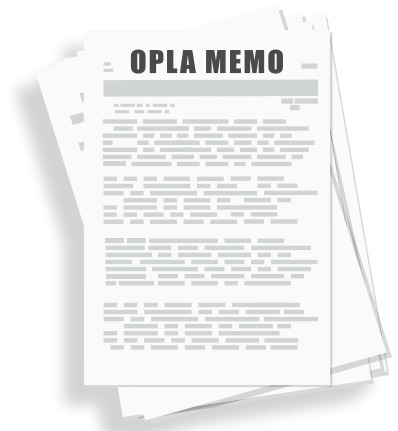




## COMMUNITY FAQ

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

You may have heard that there is a new prosecutorial discretion memo, and heard people referring to it as the “[OPLA Memo](#).” This FAQ will explain the Memo. OPLA has also put on its website some [materials](#) for people who do not have lawyers representing them to help them request prosecutorial discretion, including [this short guide](#) as well as [this form](#) that people can use to request prosecutorial discretion.



## What is OPLA?

OPLA stands for Office of the Principal Legal Advisor. OPLA is the name for ICE attorneys (lawyers) who represent ICE in deportation cases. These lawyers are also sometimes called “trial attorneys,” or TAs.

## What is prosecutorial discretion?

Any law enforcement agent, from a police officer to a district attorney to an ICE agent can decide whether or not to enforce a law against a person at a given time. In this context, when ICE grants prosecutorial discretion, the agency decides not to pursue immigration enforcement like an arrest, detention, or deportation in a particular case.

## How does the OPLA Memo interact with the Mayorkas Memo?

The [Mayorkas Memo](#), issued on September 30th, 2021 provides prosecutorial discretion guidelines to the whole Department of Homeland Security (DHS). Sec. Mayorkas, for whom the memo is named, is the Secretary of DHS meaning he is in charge of, and sets priorities for, all of the immigration departments. Meanwhile, the OPLA Memo was issued by Kerry Doyle, who is the head of OPLA, which is just one part of DHS. **The Mayorkas Memo is still the memo that defines the agency’s priorities. The OPLA memo just explains how ICE attorneys should apply the Mayorkas Memo to cases in immigration court.** [Here](#) is an explanation of the Mayorkas Memo, which also explains the priority categories and positive and negative factors.

The OPLA Memo restates the priorities for enforcement established by the Mayorkas Memo. It also provides some additional examples for each of the “enforcement priority” categories:

→ **For the “national security” category**, the OPLA Memo adds that people who have violated human rights should also be considered “threats to national security”;

→ **For the “public safety” category**, the OPLA Memo emphasizes that ICE attorneys should not look only at criminal convictions to decide whether the person is a “priority” for enforcement. The OPLA Memo also provides some additional negative and positive factors that ICE attorneys will consider:

Negative Factors	Positive Factors
<ul style="list-style-type: none"> <li>• person harmed a child or vulnerable person;</li> <li>• criminal activity involved sexual or other violence, was gang-related, or resulted in “harm to public health or pandemic response efforts”</li> </ul>	<ul style="list-style-type: none"> <li>• person is pregnant, postpartum, or nursing;</li> <li>• person has a green card, also known as being a lawful permanent resident (a green card holder), or LPR (especially if the person became an LPR a long time ago or as a child);</li> <li>• the circumstances of the person’s arrest show that the arrest was motivated by discrimination or retaliation;</li> <li>• they were convicted of something that is no longer a crime;</li> <li>• the person is a cooperating witness for law enforcement.</li> </ul>

→ **For the “border security” category**, (applies to people who entered the U.S. after November 1, 2020, unless the person can show positive factors that outweigh their being an enforcement priority), the OPLA Memo says that the positive factors that apply to the other categories also apply to this one. The Memo also provides additional negative factors:

Negative Factors
<ul style="list-style-type: none"> <li>• The person was involved in smuggling other people across the border, especially if those people were harmed; the person is involved in serious fraud to obtain some kind of legal status or document.             <ul style="list-style-type: none"> <li>• <b>However</b>, if a person lies just to get an employment document, in order to escape a country where they fear persecution, or if the person is a minor, it would not be considered a negative factor.</li> </ul> </li> </ul>

## What does the OPLA Memo affect?

The OPLA Memo talks about prosecutorial discretion in the context of removal (deportation) proceedings in immigration court, or on appeal to the Board of Immigration Appeals (BIA). Therefore, the OPLA memo affects:

- Whether ICE attorneys will start a deportation case against someone;
- Whether ICE will dismiss or delay a deportation case (through *dismissal*, which removes the case from the system, or *administrative closure*, which pauses a case so that no hearings get scheduled unless ICE or the person in proceedings formally requests a hearing);
- Whether ICE will agree to relief, to bond, or to agree to certain issues (called *stipulations*);
- Whether ICE will object to giving the person more time to prepare (called a *continuance*);
- Whether ICE will appeal a case that the person has won;
- Whether ICE will reopen a case, which means get rid of a deportation order and go back before the immigration court.

## What does the OPLA Memo say about deciding whether or not someone is an enforcement priority?

In general, ICE attorneys will review cases that were filed with the court **before November 29, 2021** to see whether they should use prosecutorial discretion. ICE attorneys will assume that for cases started after that date, that people in removal proceedings are priorities, because those cases were started after the Mayorkas Memo went into effect. It is still possible to ask ICE attorneys for prosecutorial discretion on more recent cases, but the person requesting prosecutorial discretion will need to provide new information or evidence about their case when they make their request.<sup>1</sup>

## What does the OPLA Memo say ICE attorneys should do if they decide someone is not an enforcement priority?

Because the immigration courts and OPLA attorneys have a long backlog of cases, the OPLA Memo says that ICE attorneys should focus on case dismissal, which means getting rid of the case, rather than *administrative closure*, or pausing the case. Case dismissal may help some people, but may hurt other people who have a work permit based on an application for an immigration benefit pending before the immigration court (like an application for asylum). Again, because the OPLA Memo is focused on reducing the amount of cases OPLA attorneys must use their time and resources on, it also states that ICE attorneys may agree to relief if they believe the person is eligible and deserves prosecutorial discretion.

The Memo also says that prosecutorial discretion should generally be granted before a case ends. It may be harder to get prosecutorial discretion if a person has already lost their case, because granting

---

<sup>1</sup> ICE attorneys have to get permission from their bosses, also known as the Chief Counsel or Deputy Chief Counsel, to reconsider and grant someone previously labeled an enforcement priority prosecutorial discretion. ICE attorneys considering whether a case is a priority for the first time can decide to grant prosecutorial discretion without permission from the Chief Counsel. However, ICE attorneys deciding that someone is an enforcement priority need permission from the Chief Counsel to label them that way.

prosecutorial discretion then would not prevent OPLA attorneys from using time and resources on a case. **However**, the Memo also says that ICE attorneys may agree to reopen a case in order to dismiss it to allow a person to apply for relief they are eligible for with USCIS, including a visa or other benefit. ICE attorneys can also agree to reopen and dismiss a case when the person is not a priority for enforcement and was an LPR if dismissing the case would let the person keep their green card. However, the OPLA Memo discourages reopening a case so that a person can have a new hearing if the person is not eligible for new relief.

## What does the new OPLA Memo say about people who do not have lawyers?

The OPLA Memo says that ICE attorneys should not expect formal requests for prosecutorial discretion from unrepresented people and that their requests could take many forms. The Memo also says that generally ICE attorneys can ask the immigration court to dismiss nonpriority cases without asking the person to agree to having their case dismissed (except for people who had their asylum applications denied by USCIS and who are now applying for asylum in immigration court). However, if the ICE attorney asks to dismiss a case of an unrepresented person without that person's consent, the ICE attorney should first agree to one continuance (extra time before the next hearing) to give the person a chance to find a lawyer and decide whether they want to agree to ICE's dismissal request. Additionally, and in general, the Memo encourages ICE attorneys to consider the ability to file complex legal documents and generally lesser understanding of legal issues of unrepresented people as they pursue their cases.

## What does the new OPLA Memo say about bond?

The OPLA Memo says that ICE attorneys should generally defer to the decision of an ICE officer to detain someone. **However**, ICE attorneys can agree to bond or other release conditions if the person provides new evidence that ICE should not consider them a flight risk or a public safety threat. The Memo also says that ICE attorneys should usually not agree to the release of people who are held under mandatory detention.

## Is the OPLA Memo a law?

No, the OPLA Memo is a form of agency *guidance*. ICE attorneys should follow the Memo, but the Memo gives ICE attorneys a lot of power in exercising their discretion. Additionally, because the Memo is not a law, it would be difficult for people to get a court to force ICE attorneys to do something, even if they believe the Memo requires the ICE attorney to do it.