

## Legislation vs. Administrative Reliefs, Part I

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Amnesty Law was passed by the Congress during President Reagan's time in 1986. Under the Immigration Reform Act 1986, persons who entered the U.S. on or before January 1, 1982 or performed agricultural work for 90 days during May 1985 to 1986 were granted amnesty and legalized their status as a permanent resident.

Since 1986, there have been several bills passed by the Congress, under which amendments were made to make changes in the law to grant some benefits and also enforcement to deter entry of illegal aliens apprehension and deportation of persons in unlawful status. However, no amnesty bill has been passed by the Congress until this date.

Most of the Presidents, including Bill Clinton, George Bush, and presently, Barack Obama, have supported the legislation to provide legal status to undocumented aliens. However, due to strong oppositions from the Congressional Republicans, no such bill has been passed by the Congress and more than 11 million undocumented aliens are presently in the U.S., many of them do not have social security numbers and driving license, their children cannot pursue studies in colleges, and aliens apprehended even for small violations are deported from the U.S. Attempts were made to get the Dream Act passed by the Congress to give legal status to undocumented students who entered the U.S. under the age of 16 years, so that they can come out of the shadow and live, study, or work in the U.S. without any fear. All efforts to get the Dream Act passed by the Congress have failed.

President Barack Obama made a campaign promise to get some sort of earned legalization bill and legislation, such as the Dream Act, passed by the Congress, but has failed in accomplishing this objective.

Having been frustrated by the failure on the part of the Congress to get any meaningful legislation passed by the Congress, Obama Administration has made several efforts to make changes in the manner of how existing laws are implemented, which will provide some relief to undocumented aliens. The Administration has issued several memos to concerned officials of U.S. Citizenship & Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), Government lawyers, and Immigration Judges, to follow the policy laid down by the Administration in providing reliefs as well as enforcement of the existing law.

In this series of articles, we will provide the text of these memos mentioned herewith, so that our readers can benefit from the Administrative Guidelines:

1. **Memo of March 2, 2011 issued by John Morton, Director of ICE, to all concerned officials with regards to Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens.**

### Purpose

This memorandum outlines the civil immigration enforcement priorities of U.S. Immigration and Customs Enforcement (ICE) as they relate to the apprehension, detention, and removal of aliens. These priorities shall apply across all ICE programs and shall inform enforcement activity, detention decisions, budget requests and execution, and strategic planning.

### *A. Priorities for the apprehension, detention, and removal of aliens.*

In addition to our important criminal investigative responsibilities, ICE is charged with enforcing the nation's civil immigration laws. This is a critical mission and one with direct significance for our national security, public safety, and the integrity of our border and immigration controls. ICE, however, only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States. In light of the large number of administrative violations the agency is charged with addressing and the limited enforcement resources the agency has available, ICE must prioritize the use of its enforcement personnel, detention space, and removal resources to ensure that the removals the agency does conduct promote the agency's highest enforcement priorities, namely national security, public safety, and border security.

To that end, the following shall constitute ICE's civil enforcement priorities, with the first being the highest priority and the second and third constituting equal, but lower, priorities.

#### **Priority 1. Aliens who pose a danger to national security or a risk to public safety**

The removal of aliens who pose a danger to national security or a risk to public safety shall be ICE's highest immigration enforcement priority. These aliens include, but are not limited to:

- aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;
- aliens convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders;
- aliens not younger than 16 years of age who participated in organized criminal gangs;
- aliens subject to outstanding criminal warrants; and
- aliens who otherwise pose a serious risk to public safety.

For purposes of prioritizing the removal of aliens convicted of crimes, ICE personnel should refer to the following new offense levels defined by the Secure Communities Program, with Level 1 and Level 2 offenders receiving principal attention. These new Secure Communities levels are given in rank order and shall replace the existing Secure Communities levels of offenses.

- Level 1 offenders: aliens convicted of "aggravated felonies," as defined in Section 101(a)(43) of the Immigration and Nationality Act, or two or more crimes each punishable by more than one year, commonly referred to as "felonies";
- Level 2 offenders: aliens convicted of any felony or three or more crimes each punishable by less than one year, commonly referred to as "misdemeanors"; and
- Level 3 offenders: aliens convicted of crimes punishable by less than one year.

#### **Priority 2. Recent illegal entrants**

In order to maintain control at the border and at ports of entry, and to avoid a return to the prior practice commonly and historically referred to as "catch and release," the removal of aliens who have recently violated immigration controls at the border, at ports of entry, or through the knowing abuse of the visa and visa waiver programs shall be a priority.

### **Priority 3. Aliens who are fugitives or otherwise obstruct immigration controls**

In order to ensure the integrity of the removal and immigration adjudication processes, the removal of aliens who are subject to a final order of removal and abscond, fail to depart, or intentionally obstruct immigration controls, shall be a priority. These aliens include:

- fugitive aliens, in descending priority as follows:
  - o fugitive aliens who pose a danger to national security;
  - o fugitives aliens convicted of violent crimes or who otherwise pose a threat to the community;
  - o fugitive aliens with criminal convictions other than a violent crime;
  - o fugitive aliens who have not been convicted of a crime;
- aliens who reenter the country illegally after removal, in descending priority as follows:
  - o previously removed aliens who pose a danger to national security;
  - o previously removed aliens convicted of violent crimes or who otherwise pose a threat to the community;
  - o previously removed aliens with criminal convictions other than a violent crime;
  - o previously removed aliens who have not been convicted of a crime; and
- aliens who obtain admission or status by visa, identification, or immigration benefit fraud.

The guidance to the National Fugitive Operations Program: Priorities, Goals and Expectations, issued on December 8, 2009, remains in effect and shall continue to apply for all purposes, including how Fugitive Operation Teams allocate resources among fugitive aliens, previously removed aliens, and criminal aliens.

#### *B. Apprehension, detention, and removal of other aliens unlawfully in the United States*

Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of other aliens unlawfully in the United States. ICE special agents, officers, and attorneys may pursue the removal of any alien unlawfully in the United States, although attention to these aliens should not displace or disrupt the resources needed to remove aliens who are a higher priority. Resources should be committed primarily to advancing the priorities set forth above in order to best protect national security and public safety and to secure the border.

#### *C. Detention*

As a general rule, ICE detention resources should be used to support the enforcement priorities noted above or for aliens subject to mandatory detention by law. Absent extraordinary circumstances or the requirements of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, or who are disabled, elderly, pregnant, or nursing, or demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest. To detain aliens in those categories who are not subject to mandatory detention, ICE officers or special agents must obtain approval from the field office director. If an alien falls within the above categories and is subject to mandatory detention, field office directors are encouraged to contact their local Office of Chief Counsel for guidance.

#### *D. Prosecutorial discretion*

The rapidly increasing number of criminal aliens who may come to ICE's attention heightens the need for ICE employees to exercise sound judgment and discretion consistent with these priorities when conducting enforcement operations, making detention decisions, making decisions about release on supervision pursuant to the Alternatives to Detention Program, and litigating cases. Particular care should be given when dealing with lawful permanent residents, juveniles, and the immediate family members of U.S. citizens. Additional guidance on prosecutorial discretion is forthcoming. In the meantime, ICE officers and attorneys should continue to be guided by the November 17, 2000 prosecutorial discretion memorandum from then-INS Commissioner Doris Meissner; the October 24, 2005 Memorandum from Principal Legal Advisor William Howard; and the November 7, 2007 Memorandum from then Assistant Secretary Julie Myers.

***To Be Continued...***