AMERICAN IMMIGRATION COUNCIL

COMMUNITY EDUCATION CENTER • IMMIGRATION POLICY CENTER • INTERNATIONAL EXCHANGE CENTER • LEGAL ACTION CENTER

PRACTICE ADVISORY[1]
Updated March 18, 2015

PROSECUTORIAL DISCRETION: HOW TO ADVOCATE FOR YOUR CLIENT

By the American Immigration Council[2]

Like all other enforcement agencies, DHS has prosecutorial discretion. When DHS favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of its enforcement authority in a particular case. In immigration cases, this discretion can be exercised in a variety of settings, including but not limited to: investigations, arrests, detention, the initiation of removal proceedings, the pursuit of an appeal, and even the execution of final removal orders. In some cases, a favorable grant of prosecutorial discretion may be the only avenue available to a client seeking to remain in the United States.

This practice advisory explains what prosecutorial discretion is, who has authority to exercise it, and how it is exercised most often in immigration cases. It also suggests ways that attorneys can advocate for the favorable exercise of prosecutorial discretion by DHS officers, whether from ICE, USCIS or CBP.[3]

This practice advisory also discusses all currently applicable agency guidance on prosecutorial discretion in immigration cases – including memoranda from the legacy Immigration and Naturalization Services (INS), ICE and USCIS – and summarizes this guidance in an attachment at the end of the advisory. In general, this guidance encourages officers to consider the exercise of prosecutorial discretion in a variety of settings and sets forth guidelines for doing so.

In the past, officers in the field have frequently failed to follow the guidance on prosecutorial discretion and, as a result, infrequently exercised such discretion favorably. For that reason, it is essential that attorneys advocate for expanded use of prosecutorial discretion, consistent with the Policies for the Apprehension, Detention and Removal of Undocumented Immigrants issued by Homeland Security Secretary Jeh Johnson on November 20, 2014 (hereinafter, "Enforcement

---

[1] Copyright (c) 2015 American Immigration Council. Click here for information on reprinting this practice advisory. This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

[2] The American Immigration Council thanks Maurice Goldman, Matthew Guadagno, Laura Lichter, and Shoba Sivaprasad Wadhia for their assistance with previous versions of this practice advisory. Questions regarding this practice advisory should be directed to clearinghouse@immcouncil.org.

[3] For a more in-depth discussion of prosecutorial discretion, *see* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J., No. 2, 2010.

Memo"),[4] by specifically requesting favorable prosecutorial discretion in meritorious cases, and building a case for this relief on behalf of clients, just as you would for affirmative relief.

What is prosecutorial discretion?

"Prosecutorial discretion" is the authority of a law enforcement agency or officer charged with enforcing a law to decide whether – and to what degree – to enforce the law in a particular case. A law enforcement officer who decides *not* to enforce the law against a person has *favorably* exercised prosecutorial discretion. Examples of the favorable exercise of prosecutorial discretion in the immigration context include a grant of deferred action; parole; a stay of removal; or a decision not to issue a Notice to Appear (NTA).[5]

Prosecutorial discretion applies in the law enforcement context only; that is, only in situations in which a person is suspected of having violated the law (whether civil or criminal). ICE, CBP and USCIS officers all have the authority to exercise prosecutorial discretion. In immigration cases, prosecutorial discretion primarily is exercised with respect to removal proceedings (including the decision whether to place a person in proceedings); detention; parole; and the execution of removal orders. Prosecutorial discretion is not the same as the discretion that a USCIS officer exercises when deciding an affirmative application for an immigration benefit, such as adjustment of status, since such a decision is not about whether to *enforce* a law against a person. However, if after the officer denies an adjustment application, he agrees not to issue an NTA against an applicant who might be subject to removal, he has favorably exercised prosecutorial discretion.

Prosecutorial discretion can be exercised on either an agency-wide basis or by an individual officer or employee. When DHS adopts priorities streamlining its enforcement efforts, for example, it is exercising prosecutorial discretion as an agency with respect to how to spend its resources. Administrative advocacy and liaison efforts often seek to influence the agency-wide exercise of prosecutorial discretion by advocating for adoption of more favorable enforcement practices and policies. For example, in response to coordinated advocacy efforts, USCIS adopted a new policy establishing a procedure for surviving spouses and children of deceased U.S. citizens to apply for deferred action. *See* Donald Neufeld, "Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children" (June 15, 2009). In contrast, a DHS officer who decides to cancel an NTA as improvidently issued, *see* 8 C.F.R. § 239.2(a)(6), is exercising favorable prosecutorial discretion on an individual basis.

Prosecutorial discretion is not addressed in either the immigration statute or regulations (although there is statutory or regulatory authority for some of the decisions made). Rather, prosecutorial discretion is the inherent discretionary authority that the agency has with respect to how it enforces the law. *See* Bo Cooper, General Counsel, INS, "INS Exercise of Prosecutorial

[4] For more information about the Enforcement Memo, *see* American Immigration Council and American Immigration Lawyers Association Practice Advisory, Prosecutorial Discretion Requests Under the Johnson Enforcement Priorities Memorandum (March 18, 2015).

[5] For more information on strategies available to attorneys seeking to cancel, mitigate, or challenge the contents of a Notice to Appear, see American Immigration Council Practice Advisory, Notices to Appear (June 30, 2014).

Discretion" (undated) (discussing the origins of prosecutorial discretion and its application in immigration proceedings). Both courts and the Board of Immigration Appeals (BIA) have long recognized the agency's authority to exercise prosecutorial discretion. *See, e.g., Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (characterizing the broad discretion exercised by DHS officials as a "principal feature of the removal system"); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-92 (1999) (finding that the INS retains inherent prosecutorial discretion as to whether to bring removal proceedings); *Matter of Yauri*, 25 I&N Dec. 103, 110 (BIA 2009) (noting that DHS has prosecutorial discretion over deferred action and citing cases), *overruled on other grounds by Singh v. Holder*, 771 F.3d 647 (9th Cir. 2014); *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000) (finding that the former INS had prosecutorial discretion to decide whether to commence removal proceedings against a person subsequent to IIRIRA), *overruled on other grounds by U.S. v. Vasquez-Flores*, 265 F.3d 1122 (10th Cir. 2001) *and by Hernandez-Mancilla v. INS*, 246 F.3d 1002 (7th Cir. 2001).

However, prosecutorial discretion only can be exercised within the bounds of the agency's – or an officer's – legal authority to act. Where the Immigration and Nationality Act (INA) makes a determination/action mandatory, the agency or officer generally does not have discretion to act in ways contrary to that mandate.[6] For example, DHS has stated that the mandatory detention statute, INA § 236(c), eliminates an officer's prosecutorial discretion to release a person subject to such detention. *See* Doris Meissner, Commissioner, "Exercising Prosecutorial Discretion" (Nov. 17, 2000) ("Meissner memo"). Note, however, that this would not prevent an officer from exercising prosecutorial discretion and *not* issuing an NTA against a person who – if and when the NTA were issued – would be subject to mandatory detention. *Id*. at 6. Arguably, and for the same reasons, an officer also might be able to cancel an NTA in a compelling case before it is filed with the court and thus eliminate the basis for mandatory detention. Thus, while it is always important to keep in mind the limits of an officer's statutory authority when seeking prosecutorial discretion, it is also important to think creatively about potential solutions not prohibited by law – especially in particularly compelling cases.

Finally, prosecutorial discretion is not only a humanitarian tool of the agency. It also serves other agency purposes. As a practical matter, understanding these purposes will assist you in arguing that your client is a good candidate for favorable prosecutorial discretion. Important among these purposes is that the agency's ability to exercise prosecutorial discretion – by declining to prosecute certain cases or types of cases – assists it in focusing its limited resources on higher priorities. In accord, the agency has explained that the first question behind all prosecutorial discretion decisions should be whether the enforcement action advances the agency's goals. Meissner memo, at 4-6. Consistent with this, the standard for prosecutorial discretion in a given case now is whether pursuing it meets the agency's priorities for federal immigration enforcement.[7]

---

[6] Whether a statute imposes a mandatory obligation on government officials or merely recommends a course of action often requires close analysis. *See, e.g., Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 433 n.9 (1995) (recognizing that "shall" sometimes means "may"); *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 522 (BIA 2011) (same).

[7] Enforcement Memo at 5. Unfortunately, ICE's conduct in the field often has not been consistent with the agency's national priorities. *See, e.g.,* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J., No. 2, 2010; Michele Waslin, "ICE's Enforcement

Over what types of immigration decisions can an immigration officer exercise prosecutorial discretion?

In the immigration context, DHS officers have the authority to favorably exercise prosecutorial discretion at all stages of any enforcement process. This discretion can be exercised with respect to investigations, arrests, detention, parole, the initiation of removal proceedings, appeals, motions, and even the execution of final removal orders. *See* Enforcement Memo, at 2 (discussing the "broad range" of discretionary enforcement decisions).

The following provides examples of the types of prosecutorial discretion decisions that an immigration officer can make at three discrete stages of a case: (1) prior to filing an NTA with the immigration court; (2) while the noncitizen is in removal proceedings; and (3) after a removal order has been issued. Note that this list is not exhaustive but intended to illustrate the range of decisions subject to discretionary action by agency personnel.

1. **Prior to filing an NTA.** An officer can exercise prosecutorial discretion over:
   - Whether to focus enforcement resources on particular administrative violations or conduct;
   - Whether to stop, question, or arrest an individual for an administrative violation;
   - Whether to place a person in expedited or other summary removal proceedings;
   - Whether to refer a person to secondary inspection;
   - Whether to issue, serve, file, or cancel an NTA or refrain from doing so;[8]
   - What charges to include in an NTA;
   - Whether to cancel an NTA before it is filed with the court;[9]
   - Whether to grant pre-hearing voluntary departure;
   - Whether to parole under § 212(d)(5) a person in the U.S. who was never admitted or paroled (i.e., a grant of "parole-in-place") but who otherwise is eligible to adjust so that she can pursue that relief;
   - Whether to parole an arriving alien into the United States, rather than detain the alien under § 235(b);
   - Whether to detain a person or release him or her on bond, supervision, personal recognizance, or other condition;
   - Whether to grant a noncitizen deferred action;

Priorities and the Forces that Undermine Them" (November 2010); Shoba Sivaprasad Wadhia, "Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion" (November 2010).

[8] *See* 8 C.F.R. §§ 239.1(a) and 1239.1(a) for a listing of officers who can issue an NTA.

[9] Before an NTA is filed with the court, any officer with authority to issue an NTA also has the authority to cancel the NTA as "improvidently issued," due to changed circumstances or for other reasons. 8 C.F.R. § 239.2(a). Note that ICE attorneys (known as Assistant Chief Counsels or trial attorneys) do not have authority to issue an NTA and thus do not have authority to cancel one. However, an ICE attorney can advise her client to cancel the NTA. *See* William Howard, Principal Legal Advisor, ICE, "Prosecutorial Discretion" (Oct. 24, 2005), at 4-5. Additionally, once the NTA is filed with the immigration court, the trial attorney can move to dismiss proceedings. *Id.* at 5; *see also* 8 C.F.R. § 1239.2(c).

2. **While the noncitizen is in removal proceedings.** An officer can exercise prosecutorial discretion over:
   - Whether to agree to join a motion to administratively close or terminate a removal case;
   - Whether to agree to a continuance for the person to become eligible for relief at a later date (i.e., while waiting for a family member to naturalize);
   - Whether to amend the NTA to change or remove certain charges;
   - Whether to agree not to oppose a grant of relief or voluntary departure;
   - Whether to agree to limit the issues to be heard or the evidence presented;
   - Whether to appeal an immigration judge decision that ruled in favor of a noncitizen;
   - Whether to grant deferred action or otherwise settle the case;
   - Whether to release an individual so that he or she may pursue a DACA request with USCIS;

3. **After issuance of a removal order.** An officer can exercise prosecutorial discretion over:
   - Whether to oppose a motion to reopen;
   - Whether to join a motion to reopen;
   - Whether to stay the execution of a removal order;
   - Whether to place the individual on supervised release, rather than detain the individual;
   - Whether to grant a noncitizen deferred action; and
   - Whether to agree to a remand if a case is before a court of appeals on a petition for review.

What is deferred action status and is it a favorable grant of prosecutorial discretion?

Deferred action is a DHS decision not to pursue enforcement against a person for a specific period of time, in the exercise of the agency's prosecutorial discretion. The grant of deferred action by USCIS does not confer lawful immigration status or alter the person's existing immigration status. *See Arpaio v. Obama*, 27 F.Supp.3d 185, 193 (D.D.C 2014). While deferred action does not affect any already existing period of unlawful presence, periods of time in deferred action *do* qualify as periods of stay authorized by the Secretary of DHS for purposes of INA §§ 212(a)(9)(B) and (C)(i)(I). *See* Donald Neufeld, Acting Assoc. Dir., USCIS, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act" (May 6, 2009). Note, however, that deferred action cannot be used to establish eligibility for any immigration benefit that requires maintenance of lawful status.

An individual with deferred action may apply for an Employment Authorization Document (EAD) if she can establish an economic necessity for employment. 8 C.F.R. § 274(a).12(c)(14). Thus, it can be a significant benefit to a person without other options for relief.

In 2012, DHS created a specific deferred action initiative for certain undocumented immigrants brought to the United States as children. This initiative, called Deferred Action for Childhood Arrivals (DACA), is available to any individual who was under the age of 31 on June 15, 2012;

arrived in the United States before the age of 16; continuously resided in the United States for at least 5 years immediately preceding June 15, 2012; was physically present on June 15, 2012; satisfies certain educational or military service requirements; and neither has a serious criminal history nor "poses a threat to national security or public safety."[10]

On November 20, 2014, DHS Secretary Jeh Johnson expanded certain parameters of DACA and issued guidance for case-by-case use of deferred action for certain adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities, as set forth in the Enforcement Memo.[11] However, as of the date of publication of this practice advisory, these new initiatives—expanded DACA and Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA, respectively—are not in effect. In fact, on February 16, 2015, a federal judge in the Southern District of Texas issued a preliminary injunction in *State of Texas, et al v. United States, et al.*, No. 1-14-CV-254 (S.D.Tex.), temporarily blocking the implementation of expanded DACA and DAPA. In light of the preliminary injunction, DHS and DOJ personnel are temporarily prohibited from implementing expanded DACA or DAPA. The preliminary injunction, however, does not prohibit DHS or its components from implementing the enforcement priorities set forth in the Enforcement Memo. Individuals who do not fall within the enforcement priorities—including all or substantially all potential expanded DACA and DAPA requestors as well as many other individuals—should continue to pursue prosecutorial discretion.

Who is eligible for prosecutorial discretion under the Enforcement Memo?

The Enforcement Memo explains that, because of limited resources, DHS should focus its immigration enforcement efforts on cases that fall within the following priorities:

Priority One focuses on "threats to national security, border security, and public safety." Such individuals include: persons engaged in or suspected of terrorism or espionage, persons apprehended at the border while attempting to enter unlawfully, persons at least 16 years of age who intentionally participated in an organized gang, any person convicted of an offense for which an element was active participation in a criminal street gang (defined under federal law), and persons convicted of a felony in the convicting jurisdiction or an aggravated felony under the Immigration and Nationality Act.[12]

---

[10] Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, at 1, (June 15, 2012). For more information about DACA, see the American Immigration Council Practice Advisory, *Deferred Action for Childhood Arrivals*. For a full discussion of deferred action, including factors that are to be considered, suggestions for preparing and advancing a deferred action request, and sample requests, see "Private Bills and Deferred Action Toolkit," prepared and issued by Maggio Kattar, Duane Morris and Penn State Law School.

[11] Jeh 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).

[12] Earlier, now withdrawn agency guidance on prosecutorial discretion acknowledged that an "aggravated felony" includes serious, violent offenses in addition to less serious, non-violent offenses and that the former should be prioritized. This qualification was omitted from the Enforcement Memo.

Priority Two focuses on "misdemeanants and new immigration violators." Such individuals include: persons convicted of three or more misdemeanors arising out of separate incidents, not including minor traffic offenses and state convictions where immigration status is an element; significant visa "abusers"; persons who unlawfully entered or re-entered the United States and have not been continuously present in the United States since January 1, 2014; and persons convicted of a significant misdemeanor. A "significant misdemeanor" is defined as an offense of domestic violence,[13] sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, driving under the influence, or any misdemeanor for which the person was sentenced to serve 90 days or more in jail, excluding suspended sentences.

Priority Three focuses on people who have committed "other immigration violations." This category is limited to individuals who have been issued a final order of removal on or after January 1, 2014.

For a detailed discussion of the criminal and public safety enforcement priority categories, see the Immigrant Legal Resource Center and National Immigration Project, *Practice Advisory for Criminal Defenders: New "Deferred Action for Parental Accountability" (DAPA) Immigration Program Announced by President Obama*.[14] For practical advice on advocating on behalf of individuals who are not enforcement priorities, including those who potentially qualify for expanded DACA or DAPA, see the American Immigration Council and National Immigration Project Practice Advisory, *Preventing the Removal of Individuals Who Are Not Enforcement Priorities or Who Are Eligible for Expanded DACA and DAPA* (updated March 18, 2015).

Even individuals who appear to fall within one of the above priorities may ultimately be found not to be a priority and receive prosecutorial discretion based on the exceptions specified in the Enforcement Memo. Under a plain reading of the memo, if you demonstrate to the relevant DHS official that your client meets the applicable standard to be excepted from the priority category that seemingly applies to him or her, *your client is not an enforcement priority*.[15]

Who can make the decision to favorably exercise prosecutorial discretion in a given case?

---

[13] In the case of significant misdemeanors involving domestic violence, DHS officials are directed to consider whether the convicted individual was also a victim of domestic violence, which should be a mitigating factor. Enforcement Memo at 4, n.1.

[14] This practice advisory refers to DAPA by the name USCIS initially gave it, Deferred Action for Parental Accountability. While this practice advisory focuses on the criminal and public safety bars to DAPA, those bars are co-extensive with the criminal and public safety enforcement priority categories set forth in the Enforcement Memo.

[15] The Enforcement Memo provides that the "removal of [individuals in Priority 1] must be prioritized *unless*…in the judgment of an ICE Field Office Director, CBP Sector Chief or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and *should not therefore be an enforcement priority*." Enforcement Memo at 3 (emphasis added). "Unless" clauses appear following *all* of the enumerated priority categories, though note that for Priorities 2 and 3, the Enforcement Memo requires a lesser showing than "compelling and exceptional factors[.]" *Id*. at 3-4. This language is set forth anew in subsection D of the Enforcement Memo, which is discussed below. *Id*. at 5.

Under the Enforcement Memo, presumably all "DHS personnel" will be expected to exercise discretion consistent with the three enforcement priority categories set forth therein. However, certain discretionary determinations are limited to specified DHS officers. These are:

- ICE Field Office Directors, CBP Sector Chiefs and CBP Directors of Field Operations may determine that an individual who falls within Priority 1 presents "compelling and exceptional factors" clearly indicating the individual is not a threat to national security, border security, or public safety and "should not therefore be an enforcement priority."
- The above-referenced officers as well as USCIS District Directors and USCIS Service Center Directors may determine that for individuals who fall within Priority 2, "there are factors indicating" the individual is not a threat to national security, border security, or public safety and "should not therefore be an enforcement priority."
- Any immigration officer may determine that an individual who falls within Priority 3 does not pose a "threat to the integrity of the immigration system" or that "there are factors suggesting the [individual] should not be an enforcement priority."
- ICE Field Office Directors may authorize the use of enforcement resources to pursue removal of an individual who does not fall within any of the priority categories upon determining that removal of that individual "would serve an important federal interest."
- Absent extraordinary circumstances, DHS officers and special agents must obtain approval from ICE Field Office Directors to detain individuals who are not subject to mandatory detention and who are "known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate that they are primary caretakers of children or an infirm person, or whose detention is not otherwise in the public interest."

As a practical matter, practitioners should get to know officers within their local DHS offices and find out who has authority over particular types of decisions. It is also important to know who the supervisors are, as they may have the final say over a decision. While certain DHS personnel may not have authority to make a decision, they still could be influential. For example, Assistant Chief Counsels (also known as trial attorneys) are not authorized to cancel an NTA, or to grant deferred action or a stay of removal. *See* William Howard, Principal Legal Advisor, ICE, "Prosecutorial Discretion" (Oct. 24, 2005). Nonetheless, someone from the local Office of the Chief Counsel may be able to help favorably resolve a case, and certainly ICE attorneys can advise their clients, the agency, about steps to take in a case. *Id.* Moreover, ICE attorneys do have authority over other determinations, such as whether to consent to administratively close a removal case or whether to join a motion to reopen. *Id.*

Additionally, other immigration attorneys in the locale can provide guidance on local policies and procedures.

What factors will be considered in a prosecutorial discretion decision?

The factors that will influence a decision on prosecutorial discretion will vary according to the nature of the case. However, there are some general guidelines about important factors that the agency will consider in determining whether an individual should be an enforcement priority. This list of factors, taken from the November 20, 2014 Enforcement Memo, includes:

extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative.

The decision should be based upon the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities. *Id.*[16]

What other guidance on the exercise of prosecutorial discretion exists?

ICE and CBP have created webpages with additional information on prosecutorial discretion requests pursuant to the Enforcement Memo. For more information about pursuing prosecutorial discretion requests for detained individuals or individuals in removal proceedings under President Obama's November 20, 2014 Executive Actions, please see the American Immigration Council Practice Advisory, *Preventing the Removal of Individuals Who Are Not Enforcement Priorities or Who Are Eligible for Expanded DACA and DAPA.*

Over the years, both legacy INS and components within DHS have issued numerous memoranda that discuss various aspects of prosecutorial discretion. At the end of this practice advisory is a list of agency guidance that discusses prosecutorial discretion in different contexts, with a short description of each memorandum. This list may not be exhaustive, so be sure to look for additional policy or procedural guidance supporting the exercise of prosecutorial discretion, including guidance that does not explicitly mention "discretion."

What role can an attorney play in influencing an immigration officer to exercise favorable prosecutorial discretion?

1. **Ask that favorable prosecutorial discretion be exercised in your client's case.** Despite language in earlier memoranda encouraging immigration officers to consider the favorable exercise of prosecutorial discretion on their own, this has not frequently happened. See, e.g., Meissner memo.[17] Thus, an attorney can play an important role in requesting a specific type of favorable action in a case, and advocating for this result. It is not sufficient to simply ask for a favorable exercise of prosecutorial discretion. Instead, ask specifically

[16] The Meissner memo, at 7-8, makes clear that there also are factors that cannot be considered, including the individual's race, religion, sex, ethnicity, national origin, or political association, activities or beliefs (unless the above is relevant to the person's immigration status or case in another way); the officer's own personal feelings regarding the individual; or the possible effect of the decision on the officer's own professional or personal circumstances.

[17] Moreover, be aware that despite its overall encouraging tone, the Meissner memo also cautions against "attempts to exploit prosecutorial discretion as a delay tactic, as a means merely to revisit matters that have been thoroughly considered and decided, or for other improper tactical reasons." Meissner Memo, at 10. For this reason, attorneys may want to be judicious in selecting the cases in which they advocate for prosecutorial discretion. Asking for it in cases in which it clearly is not warranted could undermine your future efforts to get prosecutorial discretion in meritorious cases.

for what it is that you want the officer to do (e.g., grant deferred action; terminate proceedings; grant a stay of removal; etc.), and outline why prosecutorial discretion is appropriate, with particular care to highlight the positive factors and how the exercise of prosecutorial discretion in your case would meet agency enforcement priorities.

2. **Put together a package of materials to support your request for prosecutorial discretion.** To better make a record, make your request in writing. Consider providing a detailed cover letter or brief, supported by material that will demonstrate that your client is deserving of prosecutorial discretion. Include and document all the facts that an immigration officer will need to make an informed decision, but be as concise as possible.

3. **Use the agency memoranda to support your request.** The exercise of favorable prosecutorial discretion is not mandatory in any circumstance. However, the memoranda do provide authority for an officer and/or local office to act favorably. For example, the Howard memo contains the following advice to local ICE counsel: "[w]here a motion to reopen for adjustment of status or cancellation of removal is filed on behalf of an alien with substantial equities, no serious criminal or immigration violations, and who is eligible to be granted the relief except that the motion is beyond the 90-day limitation contained in 8 C.F.R. § 1002.23, *strongly consider* exercising prosecutorial discretion." William Howard, Principal Legal Advisor, ICE, "Prosecutorial Discretion" (Oct. 24, 2005) (emphasis added).

4. **Highlight the positive factors in your client's case.** Review the criteria supporting favorable action that are listed in the relevant memos and highlight the applicable criteria for the officer. Develop other favorable equities, just as you would in a case seeking a discretionary benefit or relief from removal from DHS.

5. **Address any relevant problems or inadequacies in the case or the evidence.** It is generally better to address such problems directly because otherwise it could appear that you were trying to hide information from the officer, which could undercut the credibility of your other arguments. Moreover, when there is negative information relevant to the exercise of discretion, it is generally advisable to not only disclose it, but also provide mitigating information. For example, when there is a conviction, provide evidence of completion of probation or parole.

6. **Provide the evidence that the officer needs to support the decision.** A decision to exercise prosecutorial discretion in a given case requires a determination based on individual circumstances. Enforcement Memo, at 5. The more developed the facts are with respect to the factors favoring your client, the stronger the request will be. Thus, where time permits, an attorney can play an important role in providing the immigration officer with evidence

demonstrating why a favorable exercise of discretion is warranted. Where there is a relevant memo, review the criteria to be considered in support of favorable prosecutorial discretion and offer evidence demonstrating that these criteria are satisfied.

7. **If removal proceedings have been initiated, consider seeking a continuance of the proceedings so that you can discuss prosecutorial discretion options with ICE counsel.** An immigration judge may be inclined to grant a continuance to allow—or even encourage – the parties to discuss prosecutorial discretion options. Prior to the issuance of the Enforcement Memo, for example, an attorney was granted a continuance after he argued that his client did not fall within the then-current enforcement priorities and that he wanted an opportunity to advocate for ICE to favorably exercise prosecutorial discretion and join him in a motion to dismiss.[18]

8. **Ensure that all details of any plan for favorable action for your client are completely worked out and are committed to writing.** For example, if deferred action will not benefit your client unless she also is granted an EAD, be sure to include this in your advocacy for your client, and if agreed to, in the written summary of the final grant of deferred action.[19]

9. **Consider having your client contact his or her Senator or Congressional representative for additional support.** Your client can provide the elected official with a copy of the request for favorable prosecutorial discretion that you submitted to DHS. Some officials will be receptive to this and their staff members will follow up with the local DHS office.

How will I know if the officer decided to exercise prosecutorial discretion in my client's favor or not?

The Meissner memo requires that when a decision is made to favorably exercise prosecutorial discretion, it must be documented in the file, including the specific decision taken and its factual and legal basis. Meissner memo, at 11. Additionally, when the decision is favorable, the officer must notify the individual in writing of the action to be taken in her case and the consequences. Normally, notice should be by letter to the individual and the attorney of record. *Id.* Officers are cautioned to make clear in the letter that the favorable exercise of prosecutorial discretion does

[18] An ICE attorney has the authority under the regulations to move to dismiss a case for all of the reasons that an NTA can be cancelled. *See* 8 C.F.R. § 1239.2(c) (citing 8 C.F.R. § 239.2). These reasons include, among others, that the noncitizen is not deportable or inadmissible; that the NTA was improvidently issued; and that circumstances have changed such that it is no longer in the best interest of the government to continue the case. The motion, however, must be granted by the IJ in order to terminate proceedings, and such termination is without prejudice to new proceedings at a later date. Counsel should consider whether termination is the appropriate resolution, as some matters might benefit from continuing with immigration proceedings.

[19] An EAD is not automatic with a grant of deferred action, but can be granted upon a showing of economic necessity.

not confer any immigration status, ability to travel to the United States (unless the alien applies for and receives advance parole), immunity from future removal proceedings, or enforceable right or benefit. If, however, there is a potential benefit that is linked to the action (for example, the availability of employment authorization for beneficiaries of deferred action), this should be identified in the letter. *Id.* at 11-12. It is a good idea to remind the officer of this notice requirement, since otherwise it may be overlooked.

The Meissner memo, however, does not require notice to the individual if the officer decides not to favorably exercise prosecutorial discretion. *Id.* Thus, an individual who has requested the favorable action could be left hanging (or worse, arrested or deported) – not knowing if the request is still pending or if it has been denied. Practically, the only way to know definitively if a decision has been made is to periodically call the officer.

If my client receives a favorable grant of prosecutorial discretion not to be placed into removal proceedings or to stay execution of a final order, what impact does this have on his or her encounters with DHS in the future?

It is important to remember, and to fully explain to your client, that a favorable grant of prosecutorial discretion does not confer lawful immigration status on the client. *See* Meissner memo, at 12. In many cases, all that such a grant will do is provide a reprieve – of indefinite duration – from adverse action. For example, if ICE agrees not to place a client in removal proceedings, this does not give the individual any different status than that which she previously had. Additionally, there is always the chance that if the circumstances that led ICE to refrain from initiating proceedings change, there is nothing to prevent ICE from initiating removal proceedings at a future date. Similarly, where favorable action is taken by the agency – for example a stay of execution of removal, a grant of deferred action, or parole – that action is not permanent and can be reversed if the circumstances change. However, the Meissner memo advises that where an individual granted favorable prosecutorial discretion comes to the attention of an agency officer at a future date, the officer should abide by the earlier decision as a matter of agency policy, absent new facts or changed circumstances. *Id.*

If DHS refuses to exercise prosecutorial discretion in my client's favor, can I appeal this decision or otherwise challenge it?

As noted earlier, none of the DHS guidance on prosecutorial discretion requires that an immigration officer favorably exercise his or her prosecutorial discretion in any particular case, even the most compelling ones. Instead, the immigration officer has discretion to make the decision, and this discretion is bounded only by his or her authority under the law, the DHS guidelines on the exercise of prosecutorial discretion, and any supervisory review to which the officer is subject.

Unfortunately, there is no formal appeal process to challenge the denial of a request for the exercise of favorable prosecutorial discretion. However, there are internal supervisory channels through which to informally appeal a decision or seek reconsideration, so this is an avenue worth exploring in many cases. If your request is improperly denied, you should escalate the request

according to current procedures.[20] This also is information that your local AILA chapter may develop through ongoing liaison efforts. (*See* below).

Additionally, as a general matter, there is no federal court review over the exercise of (or the failure to exercise) prosecutorial discretion. *See e.g. Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (finding that there is a rebuttable presumption under the Administrative Procedure Act that a decision not to prosecute is not reviewable by the courts); *see also* INA § 242(g); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (finding that 8 U.S.C. § 1252(g) was directed against attempts to impose judicial constraints on prosecutorial discretion). Thus, once an agency decides not to exercise prosecutorial discretion, it generally will not be possible to challenge this decision in federal court.

Are there other steps I can take in particularly compelling cases if DHS refuses to favorably exercise prosecutorial discretion?

In select cases you may want to consider less conventional tactics in an attempt to influence ICE in granting deferred action or other prosecutorial discretion. Use of the media (both conventional and social), local and national advocacy organizations, and your client's congressional representative can be beneficial to the overall cause. Prior to the Deferred Action for Childhood Arrivals (DACA) initiative, this sort of strategy had worked in select cases involving DREAM Act eligible persons. There is no specific procedure in employing this sort of strategy. However, it is recommended that you consider this as a last resort and only in cases where your client has compelling facts to his or her case and understands the risks involved.

Some suggested strategies include:

- Set up a Facebook group titled "Stop the Deportation of _____" and invite as many contacts as possible to help support the cause;
- Contact local and national immigration advocacy groups to get them to post Action Alerts on their websites on where the public can call or fax ICE or CBP officials in support of the client;
- Speak to local or national media contacts about the case and try to get stories written;
- Engage local human rights organizations or religious groups to assist in forwarding the cause; and
- Hold local press conferences and have your client speak about his or her plight.

How can I advocate for more consistent use of prosecutorial discretion?

There are several ways that you, your local AILA chapter (or similar groups that engage in advocacy with local ICE, CBP and/or USCIS offices) can push for more consistent, regular and humane use of prosecutorial discretion locally. First, get information about procedures that local offices follow with respect to these decisions, such as who within the office has the authority to

[20] Escalation procedures in effect at the time of the publication of this practice advisory can be found in an AILA Practice Pointer entitled *Escalating Requests for Prosecutorial Discretion* (Updated 3/13/15) (AILA Doc No. 14052104).

make such decisions initially; who must sign off on them; and what procedures exist for an attorney to request the exercise of prosecutorial discretion. If it is not possible to get information through liaison channels, request this information through Freedom of Information Act requests.

In addition, efforts can be made to get local DHS component agency offices to adopt more favorable policies with respect to the exercise of discretion and to include consideration of favorable prosecutorial discretion as a matter of routine. Local AILA chapters and other advocates are encouraged to track the willingness of their local DHS offices to engage in favorable prosecutorial discretion. Where an office is out of compliance with national policies, consider contacting AILA National to report and remedy anomalies.

Finally, AILA and the American Immigration Council are interested in escalating cases to DHS in which ICE or CBP have failed to follow the enforcement policies set forth in the Enforcement Memo. To seek AILA and the Council's assistance, please complete the questionnaire, *Requesting AILA and the American Immigration Council's Help in Escalating a Prosecutorial Discretion Denial* (AILA Doc. No. 15031367). Assistance from local AILA chapters, AILA attorneys and other immigration legal services and advocacy organizations will be essential to the success of this effort.

ATTACHMENT
SUMMARY OF DHS GUIDANCE ON PROSECUTORIAL DISCRETION

DHS (and legacy INS) guidance:

Jeh Johnson, Secretary, DHS, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" (Nov. 20, 2014). This memo, which governs the activities of ICE, CBP, and USCIS, enumerates three categories of enforcement priorities and encourages DHS personnel to exercise discretion for individuals who do not fall within the enumerated categories and whose removal would not otherwise serve an "important federal interest." For a more in-depth analysis of this memo, *see* American Immigration Council and American Immigration Lawyers Association Practice Advisory, Prosecutorial Discretion Requests Under the Johnson Enforcement Priorities Memorandum (March 18, 2015).

Jeh Johnson, Secretary, DHS, "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). Preliminarily enjoined as of the publication of this practice advisory, this memo expands the Deferred Action for Childhood Arrivals (DACA) initiative and creates a similar initiative, called Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), which is designed to permit certain parents of U.S. citizens and LPRs to request consideration of deferred action on a case-by-case basis.

Janet Napolitano, Secretary, DHS, "Exercising Prosecutorial Discretion With Respect To Individuals Who Came to the United States as Children" (June 15, 2012). Still followed by DHS, this memo created the Deferred Action for Childhood Arrivals (DACA) initiative. DACA permits certain young people brought to the United States as children and who meet other criteria to request consideration of deferred action. For more information about DACA, read the American Immigration Council Practice Advisory, *Deferred Action for Childhood Arrivals*.

Doris Meissner, Commissioner, INS, "Exercising Prosecutorial Discretion" (Nov. 17, 2000). Still followed by DHS, this is the most comprehensive of its memoranda on prosecutorial discretion. Importantly, this memo stresses that immigration officers not only have the authority to favorably exercise prosecutorial discretion but that they should consider doing so in cases that warrant it at the earliest point possible. Thus, this memo provides general authority to support an argument that an immigration officer should act favorably in your client's case. The Meissner memo also sets forth the principles that should motivate prosecutorial discretion decisions; the process to be followed by agents in exercising this discretion; and factors that can be considered in decision-making.

Bo Cooper, General Counsel, INS, "INS Exercise of Prosecutorial Discretion" (undated). This memorandum sets forth the legal basis for legacy INS's exercise of prosecutorial discretion in its enforcement activities. The memo is not policy guidance itself, but instead intended to lay the foundation for development of such guidance. It summarizes what prosecutorial discretion is; why law enforcement officers have prosecutorial discretion; how it applies in the immigration

context; the limits on prosecutorial discretion; practical difficulties relating to the exercise of prosecutorial discretion in immigration cases; and finally, how it relates to detention, including mandatory detention.

ICE guidance:

John Morton, Assistant Secretary, ICE, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs" (June 17, 2011). This memorandum highlights ICE's recognition that cases involving crime victims, witnesses and plaintiffs require a heightened standard of prosecutorial discretion. This guidance makes clear that it is generally *against ICE policy* to initiate removal proceedings against victims or witnesses to a crime, or to "remove individuals in the midst of a legitimate effort to protect their civil rights or civil liberties." This is the first time DHS has formally recognized that private civil rights and labor litigants are deserving of protection. The language of the memo is expansive and protects those involved in labor, housing or similar disputes being waged outside of a courtroom.

John Morton, Assistant Secretary, ICE, "Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions" (Aug. 20, 2010). This memo explains a new policy for handling removal cases in which there is a pending or approved application or petition with USCIS. Adopted "as a matter of prosecutorial discretion" and to promote efficient use of resources, the policy allows for the dismissal of removal cases in which there is a pending or approved application or petition with USCIS and ICE determines, as a matter of law and in the exercise of discretion, that the individual is eligible for relief. Certain criteria must be met in all cases. Additionally, in detained cases, the trial attorney must consult with local ICE officers regarding adverse factors that may weigh against dismissal. Note that all local Offices of Chief Counsel are instructed to adopt local standard operating procedures to implement this policy. If you do not already have a copy of your local office's procedure, you could ask for one, seek a copy through your local AILA liaison, or file a FOIA request.

Peter S. Vincent, Principal Legal Advisor, ICE, "Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal" (Sept. 25, 2009). This memo provides field guidance with respect to persons with pending U visa petitions who either are 1) subject to a final administrative order of removal and request a stay of removal or 2) are in removal proceedings. Explaining that ICE officers have discretion to stay removal where an individual with a pending U visa petition demonstrates prima facie eligibility for the visa, the memo explains how ICE is to coordinate with USCIS to obtain a prima facie determination of eligibility. The memo also discusses factors that ICE officers should consider in exercising their discretion where prima facie eligibility is shown.

Julie L. Myers, Assistant Secretary, ICE, "Prosecutorial and Custody Discretion" (Nov. 7, 2007). This memo concerns the exercise of prosecutorial discretion with respect to arrest and custody decisions related to nursing mothers.

John P. Torres, Director, ICE, "Discretion in Cases of Extreme or Severe Medical Concern" (Dec. 11, 2006). This memo reiterates the importance of ICE officers exercising

prosecutorial discretion when making custody determinations with respect to adults and juveniles transferring from hospitals, social services or other law enforcement agencies who have severe medical conditions (including psychiatric). The memo explains that officers have a responsibility to identify and respond to cases presenting meritorious health claims in which detention may not be in ICE's best interest. The memo explains the procedures to be followed and provides guidance on how to make a determination about the seriousness of the medical problem.

ICE, "Detention and Deportation Officer's Field Manual" (updated Mar. 27, 2006).

-Chapter 20.8, "Deferred Action." This chapter describes generally the standard and procedures for determining whether to grant deferred action.

-Chapter 20.9, "Exercising Discretion." This chapter describes generally the standards and procedures for exercising prosecutorial discretion.

William Howard, Principal Legal Advisor, ICE, "Prosecutorial Discretion" (Oct. 24, 2005). This memo, which is still followed, focuses on when and how prosecutorial discretion can be used by trial attorneys. It explains how the exercise of prosecutorial discretion is critical to managing work overload and adhering to priorities. It also details various ways in which trial attorneys can and should consider exercising prosecutorial discretion and provides numerous examples. The memo indicates that proceedings should not be instituted, or if instituted, should be dismissed where an adjustment of status is clearly approvable based on an approvable I-130 or I-140 and the case is appropriate for adjudication by USCIS. Similarly, the memo also suggests that remands should be considered to allow a person to apply for naturalization; and that alternatives to removal should be considered in cases in which there are compelling humanitarian factors. Finally, among other types of discretionary action available to trial attorneys, the memo discusses motions to reopen and provides examples of when it would be appropriate for ICE to join these.

William Howard, Principal Legal Advisor, ICE, "Exercising Prosecutorial Discretion to Dismiss Adjustment Cases" (Oct. 6, 2005). This memo discusses when trial attorneys can exercise prosecutorial discretion to file or join a motion to dismiss a case without prejudice to allow USCIS an opportunity to adjudicate an adjustment of status application. It is not clear whether this memo has been superseded by the August 20, 2010 memo by John Morton that covers a similar topic. This memo is intended to preserve ICE resources in cases in which it appears that an adjustment application would be clearly approvable. The memo lays out the criteria that must be met before a trial attorney can exercise prosecutorial discretion and move to dismiss a case.

Marcy M. Forman, Acting Director, Office of Investigations, ICE, "Issuance of Notice to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service" (June 21, 2004). This memo explains that ICE officers can exercise prosecutorial discretion with respect to the issuance of an NTA, an administrative order of removal or a reinstatement of a final removal order when the noncitizen has military service with the U.S. The memo stipulates that the Special Agent in Charge of each field office is required to sign off on any of these actions in these cases, after review of the A file. It also sets out general guidelines for consideration of prosecutorial discretion in these

cases, and emphasizes that all such cases should be reviewed for eligibility for naturalization under INA § 328 and 329 (special naturalization provisions for members of the military).

USCIS Guidance

USCIS, Policy Memorandum, PM-602-0091, "Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)" (Nov. 15, 2013). This memo clarifies when USCIS personnel are to consider granting Parole-in-Place to individuals who are the spouses, children and parents of those serving on active duty in the U.S. Armed Forces, in the Selected Reserve of the Ready Reserve or who previously served in the U.S. Armed Forces or Selected Reserve of the Ready Reserve.

USCIS, Policy Memorandum, PM-602-0050, "Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens" (Nov. 17, 2011). This memo establishes USCIS guidelines for referring cases to ICE and for issuing Notices to Appear (NTA). The memo restates the circumstances in which USCIS personnel are required by law to issue an NTA. The memo further mandates the issuance of NTAs in fraud cases with a statement of findings substantiating fraud. It also provides that, as a matter of policy, USCIS personnel are to refer a case to ICE for possible NTA issuance in the following cases: Egregious Public Safety cases; Non-Egregious Public Safety Criminal Cases; and National Security Entry Exit Registration System (NSEERS) Violator cases. The referral process varies depending on the basis for referral. Finally, the memo discusses NTA policy with respect to certain naturalization applicants.

Michael Aytes, Assoc. Dir. for Domestic Operations, USCIS, "Disposition of Cases Involving Removable Aliens" (July 11, 2006). This memo revises guidance to USCIS officers on how to process and prioritize cases in which the person appears to be removable. The memo explains that deciding whether a person is removable and whether to issue an NTA is an integral part of the adjudications process. Prosecutorial discretion comes into play with respect to whether to issue an NTA in a case that does not involve egregious public safety, national security, a regulatory requirement to issue an NTA, or fraud (each of which is discussed in the memo). In all other cases, USCIS has discretion not to issue an NTA in compelling cases, to recommend deferred action or to reinstate a person's nonimmigrant status.

William R. Yates, Deputy Exec. Assoc. Comm'r, INS, "Procedures for Handling Naturalization Applications of Aliens Who Voted Unlawfully or Falsely Represented Themselves as U.S. Citizens by Voting or Registering to Vote" (May 7, 2002). This memorandum provides guidance on handling naturalization applications of persons who have unlawfully voted or falsely represented themselves as U.S. citizens in association with registering to vote or by voting. The memo lays out a six step process for adjudicating these cases. As part of this process, and after determining that a person is removable for having unlawfully voted or for making a false claim to U.S. citizenship when registering to vote, the officer is to determine whether the case merits the exercise of prosecutorial discretion using the

Meissner memo as guidance. Where a case does warrant this exercise, the officer is to proceed with the adjudication of the naturalization application.