

**Practice Advisory:
Advocating for Prosecutorial Discretion Under the Biden Administration’s
Prosecutorial Discretion Guidance¹**

September 15, 2023

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I. Introduction

On September 30, 2021, the Department of Homeland Security (DHS) Secretary, Alejandro N. Mayorkas, issued a memorandum detailing the Biden administration’s priorities for immigration enforcement and removal, “Guidelines for the Enforcement of Civil Immigration Law” (Mayorkas Memo).² The Mayorkas Memo, which went into effect on November 29, 2021, was initially short-lived, because the states of Texas and Louisiana persuaded a federal judge in Texas to strike it down as unlawful on June 10, 2022.³ For a year following the Texas court’s

² Memorandum from Alejandro N. Mayorkas, DHS Sec’y, Guidelines for the Enforcement of Civil Immigration Law (Sept. 30, 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf> [hereinafter “Mayorkas Memo”].

³ *Texas v. United States*, 606 F. Supp. 3d 437, 466–67 (S.D. Tex.), cert. granted before judgment, 143 S. Ct. 51 (2022), and rev’d, 143 S. Ct. 1964 (2023).

decision, the Mayorkas Memo remained vacated as the case was litigated all the way to the U.S. Supreme Court. On June 23, 2023, the Supreme Court issued a decision, *United States v. Texas*,⁴ overturning the Texas court’s decision and allowing the Mayorkas Memo to come back into effect.

This practice advisory describes the Biden administration’s current prosecutorial discretion policy in the wake of the Supreme Court’s decision and provides tips for practitioners advocating with DHS for prosecutorial discretion on behalf of noncitizens.⁵ Section II gives an overview of the Mayorkas Memo and the litigation challenging it. Section III describes the guidance issued by the Immigration and Customs Enforcement (ICE) Office of the Principal Legal Advisor (OPLA), referred to as the “Doyle Memo,” about implementing the Mayorkas Memo in immigration court removal proceedings. Section IV provides tips for requesting prosecutorial discretion with OPLA, and Section V provides tips for requesting prosecutorial discretion with ICE Enforcement and Removal Operations (ERO). Section VI discusses public campaigns and congressional and community advocacy for noncitizens seeking prosecutorial discretion.

II. Overview of the Mayorkas Memo and the Litigation Challenging It

A. The Mayorkas Memo

The Mayorkas Memo details DHS’s priorities for the apprehension and removal of noncitizens.⁶ The memo recognizes that DHS lacks resources to enforce the immigration laws in every possible circumstance and lays out a framework for DHS to prioritize arrest and removal in certain categories of cases and to exercise discretion in others. The Mayorkas Memo in many ways mirrors past enforcement guidance and instructs immigration officials to focus on three broad categories of noncitizens for enforcement action: those who pose a threat to (1) national security, (2) public safety, or (3) border security.

Priority Category 1: Threat to National Security

This category includes noncitizens who (1) have engaged in or are suspected of engaging in terrorism or terrorism-related activities; (2) have engaged in or are suspected of engaging in espionage or espionage-related activities; or (3) otherwise pose a danger to national security.⁷

⁴ 143 S. Ct. 1964 (2023).

⁵ This practice advisory focuses on requesting prosecutorial discretion with the Office of the Principal Legal Advisor and Enforcement and Removal Operations, both part of Immigration and Customs Enforcement. It is also possible to request prosecutorial discretion with other agencies within DHS, such as U.S. Citizenship and Immigration Services and Customs and Border Protection.

⁶ The Mayorkas Memo replaced interim immigration enforcement guidance issued on January 20, 2021 by then-Acting Secretary David Pekoske and interim guidance issued on February 18, 2021 by then-Acting ICE Director Tae D. Johnson. See Memorandum from David Pekoske, Acting DHS Sec’y, Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf; Memorandum from Tae D. Johnson, Interim Guidance: Civil Immigration Enforcement and Removal Priorities (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf.

⁷ Mayorkas Memo, *supra* note 2, at 3.

Priority Category 2: Current Threat to Public Safety

This category includes noncitizens whom ICE determines are a “current threat to public safety, typically because of serious criminal conduct.”⁸ In determining whether a noncitizen “poses a current threat to public safety,” the Mayorkas Memo instructs immigration officials to assess “the totality of the facts and circumstances.”⁹ The Mayorkas Memo advises against reliance solely on a particular conviction to prioritize an individual for enforcement action. There is no reference to individuals who have committed aggravated felonies or gang-related convictions as specific priorities. Immigration officials are instructed to conduct “investigative work” and aim to “review the entire criminal and administrative record” before making enforcement determinations.¹⁰ The guidance also states that the person must be a “current” public safety threat, suggesting that the determination must be supported by recent evidence.¹¹ The Mayorkas Memo offers non-exhaustive aggravating and mitigating factors for officials to consider in assessing whether an individual is a current threat to public safety.

The aggravating and mitigating factors in the Mayorkas Memo include:

Aggravating Factors	Mitigating Factors
<ul style="list-style-type: none">● The gravity of the offense and sentence imposed;● The nature and degree of the harm caused by the offense;● The sophistication of the offense;● The use or threatened use of a firearm or dangerous weapon;● A serious prior criminal record.¹²	<ul style="list-style-type: none">● Advanced or tender age;● Lengthy presence in the United States;● A mental condition that may have contributed to the conduct, or a physical or mental condition requiring care or treatment;● The individual’s status as a victim of a crime or as a victim, witness, or party in legal proceedings;● The impact the individual’s removal would have on family in the United States, such as loss of caregiver or provider;● Whether the noncitizen may be eligible for humanitarian protection or other immigration relief;● The noncitizen’s military or public service or that of their immediate family;● The time elapsed since an offense and any evidence of rehabilitation;● The fact that a conviction was vacated or expunged.¹³

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 4.

¹¹ *Id.* at 3.

¹² *Id.*

¹³ *Id.* at 3-4.

Priority Category 3: Threat to Border Security

Under the Mayorkas Memo, noncitizens are a border security priority if (1) they are apprehended at the border or a port of entry while attempting to enter the country unlawfully; or (2) they were apprehended in the United States after unlawfully entering after November 1, 2020.¹⁴ In other words, this category prioritizes anyone who was not present in the United States on or before November 1, 2020, or who was apprehended trying to enter the United States without authorization, such as by using false documents.

As with the guidance on the public safety category, the memo’s guidance on the border security category instructs immigration officials to “evaluate the totality of the facts and circumstances” to determine whether they should take enforcement action against an individual.¹⁵ Therefore, even if a client was apprehended after November 1, 2020, practitioners should still use the memo’s language to their client’s advantage and cite mitigating facts and circumstances to refute arguments that their client is an enforcement priority.

Other Topics in Mayorkas Memo

In addition to defining the three enforcement priority categories, the Mayorkas Memo discusses a number of other topics. The memo has sections about protecting noncitizens’ civil rights and civil liberties and on “guarding against the use of immigration enforcement as a tool of retaliation for the assertion of legal rights.”¹⁶ In the latter section, the memo explicitly states that a “noncitizen’s exercise of workplace or tenant rights, or service as a witness in a labor or housing dispute, should be considered a mitigating factor in the exercise of prosecutorial discretion.”¹⁷ The memo also states that “a fair and equitable case review process” will be created to allow for the review of enforcement actions.¹⁸

B. The Texas Lawsuit

The states of Texas and Louisiana brought a legal challenge to the Mayorkas Memo in a federal court in Texas, arguing that by not detaining or removing all noncitizens against whom Congress authorized detention or removal, the memo cost the states money.¹⁹ On June 10, 2022, Judge Drew B. Tipton of the U.S. District Court for the Southern District of Texas issued a decision vacating (cancelling) the Mayorkas Memo.²⁰ The Biden administration appealed Judge Tipton’s order and sought a stay of the district court’s vacatur pending the appeal, which the Fifth Circuit denied²¹ as did the U.S. Supreme Court.²² The Supreme Court issued an expedited briefing

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 5.

¹⁷ *Id.*

¹⁸ *Id.* at 6.

¹⁹ *Texas v. United States*, 606 F. Supp. 3d 437, 467 (S.D. Tex.), *cert. granted before judgment*, 143 S. Ct. 51 (2022), *and rev’d*, 143 S. Ct. 1964 (2023).

²⁰ *Id.* The decision took effect nationwide on June 24, 2022.

²¹ *Texas v. United States*, 40 F.4th 205 (5th Cir. 2022).

²² *United States v. Texas*, 143 S. Ct. 51 (2022).

schedule, bypassing the usual procedure where it would wait for a merits decision by the Fifth Circuit.²³

On June 23, 2023, the Supreme Court issued a decision holding that in this circumstance—where states were suing to force the federal government to prosecute more people—the states lacked standing, and it reversed the judgment of the district court.²⁴ Following the Supreme Court decision, Secretary Mayorkas issued a statement indicating DHS’s intention to reinstitute the Mayorkas Memo, stating that the Memo allows DHS to “effectively accomplish” its mission.²⁵ After the Supreme Court mandate issued, ICE announced via email that it is again following the Mayorkas Memo.²⁶

III. Overview of the Doyle Memo

A. Introduction

On April 3, 2022, before the federal judge in Texas had vacated the Mayorkas Memo, ICE Principal Legal Advisor (PLA) Kerry Doyle issued a memorandum (Doyle Memo)²⁷ providing guidance to all ICE OPLA²⁸ attorneys on how and when to exercise prosecutorial discretion (PD) in removal proceedings in light of DHS’s enforcement priorities.²⁹ The Doyle Memo took effect on April 25, 2022 and superseded the previous OPLA guidance issued in May 2021 by former PLA John D. Trasviña.³⁰

The Doyle Memo espouses “enduring principles of prosecutorial discretion”³¹ and incorporates the enforcement priorities included in the Mayorkas Memo.³² During the time the Mayorkas Memo was vacated, OPLA changed its webpage on prosecutorial discretion, clarifying that, because of the *Texas v. United States* litigation, OPLA attorneys could not rely on the

²³ *Id.* (granting certiorari before judgment).

²⁴ *United States v. Texas*, 143 S. Ct. 1964 (2023).

²⁵ DHS, Statement from Secretary Mayorkas Regarding the Supreme Court Decision on Immigration Enforcement (June 23, 2023), <https://www.dhs.gov/news/2023/06/23/statement-secretary-mayorkas-regarding-supreme-court-decision-immigration>.

²⁶ American Immigration Lawyers Ass’n (AILA), *Practice Alert: ICE Reinstates Mayorkas Enforcement Priorities and Doyle Memo* (July 30, 2023), <https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/practice-alert-ice-reinstates-mayorkas-enforcement>.

²⁷ Memorandum from Kerry A. Doyle, ICE Principal Legal Advisor, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf [hereinafter “Doyle Memo”].

²⁸ The Office of the Principal Legal Advisor (OPLA) was formerly known as the Office of Chief Counsel (OCC).

²⁹ The Doyle Memo operationalizes DHS’s final enforcement priorities set forth in the Mayorkas Memo. The Doyle Memo applies only to OPLA, while the priorities set forth in the Mayorkas Memo apply throughout DHS, which includes ICE ERO, Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS).

³⁰ See Memorandum from John D. Trasviña, ICE Principal Legal Advisor, Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf. Though the memo is dated May 27, 2021, OPLA released it to the public on June 4, 2021.

³¹ Doyle Memo, *supra* note 27, at 1.

³² *Id.* at 3-7.

enforcement priorities set forth in the Mayorkas Memo, but instead would “exercise their inherent prosecutorial discretion on a case-by-case basis during the course of their review and handling of cases.”³³ On September 6, 2023, OPLA again updated its prosecutorial webpage adding frequently asked questions and answers to those questions as well as a statement that, in light of the Supreme Court’s *United States v. Texas* decision, the Mayorkas and Doyle Memos had been reinstated in full as of July 28, 2023.³⁴ Additional information provided in the FAQs on the website is discussed in the relevant sections below.

The Doyle Memo states that OPLA’s goal in exercising PD is to “preserve limited government resources” and help alleviate the court backlogs, while achieving “just and fair outcomes” and advancing DHS’s mission.³⁵ The guidance in the Doyle Memo covers various decisions made by OPLA attorneys in removal proceedings, particularly regarding filing Notices to Appear (NTAs), dismissal of proceedings, administrative closure, stipulations to issues and relief, continuances, appeals, joint motions to reopen, bond proceedings, and waiving OPLA attorney appearances at hearings. Note that the OPLA guidance does not constitute any change in immigration law; it clarifies the use of existing discretionary authority. Though the guidance encourages OPLA attorneys to exercise PD for individuals who are not deemed enforcement priorities (nonpriorities), OPLA attorneys continue to have broad discretion to make their own assessments and pursue removal.

B. The Doyle Memo’s Discussion of DHS Enforcement Priorities

The Doyle Memo discusses how OPLA should exercise PD in removal proceedings in accordance with the three immigration enforcement priorities announced in the Mayorkas Memo. The Doyle Memo expands on the Mayorkas Memo’s definitions of those three enforcement priorities, for purposes of how OPLA should interpret them, as described below:

Priority Category: “Threat to National Security”: Individuals who have engaged in, or are suspected of, terrorism or espionage, or who otherwise pose a danger to national security.

The Doyle Memo adds that “terrorism” and “espionage” should be applied consistently with the Immigration and Nationality Act (INA) (*e.g.*, INA § 212(a)(3)(B)(iii)-(iv)), and that individuals engaged in or suspected of “serious human rights violations” will also be considered national security priorities.³⁶

³³ Archived Webpage: ICE, Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor (last updated July 27, 2023), <https://web.archive.org/web/20230825152115/https://www.ice.gov/about-ice/opla/prosecutorial-discretion>.

³⁴ ICE, Doyle Memorandum: Frequently Asked Questions and Additional Instructions (updated Sept. 6, 2023), <https://www.ice.gov/about-ice/opla/prosecutorial-discretion>.

³⁵ Doyle Memo, *supra* note 27, at 1, 9.

³⁶ Doyle Memo, *supra* note 27, at 3.

Priority Category: “Threat to Border Security”: Individuals apprehended at the border or ports of entry while attempting to enter unlawfully,³⁷ or who were apprehended in the United States after entering unlawfully after November 1, 2020.³⁸

The Doyle Memo adds that individuals who are knowingly involved in smuggling, especially where the smuggled individuals were abused or mistreated, and those who engaged in “serious immigrant benefit fraud” could be considered border security priorities.³⁹ Importantly, the Doyle Memo states that the same mitigating factors applicable to public safety determinations (discussed below) should be considered in the border security determination.⁴⁰ For example, if someone appears to be a priority due to an unlawful entry to the United States after November 1, 2020, practitioners may still be able to demonstrate to OPLA that the person should be a nonpriority because mitigating factors are present.

Priority Category: “Threat to Public Safety”: Individuals who pose a *current* threat to public safety, typically because of “serious criminal conduct.”⁴¹

In determining whether a noncitizen “poses a current threat to public safety,” all relevant factors must be considered in the “totality of the circumstances,” and not all factors must be weighed equally.⁴² In addition to the factors listed in the Mayorkas Memo, the Doyle Memo includes additional “mitigating” and “aggravating” factors for OPLA’s consideration, while clearly stating that the list of factors is non-exhaustive, and any other relevant factors should also be considered. The factors discussed in the Mayorkas and Doyle Memos include⁴³:

³⁷ The Doyle Memo clarifies that the border security category applies to individuals who were apprehended while attempting to enter unlawfully *after November 1, 2020*. *Id.* at 5-6.

³⁸ OPLA may not know about a respondent’s manner of entry and, because OPLA may consider those who present themselves at a port of entry differently for priority designations than those who attempt to enter without inspection, practitioners should make clear in the PD request to OPLA that, where relevant, a client appeared at a port of entry rather attempting to enter without inspection. *See* AILA, EOIR/ICE Joint Liaison Committee Meeting with ICE, at 7 (Apr. 7, 2022), AILA Doc. 22032504, [aila.org](https://www.aila.org).

³⁹ Doyle Memo, *supra* note 27, at 6. Examples of serious immigration benefit fraud cited in the memo include: marriage fraud, document fraud, frivolous asylum filings, certain false claims to U.S. citizenship, and document mill forgers. *Id.* However, using fraudulent documents to flee persecution or for employment, and false statements made by minors, would generally *not* be considered serious immigrant benefit fraud. *Id.*

⁴⁰ *Id.* at 6.

⁴¹ *Id.* at 2.

⁴² *Id.* at 4. Practitioners should use this language to argue that certain mitigating factors clearly outweigh any negative factors, such as criminal history.

⁴³ Mayorkas Memo, *supra* note 2, at 3-4; Doyle Memo, *supra* note 27, at 4-5.

<p>Mitigating Factors</p> <ul style="list-style-type: none"> • Age (if a person is young or elderly) • Longtime presence in the United States • Mental health condition that contributed to the person committing the conduct (like schizophrenia, post traumatic stress disorder, cognitive disabilities, or other mental illness) • Mental or physical health condition that requires care or treatment • Being a victim, witness, or other party in legal proceedings, including related to human trafficking or labor exploitation • Impact of the person’s removal on family members in the United States, such as loss of provider or caregiver • Eligibility for humanitarian protections and immigration relief • Military or public service of the person or their immediate family members (parents, spouse, or children) • Time since the offense and evidence of rehabilitation • Conviction was expunged or vacated • A person’s exercise of workplace or tenant rights, or service as a witness in a labor or housing dispute • Person is pregnant, postpartum, or nursing* • Person is lawful permanent resident (LPR) especially if longtime LPR or LPR since young age* • Underlying arrest seems discriminatory or made in retaliation for asserting one’s rights⁴⁴* • Crime has since been decriminalized* • Cooperation as witness or informant, or other assistance sought from/provided to law enforcement, including labor and civil rights law enforcement agencies* <p>*Additional factors listed in the Doyle Memo</p>	<p>Aggravating Factors</p> <ul style="list-style-type: none"> • Seriousness of the crime • Degree of harm the criminal conduct caused • “Sophistication” of the crime (<i>i.e.</i>, the amount of planning, intent, and resources that went into committing the crime, as well as the number of people involved) • Use of, or threat to use, a firearm or dangerous weapon • Serious prior criminal record • Victim of crime is child or particularly vulnerable* • Crime involved violence or was of a sexual nature* • Gang-related (as defined under 18 U.S.C. § 521(a)) criminal conduct, BUT inclusion in a gang database is not conclusive of gang membership* • Crime resulted in harm to public health or pandemic response efforts* <p>*Additional factors listed in the Doyle Memo</p>
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Importantly, the Doyle Memo states that a person’s criminal history, regardless of severity, is not the only indicator of whether they pose a current threat to public safety.⁴⁵ However, this standard can cut both ways for clients; it can be used to show that despite the existence of criminal

⁴⁴ This factor can be used to show that an arrest was a result of racial profiling or over-policing of Black and brown neighborhoods. Practitioners may demonstrate this bias by providing documentary evidence like reports regarding policing and demographics in the state, county, or city.

⁴⁵ Doyle Memo, *supra* note 27, at 4.

history, a person is a nonpriority, but OPLA can also deem a person a priority who has never been arrested, prosecuted, or convicted of a crime (for example, if there is evidence that the person is involved in gang activities).⁴⁶ Practitioners should continue to vehemently argue that arrests only, without conviction, should never be used as a negative factor in the public safety determination.

NOTE ON SURVIVORS AND SIJS APPLICANTS: Consistent with the ICE memorandum “Using a Victim-Centered Approach with Noncitizen Crime Victims,”⁴⁷ the Doyle Memo at footnote 8 instructs OPLA attorneys to give particular consideration to victims of crime when determining if the person is a public safety threat or a border security priority, and states that individuals with pending applications for survivor-based benefits (U visa, T visa, VAWA, and Special Immigrant Juvenile Status (SIJS)) who appear *prima facie* eligible for such relief should be deemed nonpriorities until USCIS adjudicates their applications.⁴⁸

C. OPLA Priority Designations

Under the Doyle Memo, OPLA should consider PD for all nonpriority cases, though some forms of PD are also available for priority cases, as discussed later. The memo directs OPLA attorneys to make a priority or nonpriority designation for each case that has not yet been classified for prioritization under the Mayorkas Memo upon first encountering it, which is generally upon review of an NTA or when there is an upcoming hearing.⁴⁹ The Doyle Memo states that OPLA should generally defer to priority designations made by the DHS component—ERO, USCIS, CBP—that issued the NTA if the case was initiated on or after November 29, 2021, the Mayorkas Memo’s effective date.⁵⁰

To designate a respondent a priority, OPLA attorneys must get approval from their Chief Counsel or Deputy Chief Counsel, unless the person is a border priority due to unlawful entry or attempted entry after November 1, 2020. The OPLA website indicates that OPLA will generally not agree to administrative closure or dismissal for cases that are designated as priorities, but practitioners can seek a redetermination of priority designation.⁵¹

If OPLA has designated a case a priority, practitioners can seek a client’s re-designation as a non-priority case by presenting new information or evidence. Re-designation requires approval from Chief Counsel or Deputy Chief Counsel.⁵²

⁴⁶ However, the memo states that inclusion in gang databases is not conclusive evidence of gang membership. Doyle Memo, *supra* note 27, at 5 n.9.

⁴⁷ ICE Directive 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021), <https://www.ice.gov/doclib/news/releases/2021/11005.3.pdf> [hereinafter “ICE Victim-Centered Approach Memo”].

⁴⁸ Doyle Memo, *supra* note 27, at 4-5 n.8.

⁴⁹ *Id.* at 7. NTAs are most commonly issued by ERO, CBP, or USCIS. See 8 CFR § 239.1(a) for the full list of DHS officers who may issue an NTA.

⁵⁰ Doyle Memo, *supra* note 27, at 7.

⁵¹ ICE, Doyle Memorandum: Frequently Asked Questions and Additional Instructions (updated Sept. 6, 2023), <https://www.ice.gov/about-ice/opla/prosecutorial-discretion>.

⁵² *Id.* at 8.

Although discretion may be exercised at any point in removal proceedings, OPLA attorneys are encouraged to exercise PD at the earliest point possible.⁵³ Even if OPLA does not agree that a particular case merits PD at one stage, reconsideration may be warranted if additional information comes to light or circumstances change, so practitioners should continuously evaluate the appropriateness of seeking PD reconsideration throughout the case.

PRACTICE TIP: If OPLA previously denied a PD request while the Mayorkas Memo was not in effect, practitioners may use the reimplementing of the memo as a reason to seek PD anew now that the Mayorkas and Doyle Memos are fully in effect again.

IV. Types of Prosecutorial Discretion That Noncitizens Can Request with OPLA Under the Doyle Memo

OPLA attorneys are authorized to exercise PD at various stages in a removal case, including to determine whether to: file or cancel an NTA; agree to, or unilaterally move to, dismiss proceedings; agree to administrative closure; stipulate to certain issues or grants of relief; consent to continuances; join motions to reopen; agree to a bond amount (or other conditions of release); pursue appeal; and waive OPLA's appearance at certain hearings.

A. Non-filing of an NTA

The Doyle Memo emphasizes that OPLA attorneys should exercise PD at all stages of proceedings, including at the earliest moment practicable. Consistent with this principle, the Doyle Memo notes that OPLA attorneys have discretion to conclude that an NTA should not be filed in the first place.⁵⁴ Thus, in cases in which a nonpriority client has been served an NTA that has not been filed with the court, practitioners may affirmatively reach out to OPLA asking that the NTA not be filed.⁵⁵ Practitioners should include with the request an argument for why the NTA should not have been issued or an explanation of how the facts have changed since issuance of the NTA.

Practitioners providing community education should inform immigrant communities of the possibility that OPLA may choose to not file an NTA but warn them that they should not assume that because a certain amount of time has passed, that means an NTA will not be filed with the court. Often NTAs are not filed with or processed by the court immediately, which can lead to long delays before the court enters the NTA into their system. To avoid an *in absentia* removal order, respondents and practitioners should continue to monitor cases via the Executive Office

⁵³ *Id.* at 9.

⁵⁴ Doyle Memo, *supra* note 27, at 10-11. Although the Doyle Memo contemplates action by OPLA attorneys *before* the NTA is filed with the court, as a practical matter, it is most likely that OPLA will consider PD after the NTA has been filed.

⁵⁵ OPLA has stated on stakeholder calls that it does not review NTAs for sufficiency or file them with the court. Nonetheless, OPLA should be able to discuss whether to file NTAs with other divisions of DHS. Furthermore, both the Doyle Memo and the OPLA PD webpage explicitly state that one means to exercise PD is through nonfiling of the NTA.

for Immigration Review’s (EOIR) 1-800 phone hotline or online system.⁵⁶ Furthermore, if the respondent has an NTA with a specific date on it, even if their A number is not in the EOIR system, they must assume that the court date is real and appear in court or risk receiving an *in absentia* removal order.⁵⁷

B. Dismissal of Proceedings

OPLA has made clear that its strongly preferred form of PD is moving to dismiss proceedings, apparently in an effort to decrease the immigration court backlog, and thereby preserve OPLA resources.⁵⁸ Dismissal of proceedings means that the current removal proceedings are over and the immigration court is divested of jurisdiction over the case. However, OPLA has been moving to dismiss cases without prejudice to preserve DHS’s ability to initiate new removal proceedings in the future by serving a new NTA.

While dismissal may be a good result for noncitizens who have no eligibility for relief, weak applications for relief before the immigration court, applications for relief before USCIS, or whose cases are docketed before immigration judges (IJs) who deny most applications for relief,⁵⁹ it is critical that practitioners discuss the pros and cons of accepting dismissal with their clients. Practitioners should discuss the possibility of dismissal with their clients as early as possible, particularly because, as discussed below, OPLA has been filing unilateral motions to dismiss, without first seeking the respondent’s position, to which the respondent must respond within ten days.⁶⁰ For many noncitizens, the certainty of dismissal may be preferable to risking a hearing where they may be ordered removed. On the other hand, dismissal means that the

⁵⁶ The EOIR automated case information phone hotline number is 1-800-898-7180. The online EOIR automated case information webpage is found at <https://acis.eoir.justice.gov/en/>.

⁵⁷ Even if the date on the NTA is hand-written, the respondent should assume that the court date is real. However, practitioners should report instances of hand-written dates on an NTA to ERO field office leadership. AILA, Notes from AILA National ICE Committee Spring Liaison Meeting, at 10 (Apr. 26, 2023), AILA Doc. No. 23033004, [aila.org](https://www.aila.org).

⁵⁸ See Doyle Memo, *supra* note 27, at 12; AILA, EOIR/ICE Joint Liaison Committee Meeting with ICE, at 4 (Apr. 7, 2022), AILA Doc. 22032504, [aila.org](https://www.aila.org). During the third quarter of FY 2023, 142,941 cases were dismissed or terminated, 34,942 respondents had relief granted, and IJs issued 169,223 removal orders. EOIR, Adjudication Statistics: FY 2023 Third Quarter Decision Outcomes (July 21, 2023), <https://www.justice.gov/eoir/page/file/1105111/download>. While a Trump-era decision, *Matter of S-O-G- & F-D-B-27* I&N Dec. 462 (AG 2018), limited IJs’ authority to terminate or dismiss cases unless OPLA sought dismissal, that decision was overruled by *Matter of Coronado-Acevedo*, 28 I&N Dec. 648 (AG 2022). As a result of the *Coronado-Acevedo* decision, practitioners can again seek termination from the immigration judge rather than having to rely solely on OPLA’s discretionary decisions on dismissal.

⁵⁹ See Innovation Law Lab and Southern Poverty Law Center, *The Attorney General’s Judges: How The U.S. Immigration Courts Became a Deportation Tool*, at 25 (June 2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf (noting that some “attorneys report that at least one judge simply issues removal orders without holding merits hearings, sometimes contacting the attorney the night before to say that there is no need to come to court as he plans to deny the case”). For individual IJ grant rates, see, TRAC, *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2017-2022* (Oct. 26, 2022), <https://trac.syr.edu/immigration/reports/judge2022/>; see also Tableau Public, *EOIR Asylum Data Tool* (last updated June 29, 2023), https://public.tableau.com/app/profile/jeffrey.obrien/viz/EOIR_Asylum/AsylumDashNew.

⁶⁰ EOIR, Immigration Court Practice Manual, Ch. 3.1(b), <https://www.justice.gov/eoir/reference-materials/ic/chapter-3/1>.

noncitizen may be in a permanent state of limbo, with no application pending, and remaining undocumented indefinitely.⁶¹ See below for further discussion of various considerations.

Example: Marta crossed the border in 2017 with her daughter, Elsa. They passed a credible fear interview and have been in removal proceedings and awaiting a merits hearing since then. In the meanwhile, Elsa has filed for SIJS and has an approved SIJS petition—and is now eligible for an employment authorization document (EAD)—but will have to wait years for her priority date to be current. Marta and Elsa filed for asylum with the immigration court, based on general fear of gangs in their country, but have not experienced any direct harm. In this case Marta and Elsa may want dismissal which will allow Elsa to adjust status with USCIS when her priority date is current. Dismissal will mean that Marta does not have to go forward on a likely weak asylum application that may lead to a removal order against her and her daughter. On the other hand, if they accept dismissal, they will lose their asylum-based employment authorization, and Marta may be left in limbo without another form of relief to pursue or another avenue to seek an EAD. While Marta may choose to file for asylum affirmatively with USCIS following EOIR dismissal, whether or not to refile will be a strategic decision that she will have to make with guidance from her counsel based on the specific factors in her case.⁶²

PRACTICE TIP: OPLA is likely to agree to dismissal in cases where noncitizens have applications pending with USCIS, especially survivor-based applications such as U visa, T visa, VAWA, and SIJS applications in light of footnote 8 of the Doyle Memo. Practitioners should highlight this footnote in any request for PD made on behalf of noncitizens in these categories.

i. Unilateral motions to dismiss

Under the Doyle Memo, individual OPLA attorneys are authorized to move unilaterally to dismiss proceedings.⁶³ Although the Immigration Court Practice Manual (ICPM) specifies that the moving party should seek opposing counsel’s position before filing the motion,⁶⁴ the Doyle Memo states that “OPLA attorneys are *not* required to obtain the noncitizen’s concurrence with

⁶¹ Practitioners should also consider that having an application pending for relief will generally stop accrual of unlawful presence. Dismissal of immigration court proceedings and thereby any applications for relief pending with the court will mean that the noncitizen will begin (or resume) accruing unlawful presence.

⁶² Practitioners should be sure to explain the potential implications of dismissing an NTA for clients who have been processed through expedited removal. While there is no guidance on how ICE will view the expedited removal order following dismissal of the noncitizen’s removal proceedings, there have been some instances where USCIS has refused jurisdiction over an affirmative asylum case if the NTA is terminated for a technical defect (such as failing to include the date and time of hearing), finding that the asylum seeker has an expedited removal order against them. USCIS, Affirmative Asylum Procedures Manual § III.B.3 at 89-90 (Aug. 2023), <https://www.uscis.gov/sites/default/files/document/foia/AffirmativeAsylumProceduresManual.pdf> [hereinafter “AAPM”]. The AAPM clarifies that USCIS *does* have jurisdiction over an asylum applicant who started out in expedited removal proceedings and whose subsequent removal proceedings were terminated for “substantive reasons,” which includes terminations based on prosecutorial discretion. *Id.* § III.L.3.6.c, at 176, 178.

⁶³ NIPNLG has been tracking trends with unilateral motions to dismiss and asks practitioners to complete our survey on this subject to report experiences with DHS moving unilaterally to dismiss, available at https://docs.google.com/forms/d/e/1FAIpQLScWakQcGFITnzwiXOv9pp8CD5XlpGayJ6pBaHoc_sK03s7gIQ/view_form.

⁶⁴ ICPM Ch. 5.2(i), <https://www.justice.gov/eoir/reference-materials/ic/chapter-5/2>.

unilateral DHS motions to remove nonpriority cases from the immigration court dockets filed pursuant to this memorandum.”⁶⁵ The OPLA webpage on prosecutorial discretion further states explicitly that OPLA may seek dismissal “even if the noncitizen prefers to seek relief in removal proceedings,” acknowledging that it may also be appropriate to stipulate to facts, law or relief in some cases.⁶⁶ This policy appears to be rooted in OPLA’s desire to clear cases from its docket with the least expenditure of resources.⁶⁷

In many instances, respondents will not want their cases dismissed. Some respondents are eager to pursue cancellation of removal in court, which may be their only avenue to lawful permanent residence. Others may be desperate to have their asylum cases heard if they have family members in harm’s way abroad. Respondents who want to have their cases heard in immigration court should be prepared to file an opposition to OPLA’s motion to dismiss.⁶⁸

Opposing counsel has ten days from the date of the motion to file a response.⁶⁹ Some practitioners have reported that IJs have dismissed cases before the ten-day response period has elapsed. If that happens, practitioners should file a motion to reconsider before the IJ, and if the judge does not adjudicate the motion before the appeal deadline has run, appeal the ruling to the Board of Immigration Appeals (BIA). At the same time, practitioners should contact the local Assistant Chief Immigration Judge and complain that the IJ did not follow proper procedures.⁷⁰ In cases where respondent’s counsel is concerned that OPLA will likely move to dismiss and the respondent wants to move forward in court, counsel should consider reaching out to OPLA at the earliest opportunity to explain why they oppose dismissal, especially in cases where the respondent has a strong claim for relief which can only be pursued in immigration court, such as cancellation of removal. In addition to stating that counsel should make a good faith effort to ascertain opposing counsel’s position, the ICPM also says that counsel should state that position in the motion, so, even if OPLA claims to not have the resources to contact opposing counsel, it has no similar argument to omit the stated position of respondent’s counsel.⁷¹ OPLA’s webpage on prosecutorial discretion states that “[w]here the noncitizen affirmatively advises [OPLA] of the noncitizen’s preference to remain in removal proceedings in advance of OPLA’s filing of the motion to dismiss, an OPLA attorney will determine on a case-by-case basis whether to unilaterally seek dismissal or consider another form of PD.”⁷²

⁶⁵ Doyle Memo, *supra* note 27, at 11-12 n.24 (emphasis in original).

⁶⁶ ICE, Doyle Memorandum: Frequently Asked Questions and Additional Instructions (updated Sept. 6, 2023), <https://www.ice.gov/about-ice/opla/prosecutorial-discretion>.

⁶⁷ The footnote says, “Obtaining concurrence of the noncitizen or their legal representative prior to filing such a motion would, in many cases, require the expenditure of more effort than the preparation, filing, and service of the motion itself,” clearly signaling OPLA’s goal to clear as many cases as possible with as little effort as possible. Doyle Memo, *supra* note 27, at 11-12 n.24.

⁶⁸ For a template opposition, see NIPNLG’s Template Opposition to DHS Unilateral Motion to Dismiss (May 2, 2022), <https://nipnl.org/work/resources/template-opposition-unilateral-dhs-motion-dismiss>.

⁶⁹ ICPM Ch. 3.1(b), <https://www.justice.gov/eoir/reference-materials/ic/chapter-3/1..>

⁷⁰ EOIR, ACIJ [Assistant Chief Immigration Judge] Assignments (updated July 10, 2023), <https://www.justice.gov/eoir/acij-assignments>.

⁷¹ ICPM Ch. 5.2(i), <https://www.justice.gov/eoir/reference-materials/ic/chapter-5/2>.

⁷² ICE, Doyle Memorandum: Frequently Asked Questions and Additional Instructions (updated Sept. 6, 2023), <https://www.ice.gov/about-ice/opla/prosecutorial-discretion>.

Under the Doyle Memo, OPLA is instructed not to move unilaterally to dismiss certain case types where there is a regulatory right to be placed in removal proceedings, including asylum cases referred by the asylum office and I-751 petitions denied by USCIS.⁷³

It is worth noting that, in addition to OPLA's initiatives to remove cases from their dockets, EOIR has also issued guidance to IJs encouraging them to take certain categories of cases off calendar. The non-exhaustive list of case types that IJs may seek to remove from their calendars include cases where: the respondent has relief pending before USCIS; there is other "collateral" relief pending (such as a family court case as a predicate for an SIJS petition); the respondent can file for asylum affirmatively as an unaccompanied child; the respondent has an approved visa petition and is waiting for the priority date to become current; the respondent has Temporary Protected Status (TPS) or is prima facie eligible for TPS; or the respondent is prima facie eligible for adjustment under the Cuban Adjustment Act.⁷⁴ EOIR representatives have stated in stakeholder calls that if counsel receives an EOIR notice of intent to take the case off calendar, either party need only write a letter requesting to keep the case before the court and EOIR will not remove the case. EOIR has indicated that there is no need to write a legal argument as to why the case should remain pending before EOIR.

ii. Employment authorization eligibility after case dismissal

Many noncitizens who are awaiting a merits hearing in immigration court have applications pending with the immigration court for asylum, cancellation of removal, or adjustment of status, and have an EAD based on the pending application for relief. If the removal proceedings are dismissed, the application will also be dismissed, leaving noncitizens without an application pending that gives rise to EAD eligibility. Thus, practitioners should carefully explain to clients the likely effect that dismissal will have on their ability to obtain or maintain a valid EAD. For some types of cases, like asylum and adjustment of status, the noncitizen may be able to refile with USCIS and obtain an EAD again, but for others, such as cancellation, there is currently no affirmative filing option.

iii. Special considerations for asylum seekers

Individuals who are awaiting a merits hearing in immigration court and who have asylum applications pending with the immigration court may wish to have their case dismissed so that they can pursue asylum affirmatively. For many asylum seekers, the non-adversarial interview process before a USCIS asylum officer may be preferable and more appropriate than the adversarial court process. Moreover, if an asylum seeker accepts dismissal and is not successful before the asylum office, the case would, again, be referred to immigration court, giving the asylum seeker two opportunities for adjudication rather than one.⁷⁵ Before accepting dismissal in

⁷³ Doyle Memo, *supra* note 27, at 10-11 n.22.

⁷⁴ E-mail correspondence from Tracy Short, Chief Immigration Judge, "Taking Cases Off Calendar Pursuant to 8 CFR § 1003.9(b)" (Apr. 26, 2022), AILA Doc. 22080202, [aila.org](https://www.aila.org).

⁷⁵ See 8 CFR § 208.14(c)(1).

this scenario, however, counsel should consider several issues that remain unanswered by USCIS.⁷⁶

First, it is unclear how USCIS will interpret the one year filing deadline in these cases.⁷⁷ Pursuant to 8 CFR § 208.4(a)(5)(iv), there is an extraordinary circumstances exception to the one year filing deadline for individuals who maintained lawful status. Individuals with asylum applications pending are considered to be in a period of authorized stay, which, according to the Asylum Office Lesson Plan on the One Year Filing Deadline, is relevant to an extraordinary circumstances exception.⁷⁸ The Lesson Plan concludes that those in a period of authorized stay should be considered for an extraordinary circumstances exception.⁷⁹ As with any exception to the one year filing deadline, applicants would need to refile within a reasonable period of time following the extraordinary circumstances, which here would be the EOIR case dismissal.⁸⁰

According to instructions on the USCIS webpage, asylum seekers who “were previously in immigration court proceedings” must file with the Asylum Vetting Center.⁸¹ Unlike other affirmative asylum seekers, they cannot file their I-589 application online. While the fundamental question of where to file has been answered, other significant questions remain unanswered.⁸²

⁷⁶ On May 18, 2022, the AILA Asylum Committee sent a letter to USCIS laying out many of the questions posed here. Letter from AILA Asylum & Refugee Committee to USCIS (May 18, 2022), AILA Doc. 22051901, [aila.org](https://www.aila.org). As of the date of this practice advisory, USCIS has not responded to the letter. On May 9, 2023, the AILA Asylum Committee sent a follow up letter, renewing a request for guidance and raising additional concerns; USCIS has also not responded to the second letter. Letter from AILA Asylum & Refugee Committee to USCIS (May 9, 2023), AILA Doc. 23051106, [aila.org](https://www.aila.org).

⁷⁷ Immediately after OPLA began seeking to dismiss removal proceedings under the Doyle Memo, some practitioners had hoped that OPLA could transfer the asylum application to USCIS (as USCIS does when it refers an affirmative filing to immigration court). However, USCIS has indicated on stakeholder calls that there is no mechanism for an asylum application to be remanded to USCIS from the immigration court and as a result, those who want to pursue asylum affirmatively must refile with USCIS. Although OPLA will apparently not send asylum cases to USCIS, it apparently will return adjustment of status cases to USCIS following dismissal in immigration court without requiring adjustment applicants to refile their I-485 applications. *See* USCIS, Immigration Benefits in EOIR Removal Proceedings (last reviewed/updated May 4, 2023), <https://www.uscis.gov/laws-and-policy/other-resources/immigration-benefits-in-eoir-removal-proceedings>.

⁷⁸ USCIS, One Year Filing Deadline Lesson Plan, at 17-20 (May 6, 2013), https://www.uscis.gov/sites/default/files/document/lesson-plans/One_Year_Filing_Deadline_Asylum_Lesson_Plan.pdf. Note, this publicly available asylum officer lesson plan is dated 2013. It is not clear whether USCIS has updated these materials or whether this version of the lesson plan is still in use.

⁷⁹ *Id.* at 19-20 (“A [noncitizen] with a pending application, who is not in any lawful status, may be considered to be [a noncitizen] whose period of stay is authorized by the Attorney General. The types of ‘stay authorized by the Attorney General’ that the asylum officer might encounter could include pending applications for adjustment of status. Such applicants would not be analyzed specifically under the ‘lawful status’ exception to the one-year filing deadline. However, insofar as the ‘extraordinary circumstances’ exception is not limited to the precise scenarios outlined, the Asylum Officer should consider the totality of the circumstances when determining whether an applicant with a pending application can establish an exception to the requirement that the application be filed within one year of last arrival.”).

⁸⁰ 8 CFR § 208.4(a)(5).

⁸¹ USCIS, I-589, Application for Asylum and Withholding of Removal (last reviewed/updated Aug. 2, 2023), <https://www.uscis.gov/i-589> (under “Where to File” section).

⁸² Some practitioners have reported that when they refile with the Asylum Vetting Center along with proof of the date of their prior defensive filing, they have received USCIS receipts preserving the original filing date. Other

Second, it is unclear whether these applications will be seen as newly filed and therefore subject to the Last In, First Out (LIFO) scheduling policy. According to the USCIS website, under LIFO, the first priority for scheduling asylum interviews is for rescheduled interviews, and the next priority is for cases pending fewer than 21 days; all other applications fall into the third scheduling priority.⁸³ Therefore, if USCIS views these applications as newly filed, they may be scheduled relatively quickly for interviews.⁸⁴ If the application is not granted by the asylum office, the noncitizen may have their case referred back to immigration court within the course of a few months. If the cases are not subject to LIFO, asylum seekers may be trading one backlog for another, as the asylum office currently has a backlog of cases that have been pending for several years.⁸⁵

Third, if USCIS considers these applications newly filed, asylum seekers who have had their applications pending for years in immigration court may need to wait 180 days before they become eligible for a new asylum-pending EAD. Some asylum seekers may have accrued just under 180 days on their defensive filing and have to start counting days again, depending on USCIS's interpretation of the refiling. It is also unclear whether asylum seekers who already obtained asylum-pending EADs through their defensive filing would file a renewal or an initial asylum-pending EAD.⁸⁶

Fourth, if USCIS considers the applications newly filed, children who were dependents on their parent's asylum application when originally filed may no longer be considered dependents if they turned 21 while the case was pending before the immigration court. If the child does not have an independent claim for asylum, practitioners may need to advise against accepting dismissal.

Finally, under footnote 22 of the Doyle Memo, OPLA should not move unilaterally to dismiss asylum cases that have been referred to immigration court following an interview at the asylum office. Nonetheless, it may be possible for respondent's counsel to move jointly with DHS to

practitioners have reported the opposite, that the date is based on when the refiled application is received. If USCIS issued the receipt with the original filing date, that would address concerns about the one-year deadline, as well as loss of derivative status after filing. The issue of potential loss of derivative status is discussed on page 17 of this advisory.

⁸³ USCIS, Affirmative Asylum Interview Scheduling (last reviewed/updated May 31, 2022),

<https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-interview-scheduling>.

⁸⁴ However, according to information shared during DHS stakeholder calls, with the anticipated "border surge" following the end of Title 42, very few asylum officers are even conducting affirmative interviews as most are prioritizing credible fear interviews. Thus even cases that should be interviewed "first" are likely to go into the years-long backlog.

⁸⁵ For example, as of July 2021, almost half of the cases in the Arlington asylum office backlog had been pending for more than three years. See Letter from Tracy Renaud, Acting Director of USCIS, to Rep. Gerald Connolly (Jul. 29, 2021), https://www.uscis.gov/sites/default/files/document/foia/Asylum_Cases_Pending-Rep_Connolly_7.29.21_0.pdf. At local stakeholder meetings, the New York and New Jersey Asylum Offices have indicated that they have cases pending since 2016 in their backlogs.

⁸⁶ Pursuant to 8 CFR § 208.7(b)(2), if an asylum application is denied by an IJ, the authorized employment ends when the EAD expires. The regulations do not address a withdrawn asylum application, but it is likely DHS would employ the same interpretation, and find that work remains authorized until the expiration date of the existing EAD. Nonetheless, there will likely be a gap in authorized employment for many asylum seekers with an EAD who accept dismissal of the removal proceedings.

dismiss such cases. It is not clear how the asylum office will adjudicate these applications if they have already conducted an interview. In the Affirmative Asylum Procedures Manual (AAPM), there is a discussion of asylum seekers refiling an asylum application after their cases have been denied by EOIR or by the asylum office.⁸⁷ If a case was denied on the merits by EOIR, asylum seekers must demonstrate changed circumstances from the previous adjudication of the asylum application that materially affect asylum eligibility, and asylum officers are instructed to not relitigate the findings of EOIR, but rather to focus on the changed circumstances.⁸⁸ For cases refiled with the Asylum Office after it has issued a merits decision, but where there has not been an EOIR decision, the AAPM explains that such cases are interviewed according to regular asylum office procedures except that, if possible, the applicant should be interviewed by the same officer who conducted the initial interview or, if that is not possible, should be interviewed by an officer who is supervised by the same supervising asylum officer.⁸⁹ Furthermore, “[s]ubstantial deference should be accorded to prior determinations made by an Asylum Officer regarding previously established facts, including credibility findings, unless clear error is present.”⁹⁰ Between the “frontlog” on receipting new asylum applications, asylum offices prioritizing Afghan cases, and border screenings, few refiled cases have received interviews, and the questions above remain largely unanswered.

iv. Withholding-only proceedings

In cases where the respondent is in “withholding-only” proceedings pursuant to a reinstated removal order, practitioners should generally not accept an offer of dismissal of the removal proceedings, because the respondents in those cases already have a removal order against them.⁹¹ Pursuant to 8 CFR § 208.31, noncitizens with reinstated removal orders are referred for “withholding-only” proceedings if they pass a reasonable fear interview, meaning the reinstated order cannot be executed until EOIR renders a decision on the applications for withholding and/or Convention Against Torture (CAT) protection. Dismissing the withholding-only proceedings means that the noncitizen still has a reinstated removal order outstanding, but no longer has the guarantee of a day in court before the order can be executed.⁹² Counsel can try negotiating with OPLA to rescind the reinstated removal order, but these orders are often issued by CBP or ERO, so counsel will likely need to work with CBP or ERO to rescind the prior removal order.

⁸⁷AAPM, *supra* note 62, § III.P.3, at 194-198. While INA § 208(a)(2)(C) bars asylum seekers from filing for asylum after an asylum application has been previously denied, the regulations clarify that this prohibition only applies to asylum applications that have been denied by an IJ or the BIA. 8 CFR § 208.4(a)(3).

⁸⁸ *Id.* at 197.

⁸⁹ *Id.* at 195-97.

⁹⁰ *Id.* at 195.

⁹¹ Practitioners should also note that OPLA may lack authority under 8 CFR § 239.2 to unilaterally move to dismiss withholding-only proceedings because there is no NTA in such proceedings. Instead, in withholding-only proceedings, ERO files a Form I-863, Notice of Referral to the Immigration Judge. *See* INA § 208.31(e).

⁹² Interestingly, 655 withholding-only and asylum-only cases were dismissed (570 IJ dismissals) or terminated (85 terminations) during the third quarter of FY 2023, contrasted with 1,154 denials and 426 grants of withholding or CAT protection. *See* EOIR, Adjudication Statistics, FY 2023 Third Quarter Decision Outcomes (July 13, 2023), <https://www.justice.gov/eoir/page/file/1105111/download>.

Example: Joao entered the United States in 2018, was put into expedited removal, and removed to Brazil. He returned in 2019 and his removal order was reinstated when he was apprehended shortly after crossing the border without inspection. He is LGBT, though he never suffered physical harm in Brazil, and after passing a reasonable fear interview, he was placed in withholding-only proceedings. OPLA has offered dismissal of the proceedings but will not take any steps to vacate the prior removal order. Although Joao's attorney is uncertain of the strength of his withholding case, there is little benefit to accepting dismissal of the proceedings because that would leave Joao with a removal order in place. Joao might be eligible for an EAD if he has an ERO order of supervision after the case is dismissed, but he would also be in a vulnerable position if DHS enforcement priorities change.

PRACTICE TIP: If a respondent has strong facts to support a grant of withholding of removal under INA § 241(b)(3) or protection under CAT, respondent's counsel should advocate to OPLA to stipulate to a grant of withholding or CAT protection. If OPLA will not stipulate to a grant of protection, and the respondent is reluctant to go forward with a hearing, respondent's counsel may seek administrative closure. Although OPLA has stated its preference for dismissal over administrative closure, OPLA may agree that a respondent in withholding-only proceedings is a good candidate for administrative closure given that dismissal could lead to the respondent's removal with no further review of their stated fear of persecution or torture.⁹³ Even if OPLA does not agree to administrative closure, the respondent may make a motion for administrative closure to the immigration judge.⁹⁴

V. Unrepresented respondents

The Doyle Memo contains different instructions for when OPLA may seek dismissal in the context of unrepresented respondents. If the respondent does not have counsel, OPLA should advise the IJ that the respondent is not an enforcement priority, explain to the judge why OPLA believes it is appropriate to dismiss the proceedings, and consent to a continuance to allow the respondent to seek the advice of counsel.⁹⁵ However, if the respondent is unable to secure counsel or does not agree to dismissal, OPLA may still move forward with a motion to dismiss proceedings.

Practitioners consulting with a *pro se* respondent or providing community education should discuss the meaning and impact of dismissal as well as other available forms of PD so that *pro se* respondents may be better equipped to respond orally to OPLA's motion to dismiss at the next hearing.⁹⁶

⁹³ OPLA's prosecutorial discretion webpage reiterates that although OPLA's preference is for case dismissal, OPLA will consider administrative closure on a case-by-case basis. ICE, Doyle Memorandum: Frequently Asked Questions and Additional Instructions (updated Sept. 6, 2023), <https://www.ice.gov/about-ice/opla/prosecutorial-discretion>.

⁹⁴ See broader discussion of administrative closure below at 20-21.

⁹⁵ Doyle Memo, *supra* note 27, at 11.

⁹⁶ OPLA has issued a sample *pro se* PD request for dismissal of proceedings, <https://www.ice.gov/doclib/about/offices/opla/respondent-RequestDismissalRemoval.pdf>.

C. Administrative Closure

The Doyle Memo emphasizes that OPLA “strongly prefers dismissal” over administrative closure.⁹⁷ Nonetheless, the memo includes administrative closure as a PD option in limited circumstances for nonpriority cases, such as when the respondent would be unavailable to attend court for an extended period of time due to a medical condition or incarceration. Because administratively closed proceedings are still pending (but inactive) before the court, the respondent’s application(s) for relief remain pending as well, allowing them to maintain EAD eligibility based on the application, as discussed in section IV.B above. Therefore, many respondents may prefer administrative closure over dismissal. Unfortunately, OPLA has indicated that it is generally unwilling to agree to administrative closure solely so the respondent can maintain EAD eligibility.⁹⁸ However, OPLA may agree that administrative closure is appropriate if there are compelling circumstances tied to the need to maintain EAD eligibility, such as if the respondent is a single parent who is going to lose their insurance coverage without an EAD and has a child with medical needs relying on that insurance.⁹⁹

PRACTICE TIP: In *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (AG 2021), the Attorney General restored IJs’ general authority to grant administrative closure in removal proceedings.¹⁰⁰ Citing to *Matter of Avetisyan*, the Attorney General noted in a footnote the factors that the IJ should consider in determining whether to grant administrative closure over the objection of one of the parties.¹⁰¹ Additionally, EOIR has issued a Director’s Memo explaining circumstances in which IJs should consider granting administrative closure and emphasizing that IJs should focus their time on cases that DHS deems a priority and cases where the respondent wants to go forward.¹⁰² Thus, even if OPLA does not agree to administrative closure, the respondent may still move for administrative closure over OPLA’s objection.

⁹⁷ Doyle Memo, *supra* note 27, at 12.

⁹⁸ Remarks of Kerry Doyle, ICE PLA, during Federal Bar Association Immigration Law Conference panel on prosecutorial discretion (Arlington, VA May 5, 2023).

⁹⁹ *Id.*

¹⁰⁰ Note that the Sixth Circuit previously held that IJs do not have general authority to administratively close cases. *See Hernandez-Serrano v. Barr*, 981 F.3d 459 (6th Cir. 2020), though it also found that IJs could do so in the limited circumstance where a respondent is pursuing a provisional waiver of unlawful presence with USCIS. *Garcia-DeLeon v. Garland*, 999 F.3d 986 (6th Cir. 2021); *see also* Memorandum from David L. Neil, EOIR Director, Administrative Closure, at 4 n.4 (Nov. 22, 2021), <https://www.justice.gov/eoir/book/file/1450351/download> (“For cases arising in the Sixth Circuit, adjudicators must determine to what extent administrative closure is permitted given that court’s case law, and they must handle issues involving administrative closure accordingly.”). Practitioners in the Sixth Circuit may therefore have to rely on continuances or move to have cases placed on the status docket. *See* Memorandum from David L. Neil, EOIR Director, The Status Docket (Oct. 4, 2022), <https://www.justice.gov/eoir/book/file/1540716/download>.

¹⁰¹ These factors are: “(1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings . . . when the case is recalendared before the Immigration Judge or the appeal is reinstated before the Board.” *Id.* at 327 n.1 (citing *Matter of Avetisyan*, 25 I&N Dec. 688, 696 (BIA 2012)).

¹⁰² Memorandum from David L. Neil, EOIR Director, Administrative Closure (Nov. 22, 2021), <https://www.justice.gov/eoir/book/file/1450351/download>.

PRACTICE TIP: On September 8, 2023, EOIR issued a proposed rule that would codify the BIA and IJs’ to grant administrative closure, dismissal, and termination of proceedings.¹⁰³ There is a 60-day comment period for the proposed rule, and it may take several months after comments close for EOIR to publish a final rule. Practitioners should be aware of this potential regulatory change.

D. Stipulations to Issues and Relief

The Doyle Memo authorizes and “encourage[s]” OPLA attorneys to stipulate to relief in nonpriority cases where they believe the respondent has met their burden to prove eligibility and merits favorable discretion (in cases that have a discretionary element).¹⁰⁴ Since the Doyle Memo has been in effect, practitioners have pushed OPLA to stipulate to relief in strong cases that are well-documented, arguing that such stipulations lead to just results and, in some contexts, such as asylum or adjustment of status, will preserve government resources, rather than forcing USCIS to adjudicate relief after OPLA has already expended resources reviewing the file. Despite the strong language in the Doyle Memo, during stakeholder calls, OPLA has emphasized that its preferred method of PD is dismissal of cases.¹⁰⁵ Nonetheless, practitioners should continue to push OPLA to stipulate to relief, or, at a minimum, to stipulate to issues before individual hearings, such as past persecution for asylum cases and ten years’ continuous presence for non-LPR cancellation cases. Practitioners should highlight that the Doyle Memo calls on OPLA attorneys to “use their professional judgment to do justice in each case” and reminds them the “the government wins when justice is done.”¹⁰⁶ Practitioners should then explain why a stipulation to relief furthers OPLA’s goals and how any other form of prosecutorial discretion would be unjust. Furthermore, OPLA can stipulate to mandatory forms of relief such as withholding of removal, as discussed above, or CAT protection for both priority and nonpriority respondents. Practitioners should be specific about what type of stipulation they are seeking when requesting this type of PD.

PRACTICE TIP: EOIR has also highlighted its ability to use case conferences to narrow issues or resolve cases before scheduling an individual hearing.¹⁰⁷ If OPLA is unresponsive to a practitioner’s efforts to obtain a stipulation, the practitioner could make a motion for a pre-hearing conference, particularly in well-documented cases that could largely be decided on the evidence, such as adjustment of status and non-LPR cancellation of removal cases. Getting the case in front of the judge could force OPLA to review the file and could speed up resolution for the client.

¹⁰³ EOIR, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 88 Fed. Reg. 62242 (Sept. 8, 2023).

¹⁰⁴ Doyle Memo, *supra* note 27, at 13.

¹⁰⁵ See AILA, EOIR/ICE Joint Liaison Committee Meeting with ICE, at 4 (Apr. 7, 2022), AILA Doc. 22032504, [aila.org](https://www.aila.org).

¹⁰⁶ Doyle Memo, *supra* note 27, at 2, 9.

¹⁰⁷ See ICPM Ch. 4.18, <https://www.justice.gov/eoir/reference-materials/ic/chapter-4/18>.

E. Continuances

OPLA attorneys will assess whether “good cause” exists to support a continuance and, if “good cause” exists, should agree to a continuance in nonpriority and priority cases alike.¹⁰⁸ However, the Doyle Memo instructs OPLA attorneys to seek “more durable and efficient forms” of PD instead of repeated continuances to allow USCIS and other agencies to adjudicate applications or petitions.¹⁰⁹ In circumstances where an application or petition is pending with another agency, OPLA will likely push for dismissal.

Practitioners representing clients who would benefit from a continuance should ensure that they meet the regulatory “good cause” standard as interpreted by EOIR.¹¹⁰ While the Doyle memo references *Matter of L-A-B-R-*, 27 I&N Dec. 405 (AG 2018), which interprets the regulatory good cause standard in the context of “collateral” relief, a number of BIA precedents also interpret the “good cause” standard.¹¹¹ Whenever possible, practitioners should file written motions to continue containing arguments in support of “good cause” to allow the IJ and OPLA time to fully assess the arguments.¹¹² In anticipation of efficiency arguments from OPLA, practitioners should consider discussing in the motion why a continuance comports with OPLA’s efficiency goals or why efficiency goals are irrelevant or contrary to the client’s interests.

F. Pursuing Appeal

Under the Doyle Memo, OPLA attorneys may waive appeal or withdraw an already-filed appeal.¹¹³ The Doyle Memo informs OPLA attorneys that they retain discretion over the decision to appeal a merits or bond decision while encouraging them to focus on priority cases. However, if a nonpriority case presents a “compelling basis” for appeal, such as the “need to seek clarity on an important legal issue or correct systematic legal errors,” OPLA attorneys may pursue an appeal.¹¹⁴ In deciding how to proceed, OPLA attorneys should weigh any “compelling basis” for appeal against “compelling discretionary factors” such as the respondent’s detention status, the impact of detention on the respondent, the government resources expended in appealing a detained matter, and if the IJ granted asylum or related protection in a detained case.¹¹⁵ Additionally, OPLA attorneys may reserve appeal to decide, based on the IJ’s decision and overall factors, whether to actually pursue the appeal. Therefore, practitioners should not interpret an OPLA attorney reserving appeal as an indication that the OPLA has declined or will ultimately decline to exercise PD.

¹⁰⁸ Doyle Memo, *supra* note 27, at 13.

¹⁰⁹ *Id.*

¹¹⁰ 8 CFR § 1003.29.

¹¹¹ See, e.g., *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009); *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009) (employment-based visa context); *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012) (U visa context); see also *Matter of L-N-Y-*, 27 I&N Dec. 755 (BIA 2020) (discussing good cause standard in the context of a detained U visa petitioner).

¹¹² For guidance on how to establish “good cause” in the various continuance contexts, see Catholic Legal Immigration Network, *Practice Advisory: Matter of L-A-B-R-, 27 I&N Dec. 405 (AG 2018)* (Dec. 6, 2018), <https://www.cliniclegal.org/resources/removal-proceedings/practice-advisory-matter-l-b-r-27-dec-405-ag-2018>.

¹¹³ Doyle Memo, *supra* note 27, at 14.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

If the client is considered a priority and wins relief before the IJ but OPLA reserves appeal, practitioners should consider submitting a PD request in writing asking OPLA not to file an appeal. The written request should follow the general guidelines provided by the Doyle Memo and the tips in this practice advisory. Practitioners may also need to argue that no “compelling basis” for appeal exists and expressly raise any significant discretionary factors.

Practitioners should also consider reaching out to OPLA in cases pending before the BIA where there is now an argument that OPLA should withdraw the appeal. For example, there may be superseding law or changes in facts that make the respondent’s case stronger. There may also be new equities in the case that make the respondent a lower enforcement priority. Since one goal of the Doyle Memo is for OPLA to use its limited resources on cases that are highest priority, requests for PD can be framed in terms of efficiency since withdrawing the appeal would save OPLA resources in writing an appeal brief.

For detained cases, practitioners should discuss in the PD request if the client is likely to remain detained during the appellate process (*e.g.*, subject to mandatory detention), how detention will negatively impact the particular client (*e.g.*, hardship to family members, effects on mental and physical health, etc.), and a cost assessment of how much DHS will likely expend to detain the client while the BIA decides the case.¹¹⁶ Finally, practitioners who succeed on an asylum or related protection claim for a detained client should immediately confirm with the OPLA attorney that OPLA will notify ERO of the IJ’s decision so that ICE can plan for the client’s release.¹¹⁷ Pursuant to ERO policy, ERO should favor release of noncitizens who have been granted protection relief, “absent exceptional concerns such as national security issues or danger to the community and absent any requirement under law to detain.”¹¹⁸

G. Joint Motions to Reopen

The Doyle Memo authorizes OPLA attorneys to join motions to reopen and dismiss and provides parameters on when to join motions to reopen.¹¹⁹ Where the respondent proves eligibility for

¹¹⁶ According to a 2021 report, the cost of ICE adult detention is approximately \$134 per person, per day. Lutheran Immigration and Refugee Service (LIRS), *Alternatives to ICE Detention for Non-Citizens of the United States* (Jan. 27, 2021),

<https://www.lirs.org/alternatives-ice-detention-united-states/>.

¹¹⁷ See Message from Tae D. Johnson, ICE Acting Director, REMINDER: Detention Policy Where an Immigration Judge Has Granted Asylum, Withholding of Removal, or Convention Against Torture Protection, and DHS Has Appealed (June 7, 2021), *available at*

https://www.acluva.org/sites/default/files/field_documents/redacted_petition_exhibit_excerpts_for_press_release_8-3-23.pdf (found at 44-45); ICE Directive 16004.1: Detention Policy Where an Immigration Judge Has Granted Asylum and ICE Has Appealed (Feb. 9, 2004),

https://www.prisonlegalnews.org/media/publications/ice_memo_detention_policy_where_immigration_judge_has_granted_asylum_and_ice_has_appealed_2004.pdf [hereinafter “ICE Directive 16004.1”].

¹¹⁸ ICE Directive 16004.1, *supra* note 117. Despite this policy, several ICE field offices are holding noncitizens granted withholding or CAT for at least 90 days after the grant of relief, purportedly to search for third countries to which to remove the noncitizen. See, *e.g.*, ACLU of Virginia, *Habeas Petitions Challenging ICE Was Unlawful Detention Practices*, <https://www.acluva.org/en/cases/habeas-petitions-challenging-ice-was-unlawful-detention-practices>.

¹¹⁹ Doyle Memo, *supra* note 27, at 14-15.

permanent or temporary relief outside of immigration court, or reopening would restore the respondent's LPR status, OPLA attorneys are encouraged to agree to a joint motion to reopen and dismiss proceedings.¹²⁰ In general, OPLA attorneys are discouraged from agreeing to reopen cases if reopening would recalendar the case and add to the immigration court backlogs. However, OPLA may agree to reopen proceedings where 1) the noncitizen is newly eligible for relief before the immigration court that has not been considered, and 2) in completed cases where due process was not availed.¹²¹ PLA Doyle has also stated during an unofficial stakeholder call that there is no general rule for or against joining certain motions and that OPLA will consider these on a case-by-case basis and consistent with local guidance.

A request for a joint motion to reopen and dismiss to pursue relief outside of immigration court should include documentary evidence of eligibility for the relief. Similarly, when seeking reopening to pursue relief before the immigration court, practitioners should include documentary evidence of eligibility for the identified relief. Requests to join a motion to reopen and dismiss to restore LPR status will likely be based on post-conviction relief to vacate a prior deportable conviction, or a change in law, so practitioners should include evidence clearly establishing the basis to restore LPR status and arguments that the client is a nonpriority. Finally, in cases where there were due process violations, such as lack of notice, ineffective assistance of counsel, or interpretation issues, practitioners should include an explanation of the alleged due process violations as well as any documentary evidence in support of the request, including a declaration from the respondent.

H. Bond Proceedings

Once ERO has made a custody determination, OPLA is generally expected to defer to and defend that custody determination while also exercising discretion to review custody determinations in both priority and nonpriority cases when new, relevant information arises. If practitioners present new evidence that credibly mitigates flight risk or dangerousness concerns, OPLA may stipulate to a bond amount or to other conditions of release in consultation with ERO, or may waive appeal of an IJ's custody redetermination assuming the respondent is not subject to mandatory detention and not in withholding-only proceedings.¹²²

Practitioners who wish to seek PD in custody re-determinations should consider filing a written PD request that includes the new, relevant information and evidence that mitigates flight risk or dangerousness concerns and states the type of PD sought. For example, if the client can pay a lower bond amount, include that amount in the request, or if the client is willing to be subject to an alternative to detention, note that as well. Discuss in the PD request how the new, relevant facts mitigate flight risk or dangerousness concerns and why it is likely that the client will appear

¹²⁰ *Id.* at 15; ICE, Doyle Memo: Frequently Asked Questions and Additional Instructions (updated Sept. 6, 2023), <https://www.ice.gov/about-ice/opla/prosecutorial-discretion> ("Cases that can be reopened and dismissed for the consideration of new relief before U.S. Citizenship and Immigration Services will be viewed most favorably for joint motions to reopen.").

¹²¹ Doyle Memo, *supra* note 27, at 14-15.

¹²² Doyle Memo at 15; *see Johnson v. Guzman-Chavez*, 141 S. Ct. 2271 (2021) (holding that the detention of a noncitizen subject to a reinstated order of removal is governed by INA § 241 instead of INA § 236).

at a future proceeding if released.¹²³ Practitioners may also consider conferring with the OPLA attorney immediately prior to the hearing to ask about the status of the previously submitted PD request or to make the PD request orally.

PRACTICE TIP: ERO often makes initial custody determinations based solely on criminal or immigration history, without considering mitigating factors. Therefore, practitioners preparing for a bond hearing can often present “new,” relevant information, even if circumstances have not changed, and request stipulation to bond or other conditions of release.

I. Assigning OPLA Attorneys (Waiving Appearance in Court)

Finally, the Doyle Memo states that whether to assign an OPLA attorney at all to a case is a matter of PD.¹²⁴ Even after an OPLA attorney has been assigned to a case, OPLA may waive its court appearance at master calendar hearings, at *in absentia* hearings where evidence of removability has been submitted to the court or removability has already been established, and even at individual hearings on a case-by-case basis. OPLA may also submit its position in writing instead of appearing in court. It is unclear how OPLA would submit objections, take cross examination, or present closing arguments tailored to the individual hearing, but practitioners should object to circumstances in which the IJ attempts to serve as both the judge and the prosecutor as this lack of neutral fact-finder undermines the respondent’s right to a fundamentally fair proceeding.¹²⁵

To date, OPLA has not implemented this portion of the memo on a wide scale, and at OPLA stakeholder meetings, OPLA has indicated that they are still working on guidance regarding the circumstances under which OPLA will not appear in court.

PRACTICE TIP: Practitioners have reported some instances where OPLA submitted a document to the immigration court indicating that they would not appear at the individual hearing, but they did not concede to a grant of relief.¹²⁶ Practitioners should argue that OPLA’s non-appearance constitutes a failure to prosecute and that the judge should grant relief in the absence of OPLA’s appearance.

PRACTICE TIP: In cases where the IJ issued an *in absentia* order, practitioners should review the Digital Audio Recording (DAR) to assess if OPLA was present at the hearing. If OPLA was not present at the hearing and failed to submit a written argument and documentary evidence of

¹²³ For guidance on what types of facts and evidence to include in the PD request, see CLINIC, *Practitioners’ Guide to Obtaining Release from Immigration Detention* (July 29, 2021), <https://cliniclegal.org/resources/enforcement-and-detention/practitioners-guide-obtaining-release-immigration-detention>.

¹²⁴ Doyle Memo, *supra* note 27, at 16-17.

¹²⁵ See e.g., *Abulashvili v. Att’y Gen. of U.S.*, 663 F.3d 197, 207 (3d Cir. 2011) (“The Due Process Clause cannot tolerate a situation where a supposedly neutral fact finder interjects herself into the proceedings to the extent of assuming the role of opposing counsel and taking over cross-examination for the government.”); *Elias v. Gonzales*, 490 F.3d 444, 451 (6th Cir. 2007).

¹²⁶ For a sample OPLA non-appearance notice, see Immigration Courtside (May 31, 2023), <https://immigrationcourtside.com/2023/05/31/%f0%9f%a4%af-wacko-world-of-eoir-dhs-prosecutors-deliver-the-big-middle-finger-bmf-%f0%9f%96%95to-garlands-feckless-immigration-courts-unilate/>.

removability, practitioners may consider arguing that if OPLA was not present to affirmatively prove that the respondent received notice and to establish removability as required by INA § 240(b)(5)(A), OPLA did not meet its burden of proof, and the IJ is prohibited from fulfilling OPLA’s burden of proof for them. If OPLA did submit a written argument and documentary evidence of removability, practitioners should assess if the IJ complied with 8 CFR § 1003.26 in holding an *in absentia* hearing and reviewed the evidence to determine whether DHS had met its burden of proof by presenting “clear, unequivocal, and convincing evidence.”¹²⁷

V. Types of Prosecutorial Discretion That Noncitizens Can Request with ERO

The Mayorkas Memo states that the updated enforcement priorities apply “Department-wide” and “provid[e] guidance for the apprehension and removal of noncitizens.”¹²⁸ Below are several scenarios in which practitioners may cite the enforcement priorities to advocate with ERO for prosecutorial discretion for their clients.

A. Detainers

Detainers are requests from ICE to law enforcement agencies to hold an alleged noncitizen for up to an additional 48 hours beyond the date and time of their release from criminal custody so that ICE may take custody of the noncitizen.¹²⁹ Practitioners with clients in criminal custody with ICE detainers should advocate with ICE to cancel the detainer, highlighting all mitigating factors. To make this request, practitioners should contact the ERO field office with jurisdiction over their client,¹³⁰ and argue that under the Mayorkas Memo, their client is not an enforcement priority and/or that there are compelling mitigating factors present, and request that the detainer be canceled. Because detainers often affect a person’s criminal defense strategy,¹³¹ it is best to contact ICE soon after a detainer has been issued and prior to the client’s release from criminal custody.¹³²

PRACTICE TIP: In the Supreme Court’s June 2023 *United States v. Texas* decision, the Court noted that the case (which resulted in the Mayorkas Memo being reinstated) related only to DHS’s arrest and prosecution policies, and that the government had represented to the Court that the Mayorkas Memo “d[id] not affect continued detention of noncitizens already in federal

¹²⁷ INA § 240(b)(5)(A).

¹²⁸ Mayorkas Memo, *supra* note 2, at 1, 7.

¹²⁹ See 8 CFR § 287.7.

¹³⁰ ICE Field Offices (updated Mar. 9, 2023), <https://www.ice.gov/contact/field-offices?state=All&office=16&keyword=>.

¹³¹ If the practitioner does not represent the client in their criminal proceedings, they should coordinate with the client’s criminal defense attorney.

¹³² DHS cannot compel law enforcement agencies to comply with detainer requests. However, some states and localities have laws either prohibiting or mandating that law enforcement comply with ICE requests. The Mayorkas Memo enforcement priorities do not affect law enforcement agencies’ obligations under applicable local and state laws. Therefore, advocates should direct their requests to ICE, though support from a local elected official (such as the sheriff or congressional representative) can be helpful in persuading ICE to take certain actions.

custody.”¹³³ This is a narrower reading of the Mayorkas Memo than how it was commonly interpreted during its initial period of validity. In light of the government’s representation to the Supreme Court, practitioners should expect that DHS will take the position that the Mayorkas Memo’s enforcement priorities framework does not apply to decisions about whether to release a detained noncitizen from immigration custody.¹³⁴ However, practitioners can argue that the Mayorkas Memo *does* apply to decisions whether to cancel a detainer issued against a noncitizen in state criminal custody, since such decisions involve whether to take a noncitizen into federal custody in the first instance, rather than whether to continue to hold someone in immigration detention.

B. Custody/Detention

Practitioners may advocate for ERO to exercise PD both at the time the agency makes an initial custody determination and for clients who have already been placed in immigration detention. With respect to individuals in the former category, when ICE arrests a person, they make an initial custody determination, which can occur at an ICE processing office, field office, or a detention center. To the extent possible, practitioners should advocate for their client’s release as soon as they are taken into ICE custody for processing, especially if the person has not yet been transferred to a detention center. When a client is being processed at an ICE field office or local sub-office, a practitioner may advocate with ICE to release the client on an order of recognizance (or on a low bond). Note that it can be difficult to locate a client through the ICE online detainee locator¹³⁵ or find the right contact information for ICE while the client is still being transferred and processed at an immigration facility. Local immigration practitioners who have experience with ICE, including the local AILA-ICE liaison, can provide helpful practice tips and may have ICE contact information that is not publicly available, such as the direct phone or email information for an ICE officer. If a client was picked up by ICE from a local jail, they will likely be processed at the nearest ICE office.

When ERO makes an initial decision to detain someone, that person is transferred to a detention center after being processed and assigned an ICE “deportation officer.” For clients in this situation, practitioners can make a release request with the client’s assigned deportation officer, emphasizing the positive and mitigating factors in the client’s case.

PRACTICE TIP: While practitioners can and should also advocate for the release of clients who are already in immigration custody, they should not rely solely on the Mayorkas Memo framework in making their release request, given the *Texas* decision’s discussion of the scope of the Mayorkas Memo. That said, practitioners can use the mitigating factors listed in the Mayorkas Memo as a starting point in identifying the positive factors to highlight in a given client’s case. Regardless of the Mayorkas Memo’s direct applicability, ERO has broad discretion to make custody determinations at any time, even if they previously denied a client’s release request. This means advocates should persistently and creatively pursue release, and proactively highlight all positive equities and mitigating factors. Practitioners should also review and draw

¹³³ *United States v. Texas*, 143 S. Ct. 1964, 1974 n.5 (2023).

¹³⁴ See also Doyle Memo, *supra* note 27, at 15 (stating that the Mayorkas Memo “does not address detention”).

¹³⁵ ICE Online Detainee Locator System, <https://locator.ice.gov/odls/#/index>.

on any other ICE guidance helpful to the client’s situation, for example the ICE Victim-Centered Approach Memo if the client has a pending application for certain humanitarian relief or may be eligible for a victim-based immigration benefit for which they have not yet applied.¹³⁶ Other ICE detention policies that may be relevant in a particular client’s situation include a 2022 ICE policy concerning the detention and release of individuals with serious mental disorders,¹³⁷ a 2015 policy regarding the placement and care of transgender individuals in ICE detention,¹³⁸ a 2021 policy generally prohibiting ICE from detaining individuals known to be pregnant, postpartum, or nursing,¹³⁹ and a 2022 policy about parents and legal guardians subjected to immigration enforcement.¹⁴⁰

C. Parole and Deferred Action

The Mayorkas Memo does not explicitly state that the enforcement priorities shall be applied to parole and deferred action determinations. But because the Mayorkas Memo applies “Department-wide” to decisions for “the apprehension and removal of noncitizens,”¹⁴¹ practitioners should anticipate that these priorities may be applied to such determinations.

Parole allows a noncitizen to remain in the United States for a temporary period when they are otherwise inadmissible or ineligible to remain.¹⁴² CBP may grant parole at a port of entry, ICE may grant parole and release a detained person, and USCIS also has parole authority.¹⁴³

Deferred action is a discretionary determination to defer removal action against a noncitizen, and may be granted by USCIS or ICE.¹⁴⁴ A person need not have a final removal order to

¹³⁶ ICE Victim-Centered Approach Memo, *supra* note 47, § 2, at 2 (“The fact that someone is a victim of crime and, where applicable, may be eligible for victim-based immigration benefits for which they have not yet applied, is a discretionary factor that must be considered in deciding whether to take civil immigration enforcement action against the noncitizen or to exercise discretion, including but not limited to release from detention.”).

¹³⁷ ICE Directive 11063.2, Identification, Communication, Recordkeeping, and Safe Release Planning for Detained Individuals with Serious Mental Disorders or Conditions and/or Who Are Determined to Be Incompetent by an Immigration Judge (Apr. 5, 2022), <https://www.ice.gov/doclib/news/releases/2022/11063-2.pdf>.

¹³⁸ Memorandum from Thomas Homan, Exec. Assoc. ICE Dir., Further Guidance Regarding the Care of Transgender Detainees (June 19, 2015), <https://www.ice.gov/sites/default/files/documents/Document/2015/TransgenderCareMemorandum.pdf>.

¹³⁹ ICE Directive: Identification and Monitoring of Pregnant, Postpartum, or Nursing Individuals (updated July 9, 2021), <https://www.ice.gov/directive-identification-and-monitoring-pregnant-postpartum-or-nursing-individuals>.

¹⁴⁰ ICE Directive 11064.3, Interests of Noncitizen Parents and Legal Guardians of Minor Children or Incapacitated Adults (July 14, 2022), <https://www.ice.gov/doclib/news/releases/2022/11064.3.pdf>. See, e.g., *id.* § 5.3, at 6 (recognizing that detention of such individuals will only be appropriate in “limited circumstances”).

¹⁴¹ Mayorkas Memo, *supra* note 2, at 1, 7.

¹⁴² See, e.g., USCIS, Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States (last reviewed/updated May 2, 2023), https://www.uscis.gov/humanitarian/humanitarian_parole.

¹⁴³ See Memorandum of Agreement Between USCIS, ICE, and CBP for the Purpose of Coordinating the Concurrent Exercise by USCIS, ICE, and CBP of the Secretary’s Parole Authority Under INA § 212(d)(5)(A) with Respect to Certain [Noncitizens] Located Outside of the United States (Sept. 2008), <https://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf>.

¹⁴⁴ Several deferred action programs provide for the consideration of deferred action to large groups of individuals who meet certain criteria, including the Deferred Action for Childhood Arrivals program, the deferred action program for individuals granted Special Immigrant Juvenile Status and awaiting a visa number, and the deferred

receive deferred action. A grant of deferred action allows a noncitizen to apply for work authorization under category (c)(14). In filing requests for deferred action, practitioners should point to the enforcement priorities, as well as other positive equities, mitigating factors, hardship and compelling circumstances, and humanitarian considerations. Practitioners should be creative in their strategies and attempt to present the most compelling argument for prosecutorial discretion. Practitioners filing a stay of removal request with ICE may also want to ask for deferred action.

In requesting parole and/or deferred action, practitioners should also reference any other applicable prosecutorial discretion guidance to strengthen their arguments that parole and/or deferred action are warranted in a particular case. For example, a 2010 ICE policy directs that arriving noncitizens placed in expedited removal and found to have a credible fear should generally be granted parole.¹⁴⁵ And the ICE Victim-Centered Approach memo explicitly lists both parole and deferred action as types of prosecutorial discretion ICE may exercise in favor of noncitizen victims of crime.¹⁴⁶

D. Stays of Removal

Lastly, the Mayorkas Memo applies to the execution of removal orders, which can include decisions regarding whether to grant stays of removal.¹⁴⁷ Practitioners should request stays of removal for clients in immigration custody or under the supervision of ICE who are subject to final orders of removal, and zealously advocate for the exercise of positive discretion in light of the mitigating factors present. In addition to referencing the Mayorkas Memo, practitioners should draw on other relevant guidance, such as the ICE Victim-Centered Approach Memo. That guidance directs that “absent exceptional circumstances, ICE will refrain from taking civil immigration enforcement action against known beneficiaries of victim-based immigration benefits and those known to have a pending application for such benefits.”¹⁴⁸ The guidance further directs that “[e]xcept where exceptional circumstances exist, or if USCIS has administratively closed a case for failure of the applicant to prosecute the application, a noncitizen with a pending victim-based application or petition who is subject to an

action program for workers involved in labor disputes. USCIS, Consideration of Deferred Action for Childhood Arrivals (last reviewed/updated Nov. 3, 2022), <https://www.uscis.gov/DACA>; USCIS Policy Alert: Special Immigrant Juvenile Classification and Deferred Action (Mar. 7, 2022), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220307-SIJAndDeferredAction.pdf>; DHS Support of the Enforcement of Labor and Employment Laws (May 31, 2023), <https://www.dhs.gov/enforcement-labor-and-employment-laws>. But noncitizens who do not qualify for these programs can also seek deferred action from ICE or USCIS on an individual basis.

¹⁴⁵ ICE Directive 11002.1: Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture § 6.2, at 3 (Jan. 4, 2020), https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf.

¹⁴⁶ ICE Victim-Centered Approach Memo, *supra* note 47, § 3.2, at 3.

¹⁴⁷ See Mayorkas Memo, *supra* note 2, at 2.

¹⁴⁸ ICE Victim-Centered Approach Memo, *supra* note 47, § 2, at 2; see also ICE Fact Sheet: Using a Victim-Centered Approach with Noncitizen Crime Victims Questions and Answers (Aug. 8, 2023), <https://www.ice.gov/factsheets/revision-stay-removal-request-reviews-u-visa-petitioners>.

administratively final removal order should generally be issued a stay of removal.”¹⁴⁹

For clients with final orders of removal but who are not detained or under the supervision of ICE, practitioners should consider the risks in filing a stay of removal request, which could bring the individual to ICE’s attention.

PRACTICE TIP: Practitioners should screen clients for involvement in civil rights or labor disputes and consider how their involvement in either type of dispute may support a request for prosecutorial discretion.¹⁵⁰ If a client may be being targeted as a result of retaliation or in violation of their constitutional rights, practitioners should raise this issue to an ICE supervisor immediately.¹⁵¹

VI. Requesting Prosecutorial Discretion with OPLA: Procedures & Practice Tips

When submitting a PD request, practitioners should first consider whether the client falls within one of the three enforcement priority categories laid out in the Mayorkas Memo and echoed in the Doyle Memo. If there is any possibility that they do, practitioners should, where possible, attempt to convince OPLA in the PD request that the client is a nonpriority. Certain forms of PD—namely non-filing of an NTA and agreeing to join a motion to dismiss or for administrative closure—are only available to individuals OPLA deems a nonpriority.¹⁵²

A. What to Include

To determine what to include in the PD request, practitioners should review the OPLA webpage on prosecutorial discretion.¹⁵³ OPLA’s webpage states that there is no particular format required

¹⁴⁹ ICE Victim-Centered Approach Memo, *supra* note 47, § 5.4(a), at 8; *see also id.* § 2.1, at 2 (“When a noncitizen has a pending or approved application or petition for a victim-based immigration benefit, absent exceptional circumstances, ICE will exercise discretion to defer decisions on civil immigration enforcement action against the applicant or petitioner (primary and derivative) until USCIS makes a final determination on the pending victim-based immigration benefit application(s) or petition(s), including adjustment of status for noncitizens with approved Special Immigrant Juvenile status, or, in the case of a T visa, U visa, or VAWA application, until USCIS makes a negative bona fide or prima facie determination.”).

¹⁵⁰ *See* Memorandum from Alejandro N. Mayorkas, DHS Sec’y, Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual, at 3 (Oct. 12, 2021),

https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf (stating that requests for PD based on being victims of or witnesses to workplace exploitation “should be considered on a case-by-case basis, weighing all relevant facts and circumstances”); *see also* DHS, DHS

Announces Process Enhancements for Supporting Labor Enforcement Investigations (Jan. 13, 2023), <https://www.dhs.gov/news/2023/01/13/dhs-announces-process-enhancements-supporting-labor-enforcement-investigations>; *see also* Tulane University Immigrant Rights Clinic, Unemployed Workers United, NIPNLG & National Immigration Law Center, *Practice Manual: Labor-Based Deferred Action* (Mar. 24, 2023), <https://nipnlg.org/work/resources/practice-manual-labor-based-deferred-action>.

¹⁵¹ *See* Mayorkas Memo, *supra* note 2, at 5 (discussing retaliation for the assertion of rights).

¹⁵² ICE, Doyle Memo: Frequently Asked Questions and Additional Instructions (updated Sept. 6, 2023), <https://www.ice.gov/about-ice/opla/prosecutorial-discretion>.

¹⁵³ *Id.*

to request PD; practitioners should request PD by highlighting the type of PD sought and the facts that support the request. The website instructs individuals to follow the instruction sheets implemented by each local OPLA office. The website also states that OPLA welcomes attorney assistance in submitting PD requests for *pro se* respondents.

If the client wants dismissal and is clearly a nonpriority (e.g., has no criminal history or traffic tickets only, entered on or before November 1, 2020, and presents no national security issues), the factual background supporting the request should be relatively straightforward. Practitioners should submit a statement confirming that the client is a nonpriority and there is no objection to the case being dismissed. If the client has a pending application for relief before USCIS (especially survivor-based relief), it is also good practice to include a copy of the receipt notice.

If the priority designation is unclear, practitioners should include an explanation of why the client is a nonpriority under the Doyle Memo¹⁵⁴ and supporting evidence addressing any positive or negative factors in the case. A common scenario is where the client has criminal history, such as a DUI(s), but practitioners are unsure how OPLA will treat it given the lack of bright line rules in the PD assessment under the Doyle Memo. Practitioners should also include confirmation that the client does not object to dismissal (if dismissal is the goal).¹⁵⁵ Lastly, include arguments stating that even if OPLA has designated the case a priority, the client still merits PD based on mitigating factors and either merits re-designation as nonpriority or, even if the case remains a priority for OPLA, a particular form of PD. For example, clients who entered unlawfully after November 1, 2020 may initially be deemed a priority, but practitioners can still ask for PD and re-designation by demonstrating mitigating factors.¹⁵⁶

PRACTICE TIP: Even if a client’s criminal history was from many years ago or appears minor, it is still good practice to include evidence of mitigating factors, as individual OPLA attorneys have significant discretion and often view cases differently from one another. Do not assume that OPLA will view the client’s case as a nonpriority.

Common examples of positive supporting evidence include evidence of a pending application; certified criminal dispositions¹⁵⁷ and proof of rehabilitation; proof of longtime presence in the

¹⁵⁴ It can also be helpful to reference other relevant DHS guidance in PD requests, if appropriate. E.g. ICE Victim-Centered Approach Memo, *supra* note 47 (likely the most relevant in this context); ICE Directive 11063.2: Identification, Communication, Recordkeeping, and Safe Release Planning for Detained Individuals with Serious Mental Disorders or Conditions and/or Who Are Determined to Be Incompetent by an Immigration Judge (Apr. 5, 2022), <https://www.ice.gov/doclib/news/releases/2022/11063-2.pdf>; Memorandum from Alejandro N. Mayorkas, DHS Sec’y, Guidelines for Enforcement Actions in or Near Protected Areas (Oct. 27, 2021), https://www.dhs.gov/sites/default/files/publications/21_1027_opa_guidelines-enforcement-actions-in-near-protected-areas.pdf; Memorandum from Alejandro N. Mayorkas, DHS Sec’y, Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual (Oct. 12, 2021), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf.

¹⁵⁵ Practitioners should follow the same framing and guidelines if seeking another form of PD other than dismissal.

¹⁵⁶ A sample PD request making this argument can be found on the NIPNLG website, at <https://nipnlg.org/sites/default/files/2023-09/Sample-Doyle-Memo-PD-Request.pdf>.

¹⁵⁷ Practitioners should carefully consider what types of criminal records to submit to OPLA. Generally, final criminal dispositions, such as a final judgment or dismissal order, should be sufficient. OPLA may request police or

United States; evidence of family and community ties; letters of support from family, friends and co-workers; and evidence of employment history and tax returns.¹⁵⁸ These are just examples; *any* evidence that highlights positive equities, particularly evidence of the mitigating factors listed in section III.B above, may be included.

PRACTICE TIP: The OPLA PD webpage states that noncitizens who have had their fingerprints taken by DHS in conjunction with an application for relief are not required to submit a background check with their PD request.¹⁵⁹ The webpage also notes that “in some instances” noncitizens who have been fingerprinted as part of an immigration enforcement action will not have to submit a criminal background check.¹⁶⁰ Noncitizens who have not had their fingerprints taken by DHS, or who are not sure whether they have, should submit **FBI fingerprint-based background checks** before OPLA will consider exercising PD.¹⁶¹

PRACTICE TIP: If the client can benefit from PD, do not be afraid to request it (as long as the client agrees)! If the client is in removal proceedings, practitioners should consider seeking PD, even if it is an uphill battle, because there is often nothing to lose by asking for PD since the client is already on ICE’s radar.

B. Where and When to Send an OPLA PD Request

Practitioners should consult the OPLA PD webpage for instructions on where to send PD requests. All OPLA offices have dedicated PD email addresses that are listed on OPLA’s PD website.¹⁶² Some OPLA offices may also accept PD requests by e-service or regular mail, but most, if not all, prefer that practitioners send PD requests to the dedicated PD inbox.¹⁶³ If the practitioner has filed a request that is pending but needs to submit supplemental evidence, it is generally good practice to send the supplemental evidence to the OPLA attorney who is handling the case or PD request.¹⁶⁴ However, practitioners should not submit duplicate PD requests.

OPLA affirmatively reviews cases for PD, even without receiving a request. However, to ensure OPLA has all the relevant information and to put forth the strongest arguments in the client’s

arrest reports, and practitioners should generally push back against submitting such evidence, as it is often highly prejudicial to the client, unnecessary, and inaccurate.

¹⁵⁸ Always check that tax returns were properly filed, and never include documents containing fake Social Security numbers.

¹⁵⁹ ICE, Doyle Memorandum: Frequently Asked Questions and Additional Instructions (updated Sept. 6, 2023), <https://www.ice.gov/about-ice/opla/prosecutorial-discretion>.

¹⁶⁰ *Id.*

¹⁶¹ Individuals who were fingerprinted at the border will likely need to submit an FBI background check. However, individuals who were arrested by ICE in the interior of the United States will likely already have biometrics on file. See AILA, EOIR/ICE Joint Liaison Committee Meeting with ICE, at 7 (Apr. 7, 2022), AILA Doc. 22032504, aila.org.

¹⁶² ICE, Doyle Memo: Frequently Asked Questions and Additional Instructions (updated Sept. 6, 2023), <https://www.ice.gov/about-ice/opla/prosecutorial-discretion>.

¹⁶³ Some offices have separate email addresses for specific types of requests, such as joint motions to reopen.

¹⁶⁴ Practitioners may need to reach out to OPLA to inquire about attorney assignment for the PD request. The practitioner should ask to what email address to send the supplemental evidence, the OPLA attorney’s email address, the duty attorney’s email address, or the office’s generic PD email address.

favor, practitioners should submit a request as early as possible. The Doyle Memo discourages PD requests made late in the course of removal proceedings.¹⁶⁵ The Doyle Memo does not prescribe any specific timelines for review of PD requests though many OPLA field offices have implemented their own goals for timely review and provided guidance regarding when to follow up on a pending request. OPLA generally prioritizes cases on EOIR's *active* docket and their PD review is based on their upcoming court cases. OPLA therefore reviews cases for PD in order of upcoming hearings, so if there is no upcoming hearing in the client's case or the hearing is scheduled many months out, it may take OPLA several weeks or months to respond. At the April 7, 2022 AILA EOIR/ICE Joint Liaison Committee Meeting, ICE noted that jurisdictions are responding to PD requests in a timely manner, within an average response time of sixty to ninety days, but stated that requests for joint motions to reopen are not a response priority.¹⁶⁶ Practitioners should contact OPLA via the duty attorney inbox to follow up on the status of the PD request if more than 90 days have passed.

If OPLA denies the PD request, practitioners may still re-file a PD request if circumstances change, or if new, relevant evidence arises. Keep in mind that PD may be appropriate at different postures of a case, and though OPLA may deny a request early on, they may be more willing to consider it once there is additional evidence in the record that allows them to better understand the client's circumstances and equities (*e.g.*, denying a request to stipulate for relief early on but reconsidering once supporting evidence for a merits hearing is available).

C. Case Escalation

If OPLA has not responded to the PD request or if the practitioner believes that an OPLA attorney has improperly denied the PD request, they can escalate the case for review through the OPLA field office chain of command.¹⁶⁷ Reach out to the Deputy Chief Counsel and then Chief Counsel depending on each jurisdiction's local guidance; contact information for all Chiefs Counsel is on ICE's website.¹⁶⁸ Unfortunately, OPLA has not instituted a case escalation process to National Headquarters or PLA Doyle. Although practitioners cannot escalate individual cases for review with ICE Headquarters, practitioners who are AILA members may raise systemic issues to AILA's ICE National Committee for elevation to ICE Headquarters.¹⁶⁹ If the practitioner fails in obtaining PD after escalation to Chief Counsel and the client's circumstances are compelling, consider asking the client's local congressperson to conduct a congressional inquiry or launching a public deportation defense campaign in partnership with community organizers.¹⁷⁰

¹⁶⁵ Doyle Memo, *supra* note 27, at 9.

¹⁶⁶ See AILA, EOIR/ICE Joint Liaison Committee Meeting with ICE, at 3 (Apr. 7, 2022), AILA Doc. 22032504, [aila.org](https://www.aila.org).

¹⁶⁷ While the Doyle Memo is silent on case escalation procedures, AILA notes from the April 7, 2022 AILA Liaison Meeting with ICE explain this process. *Id.*

¹⁶⁸ ICE, OPLA Chief Counsel Contact Information, <https://www.ice.gov/doclib/about/offices/opla/chiefCounselContacts.pdf>. For information about local OPLA office-specific PD procedures, practitioners can contact the local AILA-ICE liaison.

¹⁶⁹ *Id.*

¹⁷⁰ See, *e.g.*, Emily Tucker et al., Vera Institute for Justice, *Building the Movement* (May 2020), <https://www.vera.org/advancing-universal-representation-toolkit/building-the-movement>; Mijente & Just Futures Law, *Deportation Defense Toolkit* (Nov. 2021), <https://mijente.net/defend/>.

VII. Requesting Prosecutorial Discretion with ERO: Procedures & Practice Tips

Clients subject to ICE enforcement action who are not an enforcement priority under the Mayorkas Memo or who merit prosecutorial discretion for another compelling reason should make a written request to ERO for prosecutorial discretion as soon as possible, regardless of the stage of the case. If a client is not in active removal proceedings, for example because they have an unexecuted order of removal, practitioners will need to discuss with them the risks inherent in bringing themselves to ICE's attention.

A. What to Include

Briefly, a written PD request should include:

- a. A detailed cover letter referencing the Mayorkas Memo¹⁷¹ and explaining why the client:
 - Does not fall into one of the priority categories, and
 - Merits a favorable exercise of discretion.
 - If a client has criminal convictions or a history of contacts with the criminal legal system, practitioners should include arguments that their client is not a threat to public safety using the factors discussed in the Mayorkas Memo, including the extensiveness, seriousness, and recency of the criminal activity, and mitigating factors, such as personal and family circumstances, age, health and medical factors, the impact of removal on family in the United States, evidence of rehabilitation, whether the client has potential immigration relief available, and whether the conviction was vacated or expunged.
- b. Exhibits providing evidence to support an argument for prosecutorial discretion. Evidence could include:
 - For clients with convictions or recent criminal system contacts, evidence of rehabilitation, such as completed probation, classes, treatment programs, Alcoholics Anonymous or Narcotics Anonymous attendance, mental health treatment, and community based social service supports;
 - Evidence documenting physical presence in the U.S. before November 1, 2020;
 - Birth certificates or certificates of naturalization for any U.S. citizen children, spouses, or parents;
 - Letters of support, especially from relatives with lawful status, community members, church leaders, employers, etc.;
 - Letters should be signed and either notarized or accompanied by a copy of the person's photo ID;
 - Letters can reference rehabilitation and treatment, community ties, and/or assistance to family members;
 - Letter of support from a congressional representative;

¹⁷¹ If the client is already in immigration detention and seeking prosecutorial discretion in the form of release from custody, then practitioners should not rely expressly on the Mayorkas Memo but could still draw from its principles in crafting the request. *See supra* Section IV.

- Evidence of employment and payment of taxes (tax returns, pay stubs) – it is important to never include evidence with a fake Social Security number or incorrectly-filed tax returns;
- Other documentary evidence of community involvement, such as church or club membership and volunteer work;
- In addition to, or in lieu of record evidence, a declaration from the client detailing rehabilitation (if applicable), participation in community, and employment.

The evidence should be paginated and well organized, and the PD request should also include an index of evidence, with clear descriptors of each item of evidence and page numbers where the item can be found. Note also that the cover letter should feature the client’s A number clearly in the subject line and the first line of the body of the letter. Practitioners might also consider putting the client’s name and A-number in a header or footer alongside the page numbers.

B. Where to Send an ERO PD Request

If a client is in ICE custody, practitioners can send the PD request to their assigned deportation officer. If the client’s deportation officer is unknown, or their contact information is unknown, practitioners should try contacting the ICE field office’s general number to inquire.¹⁷² If the client is detained at a detention facility, practitioners can also call the detention facility’s front desk and ask to be transferred to ICE. Sometimes those numbers are available on ICE’s website.

Practitioners can also send the PD request to the Assistant Field Office Director (AFOD) and explain that they wish for it to be forwarded to the appropriate person. Again, canvassing local practitioners, including the local AILA-ICE or AILA-EOIR liaisons, will often yield valuable information about whom to contact and how to present the request.

C. Case Escalation

The Mayorkas Memo states that DHS will create a “fair and equitable case review process to afford noncitizens and their representatives the opportunity to obtain expeditious review of the enforcement actions taken.”¹⁷³ If the initial reviewing ICE officer denies a request, practitioners may seek review of the decision by a supervisor. In addition, ERO has set up an ICE Case Review process for escalating a negative decision by the ICE field office.¹⁷⁴ Practitioners should note that escalating a negative decision to field office supervisors does not replace use of the ICE Case Review, and does not need to be completed prior to escalating the request through the ICE Case Review process and beyond.

According to the ICE website, the ICE Case Review Process “offers a channel through which noncitizens and their representatives can request a secondary review of their case,” where the

¹⁷² ICE Field Offices (updated Mar. 9, 2023), <https://www.ice.gov/contact/field-offices?state=All&office=16&keyword=>.

¹⁷³ Mayorkas Memo, *supra* note 2, at 6.

¹⁷⁴ See ICE, Contact ICE About Detention Conditions or Request Case a Review (updated Sept. 1, 2023), <https://www.ice.gov/ICEcasereview>.

noncitizen has “significant reason to believe that not all factors in your case were fully considered” in the prosecutorial discretion request made to the ICE field office.¹⁷⁵ When submitting an ICE Case Review request, practitioners should include a signed Form G-28; the client’s A-number, date of birth, and country of birth; a telephone number and email address; and a statement that a case review was previously submitted to the local ICE office, along with the outcome of that request. The request should include a copy of the request submitted to the local ICE office as well as ICE’s response. The request should specify the type of prosecutorial discretion sought and summarize the facts and any supporting documentation submitted.

If a noncitizen wants to present new facts that were not considered in the initial prosecutorial discretion request made to the ICE field office, they should submit a new request to the local ICE field office with the additional information rather than using the ICE Case Review process. Similarly, if the local ICE field office responded to a prosecutorial discretion request while the Mayorkas Memo was not in effect—between June 24, 2022 and July 27, 2023—the noncitizen should first submit a new request to the local ICE field office to ask that it exercise favorable prosecutorial discretion under the Mayorkas Memo.

The ICE Case Review webpage states that the reviewing officer will prioritize individuals who are detained and whose removal is imminent and will “endeavor to respond within 14 days for detained cases.”¹⁷⁶

As noted above, if practitioners suspect that ICE is taking action against a client in retaliation or in violation of their civil rights and liberties, it is especially important to raise this issue through the ICE Case Review to headquarters, and if necessary, to a congressional representative.

VIII. Public Campaigns & Congressional and Community Advocacy

One of the most powerful tools that practitioners and advocates can use to help their clients obtain a favorable decision is to promote the case publicly by getting community members, organizations, congressional representatives, and/or media involved. Practitioners and advocates have successfully used this strategy to receive a favorable grant of prosecutorial discretion from DHS. In certain cases, taking a case public can make DHS aware that the community is invested in the client’s case and demands accountability, thus increasing the pressure on ICE to make a favorable discretionary determination. The decision whether to go public with a case is highly individualized and depends on the specifics of each situation.

Before making a decision to proceed, practitioners should discuss public engagement strategies with their clients, and obtain their informed consent. Clients and their families are often the most compelling advocates for prosecutorial discretion, but may also experience a high degree of scrutiny from both ICE and the press when going public. This is particularly true of family members who are undocumented or fall within enforcement priorities.

¹⁷⁵ The source of the details about the ICE Case Review Process described in this section are found at ICE, Contact ICE About Detention Conditions or Request Case a Review (updated Sept. 1, 2023), <https://www.ice.gov/ICEcasereview>.

¹⁷⁶ *Id.*

Moreover, going public might be a better option in situations where ICE has already targeted the client. For example, it might not be as effective to engage in a public campaign if a client is currently in jail and an ICE detainer has not yet been filed with the jail, as doing so may trigger an enforcement action. On the other hand, if practitioners know that ICE is seeking to arrest or detain the client or has already detained the client, there is less risk to going public.

Should a client wish to pursue a public campaign for prosecutorial discretion, it can take many forms. Practitioners should encourage their client and their client's family to connect with local community and immigrant justice organizers who can support and advise them on campaign strategies, and practitioners should be prepared to work closely with community advocates.

Family members, organizations, and communities can help write letters and provide testimonials to describe a client's positive equities and strong community ties when reaching out to DHS for prosecutorial discretion. Practitioners can also present signatures from online petitions as additional evidence of community support; mobilize calls to the local ICE field office and ICE headquarters to bring attention to the case; and hold community rallies and vigils outside of ICE offices. In such a rally, family members, local organizations, congressional representatives, and other community members can provide testimonies, and invite trusted members of the media to promote and highlight the cases to a larger audience. Engaging congressional representatives or other elected officials may also bolster the client's case through additional letters of support or ICE inquiries. Whatever the strategy, public campaigns have proven most successful when legal advocates collaborate closely with community organizers.

IX. Conclusion

The Supreme Court's decision affirming DHS's authority to prioritize cases and issue clear guidelines for exercising PD is welcome news to noncitizens. With the decision, DHS can again rely on the Mayorkas Memo and Doyle Memo, which will lead to more predictable results for noncitizens and their counsel. Since PD is by definition discretionary, it is subject to change based on shifting priorities of the administration. It is therefore important that practitioners keep informed about trends on how PD is being exercised so they can provide their clients with the best information as they decide whether it is in their interest to pursue PD.