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Practice Alert¹

July 29, 2015

Requesting Prosecutorial Discretion for Individuals in Removal Proceedings or Detention While the Injunction in *Texas*, et al. v. United States Remains in Effect

Introduction

On February 16, 2015, a federal district court granted a preliminary injunction² that blocks the implementation of expanded Deferred Action for Childhood Arrivals (Expanded DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).³ Before the order and following the announcement of Expanded DACA, the Department of Homeland Security (DHS) issued DACA grants for increments of three rather than two years.⁴ After the order, DHS <u>suspended</u> plans to accept requests for Expanded DACA and DAPA, and reverted to issuing DACA grants for two-year periods, as established when it created the program in 2012.⁵ Individuals who meet the <u>June 15, 2012 DACA</u> criteria may continue to apply for the first time or renew. This advisory reviews the state of the November 20, 2014 DHS memo, "<u>Policies for the Apprehension</u>, <u>Detention and Removal of Undocumented Immigrants</u>" ("Enforcement Memo"), and provides practice tips for requesting prosecutorial discretion.

What does the injunction mean for individuals now in removal proceedings and detention?

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¹ Copyright(c) 2015, National Immigration Project of the National Lawyers Guild.

² State of Texas, et al v. United States et al.; Memorandum Opinion and Order, Feb. 16, 2015, (No. 1:14-CV-254), available at http://www.aila.org/infonet/dist-ct-state-of-texas-v-usa-02-16-15 ("Injunction"). On May 13, 2015, the National Immigration Law Center provided this update regarding Texas et al v. United States et al scenarios: http://nilc.org/document.html?id=1242.

³ Jeh Charles Johnson, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are the Parents of U.S. Citizens or Permanent Residents," Nov. 20, 2014, *available at* www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf (Expanded DACA and

<u>www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf</u> (Expanded DACA and DAPA Memo).

⁴ State of Texas, et al v. United States et al.; Defendants' Advisory, Mar. 3, 2015, (No. 1:14-CV-254),

available at http://www.aila.org/File/Related/14122946f.pdf. AILA Doc. No. 14122946. (Posted 3/9/15), The injunction does not affect individuals who received 3-year DACA grants before the injunction. Note that USCIS erroneously issued 3-year employment authorization documents to approximately 2,000 individuals AFTER the Texas ruling. It is notifying these DACA recipients to return their EAD in exchange for a two-year EAD. "Immigration Advocates Clear Questions on DACA 3-Year Permits," NBC News, May 14, 2015 available at: http://www.nbcnews.com/news/latino/immigration-advocates-clear-questions-daca-3-year-permits-n359236.

The states that filed the complaint against DAPA and Expanded DACA did not challenge DHS' authority to set and implement enforcement priorities. As a result, the injunction does not affect them.⁶ The Enforcement Memo has been the primary prosecutorial discretion (PD) memorandum since January 5, 2015. After the injunction, DHS affirmatively stated that the Enforcement Memo remains "in full force and effect." Individuals who are currently in removal proceedings and detention can still request PD.

Without speaking to an experienced immigration attorney or Board of Immigration Appeals (BIA) accredited representative, individuals who are NOT in removal proceedings should not affirmatively request PD. By seeking PD without this guidance, an applicant risks removal.

What does the Enforcement Memo do?

The Enforcement Memo provides new guidance related to the arrest, detention, and removal of noncitizens. It establishes three priority categories for removal, which also serve as disqualifying bars to DAPA. Individuals who do not fall within the enforcement priorities or whose removal is not designated as serving an important federal interest qualify for prosecutorial discretion (and DAPA if it survives litigation). This memo also rescinds some previous PD guidance.

Where can I find more guidance about the implementation of the Enforcement Memo?

- Customs and Border Patrol: http://www.cbp.gov/border-security/immigration-action
- Immigration and Customs Enforcement: https://www.ice.gov/immigrationaction
 - o ICE Frequently Asked Questions Relating to Executive Action on Immigration, June 17, 2015 at: https://www.ice.gov/immigrationAction/faqs ("ICE FAQs").
 - Riah Ramlogan, Acting Principal Legal Advisor, "Guidance Regarding Cases Pending Before EOIR Impacted by Secretary Johnson's Memorandum entitled Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," Apr. 6, 2015 at: http://www.ice.gov/sites/default/files/documents/FOIA/2015/guidance_eoir_johnson_memo.pdf ("OPLA Memo").
- Department of Justice, Executive Office for Immigration Review
 - Brian O'Leary, Chief Immigration Judge, "Operating Policies and Procedures Memorandum 15-01: Hearing Procedures for Cases Covered by New DHS Priorities and Initiatives," Apr. 6, 2015 at: http://www.justice.gov/eoir/pages/attachments/2015/04/07/15-01.pdf ("EOIR Memo").
- Citizenship and Immigration Services: http://www.uscis.gov/immigrationaction

What are the other prosecutorial discretion memoranda that remain in effect? The following is a non-exhaustive list of other PD memoranda that remain in effect:

• Janet Napolitano, Secretary of Homeland Security, "Exercising Prosecutorial Discretion

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⁶ Injunction, at 123.

⁷ See Statement by DHS Secretary Jeh Johnson Concerning the District Court's Ruling Concerning DAPA and DACA, Feb. 17, 2015, available at http://www.dhs.gov/news/2015/02/17/statement-secretary-jeh-c-johnson-concerning-district-courts-ruling-concerning-dapa ("DHS Statement").

⁸ Enforcement Memo, at 5.

- with Respect to Individuals Who Came to the United States as Children," June 15, 2012.
- John Morton, Director of Immigration and Customs Enforcement, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs," June 17, 2011.
- Donald Neufeld, "Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children," June 15, 2009.
- Bo Cooper, General Counsel, INS, "INS Exercise of Prosecutorial Discretion," (undated).
- Doris Meissner, INS Commissioner, "Exercising Prosecutorial Discretion," Nov.17, 2000.

How does the Enforcement Memo address handling removal proceedings for individuals who are not enforcement priorities?

Individuals who are not enforcement priorities qualify for PD though the memo does authorize the removal of individuals who are not enforcement priorities if, in the judgment of an ICE Field Office Director, "removing such an alien would serve an important federal interest.9"

What does serving an "important federal interest" mean?

The meaning of this term is unclear. The June 17, 2015 ICE FAQs provide some factors that the Office of Chief Counsel (OCC) and the ERO Field Office Director will consider on a case-by-case when deciding whether removal serves an important federal interest: an individual's conduct and its impact on the integrity of the immigration system. The FAQs clarify that the resources ICE has already spent pursuing someone's removal should not, on their own, prevent a favorable exercise of prosecutorial discretion. The FAQs highlight three kinds of cases where DHS will review on a case-by-case basis to determine whether removal serves an important federal interest: 1) individuals who were deported and unlawfully reentered the country before January 1, 2014, but whose prior removal orders were reinstated on or after January 1, 2014; 2) individuals who were granted voluntary departure by an immigration judge or the Board of Immigration Appeals before January 1, 2014, and whose voluntary departure period expired on or after that date without them having departed; and 3) individuals ordered removed by an immigration judge before January 1, 2014, but whose timely appeals were denied on or after that date.

The Office of Legal Counsel says this standard has been left "open-ended. 10," The November 17, 2000 Meissner Memo provides that since there is always a federal interest in immigration cases, "[legacy INS] must place particular emphasis on the element of substantiality. 11. The memo suggests examining the circumstances of the case to answer this question: "[h]ow important is the federal interest in the case, as compared to other cases and priorities?¹²" Moreover, practitioners may find the US Attorney Manual¹³

http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-authprioritize-removal.pdf.

3

⁹ Id.

¹⁰ Office of Legal Counsel Memorandum Opinion for the Secretary of Homeland Security and the Counsel to the President, Nov. 19, 2014, at 11, available at

¹¹ Meissner Memo, at 4.

¹² Id.

helpful; it lists factors to consider in determining whether federal prosecution should be declined due to lack of "substantial federal interest." The Meissner Memo also mentions that other interests, such as US foreign policy, may outweigh a federal interest in a case. ¹⁴ Cases involving individuals suspected of drug trafficking, but with no criminal convictions, for example, may fall into this category of "important federal interest," as well as cases where there are domestic or foreign policy concerns. ¹⁵ DHS may also consider the removal of individuals who are not enforcement priorities, but are subject to mandatory detention under INA 236(c), as serving an important federal interest.

What does the Enforcement Memo say about immigration detention?

The memo provides that generally DHS should use its detention resources on enforcement priorities or individuals subject to mandatory detention. It instructs ICE field office directors not to expend detention resources—unless there are extraordinary circumstances or the individual is subject to mandatory detention—on individuals who:

- are known to be suffering from serious physical or mental illness;
- are disabled, elderly, pregnant, or nursing;
- demonstrate that they are primary caretakers of children or an infirm person; or
- whose detention is otherwise not in the public interest.

DHS officers must obtain approval from their ICE Field Office Director to detain individuals who fall into the categories above and are not subject to mandatory detention. With respect to individuals who meet the criteria above and are subject to mandatory detention, the memo instructs practitioners to contact their local Office of Chief Counsel to request release from detention. ¹⁶

What does the guidance say about individuals who are subject to mandatory detention, but are not enforcement priorities?

DHS' practice and polices are confusing. According to the OPLA memo, ICE will only agree to release someone from immigration detention if EOIR consents to a motion to dismiss proceedings. (Also, OPLA will not seek administrative closure for people detained in ICE custody.) This policy contradicts the Enforcement memo itself because as non-enforcement priorities, these individuals qualify for PD; yet, the requirement of mandatory detention appears to trump any exercise of PD. DHS has not developed a protocol for people who face this predicament.

What should individuals who meet the DAPA and Expanded DACA criteria do if they are in removal proceedings or immigration detention, and are not eligible for any relief? Individuals who are in removal proceedings and/or detained, and who are prima facie eligible for

¹³ United States Attorney Manual 9-27.230, *available at* http://www.justice.gov/usao/eousa/foia-reading-room/usam/title9/27mcrm.htm#9-27.230.

¹⁴ Meissner Memo, at 5 n.3.

¹⁵ See INA § 212(f). For an example of an immigrant entry found detrimental to the interests of the U.S., see "Executive Order 13664 of April 3, 2014, " available at http://www.justice.gov/eoir/vll/fedreg/presdocs/pd07apr14.pdf.

¹⁶ Id.

Expanded DACA or DAPA should <u>request prosecutorial discretion</u>. DAPA eligible individuals are not enforcement priorities under the Enforcement Memo, and most individuals eligible for Expanded DACA are also not enforcement priorities.

Documenting the facts necessary to support an Expanded DACA or DAPA finding should strengthen requests for PD. It is unclear whether referencing prospective eligibility for DAPA and expanded DACA bolsters a PD request. Some advocates believe that confusion about the injunction means any reference to expanded DACA or DAPA will result in denials of PD requests or hurt the respondent's PD request. The National Immigration Project of the National Lawyers Guild ("Project") believes in a more case-specific approach that takes into account the posture of the case. For example, a person in removal proceedings could refer to prospective eligibility in support a motion for an administrative closure because it could be a relevant factor.

Tips for Practitioners Requesting Prosecutorial Discretion (PD)

1. Your request for prosecutorial discretion should explicitly refer to the factors laid out in the Enforcement Memo and other active PD memos. Ask specifically for a favorable exercise of prosecutorial discretion (e.g., terminate proceedings, deferred action, stay of removal), cite to the applicable standard, and highlight the factors in the case demonstrating that the person is not an enforcement priority.

If your client is detained by ICE or is in removal proceedings, requests for prosecutorial discretion generally go to your client's local ICE office and/or the local Office of Chief Counsel (OCC). If your client is in removal proceedings and is seeking termination or administrative closure, the request for ICE to join in the motion to terminate or administrative closure goes to the OCC. Submit requests for prosecutorial discretion to the mailbox of the OPLA field office that is handling the case. A link to the OPLA field office mailboxes is available here.

If your client has received a final order of removal, you may request that the OCC join in a request for deferred action before ERO. Prosecutorial discretion requests for deferred action are filed with your client's deportation officer by mail or in person and/or with the local ICE Field Office Director.

The <u>ICE website</u> also instructs practitioners to call the ICE ERO Detention Reporting and Information Line, toll-free, at 1-888-351-4024 to make PD requests on behalf of detained individuals. ICE ERO created the following email address to receive and review case inquiries related to requests for PD: <u>eroprosecutorial discretion inquiries@ice.dhs.gov</u>.

2. Request prosecutorial discretion based on your client's eligibility for PD under the Enforcement Memo, even if your client is eligible for Expanded DACA or DAPA. If practitioners choose to reference eligibility for the deferred action programs, they should also state that the programs are currently enjoined. Note that some individuals who meet the Expanded DACA criteria may also trigger an enforcement priority (e.g. a 90 day sentence for a DACA non-significant misdemeanor falls within the significant misdemeanor definition

under Enforcement Priority 2(b)). In these cases, practitioners should provide reasons why their clients may fit under the relevant enforcement priority exceptions as discussed below.

- **3.** If your client is detained, refer to the factors in the detention section of the Enforcement Memo (p. 5), including all relevant bond arguments. Determine if your client is subject to mandatory detention. The April 6, 2015 OPLA Memo provides that the OCC should not seek administrative closure while the person is detained, but it does not preclude OCC from agreeing to join in a motion for administrative closure. If your client is in the Ninth Circuit, use the bond advisories for people subject to prolonged immigration detention. See Rodriguez v. Robbins, 715 F.3d 1127 (9th Cir. 2013). See more information below regarding how detained individuals may request PD. Additionally, practitioners may wish to review ICE's recent announcement that it will discontinue invoking general deterrence as a factor in custody determinations in all cases involving families.
- 4. If your client is labeled a priority under the Enforcement Memo, research whether you can argue that your client is not an enforcement priority, and whether your client qualifies for an exception. Cite to "exceptions language," as applicable. Under the memo, an individual is not an enforcement priority if: 1) the person qualifies for asylum or another form of relief or 2) meets the exception for the enforcement priority category triggered described below. The chart below illustrates WHO has the power to decide whether the person is an enforcement priority and the STANDARD for the exception in each priority.

	Priority 1	Priority 2	Priority 3
Who	ICE Field Office	ICE Field Office	An immigration
decides	Director, CBP Sector	Director, CBP Sector	officer
about the	Chief or CBP Director	Chief, CBP Director of	
exceptions	of Field Operations	Field Operations, USCIS	
to the		District Director, or	
priority		USCIS Service Center	
		Director	
Standards	compelling and	factors indicate the	the person is not a
for each	exceptional factors	person is not a threat to	threat to the
exception	that <i>clearly indicate</i> the	national security, border	integrity of the
	person is not a threat to	security, or public safety	immigration system
	national security,		or factors suggest
	border security, or		that the person should
	public safety		not be a priority

It remains unclear what kinds of factors will meet the above criteria. For reference, the June

Of LA Mello, at 3.

18 See also the ACLU's advisory, "Challenging Detention without a Bond Hearing Pending Removal Proceedings," Feb. 2015, *available at*

 $\frac{https://www.aclu.org/files/assets/ACLU\%20 detention\%20 without\%20 bond\%20 hearing\%20 February\%20}{2015.pdf}.$

¹⁷ OPLA Memo, at 3.

¹⁹ ICE announces enhanced oversight for family residential centers at: http://www.ice.gov/news/releases/ice-announces-enhanced-oversight-family-residential-centers.

15, 2012 DACA program provided an "exceptional circumstances" exception. ²⁰ If a requestor was convicted of a felony, significant misdemeanor or three or more other misdemeanors, USCIS indicated it may still grant the individual's request for DACA, if it determines there are exceptional circumstances. But DHS has not elaborated upon what constitutes exceptional circumstances. Attorneys have reported requesting review under this exception, and receiving Notices of Intent to Deny and later denials. ²¹ Using the DACA experience as a guidepost, the "compelling *and* exceptional factors" standard seems higher than that under original DACA.

5. Assess whether the disposition qualifies as an "expungement."

According to the ICE FAQs, for purposes of priority determinations under the Enforcement Memo, DHS will assess expunged convictions on a case-by-case basis to determine whether the expunged conviction makes an individual a priority for removal. The FAQs, however, do not define the term "expungement." States provide a variety of mechanisms at different stages of the criminal process to insulate a defendant from the state consequences of her or his conviction, even if they do not use the term, "expunction." Despite the timing of these mechanisms, they both serve the same purposes to ameliorate the state consequences of a disposition and expungements similarly. Matter of Ozkok, 19 I&N Dec. 546 (BIA 1988). Matter of Garcia, 19 IN Dec. 270, 274 (BIA 1985). Even though Congress took away the beneficial impact of both deferred adjudications and expungements in 1996 by enacting INA section 101(a)(48)(A), DHS recognizes some ameliorative statutes in the prosecutorial discretion calculus.²² Many states, for example, have a mechanism, called deferred adjudication, which permits a judge to mitigate consequences at the time of sentencing. In Texas, this popular disposition provides that proceedings are deferred "without entering an adjudication of guilt." See Tex. Cr. Code §42.12, Sec. 5 (a). After successfully completing deferred adjudication, the court dismisses the charge after the community supervision period. Texas does not view this disposition as a conviction. ²³The purpose of these deferred adjudications, like expungements, is to mitigate the collateral consequences of a conviction. Other states have ameliorative statutes similar to Texas and counsel should argue that those

²⁰ FAQ Q57: If I have a conviction for a felony offense, a significant misdemeanor offense, or multiple misdemeanors, can I receive an exercise of prosecutorial discretion under this new process? A57: No. If you have been convicted of a felony offense, a significant misdemeanor offense, or three or more other misdemeanor offenses not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, you will not be considered for Deferred Action for Childhood Arrivals (DACA) except where the Department of Homeland Security (DHS) determines there are exceptional circumstances, *available* at: http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.

²¹ In a July 15, 2014 NIPNLG webinar, two attorneys reported receiving an approval based on the exceptional circumstances exception.

²² For example, expunged convictions are not automatic bars to DACA. *See* U.S. Department of Homeland Security National Standard Operating Procedures, "Deferred Action for Childhood Arrivals (DACA) (Form I-821D and Form I-765), version 2.0" (April 4, 2013) at 86, *available at* http://legalactioncenter.org/sites/default/files/DACA%20Standard%20Operating%20Procedures.pdf (SOP Manual). Note that the SOP manual does not define "expungements."

statutes count as "expungements.24", Historically, the Attorney General and the Board of Immigration Appeals have treated any state action that purports to eliminate for state purposes the consequences of a conviction as an "expungement." ²⁵

- 6. Consider post-conviction relief for individuals with convictions that trigger one of the enforcement priorities. Expungements may also help individuals demonstrate on a case-bycase basis that they are not priorities for removal under the Enforcement Memo. They helped some individuals qualify for original DACA. ²⁶ USCIS still reviews expunged convictions in its discretionary analysis, but expungements may help a person avoid automatic disqualification from the program. The Project anticipates a similar policy will apply to Expanded DACA and DAPA. Practitioners are advised to consult lawyers experienced in post-conviction relief, and to obtain certified copies of court dispositions before expunging any records.
- 7. If removal proceedings are pending, consider requesting Termination or, in the alternative, Administrative Closure citing to Matter of Avetisyan, 25 I&N Dec. 688 (BIA 2012), which held that immigration judges and the BIA may, after weighing certain relevant factors, administratively close removal proceedings, even if a party opposes the closure.
 - If a direct appeal of a criminal conviction is pending, *Matter of Montiel*, 26 I&N Dec. 555 (BIA 2015) holds that an IJ or the BIA may delay the proceedings until the appellate court reaches a decision on the criminal appeal.
 - On April 6, 2015, EOIR and ICE issued guidance regarding cases affected by the Enforcement Memo. See EOIR Memo and OPLA Memo. Both memos highlight the importance of exercising PD as early in the case or proceedings as possible. OPLA directed ICE attorneys to review PD requests prior to hearings. The EOIR memo encourages immigration judges to ask ICE attorneys on the record whether the case remains a removal priority or whether ICE is seeking termination or administrative closure.
 - Refer to this recent unpublished decision where the BIA administratively closed proceedings based upon DHS's exercise of prosecutorial discretion in the case of a respondent who was ineligible to adjust status because she falsely claimed to be a U.S. citizen on numerous Form I-9s.²⁷
 - See NIPNLG's advisory and sample motion to terminate or administratively close based on prima facie eligibility for June 15, 2012 DACA at http://nipnlg.org/publications.htm.

²⁴ For an overview of state rehabilitative relief laws, refer to the National Association of Criminal Defense Lawyers' "Judicial Expungement, Sealing, and Set-Aide" Chart at: http://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Judicial_Expungemen t Sealing_and_Set-Aside.pdf.

²⁵ See In re Roldan, 22 I. & N. Dec. 512, 520 (Mar. 3, 1999); Matter of Marroquin, 23 I&N Dec. 705, 711 (A.G. 2005)

²⁶ SOP Manual, at 86.

²⁷ Flora Obushere Amwayi, A205 133 952 (BIA Oct. 28, 2014), available at: http://www.scribd.com/doc/245652313/Flora-Obushere-Amwayi-A205-133-952-BIA-Oct-28-2014?utm_source=Recent%20Postings%20Alert&utm_medium=Email&utm_campaign=RP%20Daily.

- 8. Depending on the factors surrounding your client's arrest, consider filing a motion to suppress. See the American Immigration Council's practice advisory on *Motions to Suppress in Removal Proceedings: A General Overview* at:

 http://www.legalactioncenter.org/sites/default/files/motions to suppress in removal proceedings-a general overview 1-26-15 fin.pdf
- 9. If the individual has a final order of removal, consider filing a Stay of Removal or a Motion to Reopen. There may be defects in the previous immigration court order that could be challenged. See Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues (November 20, 2013).
- **10.** If the individual is in detention or in removal proceedings, practitioners may also wish to consider filing a traditional deferred action request with ICE or USCIS. ²⁸ The Project is aware of at least one local USCIS office that received a traditional deferred action request at an infopass and approved it for two years.
- 11. In some cases, it may be helpful to consider using organizational and legislative support, as well as the media to elevate your client's request for PD.

Additional Resources

For additional strategies and tips see the American Immigration Council's practice advisory, "Prosecutorial Discretion: How to Advocate for Your Client" at: http://www.legalactioncenter.org/sites/default/files/pd_overview_final.pdf and our joint advisory "Preventing the Removal of Individuals Eligible for Deferred Action for Parental Accountability (DAPA) or Expanded Deferred Action for Childhood Arrivals (Expanded DACA)" at: http://nipnlg.org/legalresources/practice_advisories/Removal_Detention_Advisory_DACA-ExpandedDACA-DAPA_(03-18-2015).pdf.

9

²⁸ Shoba S. Wadhia. "FOIA Response/Request from USCIS on Deferred Action Cases," 2013 *available at*: http://works.bepress.com/shoba_wadhia/24.