OPLA BUFFALO PUBLIC STANDARD OPERATING PROCEDURE FOR THE IMPLEMENTATION OF PROSECUTORIAL DISCRETION PURSUANT TO THE GUIDANCE TO OPLA REGARDING THE ENFORCEMENT OF CIVIL IMMIGRATION LAWS AND THE EXERCISE OF PROSECUTORIAL DISCRETION

On April 3, 2022, Principal Legal Advisor Kerry Doyle provided all Office of the Principal Legal Advisor (OPLA) attorneys with a memo titled Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion (Doyle memo).

Frequently asked questions (FAQs) and useful guidance on the application of the Doyle memo can be found here. https://www.ice.gov/about-ice/opla/prosecutorial-discretion

Prosecutorial Discretion (PD) is not a formal program or benefit offered by ICE; however, OPLA attorneys are empowered to exercise discretion in their assigned duties in conjunction with the guidelines outlined in DHS Secretary Alejandro Mayorkas’ September 30, 2021 memorandum titled, Guidelines for the Enforcement of Civil Immigration Law (Mayorkas memo.)

Prosecutorial Discretion: Priority vs Non-Priority Cases.

A. Non-priority cases

Generally, OPLA Buffalo will move to dismiss all cases deemed to be a non-priority. Administrative closure will be considered on a very limited, case by case, basis when there is an articulated reason for such action – keeping employment authorization alone will generally not be a basis for OPLA to agree to administratively close a case.

ACCs will file motions to dismiss nonpriority cases unilaterally. There is no requirement that the ACC contact the noncitizen’s representative. Should the noncitizen oppose dismissal without prejudice, their attorney should file an opposition to the motion to dismiss.

OPLA will conduct background checks to ensure that the noncitizen remains a nonpriority for enforcement prior to moving to dismiss removal proceedings. If the noncitizen has never been fingerprinted, they must be fingerprinted before OPLA can exercise PD. OPLA will reach out to the noncitizen’s representative to coordinate.

Exceptions:

ACCs will not unilaterally file motions to dismiss on cases where the NTA was prepared by USCIS for the noncitizen to seek review of a denied application before the Immigration Court. OPLA will proceed on such cases unless an affirmative request for PD is made.
ACCs will generally not move to unilaterally dismiss cases on *pro se* noncitizens in the first instance. OPLA will review a *pro se* noncitizen’s case for PD and will inform the Court. OPLA will consent to a continuance for a *pro se* noncitizen to confer with counsel regarding PD options. Should the noncitizen return to court without counsel, OPLA may move to dismiss, or offer an alternative form of PD, at which time the Court and the noncitizen can determine how to proceed.

If the noncitizen opposes OPLA’s motion to dismiss without prejudice at the earliest stage of proceedings and proceeds to a merits hearing, OPLA will generally not reconsider PD once the hearing has commenced.

### B. Priority Cases

Cases that the Department has determined to be a priority pursuant to the standards set forth in the Mayorkas memo will not be amenable to PD in the forms of non-filing of the NTA, dismissal or termination of removal proceedings, or administrative closure as these cases are expected to be litigated to completion.

If a noncitizen believes that he/she does not fall into a priority designation as set forth in the Mayorkas memo and further described in the Doyle memo, he/she is welcome to submit evidence for OPLA to reconsider the priority designation and request PD. Noncitizens and attorneys can submit requests to OPLA Buffalo or Batavia utilizing the respected PD mailboxes:

**OPLA Buffalo - [ICE-OPLA-BUF-PD@ice.dhs.gov](mailto:ICE-OPLA-BUF-PD@ice.dhs.gov)**

**OPLA Buffalo (Batavia) - [ICE-OPLA-BUF-BTV-PD@ice.dhs.gov](mailto:ICE-OPLA-BUF-BTV-PD@ice.dhs.gov)**

**Noncitizen Requests for PD in Cases Designated as a Priority.**

Prior to submitting a PD request, both the Mayorkas memo and the Doyle memo should be reviewed. PD requests for OPLA Buffalo should conform to the instructions provided below.

- All requests must be submitted electronically to the OPLA Buffalo, or OPLA Buffalo (Batavia) PD mailboxes as set forth above. Counsel should clearly set forth what form of PD they are seeking.
- Submissions should be made at the earliest stage of proceedings or at a minimum of two months before a scheduled merits hearing. \(^1\) OPLA Buffalo will not consider a PD request filed or made orally in court on the day of hearing.
- OPLA Buffalo will generally agree to one continuance to allow Respondent to file a request for PD. Any additional requests for continuances must specify the reason for the continuance.
- Written requests for reconsideration of a case designated as a priority and prosecutorial discretion should contain persuasive evidence to overcome a priority designation as set forth in the Mayorkas memorandum, and to support a favorable exercise of prosecutorial discretion.

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\(^1\) This timeline is based on the filing deadlines set forth in the Executive Office of Immigration Review Policy Manual. If a case is subject to an earlier deadline due to, for example, a case-specific scheduling order, the requester should note this deadline in the request and adjust the submission timeline accordingly.
• Include specific factors that you believe warrant consideration including documents supporting these factors, relief applications, if applicable, tax returns, medical records, court records/criminal dispositions, proof of rehabilitation, school records, proof of family and community ties, etc.

  ➢ An honest and thorough representation of a noncitizen’s criminal history is an essential part of any PD request. The more forthcoming a noncitizen is in submitting information related to his or her request for PD (including information detailing both the equities in the case and potentially negative considerations), the more readily OPLA Buffalo attorneys will be able to assess the totality of the circumstances and make informed discretionary judgments.

  ➢ If information is withheld from OPLA Buffalo, this failure to disclose may be considered in whether to exercise PD. A noncitizen requesting PD who has committed any crime or been arrested, charged, convicted, or sentenced for any crime is expected to provide an explanation of what occurred and criminal court documents showing the outcome of the case. If not provided, the noncitizen should provide a reason why the documents are unavailable. Set forth any basis you believe the arrest, allegations, or charges of removability are subject to challenge and the basis of your claim.

• Provide copies of passport, visa (if applicable), national identification card, and/or any other photo identification.

• An affidavit from the respondent that sets forth the following information: name and any aliases used; date and country of birth; country of citizenship; date and manner of entry/admission; family members in the United States and their immigration status; all criminality and encounters with law enforcement; proof of rehabilitation; employment history and proof of paying taxes; detailed reasons for requesting PD.

The memos delegate PD decision making to the ACCs for nonpriority cases and to Deputy Chief Counsels and the Chief Counsel for priority cases. Chief Counsel Carol Bridge will hear requests to review denials of requests to reconsider priority designations and motions to dismiss proceedings. Please submit your request for review of a denial of PD to the PD mailbox and note in the “subject” line “Review of Denial of PD”. Please include your original request for PD, any additional information you may have, and a detailed message as to why you believe PD is warranted.

Disclaimers

As there is no right of noncitizens to the exercise of discretion by OPLA Buffalo, nothing in this SOP for OPLA Buffalo should be construed to prohibit the apprehension, detention, or removal of any noncitizen unlawfully in the United States, nor to limit the legal authority of ICE or any of its personnel to enforce federal immigration law. The SOP may be modified, superseded, or rescinded at any time without notice, and are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

April 2022