



U.S. Immigration
and Customs
Enforcement

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MEMORANDUM FOR: All OPLA Attorneys

FROM: Kerry E. Doyle KERRY E
Principal Legal Advisor DOYLE

SUBJECT: Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion

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KERRY E DOYLE
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On September 30, 2021, Secretary of Homeland Security Alejandro N. Mayorkas issued a memorandum titled, *Guidelines for the Enforcement of Civil Immigration Law* (Mayorkas Memorandum), which took effect on November 29, 2021.¹ The Mayorkas Memorandum lays out the Department of Homeland Security's (DHS or Department) civil immigration enforcement priorities to ensure that finite DHS resources are used in a way that accomplishes the Department's enforcement mission most effectively and justly. In accordance with the Mayorkas Memorandum, the memorandum issued by our General Counsel, Jonathan E. Meyer, titled, *Exercising Prosecutorial Discretion in the Enforcement of Civil Immigration Law* (Meyer Memorandum),² and the enduring principles of prosecutorial discretion, I am providing this guidance to the U.S. Immigration and Customs Enforcement (ICE) Office of the Principal Legal Advisor (OPLA) attorneys assigned to handle proceedings before the Executive Office for Immigration Review (EOIR), to guide them in appropriately executing DHS's enforcement priorities and exercising prosecutorial discretion.³

Prosecutorial discretion is an indispensable feature of any functioning legal system. The exercise of prosecutorial discretion, where appropriate, can preserve limited government resources, achieve just and fair outcomes in individual cases, and advance DHS's mission of administering

¹ Memorandum from Alejandro N. Mayorkas, Secretary of Homeland Security, [Guidelines for the Enforcement of Civil Immigration Law](#) (Sept. 30, 2021). Upon its effective date, the Mayorkas Memorandum rescinded then-Acting Secretary of Homeland Security David Pekoske's memorandum, *Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021), and U.S. Immigration and Customs Enforcement Acting Director Tae D. Johnson's memorandum, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021). At that time, OPLA personnel were advised via an [internal email broadcast message](#) to apply the Mayorkas Memorandum priorities to their litigation activities. This memorandum supersedes that broadcast message.

² Memorandum from Jonathan E. Meyer, General Counsel, DHS, [Exercising Prosecutorial Discretion in the Enforcement of Civil Immigration Law](#) (Apr. 3, 2022).

³ Upon the effective date of this memorandum set forth in Section V, *infra*, the memorandum issued by former Principal Legal Advisor John D. Trasviña, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), shall be automatically rescinded.

and enforcing the immigration laws of the United States in a smart and sensible way that promotes public confidence. As DHS's representative before EOIR with respect to exclusion, deportation, and removal proceedings, 6 U.S.C. § 252(c), OPLA plays a critical role in advancing the Department's enforcement priorities and exercising the Secretary's prosecutorial discretion.⁴ In performing their duties, including through implementation of this memorandum, OPLA attorneys should remain mindful that "[i]mmigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when justice is done."⁵ As a result, they are both authorized by law and expected to exercise discretion in accordance with the factors and considerations set forth in the Mayorkas Memorandum, the Meyer Memorandum, and this guidance at all stages of the enforcement process.

I. The Civil Immigration Enforcement Priorities

The Mayorkas Memorandum establishes three priorities for civil immigration enforcement. Consistent with those priorities, OPLA attorneys are directed to focus efforts and prioritize cases involving noncitizens who pose a threat to our national security, public safety, or border security. This section recites those priorities, provides interpretative guidance surrounding the priorities, and discusses how OPLA personnel are to make priority determinations.

A. The Mayorkas Memorandum Priorities

The three priorities are defined as follows:

Priority A - Threat to National Security. A noncitizen who engaged in or is suspected of terrorism or espionage, or terrorism-related or espionage-related activities, or who otherwise poses a danger to national security, is a priority for apprehension and removal.

Priority B - Threat to Public Safety. A noncitizen who poses a current threat to public safety, typically because of serious criminal conduct, is a priority for apprehension and removal. Whether a noncitizen poses a current threat to public safety is not to be determined according to bright lines or categories. It instead requires an assessment of the individual and the totality of the facts and circumstances.

⁴ Indeed, [OPLA's recently issued Strategic Plan for 2022 - 2026](#) specifically includes as our second overarching strategic goal, the "Comple[ti]on of Litigation Activities Efficiently and in the Pursuit of Justice."

⁵ *Matter of S-M-J*, 21 I&N Dec. 722, 727 (BIA 1997) (en banc). In remarks delivered at the Second Annual Conference of United States Attorneys more than 80 years ago, Attorney General Robert H. Jackson said, "Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done." Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18, 18-19 (1940).

Priority C - Threat to Border Security. A noncitizen who poses a threat to border security is a priority for apprehension and removal. A noncitizen is a threat to border security if: (a) they are apprehended at the border or port of entry while attempting to unlawfully enter the United States; or (b) they are apprehended in the United States after unlawfully entering after November 1, 2020. There could be other border security cases that present compelling facts that warrant enforcement action. In each case, there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action. Our personnel should evaluate the totality of the facts and circumstances and exercise their judgment accordingly.

These priorities are not intended to require or prohibit taking or maintaining a civil immigration enforcement action against any individual noncitizen or to contravene any legal obligations. Rather, OPLA attorneys are expected to focus their efforts and limited resources consistent with the law and ICE's important national security, public safety, and border security mission.

B. Construing the Three Enforcement Priorities

The Mayorkas Memorandum provides DHS personnel with significant discretion in construing the three enforcement priorities. In order to promote consistency and a common understanding of those priorities within OPLA, I am elaborating on their meaning for purposes of our work before EOIR.

1. Priority A: Threat to National Security

In assessing whether a noncitizen is a threat to national security, OPLA attorneys must consider all available information indicating that the noncitizen is engaged in or is suspected of terrorism or espionage, or terrorism-related or espionage-related activities, or otherwise poses a danger to national security. For purposes of the national security enforcement priority, the terms "terrorism or espionage" and "terrorism-related or espionage-related activities" should be applied consistent with (1) the definitions of "terrorist activity" and "engage in terrorist activity" in section 212(a)(3)(B)(iii)–(iv) of the Immigration and Nationality Act (INA) and (2) the manner in which the term "espionage" is generally applied in the immigration laws. In evaluating whether a noncitizen is a potential national security priority, OPLA attorneys should consider whether a noncitizen poses a threat to United States sovereignty, territorial integrity, national interests, or institutions. Consideration may also be given to whether the noncitizen would be ineligible for an exemption from certain terrorism-related inadmissibility grounds pursuant to INA § 212(d)(3)(B)(i).

When determining whether a noncitizen *otherwise* poses a danger to national security, OPLA attorneys should include in their determination process whether the noncitizen is engaged in or suspected of serious human rights violations. The values of our nation as a place of refuge for those fleeing persecution do not support providing a safe haven to those who have voluntarily participated in persecution or other human rights violations. The presence of such perpetrators in the United States not only poses an ongoing threat to their fleeing victims, but also risks the stability of our communities and threatens our strong national interest in welcoming refugees.

Indeed, the INA provisions governing removability for “security and related grounds” specifically encompass some categories of human rights violators, reflecting Congress’ judgment that such individuals threaten our nation’s security.⁶

2. *Priority B: Threat to Public Safety*

Whether a noncitizen poses a current threat to public safety generally turns on the seriousness of a noncitizen’s criminal conduct and an assessment of the individual and the totality of the facts and circumstances. In conducting a totality of the facts and circumstances analysis, not all factors need to be weighed equally. Importantly, an individual’s convictions or prosecutions are not the only indicators of whether or not an individual poses a current threat to public safety. For instance, a removable noncitizen may play a role in the criminal activities of a violent organization but may not yet have been arrested or prosecuted in connection with their association with such organization or its crimes. Such individual may be deemed a significant threat, nonetheless. Relatedly, the existence of a criminal history alone, regardless of severity, will not necessarily indicate that a noncitizen presently poses a current public safety threat pursuant to the Secretary’s priorities. The Mayorkas Memorandum provides a number of aggravating and mitigating factors to help inform public safety assessments:

- Aggravating factors may include but are not limited to: the gravity of the offense of conviction and the length and nature of the sentence imposed; the nature and degree of harm caused to the victim or the community by the criminal offense; the sophistication of the criminal offense; use or threatened use of a firearm or dangerous weapon; and a serious prior criminal record.
- Mitigating factors may include but are not limited to: advanced or tender age; lengthy presence in the United States; a mental condition that may have contributed to the criminal conduct, or a physical or mental condition requiring care or treatment;⁷ status as a victim of crime or victim, witness, or party in legal proceedings, including relating to human trafficking and labor exploitation;⁸ the impact of removal on family in the United

⁶ See INA §§ 212(a)(3)(E) and 237(a)(4)(D).

⁷ As a reminder, under established guidance, special care must be taken in the identification and handling of mental competency cases in proceedings before EOIR. OPLA attorneys play a critical role in identifying indicia of incompetency, sharing information about potential incompetency issues with ICE and EOIR, and ensuring these sensitive and significant cases are handled in accordance with ICE’s policies and procedures. Please contact OPLA’s national mental competency POCs [here](#) when handling cases with mental competency issues.

⁸ On August 10, 2021, Acting Director Johnson issued [ICE Directive 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims](#), setting forth civil immigration enforcement policy for noncitizen crime victims, including applicants for and beneficiaries of victim-based immigration benefits and Continued Presence. This directive builds upon long-standing ICE policy directing that ICE officers, special agents, and attorneys exercise all appropriate discretion on a case-by-case basis when making decisions regarding noncitizen crime victims, witnesses, and individuals pursuing legitimate civil rights complaints, with particular focus on victims of domestic violence, human trafficking, and other serious crimes. See [ICE Directive 10076.1: Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs](#) (June 17, 2011). OPLA attorneys should, accordingly, give particular consideration to noncitizen crime victims when determining whether a noncitizen poses a current public safety threat or is otherwise

States, such as loss of provider or caregiver; whether the noncitizen may be eligible for humanitarian protection or other immigration relief (including any corresponding waivers of ineligibility); military or other public service of the noncitizen or their immediate family; time since an offense and evidence of rehabilitation; and whether a conviction was vacated or expunged.

Beyond these factors, OPLA attorneys may also consider any other relevant factors in assessing whether a removable noncitizen poses a threat to public safety. Other aggravating factors may include, but are not limited to, whether the noncitizen victimized a child or other vulnerable person as part of their criminal activity; whether any criminal activity involved violence or was of a sexual nature; whether criminal conduct was in furtherance of the activities of a “criminal street gang” as defined under 18 U.S.C. § 521(a);⁹ or whether the individual’s criminal conduct resulted in harm to public health or pandemic response efforts.¹⁰ Other mitigating factors may include, but are not limited to, whether the noncitizen is pregnant, postpartum, or nursing; whether the noncitizen is a lawful permanent resident (LPR) (particularly where LPR status was obtained many years ago and/or at a young age); whether the circumstances of a noncitizen’s arrest indicate an underlying discriminatory motive or retaliation for asserting their legal rights;¹¹ whether the type of criminal conduct committed by a noncitizen has since been decriminalized; and the noncitizen’s status as a cooperating witness or confidential informant or other assistance sought from the noncitizen by, or provided by the noncitizen to, federal, state, local or tribal law enforcement, including labor and civil rights law enforcement agencies.¹²

3. *Priority C: Threat to Border Security*

As defined in the Mayorkas Memorandum and based on subsequent communications, the border security priority category applies directly to noncitizens apprehended at the border or port of

a priority for enforcement. In general, if a noncitizen has a pending application or petition for any of the following victim-based immigration benefits and appears *prima facie* eligible for such relief, OPLA should treat the case as a nonpriority matter until U.S. Citizenship and Immigration Services (USCIS) adjudicates the application or petition: T visas; U visas; Violence Against Women Act relief for qualifying domestic violence victims; and Special Immigrant Juvenile classification for qualifying children who have been abused, neglected, or abandoned by one or both parent.

⁹ OPLA attorneys should be mindful that inclusion in one or more gang databases is not determinative of whether a particular individual is, in fact, a gang member or associate. *Cf. Ortiz v. Garland*, 23 F.4th 1, 17-22 (1st Cir. 2022) (en banc) (overturning noncitizen’s adverse credibility finding based on shortcomings of gang database-derived material and discussing scholarly criticism of such databases); Mayorkas Memorandum at 4 (“Our personnel should not rely on the fact of conviction or the result of a database search alone.”).

¹⁰ This could be the case if, for instance, the individual intentionally defrauded a program administered by federal, state, local, or tribal agencies.

¹¹ Sections III and IV of the Mayorkas Memorandum provide further details on such civil rights and civil liberties issues.

¹² Such agencies may include, but are not limited to, the DHS Office of Inspector General, Office for Civil Rights and Civil Liberties, Department of Justice (DOJ) Civil Rights Division Immigrant and Employee Rights Section, Department of Labor, National Labor Relations Board, Equal Employment Opportunity Commission, ERO, Homeland Security Investigations, and any relevant state counterparts.

entry while attempting to unlawfully enter the United States after November 1, 2020, as well as to noncitizens apprehended by DHS in the United States who unlawfully entered the United States subsequent to that date. In addition to those who surreptitiously enter the United States, “unlawful entry” in this context should be construed to include individuals who apply for admission to the United States but are inadmissible at the time, including due to criminal activity or an inability to satisfy relevant documentary requirements.

The Mayorkas Memorandum further explains that this priority category could apply to other border security cases that present compelling facts warranting enforcement action. Such compelling facts may include individuals who are knowingly involved in the smuggling of noncitizens, regardless of whether they have been charged with smuggling offenses, particularly when available information indicates that the smuggled noncitizens were abused or mistreated. This category could also include those who engage in serious immigration benefit fraud that threatens the integrity of the immigration system. Examples of serious immigration benefit fraud may include fraud that has been criminally prosecuted, including under 8 U.S.C. § 1325(c) (knowingly entering into a marriage for purposes of evading any immigration law) and 18 U.S.C. § 1546 (knowingly forging, counterfeiting, altering or falsely making certain immigration documents or their use, possession, or receipt); fraud that has resulted in or is significantly likely to result in a frivolous asylum bar finding under INA § 208(d)(6) and 8 C.F.R. § 1208.20; serious types of fraud that cannot be waived as a matter of law (e.g., certain false claims to U.S. citizenship); and fraud that reflects an attempt to circumvent the immigration laws by multiple persons (e.g., document mill forgers), particularly when other noncitizens are victimized in the process. Use of fraudulent documents as a means of fleeing persecution alone, *cf.* 8 C.F.R. § 270.2(j) (precluding issuance of civil document fraud Notices of Intent to Fine under INA § 274C “for acts of document fraud committed by an alien pursuant to direct departure from a country in which the alien has a well-founded fear of persecution”), or solely for employment purposes, as well as statements and claims made by minors, will not ordinarily constitute serious immigration benefit fraud in the absence of additional aggravating factors.¹³

Similar to the public safety priority, the Mayorkas Memorandum acknowledges that there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action in a border security case. To that end, the non-exhaustive mitigating factors enumerated in the preceding subsection, among others, may be relevant in determining whether a noncitizen poses an actual threat to border security.

In construing and applying all three of the aforementioned priorities, OPLA attorneys should also be guided by formal ICE policy directives that elaborate upon the agency’s approach to its enforcement discretion. Many such directives are explicitly cited in this memorandum, but others are not. Moreover, it is inevitable that the agency will issue relevant directives in the future, including directives that supersede those cited in this memorandum. To the extent that policy choices and changes reflected in ICE directives illuminate aggravating and mitigating factors

¹³ Of course, use of a fraudulent document by a terrorist seeking entry into the United States could also implicate Priority A (threat to national security), just as use of fraudulent documents by a violent criminal seeking to conceal their identity from immigration authorities could also implicate Priority B (threat to public safety).

beyond those identified above, they should be considered by OPLA attorneys to inform their determinations whether a noncitizen's case falls within or outside one of the Mayorkas Memorandum priorities.¹⁴

C. Making and Documenting Enforcement Priority Determinations

OPLA attorneys play a unique and critical role in ensuring that government resources are focused on current priority cases. Upon first encountering a case that has not yet been classified for prioritization under the Mayorkas Memorandum, OPLA attorneys should initially review the readily available information for any indicia that the case is an enforcement priority (e.g., serious or recent criminality, national security charges, recent unauthorized entry into the United States). If removal proceedings were initiated before EOIR by ICE, USCIS, or U.S. Customs and Border Protection (CBP) subsequent to the November 29, 2021 effective date of the Mayorkas Memorandum, OPLA will generally defer to that initiating component's priority determination, which would have been made in compliance with the Mayorkas Memorandum, in any litigation it handles concerning the matter. If, based on this initial OPLA review or the determination of the DHS component that issued the Notice to Appear (NTA), the noncitizen appears to pose a threat to national security, public safety, or border security, the case should be classified in PLAnet under the corresponding priority category.¹⁵ If, however, the readily available case information fails to indicate that the noncitizen potentially falls within one or more of the three Mayorkas Memorandum priorities or any such indication is clearly overcome by readily available, persuasive evidence of mitigating factors, the case should initially be classified, and recorded in PLAnet, as a nonpriority case.

The Chief Counsel are ultimately responsible for the priority determinations made by the attorneys in their OPLA Field Locations (OFLs). In particular, in cases where the NTA-issuing component has not already made such a determination under the Mayorkas Memorandum, any determination that a noncitizen poses a threat to national security or public safety must be approved by the Chief Counsel. Determinations that a noncitizen poses a threat to border security based on compelling facts warranting enforcement action must also be approved by the Chief Counsel. A Chief Counsel may delegate these approval authorities to a Deputy Chief Counsel, but they may not be further redelegated, and the Chief Counsel remains responsible for overall implementation of the Mayorkas Memorandum within their area of responsibility.¹⁶ Moreover, a determination that a case does not appear to constitute an enforcement priority (i.e., not a national security or public safety threat) or that a noncitizen poses a threat to border security based solely on their date of unlawful entry or attempted unlawful entry into the United States requires no further management review.

¹⁴ ICE policy directives may be accessed [here](#).

¹⁵ PLAnet guidance on priority classifications and the exercise of prosecutorial discretion under this memorandum is available [here](#).

¹⁶ The responsibilities assigned to specific OPLA personnel under this memorandum may also be exercised by those serving in a specifically named position in an "acting" capacity.

If, at any time after an initial priority determination is made and documented in PLAnet, an OPLA attorney handling a case learns of additional information that is material to the noncitizen's priority (or nonpriority) determination, including affirmative submissions by the noncitizen, the attorney should reassess the case in light of that information to evaluate whether it either reinforces or contradicts that earlier determination. If the information contradicts the earlier determination and the OPLA attorney determines that the prior priority or nonpriority should be changed, the Chief Counsel (or, as delegated by the Chief Counsel, a Deputy Chief Counsel) must approve the new determination, and the new determination must be documented in PLAnet.

D. Enduring Principles of Prosecutorial Discretion

As the General Counsel has directed, "DHS attorneys involved in immigration matters should adhere to the enduring principles that apply to all of their activities: upholding the rule of law; discharging duties ethically in accordance with the law and professional standards of conduct; following the guidelines and strategic directives of senior leadership; and exercising considered judgment in individual cases, consistent with DHS objectives and mindful of the Department's limited resources."¹⁷ Independent of the guidelines provided in the Mayorkas Memorandum, OPLA attorneys should always keep in mind these enduring principles to guide the exercise of prosecutorial discretion in the preparation and litigation of cases before EOIR. In other words, distinct from any particular policy framework or articulated priorities, prosecutorial discretion is an inherent part of what OPLA attorneys do every day, a reality that is particularly acute in an era of increasingly constrained resources.¹⁸

While OPLA attorneys represent DHS and cannot provide legal advice to, or legal advocacy on behalf of, a noncitizen, it is an OPLA attorney's role as the government's representative in removal proceedings to proactively alert the immigration judge to potentially dispositive legal issues and viable relief options they have identified in the course of case preparation or a proceeding, that then may be combined with elements of prosecutorial discretion (such as stipulations) to resolve cases before EOIR. Fundamentally, OPLA attorneys play a significant and important role as officers of the court and DHS representatives in helping to ensure that immigration proceedings meet all legal and constitutional standards.¹⁹ They should, therefore,

¹⁷ Meyer Memorandum at 3.

¹⁸ See DHS, Fiscal Year 2023 Congressional Justification, DHS ICE Budget Overview, at ICE-O&S-36, https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Immigration%20and%20Customs%20Enforcement_Remediated.pdf (last visited Apr. 3, 2022) (explaining that OPLA currently faces a staffing budgetary shortfall of several hundred positions).

¹⁹ Though OPLA plays a vital role in the cases before the immigration courts and Board of Immigration Appeals (BIA), it is fundamentally EOIR that must ensure that due process is afforded to all respondents through the immigration judges' rulings and court conduct. The BIA likewise plays a vital role in reviewing and guiding the judges' activities. See, e.g., INA § 240(b)(1); *Quintero v. Garland*, 998 F.3d 612 (4th Cir. 2021) (finding that an immigration judge's authority to conduct hearings under INA § 240(b)(1) inherently requires the judge to develop the court record and to ensure a full and fair hearing to which individuals are entitled under the Due Process Clause of the Fifth Amendment); *Matter of M-A-M-*, 25 I&N Dec. 474, 479 (BIA 2011) ("Included in the rights that the

consistently endeavor to do their part to improve and enhance the removal process by using their knowledge and authorities so that, to the greatest extent possible, every noncitizen has the opportunity to have their case fairly heard and correct outcomes are achieved. Indeed, OPLA attorneys should be particularly mindful of their role and the important impact that their representation of DHS can have in cases involving pro se respondents.²⁰

To that end, OPLA attorneys are empowered and expected to use their professional judgment to do justice in each case, whether the decision relates to: filing an NTA; moving to dismiss, administratively close, or continue proceedings; stipulating to issues, relief, or bond; or pursuing an appeal. These decisions should be made in appropriate consultation with the Chief Counsel, or designated Deputy Chief Counsel, and consistent with local procedures.

II. Exercising Prosecutorial Discretion

The Mayorkas Memorandum establishes a new analytical framework under which a noncitizen's enforcement priority classification and DHS's decision whether to exercise prosecutorial discretion converge. In implementing this framework, OPLA attorneys must be particularly mindful of the resource constraints under which we operate at a time when the immigration courts' dockets total over 1.5 million cases nationwide. Sound prioritization of our litigation efforts through the appropriate use of prosecutorial discretion can preserve limited government resources, achieve just and fair outcomes in individual cases, reduce government redundancies, and advance DHS's mission of administering and enforcing the immigration laws of the United States in an efficient and sensible way that promotes public confidence.

OPLA's goal is to exercise prosecutorial discretion in a manner that furthers the security of the United States and the faithful and just execution of the immigration laws, consistent with DHS's enforcement priorities. While prosecutorial discretion is not a formal program or benefit offered by ICE, like other government attorneys, OPLA attorneys are empowered to exercise prosecutorial discretion in their assigned duties consistent with applicable guidance. In performing their duties, OPLA attorneys are expected to exercise discretion at all stages of the enforcement process in accordance with the factors and considerations set forth in the Mayorkas Memorandum and this guidance. Wherever possible, decisions to exercise prosecutorial discretion should be made at the earliest moment practicable to best conserve prosecutorial resources. Prosecutorial discretion requests made late in the course of removal proceedings should be discouraged, though late-emerging material and previously unavailable information, or materially changed circumstances pertinent to the exercise of discretion, should be taken into account. In evaluating late-emerging requests, an unrepresented noncitizen's pro se status should also be taken into account.

Due Process Clause requires in removal proceedings is the right to a full and fair hearing.”); *see also* INA § 240(b)(4)(B) (providing that “the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government”).

²⁰ *Cf. Quintero*, 998 F.3d at 628 (holding that the “immigration judges’ duty to fully develop the record becomes particularly important in cases involving uncounseled noncitizens”).

In preparing their cases for litigation, OPLA attorneys should exercise prosecutorial discretion in accordance with the case's priority designation, and as described in greater detail below.

A. Priority Cases

Any case determined to be an enforcement priority will not be amenable to prosecutorial discretion in the forms of non-filing of the NTA, dismissal or termination of proceedings, or administrative closure. Instead, OPLA attorneys are expected to litigate priority cases to completion. If a noncitizen previously determined to be an enforcement priority seeks such prosecutorial discretion, the noncitizen should generally be expected to file an affirmative request, with supporting evidence, in accordance with Section IV of this guidance, to allow OPLA to reassess the priority designation.

B. Nonpriority Cases

Noncitizens determined not to be priorities for enforcement may receive prosecutorial discretion. The OPLA-preferred forms of prosecutorial discretion for nonpriority cases are either non-filing of the NTA or, if the NTA has already been filed, dismissal of proceedings. OPLA attorneys may, in appropriate cases, consider alternative forms of prosecutorial discretion, including administrative closure, stipulations to issues or relief, continuances, not pursuing an appeal, joining motions to reopen, and stipulations in bond hearings, but OPLA's strong preference is to efficiently remove nonpriority cases from the docket altogether to best focus enforcement resources on Departmental priority cases.

Chief Counsel must establish local procedures to ensure that a fingerprint-based background check from the Federal Bureau of Investigation (FBI) is completed prior to exercising prosecutorial discretion. (b) (5), (b) (7)(E)

If the noncitizen's fingerprints are *not* contained in a DHS database, the noncitizen will be required to submit a fingerprint-based background check from the FBI.

1. Notices to Appear

When a legally sufficient, appropriately documented NTA has been issued by a DHS component consistent with the component's issuing and enforcement guidelines,²¹ it will generally be filed with the immigration court and proceedings litigated to completion unless the Chief Counsel exercises prosecutorial discretion based on their assessment of the case.²² As prosecutorial

²¹ This includes NTAs submitted to OPLA by ICE operational components as well as USCIS and CBP for review. "Appropriately documented" in this context means that, in OPLA's litigation judgment, sufficient information has been provided by the NTA-issuing component to carry any DHS burden of proof. *See* INA § 240(c); 8 C.F.R. § 1240.8.

²² Independent of the enforcement priority framework outlined in the Mayorkas Memorandum, certain noncitizens have an established right to be placed into removal proceedings. *See, e.g.*, 8 C.F.R. §§ 208.14(c)(1) (requiring

discretion is expected to be exercised at all stages of the enforcement process and at the earliest moment practicable, it may thus be appropriate for the Chief Counsel to conclude that even a legally sufficient, appropriately documented administrative immigration case warrants non-filing of an NTA. (b) (5)

Where an NTA is issued but not filed with the immigration court pursuant to this section, OPLA should document the reasoning for this position in PLANet and the OFL should work with its corresponding ERO Field Office to cancel the NTA and inform the noncitizen of the cancellation.²³

2. *Dismissal of Proceedings*

For unrepresented noncitizens who are not priorities for enforcement, as early in the process as practicable, OPLA attorneys should advise the immigration judge that: (i) the case is a nonpriority, (ii) OPLA believes dismissal of proceedings is appropriate, and (iii) OPLA will agree to a continuance to allow the noncitizen to seek counsel and consider whether to agree to dismissal. Should the individual remain unrepresented, an oral or written motion to dismiss should be made or filed with the immigration court unless, on a case-by-case basis, the OPLA attorney concludes in consultation with their Chief Counsel (or, as designated, their Deputy Chief Counsel) that another action or form of prosecutorial discretion would be more appropriate. For represented nonpriority noncitizens, as early in the process as practicable, OPLA attorneys are authorized to move to dismiss such cases pursuant to 8 C.F.R. § 1239.2(c), without seeking prior management approval or concurrence from the respondent, but may not unilaterally (i.e., in the absence of an affirmative request or consent) move to dismiss nonpriority cases described in note 22, *supra*, regardless of representation status.²⁴ OPLA attorneys may also

referral for removal proceedings of a removable noncitizen whose affirmative asylum application is not granted by USCIS); 216.4(d)(2) (requiring NTA issuance to noncitizen whose joint petition to remove conditional basis of LPR status is denied by USCIS); 216.5(f) (same; USCIS denial of application for waiver of the joint petition requirement). In other cases, USCIS may issue an NTA on a discretionary basis to a noncitizen who wishes to pursue immigration benefits before the immigration court. Although such cases may not fall within the priority framework, absent an affirmative, timely request by such a noncitizen for the favorable exercise of prosecutorial discretion to dismiss removal proceedings or consent to dismissal provided in writing or on the record in removal proceedings, OPLA attorneys should generally litigate these cases to completion. If such noncitizens are ordered removed, requests for prosecutorial discretion would then most properly be made to ERO for evaluation in accordance with DHS's stated priorities.

²³ The NTA cancellation regulation vests immigration officers who have the authority to *issue* NTAs with the authority to also cancel them. 8 C.F.R. § 239.2(a). The regulation expresses a preference for certain NTAs to be cancelled by the same officer who issued them “unless it is impracticable” to do so. *Id.* § 239.2(b). Given the enormous size of the EOIR docket, current OPLA staffing levels, and complexities associated with routing any significant number of NTAs back to specific issuing officers stationed around the country, it would be impracticable to require OPLA attorneys to do so. By contrast, the local ERO Field Offices with which OFLs routinely interact are well suited to cancel NTAs and notify noncitizens of such cancellation promptly and efficiently.

²⁴ Although the Immigration Court Practice Manual recommends that that the party filing a motion “make a good faith effort to ascertain the opposing party’s position on the motion” and that a “description of the efforts made to contact opposing counsel” be included if the filing party is unable to ascertain the opposing party’s position, EOIR Policy Manual, Chapter II.5.2(i) (Feb. 14, 2022), OPLA attorneys are *not* required to obtain the noncitizen’s

join in or non-oppose a motion to dismiss filed by a noncitizen who is a nonpriority for enforcement, whether or not represented, including when such a motion is filed with the BIA.

3. *Administrative Closure*

Administrative closure temporarily pauses removal proceedings by taking a case off the immigration courts' active calendars, but it does little to permanently address the surging growth in their dockets. As such, OPLA strongly prefers dismissal of proceedings as a discretionary tool in nonpriority cases. OPLA attorneys may, however, agree to administratively close nonpriority cases when the noncitizen does not oppose and there are specific facts that militate in favor of this alternative outcome (e.g., illness of the noncitizen that currently prevents their participation in removal proceedings to pursue a form of relief not otherwise available to them where the illness is expected to resolve in the foreseeable future).²⁵ There may also be instances in which, consistent with *Matter of Avetisyan* and *Matter of W-Y-U-*, OPLA wishes to unilaterally request that the immigration judge administratively close cases regardless of any request or assent from the noncitizen (e.g., the noncitizen is incarcerated while removal proceedings are pending).²⁶

concurrence with unilateral DHS motions to remove nonpriority cases from the immigration court dockets filed pursuant to this memorandum. Such motions are based upon DHS's conclusion that a case is not a priority for enforcement and an assessment that continuation of the proceedings is therefore "no longer in the best interest of the government," 8 C.F.R. § 1239(a)(7), matters upon which the noncitizen is simply not in a position to opine. Moreover, obtaining concurrence of the noncitizen or their legal representative prior to filing such a motion would, in many cases, require the expenditure of more effort than the preparation, filing, and service of the motion itself. That being said, OPLA attorneys may certainly seek such concurrence where circumstances permit and should explicitly state in their motions whether they made contact with the noncitizen or their legal representative, to inform the immigration judge's proper handling and disposition of the motion.

²⁵ A request for administrative closure with which both parties agree should generally be granted by EOIR without further explanation. *Cf. Matter of Yewondwosen*, 21 I&N Dec. 1025, 1026 (BIA 1997) ("We believe the parties have an important role to play in these administrative proceedings, and that their agreement on an issue or proper course of action should, in most instances, be determinative."); EOIR Director's Memorandum 22-03: [*Administrative Closure*](#), at 3 (Nov. 22, 2021) ("Under case law, where DHS requests that a case be administratively closed because a respondent is not an immigration enforcement priority, and the respondent does not object, the request should generally be granted and the case administratively closed." (citing *Yewondwosen*, 21 I&N Dec. at 1026)). However, administrative closure is generally unavailable within the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit. *See* EOIR Director's Memorandum 22-03 at 2 & n.2 ("[T]he Sixth Circuit initially held that the regulations do not delegate to immigration judges or the Board the general authority to administratively close cases. *Hernandez-Serrano v. Barr*, 981 F.3d 459, 466 (6th Cir. 2020). But the Sixth Circuit later held that the regulations provide adjudicators 'the authority for administrative closure' to allow respondents to apply with U.S. Citizenship and Immigration Services for provisional unlawful presence waivers. *Garcia-DeLeon v. Garland*, 999 F.3d 986, 991 (6th Cir. 2021).").

²⁶ *Matter of Avetisyan*, 25 I&N Dec. 688, 690 (BIA 2012) ("The issue before us is whether an Immigration Judge or the Board has the authority to administratively close a case if either party to the proceeding opposes."); *see also Matter of Cruz-Valdez*, 28 I&N Dec. 326, 327 n.1 (A.G. 2021) ("In *Avetisyan*, the Board authorized immigration judges and the Board to administratively close a case over the objection of one party . . ."); *Matter of W-Y-U-*, 27 I&N Dec. 17, 20 & n.5 (BIA 2017) (distilling *Avetisyan* down to an exercise in evaluating "whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits[,] and further explaining that "[t]his decision is intended to provide additional guidance where one of the parties opposes administrative closure. However, it is not applicable to cases in which the parties jointly agree to administrative closure . . .").

4. *Stipulations to Issues and Relief*

OPLA attorneys are encouraged to stipulate to relief, orally or in writing, in nonpriority cases where the OPLA attorney is satisfied that the noncitizen both qualifies for the relief sought under the law and, where required, merits relief as a matter of discretion.²⁷ Additionally, OPLA attorneys are encouraged to narrow issues and may choose to stipulate appropriately on any procedural, factual, or legal issue(s), particularly – but not exclusively – in nonpriority cases.

There may be instances in which a noncitizen who is a priority for enforcement nevertheless can clearly demonstrate to the satisfaction of the OPLA attorney that they are eligible for mandatory protection from removal to a particular country under section 241(b)(3) of the INA and/or the regulations implementing United States obligations under Article 3 of the Convention Against Torture (CAT), 8 C.F.R. §§ 1208.16–.18, which both impose significant burdens of proof (i.e., qualifying mistreatment must be “more likely than not” to occur). In such instances, the OPLA attorney should give serious consideration to stipulating to such mandatory forms of protection with respect to the relevant country of removal. *Cf. Matter of S-M-J*, 21 I&N Dec. at 727 (noting obligation “to uphold international refugee law, including the United States’ obligation to extend refuge where such refuge is warranted”).²⁸

5. *Continuances*

OPLA attorneys retain the authority to handle pending cases on EOIR’s docket by deciding whether to agree to a respondent’s request for a continuance for “good cause shown” under 8 C.F.R. § 1003.29.²⁹ Nonetheless, OPLA attorneys should be mindful that there is a strong preference for more durable and efficient forms of prosecutorial discretion than repeated continuances to accommodate adjudication of any ancillary applications or petitions pending with USCIS or other agencies (e.g., a federal, state, local, or tribal law enforcement agency’s consideration of a Form I-918, *Supplement B, U Nonimmigrant Status Certification*). The fact that a noncitizen is a nonpriority for enforcement will be a significant factor informing the position that OPLA attorneys should take in response to motions to continue, while being mindful that noncitizens who are enforcement priorities may also qualify for continuances under the “good cause shown” standard. It is ultimately the responsibility of the immigration judge to make a case-by-case assessment whether continuance motions are supported under the law, with

²⁷ See, e.g., INA §§ 208 (asylum), 240A(a) (cancellation of removal for certain permanent residents), 240A(b) (cancellation of removal and adjustment of status for certain nonpermanent residents), 240B (voluntary departure), 245 (adjustment of status), 249 (registry). In stipulating to asylum in nonpriority cases, however, OPLA attorneys should be mindful of *Matter of Fefe*, 20 I&N Dec. 116, 117 (BIA 1989) (contemplating that, “[a]t a minimum, ... an applicant for asylum and withholding [should] take the stand, be placed under oath, and be questioned as to whether the information in the written application is complete and correct”).

²⁸ (b) (5)

²⁹ See also *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) (interpreting this regulation).

OPLA sharing in EOIR's responsibility to ensure that pending matters move efficiently through the adjudicative system.

6. *Pursuing Appeal*

OPLA attorneys continue to have discretion to take legally viable appeals (including bond appeals)³⁰ of immigration judge decisions and present appropriate arguments in response to noncitizen appeals and motions. Appellate advocacy should focus on priority cases, absent a compelling basis to appeal a nonpriority case. OPLA attorneys may waive appeal or, in consultation with ILPD and consistent with local procedures, withdraw an already-filed appeal in a nonpriority case. This does not prevent OPLA attorneys from reserving DHS's right of appeal in order to ensure the articulation of a fully reasoned decision by an immigration judge to help inform whether the appeal should ultimately be perfected. The need to seek clarity on an important legal issue or correct systematic legal errors can be a compelling basis to justify appeal in a nonpriority case, but such appeals should be taken judiciously, mindful of compelling discretionary factors in a given case.³¹ Additionally, a determination whether a nonpriority case presents a compelling basis for appeal should be made consistent with existing appeal review procedures.

7. *Joining Motions to Reopen*³²

OPLA attorneys may join motions to reopen where the purpose for reopening is to dismiss proceedings to allow the noncitizen to proceed on an application for permanent or temporary relief outside of immigration court or to pursue relief in immigration court that has not already

³⁰ It may also be appropriate for OPLA to seek a discretionary or automatic stay under 8 C.F.R. § 1003.19(i) in conjunction with a DHS bond appeal, particularly where issues of national security or public safety are implicated. OPLA attorneys should work closely with the Immigration Law and Practice Division (ILPD) and other relevant OPLA headquarters divisions to identify instances where use of this authority may be warranted.

³¹ When deciding on an appeal, OPLA attorneys should consider whether the noncitizen is detained, the impact of the appeal on detention, and if it is in the government's interest to expend additional resources to appeal a case in which the noncitizen remains detained pending appeal. Relatedly, for detained cases in which asylum, withholding of removal, or deferral of removal is granted, OFLs should immediately notify ERO. *See* Tae D. Johnson, Acting Director, ICE, [*REMINDER: Detention Policy Where an Immigration Judge has Granted Asylum, Withholding of Removal, or Convention Against Torture Protection, and DHS has Appealed*](#) (June 7, 2021)) (citing [*ICE Directive 16004.1: Detention Policy Where an Immigration Judge has Granted Asylum and ICE has Appealed*](#) (Feb. 9, 2004)).

³² Consistent with [prior guidance provided to OPLA field managers on July 30, 2021](#), DOJ's Office of Immigration Litigation (OIL) will continue to assess whether cases at the petition for review (PFR) stage of appellate litigation are DHS enforcement priorities. Upon determining that a case is not a DHS enforcement priority, and that the noncitizen is not detained in ICE custody, OIL generally will work with the noncitizen to make the appropriate motion to the circuit court to close the case. If the noncitizen is interested in pursuing alternative prosecutorial discretion options, such as a joint motion to reopen, OIL will direct the noncitizen to OPLA for that purpose, and OFLs should consider any subsequent request for prosecutorial discretion submitted by a noncitizen consistent with the parameters of this memorandum, coordinating with OIL as set forth in the July 30, 2021 guidance.

been considered and for which the noncitizen is newly eligible.³³ An OPLA attorney should be satisfied that the noncitizen qualifies for the relief sought under law and merits relief as a matter of discretion. Similarly, where reopening and dismissal of a case would restore a noncitizen to LPR status and they are not an enforcement priority, OPLA attorneys should generally join motions to reopen and dismiss in such cases. OPLA attorneys may also continue addressing requests for joint motions to reopen on a case-by-case basis and consistent with local guidance. Generally, however, in consideration of the severe immigration court backlog, OPLA attorneys should focus DHS's finite resources on pursuing priority cases rather than relitigating previously completed cases (i.e., where due process has been availed and the purpose for reopening is not to dismiss proceedings to pursue an application before USCIS).

C. Bond Proceedings

While the Mayorkas Memorandum pertains to apprehension and removal and does not address detention, OPLA attorneys should make appropriate legal and factual arguments to ensure that DHS's interests, enforcement priorities, and custody authority are defended. In particular, in bond proceedings, OPLA attorneys should give due regard to custody determinations made by an authorized immigration officer pursuant to 8 C.F.R. § 236.1(c)(8), while not relinquishing the OPLA attorney's own responsibility to review and assess the facts under the current law and prevailing guidance. In any case, priority or nonpriority, where a noncitizen subject to a discretionary detention authority produces new information that credibly mitigates flight risk or danger concerns, OPLA attorneys have the discretion to agree or stipulate to a bond amount or other conditions of release, including (in appropriate consultation with ERO) alternatives to detention, and to waive appeal of an immigration judge's order redetermining the conditions of release in such cases.³⁴ Of course, nothing in this guidance is meant to override statutory prohibitions on the release of certain noncitizens, *see, e.g.*, INA §§ 236(c) (during pendency of removal proceedings) and 241(a)(2) (during the removal period), and OPLA attorneys should promote compliance with such mandates in the course of their litigation before EOIR.

III. Assigning OPLA Attorneys

Whether to assign an attorney to represent DHS in a particular case is a matter of prosecutorial

³³ While nothing in this memorandum is intended to prevent a Chief Counsel from exercising their independent discretion and litigation judgment to take appropriate positions in response to any joint motion request, this memorandum is not intended to relieve a noncitizen with a final order of removal from meeting the requirements of 8 C.F.R. §§ 1003.2(c)(3)(ii) and 1003.23(b)(4)(i) (relating to motions to reopen for asylum and withholding of removal). Joint motions that would result in the addition of cases to the immigration court dockets for further substantive adjudication should be filed judiciously, in recognition of resource constraints facing OPLA and the immigration courts.

³⁴ DHS and EOIR regulations recognize that, as a prerequisite for consideration for discretionary release by an ICE officer under section 236(a) of the INA, a noncitizen "must demonstrate *to the satisfaction of the officer* that such release would not pose a danger to property or persons, and that the [noncitizen] is likely to appear for any future proceeding." 8 C.F.R. §§ 236.1(c)(8) and 1236.1(c)(8) (emphasis added). Additionally, prior to agreeing to non-monetary conditions of release, OPLA attorneys should consult with their local ERO Field Offices to ensure that such conditions are practicable (e.g., GPS monitoring, travel restrictions).

discretion because applicable regulations do not require DHS to assign counsel to every removal proceeding.³⁵ As such, in an effort to prioritize limited resources, except where required by regulation and in accordance with this guidance, Chief Counsel may waive DHS's appearance in the following categories of non-detained hearings: (1) master calendar hearings; (2) in absentia hearings where evidence of removability has been submitted to the court or removability has been previously established; and (3) individual calendar hearings on a case-by-case basis. (b) (5)

Field Legal Operations (FLO). (b) (5)

OPLA attorneys may also determine that prosecutorial discretion will be warranted such that the case may be addressed through motions or a brief position statement, thereby eliminating the need to appear at a hearing.

IV. Responding to Inquiries and Client and Stakeholder Engagement

Each OFL should maintain local standard operating procedures (SOPs), including email inboxes, dedicated to receiving inquiries related to this memorandum, particularly requests for OPLA to favorably exercise its discretion. The OFLs will socialize the existence and use of these SOPs with their respective local immigration bars and other nongovernmental organizations and community-based organizations assisting immigrant communities or representing noncitizens before EOIR. OFLs should strive to be as responsive to such inquiries as resources permit, focusing on cases in active removal proceedings to conserve judicial and OPLA resources. Pending detained cases, in particular, should be prioritized for review under this guidance.

In addition, Chief Counsel are encouraged to establish long-lasting local relationships with such nongovernmental and community organizations and stakeholders. The Chief Counsel are likewise encouraged to continue to be receptive to outreach from labor enforcement agencies and other government entities that may interact regularly with noncitizens. The goals for these engagements should include responding to inquiries relating to OPLA's prosecutorial discretion guidance, providing materials on how to seek prosecutorial discretion and the information to be included in such requests, and informing the public of the availability of prosecutorial discretion for unrepresented individuals and how they may seek prosecutorial discretion. As a whole, OPLA should help facilitate public-facing content in multiple languages to explain the exercise of our prosecutorial discretion in a manner that noncitizens can readily understand.

OPLA may also provide general feedback, as appropriate, to NTA-issuing components to aid them in implementing the Mayorkas Memorandum enforcement priorities. For instance, during

³⁵ Pursuant to the regulations, DHS shall assign counsel in four categories of cases: (1) when the unrepresented noncitizen is incompetent, or under 18 years of age, and is not accompanied by a guardian, relative, or friend, 8 C.F.R. § 1240.2(b); (2) when removal proceedings would result in an order of removal and the noncitizen's nationality is at issue, *id.*; (3) when DHS is moving to rescind adjustment of status, 8 C.F.R. § 1246.5(a); or (4) when the immigration judge cannot determine removability, 8 C.F.R. § 1240.10(c). In all other cases, the General Counsel may "[i]n his or her discretion, whenever he or she deems such assignment necessary or advantageous, . . . assign a[n OPLA] attorney to any other case at any stage of the proceeding." 8 C.F.R. § 1240.2(b).

local client engagements, OFLs can discuss whether particular areas of inquiry would be helpful to document on Form I-213, *Record of Deportable/Inadmissible Alien*, to better inform priority determinations and the related exercise of prosecutorial discretion by OPLA.

V. Oversight, Monitoring, and Effective Date

It is critical that prosecutorial discretion decision-making information be promptly and accurately documented in PLAnet under applicable national and local SOPs. Wherever possible, copies of requests for prosecutorial discretion, supporting documentation, and any other related materials should be uploaded to PLAnet.³⁶ Chief Counsel should develop any local SOPs that may be required to comply with the Mayorkas Memorandum and this guidance. To ensure successful development of relevant SOPs and stakeholder outreach, this memorandum will take effect on April 25, 2022.

Official Use Disclaimer

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

³⁶ If the case involves classified information, the OPLA attorney must transmit such information only in accordance with the DHS Office of the Chief Security Officer Publication, [Safeguarding Classified & Sensitive But Unclassified Information Reference Pamphlet](#) (Feb. 2012, or as updated), and all other applicable policies governing the handling of classified information.