Practice Advisory for Immigration Advocates:
The Biden Administration's Final Enforcement Priorities

I. Introduction

On September 20, 2021, the Department of Homeland Security (DHS) Secretary, Alejandro Mayorkas, issued a memorandum, *Guidelines for the Enforcement of Civil Immigration Law* ("Mayorkas Memo"), which detailed the Biden administration's "permanent priorities" for immigration enforcement and removal.[1] The enforcement priorities laid out in the Mayorkas Memo apply nationally to the U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). The final priorities go into effect on **November 29, 2021**.[2]

The Mayorkas Memo replaces the *Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* issued on January 20, 2021 by then-Acting Secretary David Pekoske *("*Pekoske Memo"*),*[3] and the *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* ("Johnson Memo"), issued on February 18, 2021 by Acting ICE Director Tae D. Johnson.[4]

The Mayorkas Memo in many ways mirrors past enforcement guidance and continues to instruct immigration officials to focus on three broad categories of noncitizens for enforcement action. The updated priorities continue to allow immigration officials to use broad discretion to take enforcement action if noncitizens pose a current safety threat. However, the Mayorkas Memo distinctly does not contain bright-line rules to guide enforcement decisions. The Memo removes

[1] Alejandro Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law*, September 30, 2021, https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf.

[2] Several states are already challenging the legality of the final priorities. This includes the states of Texas and Louisiana, *Texas v. Mayorkas*, No. 6:21-cv-16 (S.D. Tex. Oct. 22, 2021), https://www.bloomberglaw.com/public/desktop/document/StateofTexasetalvUnitedStatesofAmericaetalDocketNo621cv00016SDTex/2?1637591953, and the states of Arizona, Montana, and Ohio. *Arizona v. Biden,* No. 3:21-cv-314 (S.D. Ohio Nov. 18, 2021), https://mcusercontent.com/cc1fad182b6d6f8b1e352e206/files/c0f29ac9-ac74-d17a-7834-01e9b4f43810/Biden_Complaint.pdf. As of the writing of this advisory, the decisions remain pending and the final priorities will go into effect.

[3] David Pekoske, *Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities,* January 20, 2021*,* https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf.

[4] Tae D. Johnson*, Interim Guidance: Civil Immigration Enforcement and Removal Priorities*, February 18, 2021, https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf.

specific references to certain criminal convictions or criminal history as a basis for enforcement. Although the Memo instructs officers to consider the "totality of circumstances" and exercise their authority to protect the rights of non-citizens, it does not specify how officers should apply these principles when exercising their discretion. The Memo also gives officers the authority to take enforcement action without oversight.

Immigration practitioners should remember that the Mayorkas Memo does not constitute a change in immigration law. The Mayorkas Memo also does not compel ICE officials to take a particular course of action. Although ICE has frequently used its discretion to make harmful enforcement decisions, practitioners should not be dissuaded from zealously advocating for their clients and should continue to make requests for prosecutorial discretion.

This practice advisory provides an overview of the final priorities. The Memo also suggests ways for practitioners to utilize the Mayorkas Memo and its lack of bright-line rules to craft persuasive arguments to protect their clients from harmful enforcement action.

II. Summary of the Updated Enforcement Priorities (Mayorkas Memo)

The Mayorkas Memo lists three general priority categories (substantially the same as the categories listed in interim guidance)[5] that DHS will target for "apprehension and removal." The categories include:

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.

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." 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."

The guidance under this category is a significant departure from the interim guidance, which listed individuals convicted of an aggravated felony or individuals who participated in "criminal gang" activity as presumptively a public safety threat. The Mayorkas Memo advises against reliance on a particular conviction, behavior, or negative case detail to prioritize an individual for

[5] Pekoske Memo at 2.

enforcement action. Immigration officials are instructed to conduct "investigative work" and aim to "review the entire criminal and administrative record" before making enforcement determinations. The guidance also states that the person must be a "current" public safety threat, suggesting that the determination must be supported by recent evidence.

The Mayorkas Memo also lays out non-exhaustive aggravating and mitigating factors for officials to consider in assessing whether an individual is a current threat to public safety. Whether a factor is aggravating or mitigating will depend on the details surrounding the specific factor. If helpful, practitioners may wish to reference additional relevant guidance issued by DHS that may bolster some requests for favorable discretion.

The factors set forth in the Mayorkas Memo include:

- Aggravating factors that weigh in favor of enforcement action (potentially harmful to the client):
    - The gravity of the offense and sentence imposed;
    - Nature and degree of harm caused by the offense;
    - The sophistication of the criminal offense;
    - Use or threatened use of a firearm or dangerous weapon;
    - A serious prior criminal record.

- Mitigating factors that weigh against enforcement action (helpful to the client):
    - Advanced or tender age;
    - Lengthy presence in the United States;
    - Mental condition that may have contributed to the conduct, physical or mental condition requiring care or treatment;
    - Status as a victim of crime or a witness/victim or party in legal proceedings;
    - Impact of the removal on family in the US, such as loss of caregiver or provider;
    - Whether they are eligible for humanitarian protection or other immigration relief;
    - Military or public service of the noncitizen or their immediate family;
    - Time since an offense and evidence of rehabilitation;
    - Conviction was vacated or expunged;
    - A person's exercise of workplace or tenant rights, or service as a witness in a labor or housing dispute.

Note on Additional Prosecutorial Discretion Policies: ICE recently released a directive to support noncitizens who are victims of crime,[6] a "worksite enforcement" memo,[7] and a "protected areas" policy.[8] Under the "Victim-Centered Approach" directive, ICE is instructed to refrain from enforcement action against noncitizens who are victims of or witnesses to a crime. This includes: 1) recipients of victim-based immigration benefits; 2) people with pending applications for victim-based benefits, 3) victims and witnesses during the pendency of any known criminal investigation or prosecution and 4) people with "continued presence".[9] Under the "Worksite Enforcement" Memo, ICE is instructed to cease all mass worksite enforcement operations, and instead redirect its enforcement resources toward exploitative employers. In the "Protected Areas" Policy, immigration officials are instructed to avoid taking enforcement action "to the fullest extent possible" to areas identified as "protected" in the Memo. Practitioners should be familiar with each memo and use these policies, when possible, to advocate for their clients.[10]

Priority Category 3: Threat to Border Security

Noncitizens are a border security priority for apprehension and removal 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. In other words, this category prioritizes anyone who was not present in the United States before November 1, 2020, or who was apprehended trying to enter the United States without authorization, such as by using false documents.

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[6] Tae D. Johnson, *Using a Victim-Centered Approach with Noncitizen Crime Victims*, August 10, 2021, https://www.ice.gov/doclib/news/releases/2021/11005.3.pdf.

[7] Alejandro Mayorkas, *Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual*, October 12, 2021, https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf.

[8] Alejandro Mayorkas, *Guidelines for Enforcement Actions in or Near Protected Areas*, October 27, 2021, https://www.dhs.gov/sites/default/files/publications/21_1027_opa_guidelines-enforcement-actions-in-near-protected-areas.pdf.

[9] Continued presence is an ICE designation provided to individuals identified as a victim of human trafficking. For more information visit https://www.dhs.gov/blue-campaign/materials/pamphlet-continued-presence.

[10] Practitioners may consult the following resources that reference the interim priorities, but continue to offer valuable information and suggestions for the use of prosecutorial discretion on behalf of victims and witnesses of crime, labor, and housing or other civil rights violations: ASISTA, *Policy Alert: Q&A on ICE Directive: Using a Victim-Centered Approach with Noncitizen Crime Victims*, August 23, 2021, https://asistahelp.org/wp-content/uploads/2021/08/ASISTA-Policy-Alert-New-ICE-Guidance-on-Victim-Centered-Approaches.pdf and National Employment Law Project (NELP), et al., *Screening for Civil and Labor Rights Violations in Support of Prosecutorial Discretion*, August 5, 2021, https://www.nelp.org/wp-content/uploads/Intake-Guide-Screening-Civil-and-Labor-Rights-Violations-in-Support-of-Prosecutorial-Discretion-8-5-2021.pdf.

Like the guidance listed in the public safety category, the Memo instructs immigration officials to "evaluate the totality of the facts and circumstances" to determine whether they should take enforcement action against an individual. Therefore, even if a client was apprehended after November 1, 2020, practitioners should still utilize 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.

III. Differences and Similarities from the Biden Administration's Interim Enforcement Policies

Same Enforcement Priority Categories: As previously noted, the Mayorkas Memo includes the same three enforcement categories listed in the interim guidance. However, the Memo removes bright-line rules to help immigration officials determine who falls into one of the three categories. The Memo also includes several statements encouraging immigration officials to consider "the totality of facts and circumstances" in each case.

Additional Language Regarding Civil Rights: The Memo directs immigration officials to use their discretion "in a way that protects civil rights and civil liberties" and cautions officers against using "immigration enforcement as a tool of retaliation." This language likely aims to protect free speech rights and stop ICE officers from targeting individuals like immigration activists, a common practice during the Trump administration. However, the Memo does not include clear parameters for how to protect these fundamental rights of noncitizens when making enforcement determinations. Although the guidance states that immigration officials should receive "extensive" and "continuous" training on the updated guidance, it does not contain any details on how and when officers will be trained to ensure the effective and consistent implementation of the guidelines.

> **Note on Prosecutorial Discretion (PD) Requests Based on the Exercise of Civil and Labor Rights:** 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.[11] If a client may be being targeted as a result of retaliation or in violation of their constitutional rights, practitioners should raise this to an ICE supervisor immediately, as discussed further in the case escalation section below.

Removal of Specific Criminal Exclusions: The updated guidance removes categorical criminal exclusions under the "public safety" category that were present in the interim guidance. Absent

[11] *See id.,* National Employment Law Project (NELP), et al., *Screening for Civil and Labor Rights Violations in Support of Prosecutorial Discretion*, August 5, 2021, https://www.nelp.org/wp-content/uploads/Intake-Guide-Screening-Civil-and-Labor-Rights-Violations-in-Support-of-Prosecutorial-Discretion-8-5-2021.pdf.

is any reference to individuals who have committed aggravated felonies or gang-related convictions as specific priorities. However, immigration officials may continue to take enforcement action against individuals with this type of criminal history. Therefore, practitioners should remain prepared to vigorously advocate for clients with criminal contacts that fall within these categories.

Removal of Supervisor Approval and Oversight: The Mayorkas Memo does not require an immigration official to obtain pre-approval for enforcement action. The interim guidance created a distinction between noncitizens presumed to be an enforcement priority and those who fell outside the priorities. Interim guidance required an immigration official to obtain supervisor approval prior to taking enforcement action against a noncitizen who was outside the priorities. Under the updated guidelines, there is no mention of a presumption for enforcement action, and immigration officials can take enforcement action against any individual without supervisor input or approval.

Data Collection and Review Process: The Mayorkas Memo directs DHS to begin data collection of all enforcement decisions related to the updated guidance. The Memo states that a review process will be in place for the first 90-days, followed by the creation of a long-term review process to ensure a "rigorous review of our personnel's enforcement decisions."

Case Review Process: The Mayorkas Memo states that "a fair and equitable review process" will be created to allow for the review of all enforcement actions. Currently, practitioners and their clients can submit a case review request to ICE following the steps outlined at https://www.ice.gov/ICEcasereview. Although the Mayorkas Memo does not specify if the review process mentioned in the updated guidance is distinct from the current case review process, practitioners should continue using the case review process presently available until any changes are made.

IV. When and How do the Updated Priorities Apply?

The Mayorkas Memo states that the updated enforcement priorities apply "Department-wide" to "decisions for the apprehension and removal of noncitizens." This broad category presumably includes all situations in which immigration officials interact with a noncitizen and exercise discretion, including whether to: stop and question an individual, arrest and detain an individual or release them from custody, and remove an individual from the United States. The guidance also applies to decisions made by the Office of the Principal Legal Advisor (OPLA) in removal proceedings such as determining whether to stipulate to bond, join various types of motions, agree to dismiss proceedings or appeal a case. Below are several scenarios in which advocates may cite the enforcement priorities to help advocate for their clients in these situations.

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/time of their release from criminal custody so that ICE may take immediate custody of the noncitizen. Practitioners with clients in criminal custody with ICE detainers should proactively identify all mitigating factors to advocate for ICE to withdraw/lift the detainer. To make this request, practitioners should contact the ICE Enforcement and Removal Operations (ERO) field office with jurisdiction over their client, 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 rescinded. Because detainers often affect a person's criminal defense strategy,[12] it is best to contact ICE soon after a detainer has been issued and prior to the client's release from criminal custody.[13]

Custody/Detention: Practitioners may also advocate for clients in DHS custody determinations. 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, 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 in the ICE online detainee locator[14] 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 immigration officer. If a client was picked up by ICE from a local jail, they will likely be processed at the nearest ICE office.

After a person is processed and transferred to a detention center, they will be assigned an ICE "deportation officer." Practitioners should use the Mayorkas Memo and any other helpful ICE guidance and emphasize any positive factors (particularly highlighting the mitigating factors mentioned in the Mayorkas Memo) to advocate for their client's release with the assigned deportation officer. As previously noted, ICE has broad discretion to make custody determinations at any time. A deportation office also has the discretion to issue a new custody

[12] Practitioners who are not representing in criminal proceedings should coordinate with the client's criminal defense attorney.

[13] ICE cannot compel law enforcement agencies to comply with detainer requests. However, some states and localities have laws either prohibiting or mandating law enforcement comply with ICE requests. The ICE enforcement priorities do not affect law enforcement agencies' obligations under applicable local and state laws, and apply only to ICE's discretionary decisions. 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 pressuring ICE to take certain actions.

[14] The ICE online detainee locator can be found at https://locator.ice.gov/odls/#/index.

determination, 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. Additional strategies for advocating for release with ICE are covered in the following section.

Initiating Removal Proceedings: Removal proceedings before an immigration judge commence when DHS issues and files a Notice to Appear (NTA). The NTA is an ICE charging document that sets forth the grounds of removability and the factual allegations supporting removability against a noncitizen. When noncitizens are initially taken into ICE custody or are otherwise at risk of being placed in removal proceedings, practitioners should advocate with ICE ERO to refrain from issuing an NTA. Where proceedings have not yet commenced, DHS can unilaterally cancel the NTA.[15] If the NTA has been prepared but not yet served on their client, practitioners still have the opportunity to request that ICE not serve the NTA, as service is necessary to commence removal proceedings.[16] If an NTA was served on a client but not yet filed with the immigration court, practitioners may contact OPLA to request that they not file the NTA with the court. Given the current delays and backlogs in the immigration courts, making a request to OPLA can be an effective strategy, especially if the client is pursuing affirmative relief before USCIS.

As for persons filing applications before USCIS, the policy contained in its November 7, 2011 Policy Memorandum 602-0050 ("2011 NTA Memo") was reinstated in the Pekoske Memo, and the Mayorkas Memo does not further address it, so it should be considered to be in effect.[17] Thus, practitioners should be aware of the specific circumstances[18] in which USCIS will refer a case to ICE for consideration of NTA issuance, and review the 2011 NTA Memo prior to filing certain applications.

Joint Motions and Agreements with the Office of Principal Legal Advisor (OPLA) – Unlike the Pekoske Memo, the Mayorkas Memo does not explicitly state that it applies to decisions to "settle, dismiss, appeal or join in a motion on a case."[19] However, the Mayorkas Memo states

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[15] 8 CFR § 239.2.
[16] 8 CFR § 1239.1.
[17] *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens*, November 7, 2011, https://www.uscis.gov/sites/default/files/document/memos/NTA%20PM%20(Approved%20as%20final%2011-7-11).pdf.
[18] The 2018 NTA guidance, which was rescinded in the Pekoske Memo, significantly expanded USCIS authority to issue an NTA. The reinstated 2011 NTA Memo directs USCIS to issue an NTA in limited circumstances including when 1) required by statute or regulation, 2) when there is a statement of findings of substantial fraud that is part of the record, and 3) when naturalization applicants are removable. The Memo also directs USCIS to refer a case to ICE in the following situations: Egregious Public Safety Cases, Non-Egregious Public Safety Criminal Cases, and National Security Entry Exit Registration System (NSEERS) Violator Cases. However, ICE should still use the final priorities to guide its decision on whether to issue an NTA.
[19] Pekoske Memo at 2–3.

that the enforcement priorities should be implemented with "consistency in decision-making across the entire agency and the Department."[20] This should include the broad range of OPLA activity that was more explicitly covered by the Pekoske Memo and the subsequent Trasviña Memo, such as whether to appeal a court decision and whether to join or not oppose motions for continuance, administrative closure, placement of the case on the status docket, and motions to terminate proceedings (including on appeal), as well as motions to remand and motions to reopen, even outside of the statutory time and numerical bars that would otherwise exclude them from consideration.[21] OPLA is expected to issue updated guidance incorporating the Mayorkas Memo. In the meantime, its website reflects the guidance currently in place, as an exercise of its longstanding inherent authority to exercise prosecutorial discretion.

> **Note on Administrative Closure:** In *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021), Attorney General Garland overturned *Matter of Castro-Tum*, 27 I&N 271 (A.G. 2018), which held that immigration courts' use of administrative closure was not authorized. Prior to *Castro-Tum*, and more frequently during the Obama administration, OPLA could agree to administratively close a case and remove it from an active court docket. In those cases, OPLA would evaluate whether the individual was an enforcement priority and consider equity arguments put forth by practitioners before agreeing to administrative closure, effectively allowing the individual to remain in the United States while retaining the option to recalendar the case in the future and place it back on an active docket. This practice has been valuable for clients who might not benefit from moving forward on an application for relief from removal. It also allowed clients to extend their work authorization if they were eligible. Under the Trump administration, some administratively closed proceedings were recalendared. Practitioners should carefully consider the viability of their clients' claims for relief and discuss with them the pros and cons of accepting administrative closure – including the possibility of recalendaring and further development of the law underlying their clients' claims for relief, both positive and negative.

Practitioners should point to the enforcement priorities and applicable OPLA and local guidance to advocate with OPLA to join in a particular motion. Where clients do not fall under the priorities, but there are arguments that justify reopening, practitioners should also file a request with OPLA seeking an agreement to reopen the proceedings. For strategies for filing a joint motion request to OPLA, see Section V below.

Practitioners with clients in removal proceedings who do not fall within the priorities may also request that OPLA join in a motion to dismiss or terminate proceedings and explain why the

[20] Mayorkas Memo at 6.
[21] *See* 8 C.F.R. § 1003.23(4)(iv).

client's situation warrants the exercise of favorable discretion.[22] Although *Matter of S-O-G- & F-D-B-,* 27 I&N Dec. 462 (A.G. 2018) limited the circumstances in which an immigration judge may dismiss or terminate proceedings, immigration judges may still do so upon a joint motion from the parties.[23]

Note that while arguments regarding the enforcement priorities are appropriate for use in requests to OPLA, they are only binding on DHS, and not the immigration courts. Therefore, the enforcement priorities should not be relied on in motions to the court, or to supplant the statutory or regulatory basis for the motion. However, following the release of the interim priorities, EOIR instructed immigration judges to inquire if a respondent appearing before them is an enforcement priority and whether OPLA has considered exercising prosecutorial discretion.[24] Moreover, on November 22, 2021, David Neal, the Director of EOIR issued a memorandum to *Provide guidance to adjudicators on administrative closure in light of Matter of Cruz-Valdez, 28 I&N Dec. 326 (A.G. 2021)* ("Neal Memo") that reviews the use of administrative closure as a docket management tool since the 1980s and its restoration under *Matter of Cruz-Valdez*, and offers protocols for adjudicators to inquire as to whether administrative closure or some other use of prosecutorial discretion is warranted or desired in cases coming before them.[25]

The Neal Memo instructs adjudicators to focus resources on cases in which DHS considers the respondent to be an enforcement authority (under the Mayorkas Memo) and those in which the respondent desires a full adjudication of their claims. The Memo instructs adjudicators to encourage resolution of administrative closure issues prior to the individual hearings and solicit the parties position on administrative closure or any other use of prosecutorial discretion well in advance of the individual hearing. Where the parties have not reported back to the court, the Memo urges adjudicators to inquire with DHS counsel on the record at the beginning of the hearing whether the respondent is an immigration enforcement priority, or if they intend to exercise some form of prosecutorial discretion in the case, including administrative closure. Finally with regard to administrative closure specifically, the new EOIR Memo notes that "[P]ending the promulgation of a regulation addressing administrative closure, immigration judges and the Board should apply the Board's case law 'except when a court of appeals has held otherwise,'... [and that] [f]or cases arising in the Sixth Circuit, adjudicators must determine to

[22] *See* 8 C.F.R. § 239.2(c) (DHS may move to dismiss proceedings where its continuation is no longer in the best interest of the government.).
[23] *Matter of S-O-G- & F-D-B-* has been overturned by the Fourth Circuit. *Gonzalez v. Garland*, 16 F.4th 131 (4th Cir. 2021).
[24] Jean King, *Effect of Department of Homeland Security Enforcement Priorities*, June 11, 2021 (directing immigration judges to "inquire, on the record . . . as to whether [cases] remain[] a removal priority for ICE and whether ICE intends to exercise some form of prosecutorial discretion."), https://www.justice.gov/eoir/book/file/1403401/download.
[25] David Neal, *Provide guidance to adjudicators on administrative closure in light of Matter of Cruz-Valdez, 28 I&N Dec. 326 (A.G. 2021)*, November 22, 2021, https://www.justice.gov/eoir/book/file/1450351/download.

what extent administrative closure is permitted given that court's case law, and they must handle issues involving administrative closure accordingly."[26]

Parole and Deferred Action - Parole allows a noncitizen to remain in the United States for a temporary period when they are otherwise inadmissible or ineligible to remain. CBP may grant parole at a port of entry, or ICE may grant parole and release a detained person.

Deferred action is a discretionary determination to defer removal action against a noncitizen, and may be granted by USCIS or ICE. A person need not have a final removal order to receive deferred action. Formal notices of deferred action may be issued that allow a noncitizen to apply for work authorization under code (c)(14), but deferred action may also be granted without a formal notice. 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.

Unlike the Pekoske and Johnson Memos, the Mayorkas Memo does not explicitly state that the enforcement priorities shall be applied to parole and deferred action determinations. But again, because the Mayorkas Memo applies "Department-wide" to "decisions for the apprehension and removal of noncitizens," practitioners should anticipate that these priorities may be applied to such determinations. Practitioners may also reference the additional discretion memos relating to worksite enforcement and the protection of victims and witnesses noted in Section II above, to strengthen their arguments that parole and deferred action are warranted in a particular case.

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.[27] 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 and the "totality of the circumstances."

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.

[26] *Id*. n. 4, citing *Hernandez-Serrano v. Barr*, 981 F.3d 459 (6th Cir. 2020) and *Garcia-DeLeon v. Garland*, 999 F.3d 986 (6th Cir. 2021) (holding that adjudicators have the limited authority to administratively close proceedings to allow respondents to apply with USCIS for provisional unlawful presence waivers.).
[27] *See* Mayorkas Memo at 2.

V. Advocacy Strategies Under the Priorities

ICE's power to choose whom to deport and what enforcement actions to take (or not take) is known as prosecutorial discretion. The following section lays out the nuts and bolts of seeking prosecutorial discretion (at various stages of a case, detailed above). It also provides strategies for escalating a request following an initial denial, and for engaging in a public campaign if DHS continues to deny the request.

1. Requests for Prosecutorial Discretion ("PD")

When to make a PD Request

If a client is subject to any of the enforcement actions mentioned above, or a client is in removal proceedings, and they are not an enforcement priority under the new guidance or merit prosecutorial discretion for another compelling reason, practitioners should make a formal, written request for prosecutorial discretion as soon as possible, regardless of the stage of the case. Additionally, practitioners may alert ICE of their intention to do so prior to filing. 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 action taken."[28]

If a client is **not in removal proceedings**, practitioners will need to discuss with them the **risks** inherent in bringing themselves to ICE's attention. This risk will also depend in part on whether the client has any prior orders of removal, contacts with CBP, and/or applications pending with another agency. Any of these factors increases the client's risk of being placed in removal proceedings or being removed on a pre-existing order.

Anatomy of a PD Request

Briefly, a written PD request should include:

- A detailed cover letter referencing the guidance 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

[28] Mayorkas Memo at 6.

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.

- 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 (not electronically) 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;
    - 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 organized with letter tabs, and the PD request should also include a Table of Contents, with clear descriptors of each item of evidence and reference to the tab 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 it in a header or footer alongside the page numbers.

Where to send the PD request

To whom the PD request is addressed will depend on the goal being sought for the client and the stage of the case. In August 2021, the 25 main field locations of OPLA each released guidance which include detailed instructions for how to submit requests for prosecutorial discretion, including the required contents and format of submissions as well as where requests should be

sent. Practitioners should consult guidance issued by the relevant OPLA office before preparing and submitting PD requests.[29]

Alternatively, many OPLA offices have an email address or e-portal for written submissions, and practitioners can send the PD request there. Finally, if neither of those options is available, there is usually an "duty attorney" email address with a different Assistant Chief Counsel (ACC) assigned to monitor it daily; practitioners can email that address to send the PD request and ask which ACC is assigned to the client's case. It is also a good practice to canvass practitioners in the jurisdiction where the request will be filed, and ask if there is a designated email for proposed joint motions to reopen or similar PD requests, or if they have other suggestions for how to present the request. Note that OPLA has not yet released specific guidance for its attorneys on how to apply the new enforcement priorities. Until OPLA issues new guidance, its current guidance issued by local OPLA offices may remain helpful.

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. 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 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.

Escalating a Request

If the initial reviewing ICE officer or OPLA attorney denies a request, practitioners may seek review of the decision by a supervisor. In addition, ICE ERO has set up an ICE Case Review process for escalating a negative decision by the Field Office. Practitioners should note that escalating a negative decision to the field office supervisors does not replace use of the ICE Case Review, and does not need to be completed prior to escalating the request to the ICE Case Review and beyond.[30]

In order to utilize the ICE Case Review process, practitioners must first submit their request to the field office, and cases involving individuals detained in ICE custody or pending imminent

[29] *See* ICE, *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor (OPLA)*, for contact information for OPLA local offices. Additionally, practitioners may consult a recent NIPNLG practice advisory *Comparing LOCAL OPLA Interim Guidance Requirements for Documenting Criminal Histories* (August 11, 2021), for further information.

[30] *See* Contact ICE About an Immigration/Detention Case, https://www.ice.gov/ICEcasereview (last visited Nov. 15, 2021).

removal will be prioritized. Practitioners should include Form G-28, the client's A-number, other identifying information, a telephone number, and a valid email in their requests.

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.

For requests to OPLA, practitioners may elevate the request to Deputy Chief Counsel and Chief Counsel for that office. It is good practice, however, to consult the ACC assigned to the case about the request, if ongoing, and to use the designated email provided by the applicable field office for the request.

2. 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, 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 move forward, practitioners should discuss public engagement strategies with their clients, and obtain their informed consent before proceeding. 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.

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, going public is a strategy worth considering.

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, can mobilize calls to the local ICE field office and ICE headquarters to bring attention to the case, and can hold community rallies and vigils outside of ICE offices, where family members, local organizations, congressional representatives, and other community members can provide testimonies, and the media is invited 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.

VI. Conclusion

The guidance described in the Mayorkas Memo presents an important advocacy tool for immigration practitioners to utilize in requesting prosecutorial discretion for noncitizen clients. We will continue to monitor policy developments in the federal immigration enforcement context, and we encourage practitioners to share their experiences and successes[31] from their advocacy.

[31] Practitioners may contact Cristina Velez at cristina@nipnlg.org and Lena Graber at lgraber@ilrc.org to share information.