

PRACTICE ADVISORY¹

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**DHS REVIEW OF LOW PRIORITY CASES FOR PROSECUTORIAL
DISCRETION**By Alexa Alonzo² and Mary Kenney

On August 18, the Obama Administration and DHS announced the establishment of a high-level joint Department of Homeland Security (DHS)-Department of Justice (DOJ) working group charged with ensuring that DHS and DOJ resources are focused on the highest immigration enforcement priorities, namely, national security, public safety, border security and the integrity of our immigration system. See [Napolitano Letter](#) and [Backgrounder](#).

- The working group will conduct a case-by-case review of the approximately 300,000 cases currently pending before the immigration courts, the BIA and federal courts of appeals. Those removal cases that are identified as “low priority” will be administratively closed and the respondents will be eligible to apply for work authorization with USCIS.
- The working group will also initiate a case-by-case review to ensure that new cases placed in removal proceedings meet DHS’s enforcement priorities and will issue guidance to prevent, on a case-by-case basis, low priority cases from entering the system.
- Additionally, the working group will issue department-wide guidance on prosecutorial discretion, including for cases that already have final orders of removal.
- In taking low priority cases out of the system, additional resources will be focused on those posing a threat to public safety. In essence, the announcement provides mechanisms for nationwide implementation of the two June 17, 2011 memoranda on prosecutorial discretion issued by John Morton, Director of ICE. See [“Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens”](#) (“Exercising Prosecutorial Discretion”) and [“Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs”](#) (“Victims, Witnesses and Plaintiffs”).

What will happen to cases deemed low priority?

Cases currently before the immigration courts and the BIA will be reviewed and those that are deemed low priority will be administratively closed. Removal cases currently pending in federal court will also be reviewed and low priority cases will be considered for an exercise of prosecutorial discretion, although it is not clear what this will be.

It is unclear what will happen from this point forward to new cases determined to be low priority. DHS has indicated that the working group will initiate a case-by-case review to ensure that new cases placed in removal proceedings meet DHS's enforcement priorities. It is not clear for how long this review will last or how extensive it will be. The working group also will issue guidance to prevent, on a case-by-case basis, low priority cases from entering the system. If a case is identified as "low priority" it remains to be seen whether no enforcement action will be taken (i.e., removal proceedings will not be initiated) or whether these new cases will be placed into removal proceedings and then administratively closed.

Will individuals whose cases have been administratively closed receive EADs?

DHS has stated that all individuals whose cases have been administratively closed will be eligible to apply for an employment authorization document (EAD) with USCIS. The legal basis for the EAD, what factors might be used to grant or deny an EAD application under this policy, and the validity period of the EAD have not been clarified. It is quite possible, however, that the basis for issuing the EAD will be 8 C.F.R. § 274.12(c)(14), which allows an individual who has been granted deferred action to apply for an EAD.

What are DHS's enforcement priorities?

In the June 17, 2011 Morton memo, Exercising Prosecutorial Discretion, and a subsequent question and answer guide ([FAQ](#)) regarding the August 18 announcement, DHS has made clear that its enforcement priorities are national security, public safety, border security, and repeat immigration law violators.

According to the FAQ, DHS will have "zero tolerance" for those apprehended at the border. It specifically states that removal cases involving recent border crossers will not be included in the review of cases carried out by the working group. It is not clear how DHS – and in particular CBP and ICE – will define who is a "recent border crosser."

What are low priority cases?

Low priority cases will be identified under the factors set forth in the June 17, 2011 Morton memo, Exercising Prosecutorial Discretion. The memo lists numerous factors that DHS should weigh in deciding whether a case is low priority or not. While DHS has made clear that no category of cases will receive a blanket exercise of favorable prosecutorial discretion, the memo does identify certain categories of individuals who are to receive particular attention. These include veterans; long-time permanent residents; minors and the elderly; individuals who have been present since childhood; individual

with serious disabilities or health issues; women who are nursing or pregnant; and victims of domestic violence or other serious crimes. The memo also identifies more general factors to be considered in all cases. DHS has stated that they will be weighing the totality of the circumstances in each case. For a full discussion of the factors in the Morton memo, *see* the Legal Action Center’s practice advisory, [Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client](#).

Is it possible for cases with criminal convictions to be considered low priority?

The June 17, 2011 Morton memo, *Exercising Prosecutorial Discretion*, makes clear that cases will be reviewed on a case-by-case basis and considered based on the totality of the circumstances presented in each individual case. There is no bright-line rule that would automatically disqualify any case. However, the memo does contain a list of negative factors that will be looked at with particular care. This list includes “serious felons, repeat offenders, and individuals with a lengthy criminal record of any kind,” as well as “known gang members.”

What is the difference between administrative closure and termination of the Notice to Appear (NTA)?

Administrative closure is a procedural convenience used to temporarily remove a case from the immigration court’s calendar. Under current law, a case cannot be administratively closed if both parties do not agree to the closure. *Matter of Gutierrez*, 21 I&N Dec. 479, 480 (1996). A person whose case has been administratively closed remains in removal proceedings, and either party can request that the case be placed back on the court’s calendar at any time.

A case that is administratively closed remains pending, although inactive. Termination means that the case has ended and the respondent is no longer in removal proceedings. Upon termination, the individual will revert to the same status he or she was in prior to commencement of proceedings. If the government wants to place the individual back into removal proceedings after a case is terminated, it would have to file a new Notice to Appear.

Should an individual (other than an “arriving alien”) whose case has been administratively closed eventually become eligible for adjustment of status, he or she will need to have the removal proceedings terminated before USCIS will have jurisdiction over the adjustment application.

When will the working group review of the 300,000 cases begin?

Specifics as to how the working group review will be conducted or the timeframe for the review process are not known, although DHS states in the FAQ that it will take the working group several months to review all pending cases. In the meantime, ICE attorneys will be asked to review the cases on their docket and close those that are “low priority” cases.

What should I be doing now?

The DHS FAQ indicates that both removal proceedings and removals will continue while the working group carries out its review. During this time, however, ICE attorneys and officers have been told to consider all cases in light of DHS enforcement priorities. Thus, you should continue to make requests for prosecutorial discretion. Requests should be made in writing and include as much supporting documentation as possible.³ For currently pending cases that will be subject to review, this will ensure that there is favorable information in the client's file when the working group review takes place. It does not appear that respondents or their attorneys will know in advance when the review of their cases will take place.

Moreover, although the working group will be conducting a systematic review of all pending cases, other avenues for requesting prosecutorial discretion remain open. ICE attorneys and officers still retain the authority to exercise prosecutorial discretion and given this announcement, may be more amenable to exercising it favorably than in the past. Additionally, the announced review process does not include cases with final removal orders, and so no systematic review of these cases is expected. For that reason, individual advocacy for prosecutorial discretion on behalf of these clients is all the more important.

You should also ensure that your clients understand that their obligations under the immigration laws remain the same. There has been a lot of confusion and misinformation over what the August 18th announcement is and is not. It is important that your clients understand that the announcement is not an amnesty. We have, for example, heard of individuals granted voluntary departure believing that they do not have to leave, which is simply wrong. The August 18th announcement has no impact on an existing voluntary departure order; anyone under such an order who fails to timely depart will face the consequences.⁴

Additionally, individuals should not seek to turn themselves into immigration authorities to get an EAD. As the DHS FAQ explains, such action carries a high risk that the individual will be placed in removal proceedings and may be ordered removed. For helpful guidance for clients, *see* [AILA Consumer Advisory](#).

What can I do to assist AILA and LAC in monitoring implementation of the new guidance?

In order to monitor how the new guidance is being implemented in the field, we need to hear your experiences with your local office. Please complete this [survey](#) and tell us about your cases. This will help with our ongoing liaison and advocacy efforts with DHS. Thank you!

Endnotes:

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³ For more on preparing a request for prosecutorial discretion, *see* [Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client](#).

⁴ For more on these consequences, *see* the Legal Action Center's practice advisory [Voluntary Departure: Automatic Termination and the Harsh Consequences of Failing to Depart](#).