Prosecutorial Discretion (PD) is the longstanding authority of an agency charged with enforcing the law to decide where to focus its resources and whether or how to enforce, or not to enforce, the law against an individual. As the Department of Homeland Security’s (DHS) representative before the Executive Office for Immigration Review (EOIR) in exclusion, deportation, and removal proceedings, the Office of the Principal Legal Advisor (OPLA) relies upon PD and other factors to guide its decision making. The controlling memoranda establishing agency policies related to prosecutorial discretion and enforcement priorities may be found here and here.¹ More information, including an overview of PD and answers to frequently asked questions, may be found here.²

OPLA Orlando attorneys may exercise PD in proceedings before EOIR, subject to direction from the Chief Counsel and applicable guidance from DHS. In exercising such discretion, OPLA Orlando attorneys adhere to the enduring principles that apply to all of their activities: upholding the rule of law; discharging duties ethically in accordance with the law and professional standards of conduct; following the guidelines and strategic directives of senior leadership; and exercising considered judgment and doing justice in individual cases. PD arises at different stages of the removal process, takes different forms, and applies to a variety of determinations, including, for instance, agreeing to dismiss cases pursuant to 8 C.F.R. § 1239.2(c), stipulating to bond, joining in noncitizens’ motions to the immigration court, and stipulating to issues or relief.

OPLA Orlando exercises PD on a case-by-case basis considering the totality of the circumstances. There are no cases in which PD is a right or entitlement. Moreover, cases that are enforcement priorities according to the controlling memoranda will not be amenable to prosecutorial discretion in the forms of non-filing of the NTA, dismissal or termination of proceedings, or administrative closing. In practice, when determining whether to exercise PD, three particularly important factors in a noncitizen’s case are:

- The noncitizen’s length of residence in the United States;
- Circumstances of the noncitizen’s arrival in the United States and manner of his or her entry;
- The noncitizen’s criminal history.

² For those without a hyperlinked document, the website is available at: www.ice.gov/opla/prosecutorial-discretion.
If a noncitizen has been arrested for, charged with, or convicted of a crime in the United States or abroad, OPLA Orlando attorneys may consider such factors as:

- The extensiveness, seriousness, and recency of the criminal activity;
- Indicia of rehabilitation;
- Extenuating circumstances involving the offense or conviction;
- The time and length of the sentence imposed, if any;
- The length of time since the offense or conviction occurred; and
- Whether subsequent criminal activity supports a determination that the noncitizen poses a threat to public safety.

Furthermore, in analyzing a request for PD, OPLA Orlando attorneys may consider such information as:

- The noncitizen’s or the noncitizen’s family’s service in the U.S. military;
- The noncitizen’s family or community ties in the United States;
- The noncitizen’s prior immigration history;
- The noncitizen’s work and education history in the United States;
- The noncitizen’s status as a victim, witness, or plaintiff in civil or criminal proceedings; and
- Compelling humanitarian factors present in the noncitizen’s case (including on the part of the noncitizen’s close family members), including:
  - Serious medical condition,
  - Age,
  - Pregnancy,
  - Status as a child, and
  - Status as a primary caregiver of a seriously ill relative in the United States;
- For proposed joint motions to reopen, whether the noncitizen has exhausted all available avenues for administrative relief.

These factors are not dispositive or exhaustive, as PD is inherently case-specific. The more forthcoming a noncitizen is in submitting information related to his or her request for PD (including information detailing both equities and potentially negative considerations), the more readily OPLA Orlando attorneys will be able to assess the totality of the circumstances and make informed discretionary judgments.

HOW TO SUBMIT A PD REQUEST TO OPLA ORLANDO:

While OPLA Orlando attorneys routinely examine the cases to which they are assigned to determine whether the exercise of PD may be warranted, because OPLA may be unaware of all equities in the case a noncitizen may want to make an affirmative request to OPLA Orlando if he or she seeks to receive a favorable exercise of PD.

Attorneys are strongly encouraged to make any request using eService. Although an email may be sent to the appropriate inbox, technological difficulties frequently limit the ability to open attachments that would otherwise be reviewable if filed via eService. As your client’s interest may be unable to be fully advanced if OPLA cannot readily review an email attachment, filing via eService will ensure all relevant materials may be served and reviewed. Duplicate PD submissions (i.e., filing via eService plus a paper-copy) should not occur. OPLA Orlando encourages PD requests to be sent at least a month in

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3 Attorneys and pro se respondents may sign up for ICE eService at [https://eserviceregistration.ice.gov/](https://eserviceregistration.ice.gov/).
4 The inbox for OPLA Orlando is [ICE-OPLA-ORL-PD@ice.dhs.gov](mailto:ICE-OPLA-ORL-PD@ice.dhs.gov).
advance of non-detained hearings to allow review, any necessary filings to EOIR, and any necessary adjudication by EOIR.

For the same reasons noted above, pro se litigants are also encouraged to use eService. However, OPLA Orlando will endeavor to accept pro se filings whether submitted via email, paper, or eService.

Requests for PD should include:

- Type of PD sought (joint motion to dismiss, continuance, stipulation for relief, bond reduction, etc.);²
- Reason(s) why PD may be warranted, which should include all of the applicable positive and potentially negative factors listed above; and,
- Supporting documentation to aid in evaluating the case, including a comprehensive list of any criminal history as well as documentation regarding all arrests, convictions, and any other encounter with law enforcement.

OPLA Orlando will convey its position on any PD request back to the requestor with any further steps that may need to be taken.

There is no application fee associated with requesting that OPLA Orlando consider PD in a specific case.⁶ Attempts to charge an application fee for this purpose could be an indicator of an unfair business practice. An individual can report evidence of unfair business practices to local licensing authorities, including the relevant state bar.

**PD Email Limited Data Security Waiver**

Those engaging in email exchange with OPLA’s prosecutorial discretion (PD) email addresses acknowledge and agree to a limited waiver of data security that shall only attach to the electronic service and transmittal of documents that may contain sensitive personally identifiable information (SPII).

Senders to the email addresses should be aware, however, that ICE cannot ensure that information transmitted outside of the DHS network will remain secure during transmission. This waiver applies to both your receipt of information transmitted by ICE and the transmission of information from you to ICE. Please also be advised that (1) from the time information leaves the DHS network until receipt by your email system and (2) during the time that information is being transmitted by your email system to the DHS network, the information contained within the email, including but not limited to SPII, is not necessarily secure against interception. You are strongly encouraged to encrypt any documents containing SPII prior to sending it to OPLA via email and to send passwords under separate email. By participating in use of the PD email addresses, you expressly agree to assume the risk that SPII may be intercepted during transmission to or from the DHS network and, as a result, be obtained by or disclosed to third-parties.

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² Any request for PD that is dispositive of the case (for example, dismissal or stipulation of relief) will require a background check to be completed. If fingerprints exist in DHS databases, DHS will produce a background check. However, if fingerprints do not exist in DHS databases, the requestor will be required to submit an FBI Identity History Summary Check. The OPLA attorney reviewing the PD request will let the requestor know if DHS is unable to complete the background check. Additionally, OPLA will only review PD matters within its purview: it will not intercede on behalf of a 3rd party with ERO, HSI, or any other governmental agency. If PD is being sought from another entity (such as issuance of an NTA, custody determination, or deferred action) that request must be communicated to that entity.

⁶ However, there may be costs associated with such a request (i.e., hiring an attorney, obtaining copies of relevant documents, FBI Identity History Summary Check fee, etc).