of prosecutorial discretion, an OCC should immediately elevate the case to FLO. Please be aware that OIL's memorandum references a corresponding OPLA guidance document, William J. Howard, *Prosecutorial Discretion* (Oct. 24, 2005), and provides that OIL may seek to remand a case for the reasons set out in that guidance. However, that OPLA guidance document has now been superseded in light of the Executive Orders, DHS implementation guidance, and the instant memorandum. *See supra* note 1.

²² The decision of a Chief Counsel or Deputy Chief Counsel whether to agree to jointly file a motion to reopen so that an alien can circumvent the time and numerical restrictions on motions to reopen, *see, e.g.*, 8 C.F.R. § 1003.2(c)(3)(iii), usually will be final and not subject to review. In deciding whether to join in such motions, OPLA field managers should be mindful of the strong DHS interest in administrative finality and the federal resources already expended on a case.

c. Bond Proceedings

OPLA should (b)(5)
(b)(5) In the absence of information not already considered by ERO, OPLA attorneys appearing before EOIR in bond proceedings should make all legal and factual arguments to ensure that ERO's interests and discretionary custody authority are vigorously defended. OPLA attorneys should (b)(5)

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(b)(5) OCCs should work closely with ILPD and other relevant OPLA headquarters divisions or sections to identify instances where use of this authority may be warranted.²⁴

VI. Official Use Disclaimer

This memorandum, which may contain legally privileged information, is intended For Official Use Only. Specifically, it contains discussion of legal strategy, outlines parameters of the attorney-client relationship, and is intended solely to provide internal direction to OPLA attorneys and staff regarding the implementation of Executive Orders and DHS guidance. It is not intended to, does not, and may not be relied upon to create or confer any right or benefit, substantive or procedural, enforceable at law or equity by any individual or other party, including in removal proceedings or other litigation involving DHS, ICE, or the United States, or in any other form or manner whatsoever. Likewise, this guidance does not and is not intended to place any limitations on DHS's otherwise lawful enforcement of the immigration laws or the Department's litigation prerogatives.

²³ DHS and EOIR regulations recognize that, as a prerequisite for even being considered for discretionary release by an ICE officer under INA § 236(a), an alien "must demonstrate *to the satisfaction of the officer* that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. §§ 236.1(c)(8) and 1236.1(c)(8) (emphasis added).

²⁴ Existing OPLA guidance on automatic and discretionary stays remains in effect. *See, e.g.,* Barry O'Melinn, *Revised Procedures for Automatic Stay of Custody Decisions by Immigration Judges* (Oct. 26, 2006).