Prosecutorial Discretion & You!

- Carlo Zayas, Chief Counsel
  OPLA Houston
- George Rodriguez
  Saenz-Rodriguez & Associates

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Abracadabra!

- ICE has reinstated application of the Civil Immigration Enforcement Priorities as set forth in the Guidelines for the Enforcement of Civil Immigration Law.
- Originally signed by Secretary of Homeland Security Alejandro N. Mayorkas on September 30, 2021, the guidelines were vacated in June 2022 and reinstated following a decision by the U.S. Supreme Court in *US v. Texas,* 599 U.S. ___ (2023).
- ICE's Enforcement and Removal Operations (ERO) officers will continue to prioritize the apprehension and removal of noncitizens who (1) pose a threat to national security, (2) public safety, or (3) border security from the United States. The Office of Principal Legal Advisor (OPLA) also reinstated PLA Kerry Doyle's memorandum.

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Mayorkas/Doyle Memos

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

Threat to Public Safety: A noncitizen who **poses a current threat to public safety**, typically because of **serious criminal conduct**, is a priority for apprehension and removal. There are no bright line rules for assessing whether someone is a threat to public safety. It is a complex analysis weighing many factors as outlined in the Mayorkas and Doyle Memos.

Threat to Border Security: A noncitizen is a threat to border security if: (a) they are apprehended at the border or port of entry **while attempting to unlawfully enter the United States; or (b) they are apprehended in the United States after unlawfully entering after November 1, 2020.** There could be other border security cases that present compelling facts that warrant enforcement action. In each case, there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action.

What Can PD do for your client?

- No NTA issued – OPLA does not control issuing of the NTA and may not be the agency filing the NTA with EOIR (see next slide).
- Dismiss an NTA
- ROR, Parole out of detention, pre-redetermination hearing bond agreement, or agreement at hearing.
- Stipulate to certain elements of relief (time, GMC, eligibility, etc)
- Stipulate to Relief
- Administrative Closure
- Continuance
- Joint Motion to Dismiss
- Joint Motion to Reopen & Dismiss
- Joint Motion to Reopen

Practice Pointers

Matter of Fernandes: OPLA has no policy specific to *Matter of Fernandes* and has not instructed their attorneys to dismiss if *Fernandes* is raised. OPLA generally expects to attempt to "remedy" deficient Notices to Appear (NTAs) where required. AILA members should note that whether such remedying of a deficient NTA is accepted appears to vary by IJ and jurisdiction.

USCIS File Transfers Following the grant of relief or following the dismissal for adjudication by USCIS, OPLA tries to accommodate USCIS's requests as to how to proceed either with production of a green card or adjudication. However, each USCIS office has different requirements, and it is therefore not possible for OPLA to standardize its processes without USCIS input and cooperation.

Notices to Appear As of February 11, 2022, all NTA's should be filed with the courts electronically by the issuing component agency. In many cases, ERO may be assisting CBP in getting the NTA's filed. OPLA is not generally reviewing NTA's prior to filing. If AILA members are seeking to have an NTA not filed, the committee also confirmed that ERO has the discretion not to file an NTA.

Attorneys handling matters in which an NTA contains an erroneous address (e.g., addresses of NGOs or other addresses where the respondent never resided) should raise these cases to OPLA. OPLA is aware of the potential need to reopen such in absentia orders. For more on this issue, please see AILA and Partners Submit Recommendations to Fix Erroneous Addresses on Asylum Seekers' Documents .

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Practice Pointers

ERO Case Review The Senior ICE Case Review process is still in operation for escalating cases in which you believe a client should not be subject to certain types of enforcement. However, attorneys are reminded to exhaust all issues with discretionary enforcement actions locally before elevating to case review.

Filing of Stays of Removal: If a client has an order of removal, ICE indicated that attorneys should not presume their clients will not be deported at check-ins even if they were previously deemed a low priority under the vacated enforcement guidelines. This is a change from past statements from ERO. Members should therefore use their best judgment and consider whether filing Form I-246 applications for stays of removal for clients is in their best interest.

Using the VESL Line for Your Client's Change of Address and Change of Reporting Location: ICE shared a new change of address option for individuals required to appear for check-ins. Specifically, you may now call Victims Engagement and Services Line (VESL) or the ICE ERO Detention Reporting and Information Line (DRIL). Attorneys calling on behalf of their clients should be prepared to provide information about your client. At the conclusion of the call, you should be given a case number and the operator is instructed to alert the new reporting location to effectuate the change of address and change of reporting location.

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