A. Renee Pobjecky, Esquire
POBJECKY & POBJECKY, LLP
786 Avenue C, SW
Winter Haven, Florida 33880
Telephone: (863) 294-0602
Email: Renee@pobjeckylaw.net

U.S. CITIZENSHIP AND IMMIGRATION SERVICES

IN THE MATTER OF:

[redacted]

[redacted]

_____/

MEMORANDUM IN SUPPORT OF REQUEST FOR HEARING ON DECISION IN NATURALIZATION PROCEEDINGS

U.S. CITIZENSHIP AND IMMIGRATION SERVICES

IN THE MATTER OF:

[redacted]

_____/

MEMORANDUM IN SUPPORT OF REQUEST FOR HEARING ON DECISION IN NATURALIZATION PROCEEDINGS

The Respondent, [redacted], by and through her undersigned counsel, hereby files this Memorandum in Support of Request for Hearing on Decision in Naturalization Proceedings and in furtherance thereof states as follows:

1. Mrs. [redacted] Did Not "Knowingly" Commit Voter Fraud.

On or about July 15, 1997, Mrs. [redacted], formerly known as [redacted], obtained lawful permanent resident status based upon her marriage to a United States Citizen. Unfortunately, Mrs. [redacted] marriage to [redacted] ended on August 8, 2005.

On October 7, 2006, Mrs. [redacted] married [redacted] and together they have three children: [redacted], born December 28, 2001, [redacted], born July 14, 2004, and [redacted], born July 27, 2007. All three of Mrs. [redacted] children are citizens of the United States of America.

On or about January 2007, Mrs. [redacted] filed Form N-400, Application for Naturalization. Under Part 10, Additional Questions, Mrs. [redacted] answered "Yes" to Question #2 which states, "Have you **ever** registered to vote in any Federal, state or local election in the United States?" Mrs. [redacted] also answered "Yes" to Question

#3 which asks, "Have you **ever** voted in any Federal, state or local election in the United States?"

On October 9, 2002, Mrs. [redacted] went to the Chester County Division of Motor Vehicles to renew her driver's license. While renewing her license, the clerk provided Mrs. [redacted] with a voter registration card and stated she was eligible to register to vote. Based on the representations of the clerk at the Division of Motor Vehicles, Mrs. [redacted] reasonably believed she was eligible to vote under Pennsylvania law.

After receiving her voter registration card, Mrs. [redacted] proceeded to vote in a local election on one single occasion.

Prior to relocating to Florida in September 2004, Mrs. [redacted] surrendered her Pennsylvania voter registration card. Upon arriving to Florida, Mrs. [redacted] attempted to register to vote in the State of Florida but was informed that she was not eligible to register to vote since she was not a citizen of the United States of America.

2. Exercising Prosecutorial Discretion.

On May 12, 2008, Mrs. [redacted] received a denial of her application for naturalization on the grounds that she lacked good Moral Character pursuant to 8 CFR § 316.10.

Pursuant to Policy Memorandum No. 86 of the Immigration Services Division Field Operations an adjudicating officer can make the determination that an applicant's case merits a favorable exercise of prosecutorial discretion. In order to determine whether to initiate or decline to initiate removal procedures the adjudicating officer must make an individualized determination of the facts and laws of the particular case.

Mrs. [redacted] situation mirrors the facts cited in *McDonald v. Gonzales*, 400 F. 3d 684 (9th Cir. 2005). In the *McDonald* case, the Court held that the Petitioner did not "knowingly" commit voter fraud and, thus, she lacked the requisite mental state for violating the Hawaiian statute. Title 25 of the Pennsylvania Statutes states that "An individual may not do any of the following: (1) Apply for registration with *knowledge* or reason to know that the individual is not entitled to registration" (emphasis added). Hence as in the *McDonald* case, the government will be unable to establish removability against Mrs. [redacted] by "clear, unequivocal, and convincing evidence. *See*, Woodby v. INS, 385 U.S. 276, 286 (1996). Since Mrs. [redacted] did not have the requisite mens rea under 25 Pa.C.S.A. § 1703 (a)(1), she did not violate that law.

Unfortunately there is no precise formula for identifying which cases warrant a favorable exercise of discretion. However, what follows below are several factors which should be taken into account by the adjudication officer in deciding whether to exercise prosecutorial discretion.

3. Factors to warrant a favorable exercise of discretion.

Pursuant to the November 27, 2000 Memorandum, the following factors should be taken into account by the adjudicating officer in deciding whether to exercise prosecutorial discretion:

1. Immigration Status. ***"Lawful permanent residents generally warrant greater consideration."*** It is undeniable that Mrs. [redacted] has been a lawful permanent resident since July 15, 1997.

2. Length of residence in the United States. ***"The longer an alien has lived in the United States, particularly in legal status, the more this factor may be considered***

a positive equity." Mrs. [redacted] first lawfully arrived to the United States in 1992/1993 as the daughter of a diplomat from her native country of Angola. Prior to departing from the United States, Mrs. [redacted] married [redacted] and he filed an I-130 Petition for Alien Relative. Mrs. [redacted] received lawful permanent resident status through consular processing based on her marriage to a United States citizen and re-entered the United States in said lawful status on July 15, 1997.

3. Criminal History. ***"Officers should take into account the nature and severity of any criminal conduct. . ."*** Mrs. [redacted] has never been convicted of a crime, either in Angola or the United States. She is law-abiding and holds a position of trust at her current place of employment, Community Bank of Florida.

4. Humanitarian Concerns. "***Relevant humanitarian concerns include, but are not limited to, family ties in the United States; medical conditions affecting the alien or the alien's family. . .and home country conditions."*** As referenced above, Mrs. [redacted] has three minor children who are all citizens of the United States. Her oldest son, [redacted], is six years old and is enrolled in elementary school. Mrs. L[redacted] and her children speak fluent English. The young children would have a very difficult time in Angola since Portuguese is the official language of Angola and native languages include Kimbundu, Bakongo, Ovimbundu, and others. The U.S. Department of State's website claims that interpreters are often necessary for travelers "because few Angolans outside the petroleum industry speak English fluently."

Of even more concern is the fact that Angola's national health facilities are below western standards. Water quality in major urban areas is poor, and because of this periodic cholera and malaria outbreaks do occur. Boiling water may be insufficient to

guard against illness; imported bottled water or water from a distiller is recommended. If served vegetables, especially salad, make sure that it has been properly treated. Raw, unpeeled fruit should be avoided. The US Center for Disease Control estimates a nationwide HIV/AIDS infection rate of 2.8 percent, though figures vary widely by province. Surveillance of tuberculosis and sexually transmitted diseases is insufficient to generate meaningful statistics, but surveys of hospitals and clinics have shown infection rates to be rising.

According to the U.S. Central Intelligence Agency's World Factbook, the average life expectancy is only 37.92 and even lower for males. Furthermore the CIA reports that the risk of becoming infected with a major infectious disease is "very high."

The U.S. Department of State has issued a warning to its citizens which advises that "the threat of criminal attack . . . is always relatively high . . . due to inflation, shortages of power, water and food, and the stark contrast between the living conditions of the majority of Angolans. Because expatriates generally have a far higher quality of life than the average Angolan, they are faced with a threatening environment that requires close attention to personal security at all times."

To make matters worse, [redacted] and [redacted] have been diagnosed with eczema and severe allergies. [redacted] also has a minor heart murmur. [redacted]s doctor recommends frequent monitoring of his condition to ensure that it does not worsen. As the attached medical records state "An ounce of prevention is worth a pound of cure." It is imperative to the health of these young children that they remain in the United States to continue treatment for their skin disease. This is especially true in light of the living conditions and the inadequacy of medical care in Angola.

Subjecting three young U.S. citizens to such diseases and infections would be harsh and cruel. Surely, in such a case, a favorable exercise of discretion is warranted.

5. Immigration History. ***"Aliens without a past history of violating the immigration laws. . . warrant favorable consideration to a greater extent than those with such a history."*** As her immigration files demonstrates, Mrs. [redacted] does not have any violations, such as reentering after removal, failing to appear at hearing, or resisting arrest, which would show a heightened disregard for the legal process. Rather, Mrs. [redacted] is grateful to be living in the United States and has made every effort to abide by the laws of this country.

6. Likelihood of ultimately removing the alien. ***"Whether a removal proceeding would have a reasonable likelihood of ultimately achieving its intended effect, in light of the case circumstances such as the alien's nationality."*** Since Mrs. [redacted] has been a lawful permanent resident of the United States for over ten (10) years she has several remedies available to her should she be placed in removal proceedings. For example, if necessary, Mrs. [redacted] is eligible for Cancellation of Removal under INA §240(a) since she has been lawfully admitted for permanent residence for five years, has not been convicted of an aggravated felony and has resided in the U.S. continuously for 10 years after having been admitted in any status.

As the supporting documentation demonstrates, Mrs. [redacted] is hardworking individual and is an asset to her family and community.

CONCLUSION

It is the duty of a service officer to exercise prosecutorial discretion in a judicious manner and in exercising such discretion an officer must taken into account the above-

referenced principles in order to promote the efficient and effective enforcement of the immigration laws and the interests of justice. As a general matter, officers may decline to prosecute a legally sufficient case if the Federal immigration enforcement interest that would be served by prosecution is not substantial.

Even when an immigration officer has reason to believe that an alien is removable and that there is sufficient evidence to obtain a final order of removal, it may be appropriate to decline to proceed with that case. In fact, the November 17, 2000 Memorandum of Doris Meissner states that "as a general matter, it is better to exercise favorable discretion as early in the process as possible, once the relevant facts have been determined, in order to conserve the Services' resources and in recognition of the alien's interest in avoiding unnecessary legal proceedings."

The above factors establish that Mrs. [redacted]'s case merits a favorable exercise of prosecutorial discretion and as such her N-400 should be adjudicated and subsequently approved.

Dated: December ___, 2008.

Respectfully submitted,

A. Renee Pobjecky, Esquire
POBJECKY & POBJECKY, LLP
786 Avenue C, SW
Winter Haven, Florida 33880
Telephone: (863) 294-0602
Facsimile: (863) 299-3754
Counsel for Respondent

U.S. CITIZENSHIP AND IMMIGRATION SERVICES

IN THE MATTER OF:

[redacted]

[redacted]

_____/

INDEX TO SUPPORTING DOCUMENTATION

		EXHIBIT
1.	**Letter of Recommendation from Employer, Community Bank of Florida**	**1**
2.	**Letter of Recommendation for Susan G. Komen For The Cure acknowledging community spirit and volunteer hours**	**2**
3.	**Medical Records of** [redacted]	**3**
4.	**Medical Records of** [redacted]	**4**
5.	**Letter of Verification of Attendance at Socrum Elementary School And Kindergarten Report Card**	**5**
6.	**Sample Credit Card Debt and Utility Bills** ***It is undeniable that in the event*** [redacted] ***is placed in removal proceedings then she will be unable to repay her financial obligations due to the cost of living standards in her native country of Angola.***	**6**
7.	**Educational Loans, Vehicle Loans, & Home Mortgage**	**7**
8.	**Academic Accolades and educational achievements**	**8**
9.	**Pay Stubs**	**9**
10.	**2007-2005 U.S. Federal Tax Returns**	**10**

IMMIGRATION SERVICES DIVISION, FIELD OPERATIONS

POLICY MEMORANDUM NO. 86

SUBJECT: Procedures for Handling Naturalization Applications of Aliens Who Voted Unlawfully or Falsely Represented Themselves as U.S. Citizens by Voting or Registering to Vote

U.S. Department of Justice
Immigration and Naturalization Service

HQ 70/33

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

MAY - 7 2002

MEMORANDUM FOR ALL REGIONAL DIRECTORS
DISTRICT DIRECTORS
SERVICE CENTER DIRECTORS
OFFICERS-IN-CHARGE

FROM: William R. Yates
Deputy Executive Associate Commissioner
Office of Field Operations
Immigration Services Division

SUBJECT: Procedures for Handling Naturalization Applications of Aliens Who Voted Unlawfully or Falsely Represented Themselves as U.S. Citizens by Voting or Registering to Vote

This memorandum provides guidance on handling naturalization applications of aliens who have unlawfully voted or falsely represented themselves as U.S. citizens in association with registering to vote or by voting. This guidance supplements the May 13, 1997, Office of Naturalization Operations Policy Memorandum titled, "Voter Registration and Standardized Citizenship Testing," which instructs adjudicators to ask all naturalization applicants if they have ever registered to vote or voted in a U.S. election. This memorandum should be read in conjunction with the Commissioner's November 17, 2000 memorandum titled, "Exercising Prosecutorial Discretion," which provides more general guidance on determining when or if removal proceedings should be initiated for certain naturalization applicants. This memorandum can be found on the INS Power Port under the section entitled "INS Policy and Procedural Memoranda".

What sections of the Immigration and Nationality Act (INA) address illegal voting?

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) added sections 212(a)(10)(D)(i) and 237(a)(6)(A) to the INA to address illegal voting.[i] Title II of the Child Citizenship Act of 2000 (CCA), Pub. L. 106-395, added sections 212(a)(10)(D)(ii) and 237(a)(6)(B) to provide exceptions to the removal grounds for lawful permanent residents who resided in the United States prior to age 16 and who have U.S. citizen parents.[ii] The CCA also

added a clause to section 101(f)[iii] to address good moral character (GMC) determinations for individuals who voted unlawfully.

Are there any criminal penalties for illegal voting?

Non-citizens who violate or who have violated these provisions may face criminal prosecution in addition to administrative removal. IIRIRA created a new section 18 U.S.C. 611,[iv] establishing criminal penalties for aliens who have voted in any federal election. An alien convicted of violating this provision of the law may be fined, imprisoned for up to one year, or both.

The CCA also added an exception to the criminal provision, 18 U.S.C. 611(c), for lawful permanent residents who resided in the United States prior to age 16, have U.S. citizen parents, and who reasonably believed at the time of voting in violation of the law that he or she was a citizen of the United States. The criminal provision exception only applies to convictions that became final on or after the date of enactment of the CCA – October 30, 2000.[v] In such cases, because the district court has made the determination that the applicant did not fall within the terms of the exception, the Service need not re-adjudicate this issue.

Even if there is no conviction for illegal voting, officers should continue to analyze the case as provided on page 4 of this memorandum.

Is a criminal conviction for illegal voting required to support a removal charge?

No. An alien who votes illegally but who has not been convicted under 18 U.S.C. 611 is still potentially removable. Removal charges can be sustained simply by proving that the alien voted in violation of the relevant law.

What sections of the INA address false claims to U.S. citizenship?

IIRIRA added sections 212(a)(6)(C)(ii)(I) and 237(a)(3)(D)(i) to the INA to address false claims to U.S. citizenship.[vi] The CCA added sections 212(a)(6)(C)(ii)(II) and 237(a)(3)(D)(ii) to provide exceptions to the removal grounds.[vii] The CCA also added a clause to section 101(f)[viii] to address GMC determinations for individuals who made a false claim to U.S. citizenship.

Are there any criminal penalties for making a false claim to U.S. citizenship?

IIRIRA added section 1015(f)[ix] to Title 18 to establish criminal penalties for any alien who makes a false claim to U.S. citizenship in order to vote or register to vote in an election. An alien convicted of violating this provision of the law may be fined or imprisoned for not more than five years, or both.

The CCA also added an exception to the criminal provision, the last clause of 18 U.S.C. 1015(f), for lawful permanent residents who resided in the United States prior to age 16, have U.S. citizen parents, and who reasonably believed that he or she was a citizen of the United States at the time of making the false claim. Like 18 U.S.C. 611(c), this criminal provision

exception only applies to convictions that became final on or after October 30, 2000.[x] In such cases, because the district court has made the determination that the applicant did not fall within the terms of the exception, the Service need not re-adjudicate this issue.

Even if there is no conviction for making a false claim to U.S. citizenship, officers should continue to analyze the case as provided on page 4 of this memorandum.

Is a criminal conviction for making a false claim to U.S. citizen required to support a removal charge?

No. An alien who knowingly makes a false claim to U.S. citizenship for the purpose of voting or registering to vote, but who has not been convicted under 18 U.S.C. 1015(f) is still potentially removable. Removal charges can be sustained simply by proving that the alien knowingly made the false claim for purposes of voting or registering to vote.

How is making a false claim different from illegal voting?

In the voting context, an applicant can only be found to have violated the provision if his or her conduct would be deemed unlawful under the relevant Federal, state, or local election law.

For false claims to U.S. citizenship, there is no need to focus on the underlying election law that was violated. Officers need only establish that the applicant: (1) actually falsely represented himself or herself as a U.S. citizen on or after September 30, 1996[xi]; and (2) that such representation was made for the purpose of registering to vote or voting.

What are the exceptions to the provisions related to illegal voting and false claims to U.S. citizenship?

The CCA establishes exceptions to removal under sections 212(a) and 237(a), to GMC under 101(f) of the INA, and to criminal prosecution under 18 U.S.C. 611 and 1015(f), for any alien:

- whose natural or adoptive parents (both parents) are or were U.S. citizens
- who permanently resided in the U.S. prior to his or her 16th birthday, and
- who "reasonably believed" at the time of the violation or false representation that he or she was a US citizen.

As a matter of policy, the Service has determined that the applicant's parents had to be U.S. citizens at the time of the illegal voting or false claim to U.S. citizenship in order to meet the first prong of this exception.

How do I adjudicate these cases?

For every naturalization case where the applicant may have unlawfully voted or may have made a false claim to U.S. citizenship while voting or registering to vote, officers should analyze the case following the six steps outlined below (see also **Attachment A** for flowchart).

Officers should note that in most instances there will not be a conviction under 18 U.S.C. 611 or 1015(f).

1. Determine if the applicant:

   (a) actually voted in violation of the relevant election law; or
   (b) made a false claim to U.S. citizenship when registering to vote or voting in any Federal, State, or local election any time on or after September 30, 1996;

2. If either "a" or "b" above happened, the applicant is removable. Now determine whether the applicant is eligible for the exceptions from removal as provided under sections 212(a) and 237(a) of the INA. If the applicant is eligible for the exceptions, the applicant is no longer removable. Proceed with adjudication of the N-400 (see Step 6).

3. If the applicant does not qualify for one of the exceptions, determine whether the applicant's case merits the exercise of prosecutorial discretion.

4. If the applicant's case does not merit the exercise of prosecutorial discretion, initiate removal proceedings and **continue** the naturalization application, pending the outcome of such proceedings.

5. If the applicant's case merits prosecutorial discretion, proceed with adjudication of the N-400 (see Step 6).

6. Assess the applicant's eligibility for naturalization. The assessment should focus on whether the applicant's conduct overall (including any other potential grounds of ineligibility) precludes a finding of good moral character. The assessment should also include a determination of whether the applicant is exempted from a finding that he or she does not have good moral character based on the exception contained in 101(f).

How do I determine if applicant voted in violation of relevant election law or made a false claim to U.S. citizenship?

(a) Voting in violation of election law

Whether the alien actually violated federal, state or local law depends upon whether he or she: (1) actually voted and (2) the act of voting violated a specific election law provision. The provisions governing voting and eligibility to vote will vary by location. In addition, the penalties for voting unlawfully will vary and may include a specific intent requirement.

Information about whether an applicant actually voted can come from his or her own admission under oath or from independent sources, such as voter records. Even if the applicant actually voted, however, the act of voting, by itself, is not sufficient to establish that the applicant voted unlawfully. Officers must also determine whether the applicant's act of voting would be deemed a violation under the relevant election law.

To make the violation decision, officers must determine in what type of election the applicant voted – Federal, State, or local – and then review the appropriate jurisdiction's election laws. Federal election laws provide that only U.S. citizens can vote. Clearly, if an applicant is convicted under 18 U.S.C. 611, which governs federal elections, the applicant has voted in violation of the law.

Some local municipalities permit lawful permanent residents and/or nonresident aliens to vote in municipal elections. Officers should review all code provisions that define who is eligible and/or qualified to vote in such elections.[xii]

If the election law penalizes the actual act of voting, the fact that an applicant has actually voted is sufficient to establish that he or she has voted unlawfully. If, however, the election law penalizes the act of voting only upon an additional finding that the individual acted "knowingly" or "willfully," adjudicating officers cannot conclude that an applicant voted unlawfully until they assess the circumstances surrounding the voting, the applicant's credibility, and the documentary evidence. In these situations, officers should determine:

(1) how, when, and where the applicant registered to vote and/or voted;
(2) the extent of the applicant's knowledge of the election laws;
(3) whether the applicant received any instructions, or was questioned verbally about his or her eligibility to vote;
(4) who provided the applicant with information about election laws or his or her eligibility to vote;
(5) whether the election registration form and/or voting ballot:
    (a) contains a specific question asking if the applicant is a U.S. citizen;
    (b) requires the applicant to declare under penalty of perjury that he or she is a U.S. citizen; or
    (c) requires the applicant to be qualified to vote and lists specifically the requirement of U.S. citizenship elsewhere on the form.

Officers should record the applicant's testimony regarding his or her voting in a sworn statement, and obtain any relevant evidence to support the illegal voting charge. Such evidence, for example, can include a copy of the alien's voter registration form with instructions and his or her voter registration card, establishing that U.S. citizenship was required in order to obtain the card.

If, after weighing all the favorable and unfavorable factors, the officer determines that the applicant voted with knowledge that such voting would be a violation, the officer can conclude that the applicant voted unlawfully.

If the applicant voted unlawfully, the applicant is removable. The officer must then proceed to the next steps of determining whether the applicant meets the exceptions to removal or merits an exercise of prosecutorial discretion.

(b) Making a false claim to U.S. citizenship to vote or register to vote

Clearly, if an applicant is convicted under 18 U.S.C. 1015(f), which governs making a false claim to U.S. citizenship in order to vote or register to vote, the applicant has violated the law. However, absent a conviction, information about whether an applicant actually falsely represented himself or herself as a U.S. citizen can come from his or her own admission under oath or from independent documentary evidence, such as voter registration forms.

The law requires that the applicant have "represented" himself or herself as a U.S. citizen on or after September 30, 1996. "Representation" is not limited to oral statements made in response to questioning by an officer; an applicant can make a false representation if he or she signed an employment application or voter registration card that specifically asked the question "Are you a U.S. citizen?" or declared under oath or penalty of perjury, in writing or orally, that he or she was a U.S. citizen. Officers should record the applicant's testimony regarding his or her misrepresentation in a sworn statement, and obtain any relevant evidence to support a false claim to US citizenship charge. Such evidence, for example, can include a copy of the alien's voter registration form with instructions and his or her voter registration card, establishing that U.S. citizenship was required in order to obtain the card.

If the officer determines that the applicant made a false claim to U.S. citizenship for the purpose of voting or registering to vote, the applicant is removable. The officer must then proceed to the next steps of determining whether the applicant meets the exceptions to removal or merits an exercise of favorable prosecutorial discretion.

How do I determine if the applicant qualifies for the exceptions to the removal grounds?

If an applicant has been convicted for violation of 18 U.S.C. 611 or 1015(f), and the conviction became final on or after October 30, 2000, the applicant is removable and not eligible for exceptions created by the CCA.[xiii]

If the applicant has not been convicted, or if the applicant's conviction became final prior to October 30, 2000, officers must analyze whether the applicant falls under the exceptions to the illegal voting and false claim to U.S. citizenship provisions under sections 212(a) and 237(a).

The exceptions apply to any alien:

- whose natural or adoptive parents (both parents) are or were U.S. citizens,
- who permanently resided in the U.S. prior to his or her 16th birthday, and
- who "reasonably believed" at the time of the violation or false representation that he or she was a U.S. citizen.

Officers will need to obtain evidence of the applicant's parents' citizenship status if not currently available in the applicant's A-file and use normal procedures for determining qualifying lawful permanent resident status. As a matter of policy, the Service has determined that the applicant's parents had to be U.S. citizens at the time of the illegal voting or false claim to U.S. citizenship in order to meet the first prong of this exception.

To assess whether the applicant reasonably believed that he or she was a U.S. citizen at the time of the violation, officers must consider the totality of the circumstances in the case, weighing such factors as the length of time the applicant resided in the United States and the age when the applicant entered as a lawful permanent resident. For example, suppose an applicant acknowledges voting unlawfully, but claimed he or she believed he or she was a U.S. citizen because: (1) the applicant was born overseas and adopted as an infant by a U.S. citizen couple; (2) the applicant's parents mistakenly believed that the applicant's adoption and entry into the United States conferred citizenship upon the applicant; and (3) the applicant's parents always told him or her that he or she was a U.S. citizen. In this case, it is likely the applicant has established the "reasonable belief" necessary for an exception from the removal grounds.

An applicant who qualifies for the exceptions to removal is no longer removable. Officers should then determine whether the applicant is eligible for naturalization. If the applicant does not qualify for the exceptions to removal, officers should proceed to the next step and determine if the applicant's case merits a favorable exercise of prosecutorial discretion.

How do I determine whether the applicant's case merits prosecutorial discretion?

Officers should determine whether to initiate or decline to initiate removal proceedings on a case-by-case basis, following the procedures outlined in the Commissioner's November 17, 2000 memorandum titled "Exercising Prosecutorial Discretion."

If the applicant's case does not merit prosecutorial discretion, what do I do with the N-400?

If the adjudicating officer determines that initiation of removal proceedings is appropriate, the officer should follow local procedures for issuing a Notice to Appear (NTA).[xiv] In addition to initiating removal proceedings, the adjudicating officer should **continue** the naturalization application pending the outcome of the removal proceedings. The applicant's naturalization application should not be denied under INA § 318 either prior to placing him or her into proceedings or after proceedings are initiated. The applicant is not considered to be in removal proceedings until the NTA has been served on the Immigration Court. Once an applicant is in proceedings, his or her application may not be denied because § 318 prohibits the Attorney General from taking **any** action on the case (including naturalization adjudication) while removal proceedings are pending.

If the applicant's case merits prosecutorial discretion, what should I do with the N-400?

If the Service decides that the applicant's case merits a favorable exercise of prosecutorial discretion, the officer should proceed with adjudication of the N-400. Note that the alien is not ineligible to naturalize simply because he or she is still susceptible to a removal charge.[xv] The facts surrounding an alien's susceptibility to a removal charge, however, should be considered when assessing whether he or she is of good moral character for the purpose of naturalization.

How do I assess an applicant's good moral character?

Officers should decide whether the unlawful voting or false claim to U.S. citizenship affects the applicant's eligibility to naturalize. Officers should analyze the case focusing on:

(1) whether the applicant is precluded from establishing good moral character pursuant to section 101(f)(1) through (8),
(2) whether the unlawful conduct warrants a discretionary denial based on lack of good moral character, after balancing the equities, and
(3) whether the applicant qualifies for an exception to 101(f).

Per se Bars to Establishing Good Moral Character

If the applicant has been convicted of a violation of 18 U.S.C. 611 or 1015(f),[xvi] the officer must determine whether or not the conviction precludes the applicant from establishing good moral character (GMC). Of particular importance are the bars to GMC that involve applicants who have been convicted of certain classes of crime, specifically INA 101(f)(3) and (f)(7).[xvii]

Sections 101(f)(3) and 212(a)(2)(A)(i)(I) provide that individuals convicted of certain crimes involving moral turpitude (CIMT) are precluded from establishing GMC. Because it is unlikely that a conviction under 18 U.S.C. 611 is a CIMT, such conviction will not preclude the applicant from establishing GMC under these provisions. However, the Service has determined that section 18 U.S.C. 1015(f) is a CIMT. Because it is a felony, such conviction will preclude a finding of GMC, under 101(f)(3) and 212(a)(1)(A)(i), if the offense was committed within the statutory period, unless the officer determines that the applicant qualifies for the 101(f) exception for lawful permanent residents who resided in the United States prior to age 16 and have U.S. citizen parents.

Sections 101(f)(3) and 212(a)(2)(B) preclude individuals who have been convicted of multiple crimes for which the aggregate sentence imposed is greater than five years, regardless of whether the offenses involve moral turpitude, from establishing good moral character. In addition, section 101(f)(7) precludes an applicant from establishing GMC if he or she has been confined in a penal institution for 180 days or more, regardless of whether the offense for which he or she was convicted was committed in or outside the statutory period. Officers should determine whether an applicant who has been convicted under 18 U.S.C. 611 or 1015(f) was confined for 180 days or more or has multiple convictions with an aggregate sentence of more than five years during the statutory period. If, after a careful analysis, the officer concludes that the applicant's convictions fall under 101(f)(3) and 212(a)(2)(B), or 101(f)(7), then the officer must determine whether the applicant qualifies for the 101(f) exception for lawful permanent residents who resided in the United States prior to age 16 and have U.S. citizen parents.

Discretionary Good Moral Character

If the applicant's conviction does not preclude a finding of GMC under 101(f)(3) or (f)(7) or the applicant has not been convicted for violations of 18 U.S.C. 611 and 1015(f), the officer must still determine whether the applicant lacks GMC as a matter of discretion.

When a discretionary denial is considered, officers must consider the totality of the circumstances in the case and weigh all factors, favorable and unfavorable, in determining whether naturalization should be denied as a matter of discretion. Officers must balance the facts regarding the applicant's unlawful voting or false representation as a U.S. citizen against other factors such as:

(1) family ties and background
(2) the absence or presence of other criminal history
(3) education and school records
(4) employment history
(5) other law-abiding behavior, e.g. meeting financial obligations, paying taxes, etc.
(6) community involvement
(7) credibility of the applicant
(8) length of time in United States.

For example, an officer might find that an applicant who: (1) unlawfully registered to vote in a federal election fifteen years ago; (2) signed the voter registration card without understanding that he or she was claiming to be a U.S. citizen by doing so; (3) was specifically told by a community organization that he or she was entitled to vote; (4) has been a law-abiding citizen in all other respects; and (5) has no other criminal history, can establish good moral character in spite of making a false claim to U.S. citizenship. Alternatively, an officer might find that an applicant who: (1) voted unlawfully but was not convicted; (2) has failed to pay taxes in the past 15 years; (3) has 50 unpaid traffic tickets; and (4) owes $20,000 in back child support, cannot establish good moral character even if the officer determines that the applicant is eligible for the CCA exceptions to 101(f) for long-term residents because the applicant's other bad acts cumulatively reflect that he or she lacks good moral character as a matter of discretion. Further, where an officer finds that the applicant's testimony is not credible and that he or she has no or few favorable factors to support a finding of good moral character, the officer can deny the application as a matter of discretion. In every instance, officers should clearly document in the file which factors were considered and, if the case is denied, cite those factors in the denial so that a person reviewing the file can clearly understand how the officer concluded that the applicant did not merit a finding of good moral character.

If, after a careful analysis, the officer concludes that the applicant's case warrants denial as a matter of discretion, then the officer must determine whether the applicant qualifies for the 101(f) exception for lawful permanent residents who resided in the United States prior to age 16 and have U.S. citizen parents.

Exception to Section 101(f) for Long-Time Residents

If an applicant has been convicted for violation of 18 U.S.C. 611 or 1015(f), and the conviction became final on or after October 30, 2000, the applicant does not fall within the 101(f) exception.[xviii]

If the applicant's conviction became final prior to October 30, 2000, or if the applicant has not been convicted, officers must analyze whether the applicant falls under the 101(f) exception. Because the 101(f) exception determination is identical to the exception for removal,

the officer's determination should be consistent with the prior determination. Thus, if the officer determined that the applicant was not removable for illegal voting or making a false claim to U.S. citizenship, the applicant should also fall within the 101(f) exception. If, however, the officer determined that the applicant was removable, but proceedings were not initiated as a matter of prosecutorial discretion, the applicant should not be eligible for the 101(f) exception.

* *

Officers should consult with their local district counsel to receive updated information related to the election laws. Requests for additional information regarding this policy guidance should be directed to Lyle Boelens, Immigrations Services Division, (202) 514-8273.

---

[i]Sections 212(a)(10)(D)(i) and 237(a)(6)(A) provide that "[a]ny alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation" is inadmissible and deportable.

[ii]Sections 212(a)(10)(D)(ii) and 237(a)(6)(B) provide that "[i]n the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction on voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be inadmissible [deportable] under any provision of this subsection based on such violation."

[iii]The last clause of section 101(f) provides: "[i]n the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it."

[iv]Under 18 U.S.C. § 611, it is unlawful for an alien to vote in any election held "for the purpose of electing a candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Residential Commissioner...."

[v]See section 201(d)(3) of Pub. L. 106-395.

[vi]Sections 212(a)(6)(C)(ii)(I) and 237(a)(3)(D)(i) provide that "[a]ny alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any other Federal or State law" is inadmissible and deportable.

[vii]Sections 212(a)(6)(C)(ii)(II) and 237(a)(3)(D)(ii) provide that "[i]n the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation he or she was a citizen, the alien shall not be considered to be inadmissible [deportable], under any provision of this subsection based on such representation."

[viii]See endnote 3.

[ix]18 U.S.C. 1015(f) provides: "Whoever knowingly makes any false statement or claim that he is a citizen of the United States in order to register to vote or vote in any Federal, State, or local election (including an initiative, recall, or referendum)-- Shall be fined under this title or imprisoned not more than five years, or both."

[x] See endnote 5.

[xi]For an individual to be subject to the false claim provision, the representation must have occurred on or after September 30, 1996. However, for an individual to be subject to the voting provision, the unlawful voting could have occurred at anytime before, on or after September 30, 1996.

[xii]Some state statutes use different terms, such as "qualified," "eligible," "entitled," in defining who may vote in an election and sometimes have separate code provisions addressing who can vote. For example, under one New York election law provision, a person is only "qualified" to register to vote and to vote if he or she is: (1) a U.S. citizen, (2) 18 years or older, and (3) a resident of the state for at least 30 days prior to the election. See, e.g. N.Y. Elec. Code. §§ 5-100-102. By contrast, under one Texas election law, a person is only "eligible" to vote if he or she is "a qualified voter." See V.T.C.A. Elec. Code § 11.001. Whether a person is a "qualified voter" is defined under a separate provision as a person who is 18 years or older, a United States citizen, not a convicted felon, a resident of the state, etc. See V.T.C.A. Elec. Code § 11.002.

Officers must also review relevant election laws to determine: (1) what actions or conduct constitute a violation and (2) whether the associated penalties that can be imposed are based solely on the conduct itself, or require an additional finding that the individual acted "knowingly" or "willfully." For example, under New York election law, an individual can be found to have "illegally voted" if he or she simply voted or attempted to vote at an election more than once. See, e.g. N.Y. Elec. Code. § 17-132(3). New York law, however, also provides that an individual can be found to have "illegally voted" when he or she "knowingly vot[ed]... at any election, when not qualified." See, e.g. N.Y. Elec. Code. § 17-132(1).

[xiii]Both 18 U.S.C. 611 and 1015(f) have exceptions that are identical to the exceptions provided in INA 212(a) and 237(a). See footnote 2. The CCA amendments creating these exceptions only apply to convictions that became final on or after the date of enactment of the CCA – October 30, 2000. See section 201(d)(3) of Pub. L. 106-395. Because a district court has made the determination that the applicant did not fall within the terms of the exception, the Service need not re-adjudicate this issue.

[xiv]The Service has determined that 18 U.S.C. 1015(f) is a crime involving moral turpitude (CIMT). Officers therefore should note that if the applicant has been convicted for making a false claim to U.S. citizenship under 18 U.S.C. 1015(f), the applicant is removable under sections 212(a)(2)(A)(i) or 237(a)(2)(A)(i) and (ii) as an alien convicted of a CIMT. Officers should consult with the local district counsel to determine whether these additional charges are appropriate. See discussion in the attached Office of the General Counsel, Advisory Memorandum: Legal Consequences of Voting by an Alien Prior to Naturalization, February 13, 1997 (**Attachment B**).

[xv]Id.

[xvi]It is possible that the applicant could be convicted under state criminal provisions. If the applicant has been convicted pursuant to State law, the officer must review the relevant state law provision to determine what, if any, effect the conviction has on the applicant's ability to establish good moral character.

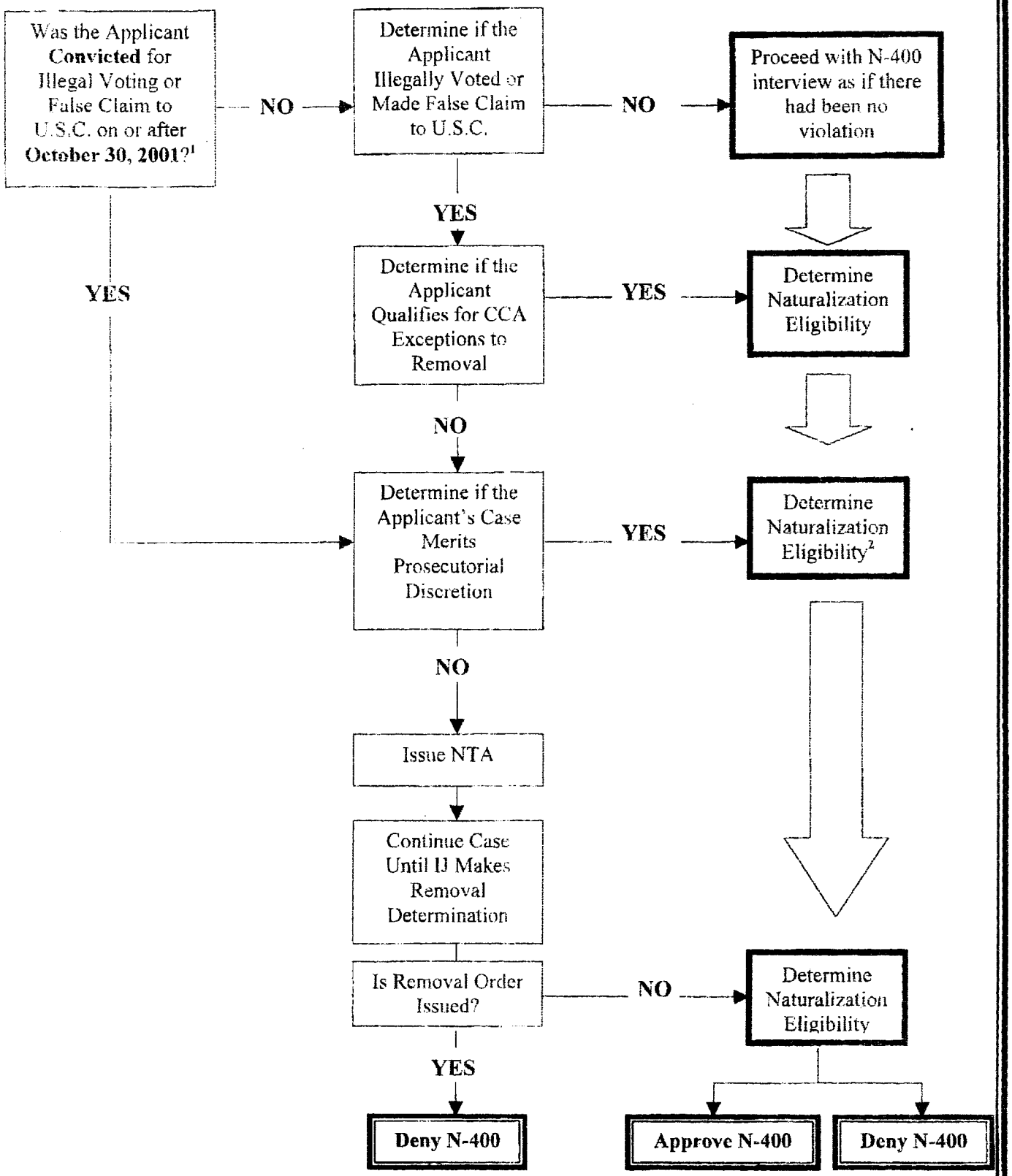
[xvii]A conviction under § 611 is a misdemeanor, punishable by a fine, imprisonment up to one year, or both, and a conviction under § 1015(f) is a felony, punishable by a fine, imprisonment up to five years, or both. Neither conviction is an aggravated felony. Thus, an applicant is not precluded from establishing good moral character under INA 101(f)(8).

[xviii]See endnote 11.

(Attachment A)

Illegal Voting and False Claim to U.S. Citizenship
Flow Chart

ILLEGAL VOTING AND FALSE CLAIM TO U.S. CITIZENSHIP FLOW CHART



Note 1: If the applicant was convicted after 10/30/2001, the district court has already determined that the applicant does not qualify for CCA exceptions. See p. 3 of memo.

Note 2: If you determined that the applicant did not qualify for CCA exceptions for removal but his or her case merited prosecutorial discretion, the applicant is not eligible for CCA exceptions to good moral character. See p. 9 of memo.

U.S. Department of Justice
Immigration and Naturalization Service

HQOPP 50/4

Office of the Commissioner

425 I Street NW
Washington, DC 20536

NOV 17 2000

MEMORANDUM TO REGIONAL DIRECTORS
DISTRICT DIRECTORS
CHIEF PATROL AGENTS
REGIONAL AND DISTRICT COUNSEL

FROM: Doris Meissner
Commissioner
Immigration and Naturalization Service

SUBJECT: Exercising Prosecutorial Discretion

Since the 1996 amendments to the Immigration and Nationality Act (INA) which limited the authority of immigration judges to provide relief from removal in many cases, there has been increased attention to the scope and exercise of the Immigration and Naturalization Service's (INS or the Service) prosecutorial discretion. This memorandum describes the principles with which INS exercises prosecutorial discretion and the process to be followed in making and monitoring discretionary decisions. Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process–from planning investigations to enforcing final orders–subject to their chains of command and to the particular responsibilities and authority applicable to their specific position. In exercising this discretion, officers must take into account the principles described below in order to promote the efficient and effective enforcement of the immigration laws and the interests of justice.

More specific guidance geared to exercising discretion in particular program areas already exists in some instances,[1] and other program-specific guidance will follow separately.

[1] For example, standards and procedures for placing an alien in deferred action status are provided in the Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing, and Removal (Standard Operating Procedures), Part X. This memorandum is intended to provide general principles, and does not replace any previous specific guidance provided about particular INS actions, such as "Supplemental Guidelines on the Use of Cooperating Individuals and Confidential Informants Following the Enactment of IIRIRA," dated December 29, 1997. This memorandum is not intended to address every situation in which the exercise of prosecutorial discretion may be appropriate. If INS personnel in the exercise of their duties recognize apparent conflict between any of their specific policy requirements and these general guidelines, they are encouraged to bring the matter to their supervisor's attention, and any conflict between policies should be raised through the appropriate chain of command for resolution.

However, INS officers should continue to exercise their prosecutorial discretion in appropriate cases during the period before more specific program guidance is issued.

A statement of principles concerning discretion serves a number of important purposes. As described in the "Principles of Federal Prosecution,"[2] part of the U.S. Attorneys' manual, such principles provide convenient reference points for the process of making prosecutorial decisions; facilitate the task of training new officers in the discharge of their duties; contribute to more effective management of the Government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of different offices and between their activities and the INS' law enforcement priorities; make possible better coordination of investigative and prosecutorial activity by enhancing the understanding between the investigative and prosecutorial components; and inform the public of the careful process by which prosecutorial decisions are made.

Legal and Policy Background

"Prosecutorial discretion" is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone. The INS, like other law enforcement agencies, has prosecutorial discretion and exercises it every day. In the immigration context, the term applies not only to the decision to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions, including among others: Focusing investigative resources on particular offenses or conduct; deciding whom to stop, question, and arrest; maintaining an alien in custody; seeking expedited removal or other forms of removal by means other than a removal proceeding; settling or dismissing a proceeding; granting deferred action or staying a final order; agreeing to voluntary departure, withdrawal of an application for admission, or other action in lieu of removing the alien; pursuing an appeal; and executing a removal order.

The "favorable exercise of prosecutorial discretion" means a discretionary decision not to assert the full scope of the INS' enforcement authority as permitted under the law. Such decisions will take different forms, depending on the status of a particular matter, but include decisions such as not issuing an NTA (discussed in more detail below under "Initiating Proceedings"), not detaining an alien placed in proceedings (where discretion remains despite mandatory detention requirements), and approving deferred action.

[2] For this discussion, and much else in this memorandum, we have relied heavily upon the Principles of Federal Prosecution, chapter 9-27.000 in the U.S. Department of Justice's United States Attorneys' Manual (Oct. 1997). There are significant differences, of course, between the role of the U.S. Attorneys' offices in the criminal justice system, and INS responsibilities to enforce the immigration laws, but the general approach to prosecutorial discretion stated in this memorandum reflects that taken by the Principles of Federal Prosecution.

Courts recognize that prosecutorial discretion applies in the civil, administrative arena just as it does in criminal law. Moreover, the Supreme Court "has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831 (1985). Both Congress and the Supreme Court have recently reaffirmed that the concept of prosecutorial discretion applies to INS enforcement activities, such as whether to place an individual in deportation proceedings. INA section 242(g); Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999). The "discretion" in prosecutorial discretion means that prosecutorial decisions are not subject to judicial review or reversal, except in extremely narrow circumstances. Consequently, it is a powerful tool that must be used responsibly.

As a law enforcement agency, the INS generally has prosecutorial discretion within its area of law enforcement responsibility unless that discretion has been clearly limited by statute in a way that goes beyond standard terminology. For example, a statute directing that the INS "shall" remove removable aliens would not be construed by itself to limit prosecutorial discretion, but the specific limitation on releasing certain criminal aliens in section 236(c)(2) of the INA evidences a specific congressional intention to limit discretion not to detain certain criminal aliens in removal proceedings that would otherwise exist. Personnel who are unsure whether the INS has discretion to take a particular action should consult their supervisor and legal counsel to the extent necessary.

It is important to recognize not only what prosecutorial discretion is, but also what it is not. The doctrine of prosecutorial discretion applies to law enforcement decisions whether, and to what extent, to exercise the coercive power of the Government over liberty or property, as authorized by law in cases when individuals have violated the law. Prosecutorial discretion does not apply to affirmative acts of approval, or grants of benefits, under a statute or other applicable law that provides requirements for determining when the approval should be given. For example, the INS has prosecutorial discretion not to place a removable alien in proceedings, but it does not have prosecutorial discretion to approve a naturalization application by an alien who is ineligible for that benefit under the INA.

This distinction is not always an easy, bright-line rule to apply. In many cases, INS decisionmaking involves both a prosecutorial decision to take or not to take enforcement action, such as placing an alien in removal proceedings, and a decision whether or not the alien is substantively eligible for a benefit under the INA. In many cases, benefit decisions involve the exercise of significant discretion which in some cases is not judicially reviewable, but which is not prosecutorial discretion.

Prosecutorial discretion can extend only up to the substantive and jurisdictional limits of the law. It can never justify an action that is illegal under the substantive law pertaining to the

conduct, or one that while legal in other contexts, is not within the authority of the agency or officer taking it. Prosecutorial discretion to take an enforcement action does not modify or waive any legal requirements that apply to the action itself. For example, an enforcement decision to focus on certain types of immigration violators for arrest and removal does not mean that the INS may arrest any person without probable cause to do so for an offense within its jurisdiction. Service officers who are in doubt whether a particular action complies with applicable constitutional, statutory, or case law requirements should consult with their supervisor and obtain advice from the district or sector counsel or representative of the Office of General Counsel to the extent necessary.

Finally, exercising prosecutorial discretion does not lessen the INS' commitment to enforce the immigration laws to the best of our ability. It is not an invitation to violate or ignore the law. Rather, it is a means to use the resources we have in a way that best accomplishes our mission of administering and enforcing the immigration laws of the United States.

Principles of Prosecutorial Discretion

Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law.

It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals. The INS has used this principle in the design and execution of its border enforcement strategy, its refocus on criminal smuggling networks, and its concentration on fixing benefit-granting processes to prevent fraud. An agency's focus on maximizing its impact under appropriate principles, rather than devoting resources to cases that will do less to advance these overall interests, is a crucial element in effective law enforcement management.

The Principles of Federal Prosecution governing the conduct of U.S. Attorneys use the concept of a "substantial Federal interest." A U.S. Attorney may properly decline a prosecution if "*no substantial Federal interest would be served by prosecution.*" This principle provides a useful frame of reference for the INS, although applying it presents challenges that differ from those facing a U.S. Attorney. In particular, as immigration is an exclusively Federal responsibility, the option of an adequate alternative remedy under state law is not available. In an immigration case, the interest at stake will always be Federal. Therefore, we must place particular emphasis on the element of substantiality. How important is the Federal interest in the case, as compared to other cases and priorities? That is the overriding question, and answering it requires examining a number of factors that may differ according to the stage of the case.

As a general matter, INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial.[3] Except as may be provided specifically in other policy statements or directives, the responsibility for exercising prosecutorial discretion in this manner rests with the District Director (DD) or Chief Patrol Agent (CPA) based on his or her common sense and sound judgment.[4] The DD or CPA should obtain legal advice from the District or Sector Counsel to the extent that such advice may be necessary and appropriate to ensure the sound and lawful exercise of discretion, particularly with respect to cases pending before the Executive Office for Immigration Review (EOIR).[5] The DD's or CPA's authority may be delegated to the extent necessary and proper, except that decisions not to place a removable alien in removal proceedings, or decisions to move to terminate a proceeding which in the opinion of the District or Sector Counsel is legally sufficient, may not be delegated to an officer who is not authorized under 8 C.F.R. § 239.1 to issue an NTA. A DD's or CPA's exercise of prosecutorial discretion will not normally be reviewed by Regional or Headquarters authority. However, DDs and CPAs remain subject to their chains of command and may be supervised as necessary in their exercise of prosecutorial discretion.

Investigations

Priorities for deploying investigative resources are discussed in other documents, such as the interior enforcement strategy, and will not be discussed in detail in this memorandum. These previously identified priorities include identifying and removing criminal and terrorist aliens, deterring and dismantling alien smuggling, minimizing benefit fraud and document abuse, responding to community complaints about illegal immigration and building partnerships to solve local problems, and blocking and removing employers' access to undocumented workers. Even within these broad priority areas, however, the Service must make decisions about how best to expend its resources.

Managers should plan and design operations to maximize the likelihood that serious offenders will be identified. Supervisors should ensure that front-line investigators understand that it is not mandatory to issue an NTA in every case where they have reason to believe that an alien is removable, and agents should be encouraged to bring questionable cases to a supervisor's attention. Operational planning for investigations should include consideration of appropriate procedures for supervisory and legal review of individual NTA issuing decisions.

---

[3] In some cases even a substantial immigration enforcement interest in prosecuting a case could be outweighed by other interests, such as the foreign policy of the United States. Decisions that require weighing such other interests should be made at the level of responsibility within the INS or the Department of Justice that is appropriate in light of the circumstances and interests involved.

[4] This general reference to DDs and CPAs is not intended to exclude from coverage by this memorandum other INS personnel, such as Service Center directors, who may be called upon to exercise prosecutorial discretion and do not report to DDs or CPAs, or to change any INS chains of command.

[5] Exercising prosecutorial discretion with respect to cases pending before EOIR involves procedures set forth at 8 CFR 239.2 and 8 CFR Part 3, such as obtaining the court's approval of a motion to terminate proceedings.

Careful design of enforcement operations is a key element in the INS' exercise of prosecutorial discretion. Managers should consider not simply whether a particular effort is legally supportable, but whether it best advances the INS' goals, compared with other possible uses of those resources. As a general matter, investigations that are specifically focused to identify aliens who represent a high priority for removal should be favored over investigations which, by their nature, will identify a broader variety of removable aliens. Even an operation that is designed based on high-priority criteria, however, may still identify individual aliens who warrant a favorable exercise of prosecutorial discretion.[6]

Initiating and Pursuing Proceedings

Aliens who are subject to removal may come to the Service's attention in a variety of ways. For example, some aliens are identified as a result of INS investigations, while others are identified when they apply for immigration benefits or seek admission at a port-of-entry. While the context in which the INS encounters an alien may, as a practical matter, affect the Service's options, it does not change the underlying principle that the INS has discretion and should exercise that discretion appropriately given the circumstances of the case.

Even when an immigration officer has reason to believe that an alien is removable and that there is sufficient evidence to obtain a final order of removal, it may be appropriate to decline to proceed with that case. This is true even when an alien is removable based on his or her criminal history and when the alien–if served with an NTA–would be subject to mandatory detention. The INS may exercise its discretion throughout the enforcement process. Thus, the INS can choose whether to issue an NTA, whether to cancel an NTA prior to filing with the immigration court or move for dismissal in immigration court (under 8 CFR 239.2), whether to detain (for those aliens not subject to mandatory detention), whether to offer an alternative to removal such as voluntary departure or withdrawal of an application for admission, and whether to stay an order of deportation.

The decision to exercise any of these options or other alternatives in a particular case requires an individualized determination, based on the facts and the law. As a general matter, it is better to exercise favorable discretion as early in the process as possible, once the relevant facts have been determined, in order to conserve the Service's resources and in recognition of the alien's interest in avoiding unnecessary legal proceedings. However, there is often a conflict

[6] For example, operations in county jails are designed to identify and remove criminal aliens, a high priority for the Service. Nonetheless, an investigator working at a county jail and his or her supervisor should still consider whether the exercise of prosecutorial discretion would be appropriate in individual cases.

between making decisions as soon as possible, and making them based on evaluating as many relevant, credible facts as possible. Developing an extensive factual record prior to making a charging decision may itself consume INS resources in a way that negates any saving from forgoing a removal proceeding.

Generally, adjudicators may have a better opportunity to develop a credible factual record at an earlier stage than investigative or other enforcement personnel. It is simply not practicable to require officers at the arrest stage to develop a full investigative record on the equities of each case (particularly since the alien file may not yet be available to the charging office), and this memorandum does not require such an analysis. Rather, what is needed is knowledge that the INS is not legally required to institute proceedings in every case, openness to that possibility in appropriate cases, development of facts relevant to the factors discussed below to the extent that it is reasonably possible to do so under the circumstances and in the timeframe that decisions must be made, and implementation of any decision to exercise prosecutorial discretion.

There is no precise formula for identifying which cases warrant a favorable exercise of discretion. Factors that should be taken into account in deciding whether to exercise prosecutorial discretion include, but are not limited to, the following:

- Immigration status: Lawful permanent residents generally warrant greater consideration. However, other removable aliens may also warrant the favorable exercise of discretion, depending on all the relevant circumstances.
- Length of residence in the United States: The longer an alien has lived in the United States, particularly in legal status, the more this factor may be considered a positive equity.
- Criminal history: Officers should take into account the nature and severity of any criminal conduct, as well as the time elapsed since the offense occurred and evidence of rehabilitation. It is appropriate to take into account the actual sentence or fine that was imposed, as an indicator of the seriousness attributed to the conduct by the court. Other factors relevant to assessing criminal history include the alien's age at the time the crime was committed and whether or not he or she is a repeat offender.
- Humanitarian concerns: Relevant humanitarian concerns include, but are not limited to, family ties in the United States; medical conditions affecting the alien or the alien's family; the fact that an alien entered the United States at a very young age; ties to one's home country (e.g., whether the alien speaks the language or has relatives in the home country); extreme youth or advanced age; and home country conditions.
- Immigration history: Aliens without a past history of violating the immigration laws (particularly violations such as reentering after removal, failing to appear at hearing, or resisting arrest that show heightened disregard for the legal process) warrant favorable consideration to a greater extent than those with such a history. The seriousness of any such violations should also be taken into account.

- Likelihood of ultimately removing the alien: Whether a removal proceeding would have a reasonable likelihood of ultimately achieving its intended effect, in light of the case circumstances such as the alien's nationality, is a factor that should be considered.
- Likelihood of achieving enforcement goal by other means: In many cases, the alien's departure from the United States may be achieved more expeditiously and economically by means other than removal, such as voluntary return, withdrawal of an application for admission, or voluntary departure.
- Whether the alien is eligible or is likely to become eligible for other relief: Although not determinative on its own, it is relevant to consider whether there is a legal avenue for the alien to regularize his or her status if not removed from the United States. The fact that the Service cannot confer complete or permanent relief, however, does not mean that discretion should not be exercised favorably if warranted by other factors.
- Effect of action on future admissibility: The effect an action such as removal may have on an alien can vary for example, a time-limited as opposed to an indefinite bar to future admissibility–and these effects may be considered.
- Current or past cooperation with law enforcement authorities: Current or past cooperation with the INS or other law enforcement authorities, such as the U.S. Attorneys, the Department of Labor, or National Labor Relations Board, among others, weighs in favor of discretion.
- Honorable U.S. military service: Military service with an honorable discharge should be considered as a favorable factor. See Standard Operating Procedures Part V.D.8 (issuing an NTA against current or former member of armed forces requires advance approval of Regional Director).
- Community attention: Expressions of opinion, in favor of or in opposition to removal, may be considered, particularly for relevant facts or perspectives on the case that may not have been known to or considered by the INS. Public opinion or publicity (including media or congressional attention) should not, however, be used to justify a decision that cannot be supported on other grounds. Public and professional responsibility will sometimes require the choice of an unpopular course.
- Resources available to the INS: As in planning operations, the resources available to the INS to take enforcement action in the case, compared with other uses of the resources to fulfill national or regional priorities, are an appropriate factor to consider, but it should not be determinative. For example, when prosecutorial discretion should be favorably exercised under these factors in a particular case, that decision should prevail even if there is detention space available.

Obviously, not all of the factors will be applicable to every case, and in any particular case one factor may deserve more weight than it might in another case. There may be other factors, not on the list above, that are appropriate to consider. The decision should be based on the totality of the circumstances, not on any one factor considered in isolation. General guidance such as this cannot provide a "bright line" test that may easily be applied to determine the "right" answer in

cases must be an exercise of judgment by the responsible officer based on his or her experience, good sense, and consideration of the relevant factors to the best of his or her ability.

There are factors that may not be considered. Impermissible factors include:

- An individual's race, religion, sex, national origin, or political association, activities or beliefs;[7]
- The officer's own personal feelings regarding the individual; or
- The possible effect of the decision on the officer's own professional or personal circumstances.

In many cases, the procedural posture of the case, and the state of the factual record, will affect the ability of the INS to use prosecutorial discretion. For example, since the INS cannot admit an inadmissible alien to the United States unless a waiver is available, in many cases the INS' options are more limited in the admission context at a port-of-entry than in the deportation context.

Similarly, the INS may consider the range of options and information likely to be available at a later time. For example, an officer called upon to make a charging decision may reasonably determine that he or she does not have a sufficient, credible factual record upon which to base a favorable exercise of prosecutorial discretion not to put the alien in proceedings, that the record cannot be developed in the timeframe in which the decision must be made, that a more informed prosecutorial decision likely could be made at a later time during the course of proceedings, and that if the alien is not served with an NTA now, it will be difficult or impossible to do so later.

Such decisions must be made, however, with due regard for the principles of these guidelines, and in light of the other factors discussed here. For example, if there is no relief available to the alien in a removal proceeding and the alien is subject to mandatory detention if

[7] This general guidance on factors that should not be relied upon in making a decision whether to enforce the law against an individual is not intended to prohibit their consideration to the extent they are directly relevant to an alien's status under the immigration laws or eligibility for a benefit. For example, religion and political beliefs are often directly relevant in asylum cases and need to be assessed as part of a prosecutorial determination regarding the strength of the case, but it would be improper for an INS officer to treat aliens differently based on his personal opinion about a religion or belief. Political activities may be relevant to a ground of removal on national security or terrorism grounds. An alien's nationality often directly affects his or her eligibility for adjustment or other relief, the likelihood that he or she can be removed, or the availability of prosecutorial options such as voluntary return, and may be considered to the extent these concerns are pertinent.

placed in proceedings, that situation suggests that the exercise of prosecutorial discretion, if appropriate, would be more useful to the INS if done sooner rather than later. It would be improper for an officer to assume that someone else at some later time will always be able to make a more informed decision, and therefore never to consider exercising discretion.

Factors relevant to exercising prosecutorial discretion may come to the Service's attention in various ways. For example, aliens may make requests to the INS to exercise prosecutorial discretion by declining to pursue removal proceedings. Alternatively, there may be cases in which an alien asks to be put in proceedings (for example, to pursue a remedy such as cancellation of removal that may only be available in that forum). In either case, the INS may consider the request, but the fact that it is made should not determine the outcome, and the prosecutorial decision should be based upon the facts and circumstances of the case. Similarly, the fact that an alien has not requested prosecutorial discretion should not influence the analysis of the case. Whether, and to what extent, any request should be considered is also a matter of discretion. Although INS officers should be open to new facts and arguments, attempts to exploit prosecutorial discretion as a delay tactic, as a means merely to revisit matters that have been thoroughly considered and decided, or for other improper tactical reasons should be rejected. There is no legal right to the exercise of prosecutorial discretion, and (as stated at the close of this memorandum) this memorandum creates no right or obligation enforceable at law by any alien or any other party.

Process for Decisions

Identification of Suitable Cases

No single process of exercising discretion will fit the multiple contexts in which the need to exercise discretion may arise. Although this guidance is designed to promote consistency in the application of the immigration laws, it is not intended to produce rigid uniformity among INS officers in all areas of the country at the expense of the fair administration of the law. Different offices face different conditions and have different requirements. Service managers and supervisors, including DDs and CPAs, and Regional, District, and Sector Counsel must develop mechanisms appropriate to the various contexts and priorities, keeping in mind that it is better to exercise discretion as early in process as possible once the factual record has been identified.[8] In particular, in cases where it is clear that no statutory relief will be available at the immigration hearing and where detention will be mandatory, it best conserves the Service's resources to make a decision early.

Enforcement and benefits personnel at all levels should understand that prosecutorial discretion exists and that it is appropriate and expected that the INS will exercise this authority in appropriate cases. DDs, CPAs, and other supervisory officials (such as District and

[8] DDs, CPAs, and other INS personnel should also be open, however, to possible reconsideration of decisions (either for or against the exercise of discretion) based upon further development of the facts.

Sector Counsels) should encourage their personnel to bring potentially suitable cases for the favorable exercise of discretion to their attention for appropriate resolution. To assist in exercising their authority, DDs and CPAs may wish to convene a group to provide advice on difficult cases that have been identified as potential candidates for prosecutorial discretion.

It is also appropriate for DDs and CPAs to develop a list of "triggers" to help their personnel identify cases at an early stage that may be suitable for the exercise of prosecutorial discretion. These cases should then be reviewed at a supervisory level where a decision can be made as to whether to proceed in the ordinary course of business, to develop additional facts, or to recommend a favorable exercise of discretion. Such triggers could include the following facts (whether proven or alleged):

Lawful permanent residents;
Aliens with a serious health condition;
Juveniles;
Elderly aliens;
Adopted children of U.S. citizens;
U.S. military veterans;
Aliens with lengthy presence in United States (i.e., 10 years or more); or
Aliens present in the United States since childhood.

Since workloads and the type of removable aliens encountered may vary significantly both within and between INS offices, this list of possible trigger factors for supervisory review is intended neither to be comprehensive nor mandatory in all situations. Nor is it intended to suggest that the presence or absence of "trigger" facts should itself determine whether prosecutorial discretion should be exercised, as compared to review of all the relevant factors as discussed elsewhere in these guidelines. Rather, development of trigger criteria is intended solely as a suggested means of facilitating identification of potential cases that may be suitable for prosecutorial review as early as possible in the process.

Documenting Decisions

When a DD or CPA decides to exercise prosecutorial discretion favorably, that decision should be clearly documented in the alien file, including the specific decision taken and its factual and legal basis. DDs and CPAs may also document decisions based on a specific set of facts not to exercise prosecutorial discretion favorably, but this is not required by this guidance.

The alien should also be informed in writing of a decision to exercise prosecutorial discretion favorably, such as not placing him or her in removal proceedings or not pursuing a case. This normally should be done by letter to the alien and/or his or her attorney of record, briefly stating the decision made and its consequences. It is not necessary to recite the facts of the case or the INS' evaluation of the facts in such letters. Although the specifics of the letter

will vary depending on the circumstances of the case and the action taken, it must make it clear to the alien that exercising prosecutorial discretion does not confer any immigration status, ability to travel to the United States (unless the alien applies for and receives advance parole), immunity from future removal proceedings, or any enforceable right or benefit upon the alien. If, however, there is a potential benefit that is linked to the action (for example, the availability of employment authorization for beneficiaries of deferred action), it is appropriate to identify it.

The obligation to notify an individual is limited to situations in which a specific, identifiable decision to refrain from action is taken in a situation in which the alien normally would expect enforcement action to proceed. For example, it is not necessary to notify aliens that the INS has refrained from focusing investigative resources on them, but a specific decision not to proceed with removal proceedings against an alien who has come into INS custody should be communicated to the alien in writing. This guideline is not intended to replace existing standard procedures or forms for deferred action, voluntary return, voluntary departure, or other currently existing and standardized processes involving prosecutorial discretion.

Future Impact

An issue of particular complexity is the future effect of prosecutorial discretion decisions in later encounters with the alien. Unlike the criminal context, in which statutes of limitation and venue requirements often preclude one U.S. Attorney's office from prosecuting an offense that another office has declined, immigration violations are continuing offenses that, as a general principle of immigration law, continue to make an alien legally removable regardless of a decision not to pursue removal on a previous occasion. An alien may come to the attention of the INS in the future through seeking admission or in other ways. An INS office should abide by a favorable prosecutorial decision taken by another office as a matter of INS policy, absent new facts or changed circumstances. However, if a removal proceeding is transferred from one INS district to another, the district assuming responsibility for the case is not bound by the charging district's decision to proceed with an NTA, if the facts and circumstances at a later stage suggest that a favorable exercise of prosecutorial discretion is appropriate.

Service offices should review alien files for information on previous exercises of prosecutorial discretion at the earliest opportunity that is practicable and reasonable and take any such information into account. In particular, the office encountering the alien must carefully assess to what extent the relevant facts and circumstances are the same or have changed either procedurally or substantively (either with respect to later developments, or more detailed knowledge of past circumstances) from the basis for the original exercise of discretion. A decision by an INS office to take enforcement action against the subject of a previous documented exercise of favorable prosecutorial discretion should be memorialized with a memorandum to the file explaining the basis for the decision, unless the charging documents on their face show a material difference in facts and circumstances (such as a different ground of deportability).

Legal Liability and Enforceability

The question of liability may arise in the implementation of this memorandum. Some INS personnel have expressed concerns that, if they exercise prosecutorial discretion favorably, they may become subject to suit and personal liability for the possible consequences of that decision. We cannot promise INS officers that they will never be sued. However, we can assure our employees that Federal law shields INS employees who act in reasonable reliance upon properly promulgated agency guidance within the agency's legal authority such as this memorandum–from personal legal liability for those actions.

The principles set forth in this memorandum, and internal office procedures adopted hereto, are intended solely for the guidance of INS personnel in performing their duties. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Training and Implementation

Training on the implementation of this memorandum for DDs, CPAs, and Regional, District, and Sector Counsel will be conducted at the regional level. This training will include discussion of accountability and periodic feedback on implementation issues. In addition, following these regional sessions, separate training on prosecutorial discretion will be conducted at the district level for other staff, to be designated. The regions will report to the Office of Field Operations when this training has been completed.