

Legislation vs. Administrative Reliefs, Part IV

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This is the continuation of a series of articles on Legislation vs. Administrative Reliefs and to the Memo of November 17, 2011 issued by Peter S. Vincent, Principal Legal Advisor to all concerned officials with regards to case-by-case review of incoming and certain pending cases pertaining to removal proceedings.

4. Memo of November 17, 2011 from Peter S. Vincent, Principal Legal Advisor to all concerned officials with regards to Case-by-Case Review of Incoming and Certain Pending Cases.

Purpose:

In order to ensure that the cases before the Executive Office for Immigration Review (EOIR) conform to the U.S. Immigration and Customs Enforcement (ICE) Civil Enforcement priorities as described in ICE Director John Morton's 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) (July 17, 2011 Prosecutorial Discretion Memorandum), the Office of the Principal Legal Advisor (OPLA) will conduct a review of the EOIR immigration court docket in each Office of Chief Counsel (OCC).

Scope of the Review:

OPLA has been directed to begin a review of incoming cases and cases pending in immigration court. Each OCC must immediately review three categories of cases: (1) cases in which the Notices to Appear have not been filed with EOIR; (2) all cases on the master docket; and (3) all non-detained cases with merits hearings scheduled up to seven months from the date of issuance of this memorandum.

The initial implementation of the review set forth in this memorandum will last for approximately the next two months, until January 13, 2012. At the end of that period, we will assess the data and other implementation outcomes related to this review and make any necessary adjustments to the process before implementing a revised policy for the continuation of this review.

Criteria:

This review process does 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. During the course of review, attorneys should focus on the factors discussed in the June 17, 2011 Prosecutorial Discretion Memorandum, as well as the criteria contained in the *Guidance to ICE Attorneys' Reviewing U.S. Customs and Border Protection (CBP), U.S. Citizenship & Immigration Services (USCIS), and ICE Cases Pending Before the Executive Office for Immigration Review* (Guidance). Moreover, at all stages of the immigration enforcement process, attorneys should consider, on a case-by-case basis, the full range of factors set forth in the June 17, 2011 Prosecutorial Discretion Memorandum.

The criteria set forth in the Guidance 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.

In making a decision on whether to exercise prosecutorial discretion, attorneys should also consider the following memoranda from Director Morton: *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011); *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* (Aug. 20, 2010); and *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011).

Standard Operating Procedure:

Each OCC shall immediately draft and implement a standard operating procedure. (SOP) establishing a process for the review of all matters described in the previous section. Before implementation, each SOP must be reviewed by the Director of Field Legal Operations at headquarters.

Each SOP must include:

- Assistant Chief Counsel/Senior Attorney initial review;
- Supervisory review;
- Notification process to individuals where the acc decides to exercise prosecutorial discretion in the absence of a request;
- Use and monitoring of an electronic mailbox for the receipt of additional documentation that individuals wish to be considered during the prosecutorial discretion review process;
- Notification to a supervisory official at Enforcement and Removal Operations, Homeland Security Investigations, U.S. Citizenship and Immigration Services (USCIS), or U.S. Customs and Border Protection (CBP) of the decision to exercise prosecutorial discretion; and
- National security and public safety checks for any case being considered for administrative closure or dismissal.

Each SOP should also contain the following language:

"Some individuals may decline prosecutorial discretion and elect to proceed before the immigration court. In some instances, applicants for immigration benefits whose applications are denied by USCIS are entitled to a *de novo* review before an immigration judge (11). Asylum and Temporary Protected Status are two examples. *See, e.g.*, 8 C.F.R. § 208.14(c)(I) (2011); 244.1 O(c)(1H2) (2011). Moreover, some adjustment of status provisions also provide for renewal of a USCIS-denied application before an IJ. *See, e.g., id.* §§ 209.1(e), 209.2(f), 245.2(a)(5)(ii). In addition, some forms of immigration relief or protection may be granted only in immigration court, including cancellation of removal under section 240A of the Immigration and Nationality Act, 8 U.S.C. § 1229b, as well as withholding and deferral of removal under 8 C.F.R. §§ 1208.16-17."

Motions to EOIR

A standard joint motion package should be filed with EOIR or an oral motion made before the immigration court for those cases in which, pursuant to this review process, the exercise of prosecutorial discretion is deemed appropriate. A template for a joint motion to administratively close proceedings can be found on SharePoint.

Disclaimer

As there is no right to the exercise of discretion by the agency, nothing in this memorandum 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 or any of its 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.

5. Memo from the Department of Homeland Security with regards to Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE cases before the Executive Office for Immigration Review (EOIR).

I. Introduction:

On August 18, 2011, the Department of Homeland Security announced a review of all administrative removal cases pending before and incoming to the Executive Office for Immigration Review (EOIR) of the Department of Justice. The purpose of the review is to identify those cases that reflect a high enforcement priority for the Department of Homeland Security. This review covers all CBP, USCIS, and ICE removal cases, whether the cases are before immigration judges or the Board of Immigration Appeals. The review to which this guidance applies shall focus on the criteria laid out in Section II, but nothing in this guidance should be construed to prohibit or discourage the consideration of all of the factors laid out in the June 17, 2011 Prosecutorial Discretion Memorandum.

II. Criteria for Review

The following removal cases are enforcement priorities for the Department of Homeland Security 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 –
 - o a felony or multiple misdemeanors,
 - o illegal entry, re-entry, or immigration fraud, or
 - o 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 significant threat to public safety;
- 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.

To Be Continued...