OOD
DM 23-04

Issued: September 28, 2023
Effective: Immediately

DEPARTMENT OF HOMELAND SECURITY ENFORCEMENT PRIORITIES AND PROSECUTORIAL DISCRETION INITIATIVES

PURPOSE:	Provide guidance to EOIR adjudicators on Department of Homeland Security enforcement priorities and prosecutorial discretion initiatives.
OWNER:	David L. Neal, Director
AUTHORITY:	8 C.F.R. § 1003.0(b)
CANCELLATION:	Policy Memorandum 21-25

I. Introduction

This Director's Memorandum (DM) provides guidance to Executive Office for Immigration Review (EOIR) adjudicators on the enforcement priorities and exercises of prosecutorial discretion of the Department of Homeland Security (DHS). This DM is being issued in light of: (1) a memorandum by Secretary Alejandro N. Mayorkas entitled *Guidelines for the Enforcement of Civil Immigration Law* (Mayorkas Memorandum), issued on September 30, 2021 and effective on November 29, 2021, and (2) a subsequent memorandum by Kerry E. Doyle, the Principal Legal Advisor of DHS, Immigration and Customs Enforcement (ICE), Office of the Principal Legal Advisor (OPLA), entitled *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion* (Doyle Memorandum), issued on April 3, 2022.[1] This DM rescinds Policy Memorandum 21-25, *Effect of Department of Homeland Enforcement Priorities*.

[1] The Mayorkas Memorandum is available at https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf, and the Doyle Memorandum at https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf. In line with the Doyle Memorandum's terminology, this DM will refer to DHS attorneys who practice before the immigration courts and the Board of Immigration Appeals as "OPLA attorneys."

II. Background

On January 20, 2021, President Biden issued Executive Order 13993, which directed relevant agencies to take appropriate action to "reset the policies and practices for enforcing civil immigration laws to align enforcement" with the Administration's priorities "to protect national and border security, address the humanitarian challenges at the southern border, and ensure public health and safety." Exec. Order No. 13993, 86 Fed. Reg. 7051 (Jan. 20, 2021). The Mayorkas and Doyle Memoranda were issued in light of this Executive Order. They define DHS' "civil immigration enforcement priorities" and set forth guidance on DHS' exercises of prosecutorial discretion in EOIR proceedings.[2]

The Mayorkas and Doyle Memoranda identify DHS' "civil immigration enforcement priorities" as three groups of noncitizens. These groups are:

- Noncitizens who pose a threat to national security, meaning noncitizens who engaged in or are suspected of terrorism or espionage, or terrorism-related or espionage-related activities, or who otherwise pose a danger to national security.

- Noncitizens who pose a current threat to public safety, typically because of serious criminal conduct.

- Noncitizens who pose a threat to border security, meaning noncitizens who were apprehended at the border or a port of entry while attempting to unlawfully enter the United States after November 1, 2020, or who unlawfully entered after November 1, 2020 and were subsequently apprehended in the United States.[3] This third group also includes other border security cases that present compelling facts warranting enforcement action.

Mayorkas Memorandum at 3-4; Doyle Memorandum at 3-7. A noncitizen who does not fall into one of these three groups is not a civil immigration enforcement priority for DHS.

The Mayorkas and Doyle Memoranda both discuss, in general terms, the importance of prosecutorial discretion. The Mayorkas Memorandum states that "[i]t is well established in the law that federal government officials have broad discretion to decide who should be subject to arrest, detainers, removal proceedings, and the execution of removal orders." Mayorkas Memorandum at 2. It goes on to describe "[t]he exercise of prosecutorial discretion in the

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[2] The Mayorkas Memorandum was vacated on June 10, 2022 by a federal district court. *See Texas v. United States*, 606 F. Supp. 3d 437 (S.D. Tex. June 10, 2022). However, on June 23, 2023, the Supreme Court reversed the district court's decision. *See United States v. Texas*, 143 S. Ct. 1964 (2023). In so doing, the Court noted that "the Executive Branch (i) invariably lacks the resources to arrest and prosecute every violator of every law and (ii) must constantly react and adjust to the ever-shifting public-safety and public-welfare needs of the American people," and that the Executive Branch therefore "must prioritize its [immigration] enforcement efforts." *Id.* at 1972; *see also id.* at 1978 (noting that "federal officials" possess "prosecutorial discretion when it comes to deciding which aliens to prioritize for arrest and removal") (Gorsuch, J., concurring).

[3] Under the Doyle Memorandum, OPLA interprets "unlawful entry" in this context to include applying for admission to the United States while inadmissible, including due to criminal activity or an inability to satisfy relevant documentary requirements. *See* Doyle Memorandum at 6.

immigration arena" as "a deep-rooted tradition." *Id.* The Doyle Memorandum describes prosecutorial discretion as "an indispensable feature of any functioning legal system." Doyle Memorandum at 1. It states that, "[w]hile prosecutorial discretion is not a formal program or benefit offered by ICE, like other government attorneys, OPLA attorneys are empowered to exercise prosecutorial discretion in their assigned duties consistent with applicable guidance." *Id.* at 9.

More specifically, the Doyle Memorandum states that "[n]oncitizens determined not to be priorities for enforcement may receive prosecutorial discretion." *Id.* at 10. Depending on the case, OPLA's exercise of prosecutorial discretion may take one of several forms. Where a Notice to Appear (NTA) has been issued but not yet filed with the immigration court, and the noncitizen is not an immigration enforcement priority, OPLA may decide not to file the NTA with the court and to cancel the NTA. *Id.* at 10-11. Where an NTA has been filed with the immigration court and the noncitizen is not a priority, OPLA's "preferred" way to exercise prosecutorial discretion is to request the dismissal of the proceedings. *See id.* at 10. But "OPLA attorneys may, in appropriate cases, consider alternative forms of prosecutorial discretion." *Id*. These include agreeing to administrative closure, stipulating as to relief or particular issues, agreeing to continuances, foregoing appeals, and joining motions to reopen. *See id.*

III. Guidance for EOIR Adjudicators

A. In General

EOIR has a large case load and finite resources. Given this reality, EOIR adjudicators must manage their dockets efficiently while striving to decide each case in a manner that is fair to both parties.[4]

The Doyle Memorandum recognizes the importance of both efficiency and fairness, stating that "OPLA attorneys must be particularly mindful of the [immigration courts'] resource constraints," and that "[s]ound prioritization of [OPLA's] litigation efforts through the appropriate use of prosecutorial discretion can," among other things, "preserve limited government resources" and "achieve just and fair outcomes in individual cases." *Id.* at 9. Generally speaking, EOIR adjudicators should focus on cases where the respondent is a civil immigration enforcement priority or desires a full adjudication of a claim for immigration relief, and EOIR adjudicators

[4] Generally speaking, efficiency and fairness are served where EOIR adjudicators focus on resolving disputes between the parties, and adjudicators need not spend time on questions or issues about which the parties agree or about which a party has the prerogative to decide. The role of an EOIR adjudicator is to resolve disputes between the parties. *Cf.* 8 C.F.R. §§ 1003.1(d)(1) ("The Board shall resolve *the questions before it* in a manner that is timely, impartial, and consistent with the [Immigration and Nationality Act] and regulations."), 1003.10(b) ("In all cases, immigration judges shall seek to resolve *the questions before them* in a timely and impartial manner consistent with the [Immigration and Nationality Act] and regulations.") (emphasis added). A counsel's role is to protect their client's interests. Adjudicators are tasked with being impartial arbiters, and it is generally inconsistent with this role for an adjudicator to substitute their judgement for that of either counsel, including by second-guessing an agreement the parties have reached. Where the parties have reached agreement on how a case or issue should be resolved, and no dispute thus exists with respect to the case or issue, an EOIR adjudicator's default should be to respect the agreement and to rule in accord with it. *See, e.g.*, *Matter of Yewondwosen*, 21 I&N Dec. 1025, 1026 (BIA 1997) (stating the parties' "agreement on an issue or proper course of action should, in most instances, be determinative").

should not expend our limited judicial resources on cases that do not fall into either of those categories. Our pending caseload compels us to prioritize cases where one or both of the parties wish to proceed. Where OPLA attorneys exercise prosecutorial discretion in appropriate instances, their doing so furthers our mission of deciding cases both efficiently and fairly.

The decision whether a respondent is a civil immigration enforcement priority is OPLA's to make, and an EOIR adjudicator does not have the authority to overrule an OPLA attorney's determination that a particular respondent is or is not an enforcement priority. Given the importance of prosecutorial discretion as described above, EOIR adjudicators should review the Mayorkas and Doyle Memoranda and familiarize themselves with the three groups of noncitizens that DHS deems civil immigration enforcement priorities, OPLA's criteria for determining whether a given noncitizen falls within those three groups, and OPLA's views on appropriate prosecutorial discretion in various scenarios.

B. Immigration Judges

In each case in removal proceedings, the immigration judge should inquire of OPLA whether the respondent is a civil immigration enforcement priority. Where the OPLA attorney informs the immigration judge that the respondent is not such a priority, the judge should solicit the parties' views on how the case should be resolved in light of that fact. Given that OPLA's "preferred" form of prosecutorial discretion is to request the dismissal of the case once an NTA is filed with the immigration court, immigration judges should anticipate that OPLA attorneys will make such requests. When an OPLA attorney moves to dismiss a particular case, the immigration judge should be prepared to adjudicate that motion as is appropriate under the law, taking into consideration any objection to dismissal by the respondent.[5] Where there is no dispute between the parties, efficiency and fairness will be served by such a dismissal.

Immigration judges should bear in mind that resolutions other than dismissal can also be appropriate in cases involving respondents who are not civil immigration enforcement priorities. For example, the Doyle Memorandum states that "OPLA attorneys are encouraged to stipulate to relief, orally or in writing, in nonpriority cases where the OPLA attorney is satisfied that the noncitizen both qualifies for the relief sought under the law and, where required, merits relief as a matter of discretion." *Id.* at 13. It further states that "OPLA attorneys are encouraged to narrow issues and may choose to stipulate appropriately on any procedural, factual, or legal issue(s), particularly – but not exclusively – in nonpriority cases." *Id.* Where OPLA attorneys stipulate to relief or otherwise actively engage with respondents' counsels to narrow the issues that the judge must decide, this greatly assists immigration judges in deciding cases efficiently and fairly.

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[5] At present, dismissal and termination of cases in removal proceedings is governed by the Attorney General's decision in *Matter of Coronado Acevedo*, 28 I&N Dec. 648 (A.G. 2022). This decision notes that "[c]ertain regulations expressly authorize termination or dismissal in specified circumstances," and holds that EOIR adjudicators may terminate cases in certain other, "limited circumstances" as well. *Matter of Coronado Acevedo*, 28 I&N Dec. at 648, 652. On September 8, 2023, the Department of Justice published a Notice of Proposed Rulemaking (NPRM) entitled *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 88 Fed. Reg. 62242. This NPRM proposes, among other things, to revise the regulations governing the dismissal and termination of cases in EOIR proceedings.

In addition, where a respondent is not a civil immigration enforcement priority, it is sometimes appropriate for the immigration judge to administratively close the case pursuant to a party's motion. As the Attorney General noted in *Matter of Cruz-Valdez*, 28 I&N Dec. 326, 327 (A.G. 2021), administrative closure has in the past "served to facilitate the exercise of prosecutorial discretion, allowing government counsel to request that certain low-priority cases be removed from immigration judges' active calendars or the [Board of Immigration Appeals'] docket, thereby allowing adjudicators to focus on higher-priority cases."[6] The administrative closure of cases involving nonpriority respondents benefits EOIR by allowing immigration judges to focus on other cases. In adjudicating motions to administratively close cases, immigration judges should bear in mind that a party's objection to administrative closure is not dispositive. *See Matter of Avetisyan*, 25 I&N Dec. 688, 694 (BIA 2012) (stating that "neither an Immigration Judge nor the [Board of Immigration Appeals] may abdicate the responsibility to exercise independent judgement and discretion in a case by permitting a party's opposition to act as an absolute bar to administrative closure of that case when circumstances otherwise warrant such action"); *Matter of W-Y-U-*, 27 I&N Dec. 17, 20, n. 5 (BIA 2017) (clarifying that "the primary consideration for an Immigration Judge in determining whether to administratively close . . . proceedings is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits," but "continu[ing] to hold that neither party has absolute veto power over administrative closure requests" (quotation omitted)).[7]

Generally speaking, the sooner issues relating to prosecutorial discretion are addressed in a given case the better, especially from a standpoint of docket management. Along these lines, the Doyle Memorandum states that "[w]herever possible, [OPLA attorneys'] decisions to exercise prosecutorial discretion should be made at the earliest moment practicable to best conserve prosecutorial resources." Doyle Memorandum at 9. Where practicable, immigration judges should solicit, on the record at master calendar hearings, OPLA's views on whether the respondent is a civil immigration enforcement priority and the parties' views on how the case should proceed in light of OPLA's determination. Alternatively, immigration judges should send scheduling orders to parties, well in advance of individual calendar hearings, soliciting this information. Where necessary, issues relating to prosecutorial discretion, including whether dismissal or administrative closure of a case is appropriate, may be addressed at individual calendar hearings. However, to conserve judicial resources, such issues should generally be resolved well in advance of individual calendar hearings, and such hearings should be reserved

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[6] Detailed information on administrative closure is available in DM 22-03, *Administrative Closure*, at https://www.justice.gov/eoir/book/file/1450351/download.

[7] As noted in footnote 5, *supra*, the Department of Justice published an NPRM entitled *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, on September 8, 2023. This NPRM, in addition to addressing termination and dismissal, proposes to revise the regulations to set out a standard for administrative closure. Under *Matter of Cruz-Valdez*, 28 I&N Dec. at 329, while this rulemaking proceeds, "except where a court of appeals has held otherwise, [EOIR adjudicators] should apply the standard for administrative closure set out in [*Matter of Avetisyan* and *Matter of W-Y-U-*]." Regarding the Attorney General's reference to "a court of appeals," the Sixth Circuit has held that EOIR adjudicators have the authority to administratively close cases only in limited circumstances. *See Garcia-DeLeon v. Garland*, 999 F.3d 986 (6th Cir. 2021); *Hernandez-Serrano v. Barr*, 981 F.3d 459 (6th Cir. 2020). While the rulemaking proceeds, adjudicators in the Sixth Circuit must determine to what extent administrative closure is permitted given that court's case law, and they must handle issues involving administrative closure accordingly.

for cases where the respondent is a civil immigration enforcement priority, or where the respondent is not a priority but wishes to pursue immigration relief.

C. Appellate Immigration Judges

The Doyle Memorandum makes clear that whether a respondent is a civil immigration enforcement priority should factor into OPLA's decision-making pertaining to appeals. In particular, it states that "[a]ppellate advocacy should focus on priority cases, absent a compelling basis to appeal a nonpriority case." *Id.* at 14. In addition, "OPLA attorneys may waive appeal or [after following internal OPLA procedures] withdraw an already-filed appeal in a nonpriority case." *Id.* Appellate immigration judges are encouraged to request supplemental briefing in pending cases, soliciting from OPLA whether the respondent is a civil immigration enforcement priority and, where the respondent is not, giving the parties an opportunity to make requests in light of the respondent's nonpriority status. As with immigration judges, appellate immigration judges should adjudicate motions to dismiss as is appropriate under the law, taking into account any objection to dismissal from the respondent. They should also bear in mind that a party's objection to administrative closure is not dispositive. *See Matter of Avetisyan*, 25 I&N Dec. at 694; *Matter of W-Y-U-*, 27 I&N Dec. at 20, n. 5.[8]

IV. Conclusion

Prosecutorial discretion is essential to an efficient and fair court system. DHS' current prosecutorial discretion efforts will greatly assist EOIR, and it is incumbent on EOIR to be supportive of these efforts, while also remembering our independent obligation to be fair to both parties. The guidance in this DM is intended to assist EOIR adjudicators in conducting proceedings efficiently and fairly in light of DHS' civil immigration enforcement priorities.

If you have any questions, please contact your supervisor.[9]

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[8] The caveats with respect to administrative closure in the Sixth Circuit apply to adjudications by appellate immigration judges as well. *See* note 7, *supra*.

[9] This memorandum is not intended to, does not, and may not be relied upon to, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States; its departments, agencies, or entities; its officers, employees, or agents; or any other person. This memorandum does not mandate that a particular motion, whether made by the respondent or OPLA, be granted or denied, nor does it otherwise direct the result in any case. Immigration judges and appellate immigration judges must always exercise their independent judgment and discretion in adjudicating cases, consistent with the law. *See* 8 C.F.R. §§ 1003.1(d)(1)(ii), 1003.10(b).