



COMMUNITY FAQ

OFFICE OF THE PRINCIPAL LEGAL ADVISER (OPLA) PROSECUTORIAL DISCRETION MEMO

What is the new Prosecutorial Discretion (“PD”) memo?

On Friday, June 4, ICE issued a new prosecutorial discretion memo for **ICE attorneys in charge of prosecuting deportation and bond cases**. These ICE attorneys work within an office known as OPLA, or the Office of the Principal Legal Adviser. The new memo, like the February 18 Memo (see our Community FAQ) is an “interim memo,” meaning that it is subject to change. However, until ICE issues another memo, this memo creates the rules for how ICE attorneys grant prosecutorial discretion.



What does “prosecutorial discretion” mean?

Typically, a grant of prosecutorial discretion means a decision not to pursue immigration enforcement (arrest, detention, and/or deportation) in a particular case.

Does the memo change the February 18 categories?

No. The new memo is a set of instructions for ICE attorneys on how to implement the February 18 guidance, and how to deal with cases involving people ICE does not consider “enforcement priorities.” Those priorities remain:

- People DHS considers a threat to national security;
- People DHS considers a threat to border security;
- People DHS considers a threat to public safety, which includes:
 - People who have been convicted of an “[aggravated felony](#)”
 - People who have been convicted of a gang offense, or who have, according to OPLA, “actively participated” in a gang after the age of 16.

However, the new memo clarifies that in order to be considered a public safety threat, a person must both have an aggravated felony conviction, gang conviction, or gang participation **AND** be determined to “pose a threat to public safety.” A person should not automatically be considered a priority for enforcement just because they have an aggravated felony conviction, gang conviction, or gang participation.

The memo also lays out additional positive and negative factors for deciding whether to grant prosecutorial discretion:

Positive Factors	Negative Factors
<ul style="list-style-type: none"> • Length of time in the United States • Military service • Family and community ties in the United States • How and why the person entered the United States • Current immigration status (with “greater consideration” for people who are green card holders) • Work history in the United States • Education in the United States • Being a witness, victim, or plaintiff in a civil or criminal case (a civil case is any lawsuit that is not a criminal case; a plaintiff is the person who starts the lawsuit) • Whether the person is eligible for some kind of immigration relief • Contributions to the community • “Humanitarian” factors, including: <ul style="list-style-type: none"> • Poor health • Age • Pregnancy • Being a child • Being a caregiver for a seriously ill relative in the United States 	<ul style="list-style-type: none"> • Criminal convictions BUT ICE attorneys should also consider: <ul style="list-style-type: none"> • How serious, recent, and how many criminal convictions a person has • Rehabilitation and extenuating circumstances • Length of sentence imposed and served • Age of person when convicted • How long ago the conviction took place • Whether the person has additional convictions or other “criminal activity” • Participation in persecution or other human rights violations • Previous immigration “violations” <ul style="list-style-type: none"> • Failure to comply with terms of release on bond • Prior unauthorized entries • Prior deportations

The memo also encourages ICE to try to grant prosecutorial discretion as early as possible, and emphasizes that ICE may grant prosecutorial discretion at any stage of a case. The memo also directs ICE to evaluate people’s cases for prosecutorial discretion even if the person does not ask for prosecutorial discretion.

What do ICE attorneys do? Which of their actions does the new memo affect? How?

The new memo provides guidance for all of the following ICE attorney actions:

To file or cancel a Notice To Appear. A Notice to Appear is the paperwork that ICE uses to start a deportation case against someone in immigration court.

- **PD:** ICE attorneys may grant PD by deciding not to file an NTA or deciding to cancel an NTA.

To join or oppose a motion for a continuance, which is a request to the immigration court to give more time before the next hearing (including for a consideration of prosecutorial discretion) or more time to file evidence and/or legal briefs.

- **PD:** In general, ICE attorneys should not oppose motions to continue if a person does not fall within one of the “priority enforcement categories” and should generally agree to them to allow someone to apply for PD.

To join or oppose motions for immigration relief or to reopen a case. Immigration relief is when the immigration court grants someone a form of status like asylum or a green card. ICE can either decide to oppose a motion or application for relief, or ICE can agree that the person is eligible and join them in presenting the motion/application to the court. A motion to reopen is a request for another chance at a hearing that a person can make because something in their case has changed, or because there was a problem in the first hearing. ICE can either decide to oppose the immigrant’s request or join it. Finally, ICE attorneys can decide whether to agree with an immigrant about certain issues or facts (“stipulations”).

- **PD:** ICE attorneys can join motions for relief or to reopen a case if they believe the person qualifies under the law and should be granted PD; ICE can also agree to accept certain facts or issues that the person has presented (like whether past events in the person’s testimony happened or whether the person is right about a particular legal issue).

To agree to or oppose a bond or conditions of release, and whether to appeal an immigration judge’s grant of bond

- **PD:** If an immigrant provides “new evidence” (evidence the person has put together since the ICE officer who arrested them made a bond decision) that they are not a flight risk or a danger to society, then the ICE attorney is allowed to agree to a bond amount or other condition of release (like GPS monitoring or check-ins). ICE attorneys can also decide not to appeal bond grants based on the PD factors, even if they argued against bond at the hearing.

When will ICE attorneys agree to dismiss (end) a deportation case?

Because of the immigration court backlog of over 1.3 million cases, the memo identifies **five groups of people whose cases ICE should generally dismiss** if they are not enforcement priorities and if they do not have serious negative factors:

1. People who have served in the **military** and been honorably discharged; who are currently in the military; or whose immediate relative is in the military or previously served and was honorably discharged.
2. People who are **likely to get temporary or permanent status** outside of deportation proceedings.
3. People who have **compelling humanitarian factors**, such as:
 - Having a serious health condition or being pregnant; being elderly or a minor;
 - Being a caregiver to or having an immediate family or household member who is suffering from serious physical or mental illness;
 - Being a victim of domestic violence, human trafficking, or other serious crime;
 - Having come to the U.S. as a young child and lived here continuously since;
 - Being involved in a serious lawsuit outside of the deportation proceeding (like family court, civil rights, or a labor dispute).
4. People who are **witnesses, confidential informants, or otherwise assisting** law enforcement, including for labor and civil rights investigations/cases.
5. People who are **long-time lawful permanent residents** (green card holders), especially if they became lawful permanent residents at a young age and have close family and community ties.

What's next from ICE?

The guidance is temporary, so we still expect at least one more prosecutorial discretion memo from ICE. The memo also says that ICE will put out more rules for ICE attorneys on when they should join motions to reopen (motions that would give a person another chance to present their case to an immigration judge).

What can we do?

If you would like to request prosecutorial discretion on behalf of yourself or someone else, you should gather evidence to show that you have positive factors, that your case is one of the five types ICE should dismiss, or both, and submit that evidence to ICE. Evidence could look like letters of support, family members' birth certificates, certificates from completed programs (educational, rehabilitative, or both), pay stubs and time sheets, medical records, and USCIS filing receipts, among others.

There is also still time to push back on ICE's enforcement priorities - to push them to expand the categories of people who should be granted PD, to end detention, and to focus on protection instead of enforcement.

Questions? You can contact Caitlin Bellis at cbellis@nipnl.org.