

Legislation vs. Administrative Reliefs, Part V

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This is the fifth and concluding part of a series of articles on Legislation vs. Administrative Reliefs and the Memo from the Department of Homeland Security with regards to guidance to the U.S. Immigration and Customs Enforcement (ICE) Attorneys reviewing the U.S. Customs and Border Protection (CBP), U.S. Citizenship & Immigration Services (USCIS), and ICE cases before the Executive Office for Immigration Review (EOIR).

The following cases are generally not enforcement priorities for the Department of Homeland Security and should be carefully considered for prosecutorial discretion on a case-by-case basis to avoid unnecessary diversion of resources from the enforcement priorities identified above. 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;
- 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
- 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.

III. National Security and Public Safety Checks

If an ICE attorney decides to exercise prosecutorial discretion to dismiss or administratively close a particular case or matter, the attorney must first ensure that the alien in question is vetted for national security and public safety concerns. No exercise of discretion under this case review may proceed without this vetting.

IV. Special Rule for Asylum Cases

ICE attorneys may agree to the administrative closure of removal proceedings of an individual who filed an asylum application if 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 CFR 208.7(a)(2) which tolls the 180-day clock for employment authorization eligibility.

V. Individual Case Review

ICE attorneys are reminded that the decision to exercise prosecutorial discretion should be made on a case-by-case basis and on the totality of the circumstances presented by the individual case in question. The factors discussed in section II do not replace or supersede the June 17, 2011 Prosecutorial Discretion Memorandum, which remains the cornerstone for assessing whether prosecutorial discretion is appropriate in any circumstance. No one positive factor is determinative, and no one factor should be considered solely in isolation. General guidance such as this guidance cannot provide a "bright line" test, and many cases will require a balancing of the various factors laid out in the June 17, 2011 Prosecutorial Discretion Memorandum and earlier memoranda on the same subject. Reasonable minds can differ on close cases, and ICE attorneys should consult closely with their ICE supervisors whenever questions, concerns, or issues arise. ICE attorneys should base their decisions on the information in the record and are not expected to conduct additional investigation, although they may seek additional information if easily and timely available. Similarly, individuals may submit to ICE attorneys additional information relevant to their case for consideration under this process.

VI. Notice to Charging Component

If an ICE attorney decides to exercise prosecutorial discretion to dismiss or administratively close a particular case or matter, the attorney must notify a relevant supervisory charging official at CBP, USCIS, or ICE about the decision. In the event there is a dispute between the supervisory official and the ICE attorney regarding the attorney's decision to exercise prosecutorial discretion, the ICE Chief Counsel should attempt to resolve the dispute locally. If local resolution is not possible, the matter should be elevated to the Deputy Director of ICE for resolution.

VII. Disclaimer

As there is no right to the favorable exercise of discretion by the agency, nothing in this guidance should be construed to prohibit the apprehension, detention, or removal of any alien unlawfully in the United States or to limit the legal authority of ICE, CBP, or USCIS or any of their respective personnel to enforce Federal immigration law. Similarly, this memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.