



PRIVATE BILLS &  
DEFERRED ACTION



TOOLKIT



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## **Disclaimer**

This toolkit is designed to provide information about the law and to help users pursue private bills and deferred action. Legal information is not the same as legal advice—the application of law to an individual's specific circumstances. Although we have gone to great lengths to make sure our information is accurate and useful, we recommend you consult a lawyer if you want professional assurance that our information, and your interpretation of it, is appropriate to your particular situation.

## Selected Readings

### For more information on Private Bills:

- Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* (American Immigration Lawyers Associations, 2008).
- Margaret Mikyung Lee, *Private Immigration Legislation* (Aug. 9, 2005), CRS Report for Congress No. RL33024.
- R. Beth, *Private Bills: Procedure in the House* (Oct. 21, 2004), CRS Report for Congress No. 98-628, available at [www.rules.house.gov/archives/98-628.pdf](http://www.rules.house.gov/archives/98-628.pdf).
- Bernadette Maguire, *Immigration: Public Legislation and Private Bills* (University Press of America, 1997).

### For more information on Deferred Action:

- Mary Kenney, Practice Advisory: *Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client*, (American Immigration Council Legal Action Center, 2010).
- Immigration Policy Center, Executive Action: A Resource Page available at <http://www.immigrationpolicy.org/just-facts/executive-action-resource-page>
- Ira J. Kurzban, *Immigration Law Sourcebook* (12<sup>th</sup> ed., 2010).
- Shoba Sivaprasad Wadhia, *Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion*, Immigration Policy Center, American Immigration Council (2010) available at <http://ssrn.com/abstract=1723165>.
- Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010).
- Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Cases*, 41 SAN DIEGO L. REV. 819 (2004).
- Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42 (1977).
- Leon Wildes, *The United States Immigration Service v. John Lennon: The Cultural Lag*, 40 BROOK L. REV. 279 (1974).

## Preface

### I. PURPOSE

The purpose of this toolkit is to provide an instrument to aid practitioners in producing compelling arguments for extraordinary relief on behalf of their clients, while also appealing to Congress to address the human dimensions of the immigration laws. This toolkit delves into two forms of relief: private bills and deferred action. The goal of this toolkit is to provide concise and helpful information for practitioners representing clients' whose last possible options for relief are deferred action or private bills. Both forms of relief are tricky and difficult, at best. This toolkit includes background information on deferred action and private bills, best practices, sources of law, case summaries, and other resources, to aid individuals in their pursuit of relief.

### II. THE REMEDIES

A **private bill** is a bill for the relief of one or several specified persons, corporations, institutions, etc. It is distinguishable from a public bill, which relates to public matters and covers the entire population or specified classes within the population. A private immigration bill is an extraordinary remedy that can assist noncitizens with unusual problems rising from atypical hardships. At its core, a private immigration bill is an exception to the general law and should not be viewed as a method for evading the general law.

**Deferred action** is when the Department of Homeland Security (DHS), or any of the immigration agencies under its umbrella, agrees not to place an individual in removal (deportation) proceedings or not to execute an order of removal. A decision to grant or deny a request is solely a discretionary administrative act and is not subject to administrative or federal court review. Deferred action is not an entitlement. The decision to grant deferred action is made at the agency level and is subject only to agency guidance through manuals and internal agency memoranda.

There are no official forms to fill out or formal procedures to request deferred action.

### **III. KNOW THE RISKS**

It is extremely important to understand the risks of attempting to obtain either form of relief. Both a private bill and deferred action often mark the point at which an individual seeking to avoid removal is left with no other option. In attempting to obtain either form of relief, the prospective beneficiary must understand that they are shedding light on their situation and informing the government of their current status, which is likely in violation of the immigration laws. There is also potential for an increased risk to members of the prospective beneficiary's family, as the family members' immigration statuses may come to the attention of the authorities. If the private bill or deferred action is unsuccessful, the beneficiary is usually left with no other options, and may be forced to leave the country.

### **IV. ABOUT THE AUTHORS**

Launched in 2008, the Center for Immigrants' Rights<sup>1</sup> is an immigration clinic where students work on innovative advocacy and policy projects relating to United States ("U.S.") immigration primarily through representation of immigration organizations. The Center promotes a modernized immigration system that legally recognizes and affords due process to individuals entering or living in the U.S. to work, study, reunite with family, or acquire refuge from danger in their home countries. The mission of the Center is to represent immigrants' interests through legal excellence, advocacy, education, and collaboration with key stakeholders and the community.

Maggio+Kattar<sup>2</sup> and Duane Morris LLP<sup>3</sup> are leading law firms in the immigration field. Both firms practice and have expertise in all areas of immigration

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<sup>1</sup> [http://law.psu.edu/academics/clinics\\_and\\_externships/center\\_for\\_immigrants\\_rights](http://law.psu.edu/academics/clinics_and_externships/center_for_immigrants_rights).

<sup>2</sup> <http://www.maggio-kattar.com>.

<sup>3</sup> <http://www.duanemorris.com>.

law, representing individuals, families, corporations, non-profits, and universities. They are committed to protecting immigrants' rights and advancing the legal opportunities for immigrants in the U.S. Maggio+Kattar and the immigration group at Duane Morris take a serious approach to developing a more just and humane immigration law.

## **V. METHODOLOGY**

This toolkit is primarily based on the experiences of practitioners in the field. In order to create a compilation, the research was conducted in phases. The first phase was an examination of laws, policy memoranda, and related authorities in order to identify the foundational precepts of the law. This information was collected, organized, and streamlined into the Background sections of this toolkit.

The second phase involved soliciting practical knowledge and advice from practitioners who have sought private bills and/or deferred action on behalf of their clients. An initial electronic request for information was sent out to listservs targeting attorneys in the immigration field. We followed up with practitioners who voluntarily replied to our request, and interviewed them about their experiences via telephone. The interviews were conducted with prepared questions designed to fill in the gaps in the background research. Specifically, practitioners were asked about: the details of their respective cases; the culture and procedures of their local congressional offices and immigration agency field offices; the processes they used when preparing their requests for relief; the techniques and resources they implemented when building outside support for their clients; the resources and information they found most helpful when preparing their cases; and what information, not readily available to them, would have been useful when they undertook their respective cases. We also attempted to contact immigration officials and activist organizations that participated in private bill or deferred action cases. In both instances, concrete information was not made available in time for

the publication of this toolkit.<sup>4</sup> The facts gathered from the interviews were synthesized into the information and advice provided in the Background and Best Practices section.

In the third phase of the research, we asked practitioners to volunteer redacted documents and notes from their case files. These documents included requests for relief composed by the practitioners, exhibit lists and documentation for their claims, letters of support from the community or activist organizations, and examples of news coverage. Samples from these materials are included in the Case Summaries section of this toolkit. The samples are intended to provide users with references for comparison to their own cases, as well as ideas for new approaches.

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<sup>4</sup> However, a conversation with Immigration and Customs Enforcement (“ICE”) Headquarters revealed that they are in the process of creating internal guidance for ICE officers in order to ensure more consistent processing of deferred action requests.

## Background: Private Bills

### I. INTRODUCTION

A private bill is an individual discretionary exception to the general law. It provides relief for one or a number of people, a corporation, or an institution.<sup>5</sup> Private bills differ from public bills in that public bills are far reaching, relate to public issues, and deal with the individual only indirectly.<sup>6</sup> The underlying principle of any private bill is to correct a personal injustice that cannot be remedied under the general law.<sup>7</sup> They are a rare form of relief from immigration laws and are usually reserved for the most compelling cases. Private bills serve a two-fold purpose: they provide individual relief for those individuals pursuing the bill; and as the numbers of private bills on a particular issue increase, they act as a red flag educating and warning Congress and other decision-makers that flaws and inequities exist in the current laws.<sup>8</sup>

### II. HISTORY

Private bills have been a part of our nation's history and legislation since the first Congress, when the first private bill was passed on September 24, 1789 and signed into law by George Washington.<sup>9</sup> The First Amendment to the Constitution of the United States provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

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<sup>5</sup> A. Hinds, *Hinds' Precedents of the House of Representatives of the United States*, Washington, D.C. U.S. Govt. Print. Off., 1907, vol. IV, at 247.

<sup>6</sup> *Id.*

<sup>7</sup> Bernadette Maguire, *Immigration: Public Legislation and Private Bills* 4 (University Press of America, 1997).

<sup>8</sup> Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 1 (American Immigration Lawyers Association) (2008).

<sup>9</sup> "An Act to Allow the Baron de Glaubeck the Pay of a Captain in the Army of the United States," ch.26, 6 Stat. 1 (1789). This first private law "gave seventeen months back pay at the rank of captain to the Baron de Glaubeck, a foreign officer in the service of the United States." 1 Guide to Congress 526 (5th ed. 2000).

*and to petition the Government for redress of grievances.*"<sup>10</sup> The last phrase of the First Amendment has often been cited as the source of authority for private bills.<sup>11</sup> The power to enact private laws is exclusively within the authority vested in Congress under Article I of the Constitution relating to the responsibilities of the legislature to pay the debts of the United States. Courts have interpreted "debts" to include both moral and honorary debts.<sup>12</sup>

While the absolute number of private bills submitted by individual Members of Congress has remained relatively steady, the numbers that have become private laws has shown a sharp decline. Five of the 108 laws the first Congress passed in 1789 were private bills.<sup>13</sup> This number grew over the years and from 1817 to 1971; most Congresses enacted hundreds of private bills.<sup>14</sup> The highest number of private bills during one Congress occurred during the 59th Congress (1905-06) when Congress approved 6,249 bills.<sup>15</sup> In the area of immigration, Congress has enacted over 7,000 private immigration bills since its first session in 1789.<sup>16</sup> Though this sounds quite positive, the following information puts the number into perspective: from the 77th Congress in 1942 until the 107th Congress in 2003, 60,601 private immigration-related bills were introduced but only 6,761 of them were enacted.<sup>17</sup> The 109th Congress (2005-07), introduced 77 private immigration bills but not one of them became law.<sup>18</sup> The reduction in the number of private bills over the last forty years comes from a combination of both the expansion of discretionary administrative relief, and the fallout from scandals involving congresspersons

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<sup>10</sup> Emphasis added.

<sup>11</sup> Bernadette Maguire, *Immigration: Public Legislation and Private Bills* 2 (University Press of America, 1997).

<sup>12</sup> *Id.* at 3.

<sup>13</sup> Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 7 (American Immigration Lawyers Association) (2008).

<sup>14</sup> R. Beth, Private Bills: Procedure in the House (Oct. 21, 2004), CRS Report for Congress No. 98-628, available at [www.rules.house.gov/archives/98-628.pdf](http://www.rules.house.gov/archives/98-628.pdf).

<sup>15</sup> A History of the Committee of the Judiciary 1813-2006, H. Doc. 109-158, p. 143 (2006).

<sup>16</sup> Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 8 (American Immigration Lawyers Association) (2008).

<sup>17</sup> U.S. Department of Homeland Security, *Yearbook on Immigration Statistics*, 2003 (U.S. Government Printing Office 2004), Table 51.

<sup>18</sup> Report on the Activities of the Committee of the Judiciary of the House of Representatives during the One Hundredth and Ninth Congress, 107-08, H. Rep. 109-749.

pressured to introduce private bills, or who did so in bad faith.<sup>19</sup> Notably, the 111<sup>th</sup> Congress passed two private bills granting permanent resident status on December 22, 2010.<sup>20</sup>

### III. PRIVATE BILLS

A private bill is drafted on behalf of the individual seeking relief and introduced by a Member of Congress. Typically, the attorney representing the individual will play a large role in the drafting although the Congressperson or a member of his or her staff may draft the bill. Hardship is the principle factor in private immigration bills.<sup>21</sup> The case must be extraordinary to justify an exception to the general law.<sup>22</sup> On the subject of private immigration bills, Peter Rodino, who would later become chair of the House Committee on the Judiciary from 1973 to 1989, said: “A private immigration bill is an extraordinary remedy available to assist aliens with unusual problems resulting in unusual hardship. The private immigration bill is, in essence, an exception to the general law and should be viewed as such and not as a method to circumvent the general law.”<sup>23</sup>

In addition to the hardship criteria, Congressional precedents act as key player in the passage of a private bill.<sup>24</sup> When confronted with a particular case, Congress often looks to past decisions and actions to determine whether a bill should be enacted into law.<sup>25</sup> Executive Branch opposition, veto by the President, or failure of passage in either the Senate or the House of Representatives of similar

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<sup>19</sup> Arguably the most famous and devastating abuse of private bills was the Abscam scandal of the 1970s and 1980s. The scandal involved FBI agents posing as rich Middle Eastern sheiks who offered Members of Congress money in exchange for introducing private bills that would allow the wealthy Middle Easterners to immigrate. The sting operation ultimately led to the conviction of one Senator, five members of the House of Representatives, and an INS inspector, among others.

<sup>20</sup> An Act for the Relief of Shigeru Yamada, Private Law No: 111-1 (2010); An Act for the Relief of Hotaru Nakama Ferschke, Private Law No: 111-2 (2010).

<sup>21</sup> Bernadette Maguire, *Immigration: Public Legislation and Private Bills* 4 (University Press of America, 1997).

<sup>22</sup> *Id.* at 5.

<sup>23</sup> 117 Cong. Rec. 10143 (1971).

<sup>24</sup> Bernadette Maguire, *Immigration: Public Legislation and Private Bills* 8 (University Press of America, 1997).

<sup>25</sup> *Id.* at 18.

bills could suggest the potential failure of a pending private bill.<sup>26</sup> On the other hand, if a private bill contains facts that are similar to a past case where a private bill had a positive outcome, success is more likely. For example, a large number of precedent cases suggest that applicants who can show strong relationships to United States citizen relatives may be able to achieve a favorable disposition.

Under the rules of both the Senate Subcommittee on Immigration, Border Security and Citizenship and the House Subcommittee on Immigration, Border Security and Claims, no private bill shall be considered or acted upon by these Subcommittees until all avenues for administrative and judicial relief have been exhausted.<sup>27</sup> In most situations, this exhaustion requirement is not too difficult to overcome, as there is often no law that applies to, or provides a remedy for, a private bill-seeker's extraordinary circumstances.

Once drafted, a private bill is moved through congressional procedure in the same way as a public bill, including introduction and referral to a committee.<sup>28</sup> Any Member of Congress may introduce a bill at any time that Congress is in session. The "sponsor" is the congressperson introducing the bill. Once the bill is printed in the *Congressional Record*, it is assigned a legislative number. Copies of the bill are then sent to the respective judiciary committees of each house, which have jurisdiction over private bills.<sup>29</sup>

The House of Representatives and the Senate each have their own rules that guide consideration of all legislation in Congress.<sup>30</sup> The judiciary committees in each house have jurisdiction over private bills, including those involving immigration matters.<sup>31</sup> However, the Senate Subcommittee on Immigration, Refugees and Border Security (hereinafter Senate Subcommittee), and the House Subcommittee on Immigration, Citizenship, Refugees, Border Security and

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<sup>26</sup>*Id.*

<sup>27</sup> Senate Subcomm. Rules, no. 3; House Subcomm. Rules, no. 3.

<sup>28</sup> See Appendix C for flow chart on how a public bill is introduced and referred.

<sup>29</sup> Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 14 (American Immigration Lawyers Association) (2008).

<sup>30</sup> Bernadette Maguire, *Immigration: Public Legislation and Private Bills* 9 (University Press of America, 1997).

<sup>31</sup> *Id.*

International Law (hereinafter House Subcommittee) within their respective judiciary committees actually initiate any action on the bill through hearings and the preparation of background reports. The “Rules of Procedure” are adopted by the subcommittees on immigration and then affirmed by the judiciary committees.<sup>32</sup> From here, the rules of each house of Congress differ.

#### **IV. THE SENATE RULES**

There are fewer rules guiding the drafting and introduction of private bills in the Senate than there are in of the House of Representatives. After consideration by the Senate Committee on the Judiciary, bills are placed on a Calendar of Business for action.<sup>33</sup> Generally, the bills are taken up by unanimous consent on the Senate floor at a time that is convenient for the majority leader. Hence, there are no designated days or time limitations on the consideration of private bills, as there may be for public bills. The Senator endorsing the private bills must sign and deliver them.

Prior to the introduction of a private bill, the Senate Subcommittee asks Senators who want to introduce a private bill to send a letter, copying the ranking member, explaining his or her request and attaching a copy of the private bill.<sup>34</sup> Most Senators comply with and are familiar with this procedure even though it is not listed in the formal rules.<sup>35</sup> At this point, the Senate Subcommittee takes no position on the bill and moves it forward.

In accordance with the Senate Subcommittee rules, supporting information for private bills is capped at three to four typewritten pages. This information should contain:

- A detailed statement by the sponsor establishing the equities of the case and explaining why adequate remedy is not otherwise available;
- The alien registration number of the potential beneficiary;

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<sup>32</sup> *Id.*

<sup>33</sup> The Legislative Process of the Senate Floor: An Introduction, CRS Report for Congress No. 96-548, available at [www.senate.gov/reference/resources/pdf/96-548.pdf](http://www.senate.gov/reference/resources/pdf/96-548.pdf).

<sup>34</sup> Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 8 (American Immigration Lawyers Association) (2008).

<sup>35</sup> *Id.*

- The Senate bill number and copy of the bill; and
- A request that the chair of the Senate Subcommittee obtain a departmental report on the beneficiary (this is usually from ICE).<sup>36</sup>

The sponsor may also submit background material, such as character references and employment or school records, in conjunction with the aforementioned materials.<sup>37</sup>

Consideration of a private bill will not occur until the relevant government agency has submitted a report as requested. The agency is supposed to generate the report within 60 days, but it typically takes much longer.<sup>38</sup> After the report is received, the private bill may then be placed on the Calendar for the Senate Subcommittee's consideration.<sup>39</sup>

## V. STAYS OF REMOVAL

A stay of removal serves to prevent DHS from executing an order of deportation, removal, or exclusion.<sup>40</sup> In those cases where a subcommittee requests a report from DHS on a beneficiary of a private bill, the subcommittee has the power to ask DHS to stay the removal of the beneficiary until final action is taken on the private bill.<sup>41</sup> Traditionally, an individual's chances of obtaining a stay of removal are much stronger in the Senate than in the House, as each house has distinct procedures and habits for granting stays of removal to potential beneficiaries.<sup>42</sup>

The process for obtaining a stay in the Senate begins with the Senate Subcommittee requesting a background report from the relevant government agency (generally from ICE) regarding the individual for whom the bill is written. The chair of the Senate Subcommittee writes a sponsor's request for a report and

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<sup>36</sup> *Id.* at 28.

<sup>37</sup> *Id.*

<sup>38</sup> Telephone interview with Anna Gallagher, Shareholder and Head of Litigation and Global Visas Practice, Maggio + Kattar, P.C. (Oct. 28, 2010).

<sup>39</sup> Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 29 (American Immigration Lawyers Association) (2008).

<sup>40</sup> See U.S. DOJ EOIR, Fact Sheet: Forms of Relief from Removal (Aug. 3, 2004), available at <http://www.justice.gov/eoir/press/04/ReliefFromRemoval.htm>.

<sup>41</sup> Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 29 (American Immigration Lawyers Association) (2008).

<sup>42</sup> Telephone interview with Christopher Nugent, former Senior Counsel, Holland & Knight, LLP. (Sept. 23, 2010).

sends it to ICE.<sup>43</sup> Once the ICE Office of Congressional Affairs receives the request, it determines which of its field offices will prepare the response.<sup>44</sup> The selected field office will conduct an investigation that includes a review of the A-file and interviews with various people, including the intended beneficiary and their family members.<sup>45</sup> At this point, a criminal background check is also done.<sup>46</sup> Once ICE receives a report request, it will institute a stay of removal for the intended beneficiary of the private bill for the entire session of the Congress, during which the bill was introduced, including a grace period up to the month of March following the end of the session.<sup>47</sup>

Under the House Subcommittee rules, however, the House Subcommittee will not intervene in removal proceedings or institute a stay by requesting a report from ICE unless the bill is designed to prevent “extreme hardship” to the beneficiary or a U.S. citizen spouse, child or parent.<sup>48</sup> A determination of whether the extreme hardship requirement has been met must be made during a formal meeting of the House Subcommittee.<sup>49</sup> The Senate Subcommittee, on the other hand, will generally request a report from ICE at the behest of the sponsor of the bill without initial consideration of the merits of the case.<sup>50</sup> The Senate Subcommittee requires a showing of hardship only for certain disfavored categories.<sup>51</sup> Given the differences in these processes, an advantage of introducing a private bill through the Senate is the increased potential for a stay of removal.

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<sup>43</sup> This procedure is simpler than that of the House where there is a need for subcommittee approval (i.e., the members of the subcommittee must approve a request for a report by vote). Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 29 (American Immigration Lawyers Association) (2008).

<sup>44</sup> Anna Gallagher, Brent Renison, and Daniel Weiss, *Out in the Cold: People With No Options Under Our Current Immigration System*, AILA Immigration Practice Pointers (11th ed. 2010).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> House Subcomm. Rules, no. 4, 5.

<sup>49</sup> CRS Report for Congress RL33024, at 4 (February 28, 2007), available at <http://www.ilw.com/immigrationdaily/news/2007,1010-crs.pdf>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

## VI. THE HOUSE OF REPRESENTATIVES RULES

### *A. Introducing a bill in the House of Representatives*

The House of Representatives has very detailed rules with regard to the procedure for a private bill. A request for consideration of a private immigration bill begins with a letter from the sponsor of the bill to the chairperson of the House Subcommittee. The letter should contain all of the relevant facts in the case and all supporting documents. The House Subcommittee will only review cases that are of an extraordinary nature and that require an exception to the current law.<sup>52</sup> Generally, the House Subcommittee will only act favorably on those private bills that meet certain precedents.<sup>53</sup> Precedents, in the arena of private bills, are regarded as similar to case law in their effect. House members will cite to precedents to support their point and benefit their bill, just as practitioners would make use of certain cases in their arguments or briefs.<sup>54</sup> Note that all precedents, however, do not necessarily carry equal weight.<sup>55</sup> For example, recent precedents are more powerful than earlier ones, and a precedent that is part of an evolved pattern may carry more weight than an isolated one.<sup>56</sup>

The House Subcommittee will not accept documents in support of a private bill unless they are filed directly by the sponsor of the bill. Supporting documentation must be submitted in triplicate and should contain:<sup>57</sup>

- The date and place of birth of each beneficiary<sup>58</sup>

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<sup>52</sup> Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 22 (American Immigration Lawyers Association) (2008).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> T. Carr, *Parliamentary Reference Sources: House of Representatives*, CRS Report to Congress RL30787, at 4 (Mar. 16, 2004), available at [www.rules.house.gov/archives/r130787.pdf](http://www.rules.house.gov/archives/r130787.pdf).

<sup>56</sup> *Id.*

<sup>57</sup> Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 23 (American Immigration Lawyers Association) (2008).

<sup>58</sup> In this instance, "beneficiary" refers to the individual who will benefit from the passage of the private bill.

- The addresses and telephone numbers of each beneficiary presently in the United States
- The dates of all entries (legal and illegal) and departures from the United States, along with the type of visa used for admission; the name of the consulate where the beneficiary obtained a visa for entry; the name of the consulate where the beneficiary will be seeking a visa if one is used
- The status of all petitions and immigration proceedings, including immigrant and nonimmigrant petitions that have been filed by the beneficiary or on his or her behalf
- Copies of all immigration-related letters between agencies in the United States and the beneficiary
- Copies of all administrative and judicial decisions involving the beneficiary's case
- The names, addresses, and telephone numbers of interested parties in the United States
- The names, addresses, dates and places of birth, and immigration or citizenship status of all close relatives
- The occupations, recent employment records, and salaries of all beneficiaries
- A signed statement by each beneficiary, or the beneficiary's guardian, that he or she wants the relief requested in the private bill<sup>59</sup>
- Information on how failure to obtain the relief sought in the private bill will result in extreme hardship to the beneficiary or each beneficiary's U.S. citizen spouse, parent, or child
- A signed statement by the sponsor of the bill confirming that he or she has personally met with the beneficiary or with members of the beneficiary's family<sup>60</sup>

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<sup>59</sup> See Client A Case Summary and following redacted documents for an example.

<sup>60</sup> See *Id.*

## ***B. Voting in the House of Representatives***

Once a private bill has gone through the House Subcommittee and the House Committee on the Judiciary, it moves to the floor of the House of Representatives for debate.<sup>61</sup> The calendar for private bills, the “Private Calendar,” is called on the first and third Tuesday of each month.<sup>62</sup> The consideration of the Private Calendar bills on the first Tuesday is mandatory unless it is discarded by a two-thirds vote.<sup>63</sup> On the first Tuesday of each month, the Speaker directs the call of the Private Calendar.<sup>64</sup>

If two or more Members object to a bill called from the Private Calendar, the bill is automatically recommitted to the committee reporting it.<sup>65</sup> If, on the other hand, there are no objections to a private bill the entire House of Representatives will consider it.<sup>66</sup> The Majority Leader and the Minority Leader each appoint three congresspersons to serve as “Private Calendar Objectors” during a Congress.<sup>67</sup> The “Private Calendar Objectors” are present on the Floor of the House in order to object to any private bill they find unacceptable for any reason.<sup>68</sup>

Although more unusual than requests from the Senate, the House Subcommittee may also request a report from DHS or ICE. The House Subcommittee may request that ICE stay the removal of the beneficiary until final actions are taken on the private bill.<sup>69</sup> Note that according to the House Subcommittee rules, this stay is only granted in those cases designed to prevent extreme hardship to the beneficiary or to the U.S. citizen spouse, parent, or child.<sup>70</sup> The House Subcommittee can only request this report after a voice vote of its

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<sup>61</sup>Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 22 (American Immigration Lawyers Association) (2008).

<sup>62</sup>Honorable F. James Sensenbrenner, Jr. of Wisconsin, Extension of Remarks in The House of Representatives: The History of the Private Calendar and the Consideration of Private Bills (April 21, 1999) (*available at* [http://www.rules.house.gov/archives/consid\\_priv\\_bill.htm](http://www.rules.house.gov/archives/consid_priv_bill.htm)).

<sup>63</sup>*Id.*

<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>*Id.*

<sup>68</sup>*Id.*

<sup>69</sup>Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 24 (American Immigration Lawyers Association) (2008).

<sup>70</sup>*Id.*

members indicating their support.<sup>71</sup> Once the House Subcommittee requests the report, ICE follows the same procedures as they do when the Senate makes such a request.

## **VII. EXECUTIVE APPROVAL**

When both houses of Congress have passed a private bill in identical forms, a copy of the private bill is enrolled for presentation to the President.<sup>72</sup> Under the U.S. Constitution, the President must approve every bill passed by the House of Representatives and the Senate before it becomes a law. Once a bill is delivered to the White House, the bill commences the ten-day constitutional period for presidential action. If the President approves the bill, he or she will sign it into law. A private bill may also become a private law without the President's signature if the President does not object to the bill and returns it within the ten days after its presentation.<sup>73</sup> The private bill becomes a private law on the date of the President's approval or passage over the President's veto.<sup>74</sup> If Congress prevents the private bill's return by adjourning, the private bill does not become a law and must be reintroduced, starting the congressional process over.

Once the President approves a bill or permits it to become law without signing it, the White House sends the original enrolled bill to the archivist of the United States for publication. At this point, the bill is assigned a private bill number.<sup>75</sup> Published individually as slip laws, private bills are included chronologically in *The United States Statutes at Large*.

## **VIII. ENACTMENT OF A PRIVATE LAW**

Upon enactment of a private bill, ICE and relevant offices of the State Department will take appropriate action in accordance with the terms of the private law and ICE shall not subsequently institute removal proceedings against the

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<sup>71</sup> *Id.* .

<sup>72</sup> *Id.* at 15.

<sup>73</sup> U.S. Constitution art. I, §7.

<sup>74</sup> Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 15 (American Immigration Lawyers Association) (2008).

<sup>75</sup> *Id.*

beneficiary on grounds based solely on information developed and contained in the judiciary committee's reports on the legislation.<sup>76</sup>

DHS will notify the appropriate ICE field office of the enactment of a private immigration bill.<sup>77</sup> When a private bill provides the beneficiary with Lawful Permanent Resident (LPR) status, the beneficiary must pay the appropriate visa fee. Thereafter, the field office will prepare a Form I-181 to be placed in the A-file. At this point, the beneficiary will receive the relevant notification and documents from the field office.<sup>78</sup> When a private bill authorizes the grant of immediate relative or preference status, in order to obtain an immigrant visa, the field office will send Form G-388 to the appropriate party.<sup>79</sup> This will include a notice that a visa petition should be filed, if necessary.<sup>80</sup> In the event that the private bill directs that pending removal proceedings should be terminated, the field office will notify the beneficiary that proceedings have indeed been terminated as a result of the bill. Also, if a private bill grants some other form of benefit or waiver, the field office will notify the beneficiary and offer the appropriate instructions as to how to proceed.<sup>81</sup>

## **IX. WORK AUTHORIZATION**

The regulations do not specifically provide for work authorization to a potential beneficiary of a private bill. However, a potential beneficiary of a private bill may be able to obtain a work permit, if the beneficiary first acquires deferred action.<sup>82</sup> A successful private bill may lead to LPR status for the potential beneficiary, which would not require the individual to obtain work authorization. However, obtaining a private bill may take years. In the meantime, it may help the beneficiary to try to receive work authorization while the private bill is pending. In

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<sup>76</sup> Legacy OI 107.1(h)(2).

<sup>77</sup> Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 36 (American Immigration Lawyers Association) (2008).

<sup>78</sup> Legacy OI 107.1(h)(2).

<sup>79</sup> Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 36 (American Immigration Lawyers Association) (2008).

<sup>80</sup> Legacy OI 107.1(h)(2).

<sup>81</sup> Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 36 (American Immigration Lawyers Association) (2008); *See also* Legacy OI 107.1(h)(2).

<sup>82</sup> Anna Gallagher, Brent Renison, and Daniel Weiss, *Out in the Cold: People With No Options Under Our Current Immigration System*, AILA Immigration Practice Pointers (11th ed. 2010).

order to obtain work authorization, counsel must request deferred action for the time that the private bill is pending. If deferred action is granted, counsel can file for work authorization under 8 CFR § 274a.12.

USCIS is responsible for adjudicating requests for employment authorization under 8 CFR § 274a.12.<sup>83</sup> To apply for employment authorization one must file Form I-765.<sup>84</sup> If deferred action is granted as a result of the introduction of a private bill, and the beneficiary receives notice of such a decision, he or she should submit a copy of that notice with the application for work authorization.<sup>85</sup> On the other hand, if the beneficiary has not received a notice of deferred action, but a report has been requested from ICE and removal stayed, USCIS will have to review the beneficiary's file to confirm that a stay has been granted in order to issue an employment authorization document.<sup>86</sup>

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<sup>83</sup> Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 33 (American Immigration Lawyers Association) (2008).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* 33 (American Immigration Lawyers Association) (2008), *citing* Electronic correspondence with David G. Gulick, Domestic Operations Chief of Staff, USCIS, dated Sept. 10, 2007.

## Quick Guide: Private Bills

- **What is a private bill?**
  - A private bill is an individual discretionary exception to the general law in the form of legislation
- **Where does the authority for a private bill come from?**
  - The First Amendment to the Constitution of the United States says, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, *and to petition the Government for redress of grievances.*”
- **Who is eligible for a private immigration bill?**
  - Individuals with extraordinary circumstances and hardship for which the law does not provide a just remedy
- **When should a private bill be sought?**
  - When all other forms of relief have been denied/exhausted, but the individual has a valid and compelling reason to remain in the United States
- **How do I get a private bill introduced?**
  - Find a congressperson to be a sponsor for the private bill
  - Gather relevant information required under House or Senate rules
  - Draft the bill
  - The sponsor will then start the legislative process
- **Is there a difference between introducing the bill and obtaining a stay of removal in the House or Senate?**
  - Introduction of a private bill in the House does NOT result in an automatic stay of removal while the bill is pending; the chance of obtaining a stay of removal is much stronger in the Senate
  - There are different procedures for the passage of laws in the House and the Senate; the rules of procedure in the House are more stringent than those in the Senate
- **What factors do Congresspersons take into consideration when deciding to sponsor a private bill?**
  - How sympathetic the individual is
  - Whether the individual has a criminal record

- Whether the Congressperson is up for re-election and how sponsoring the bill could positively or negatively affect his or her campaign
- **What information should I include in, or in support of, the private bill requested from the Senate?**
  - Typically, the attorney representing the individual will play a large role in the drafting of the private bill
  - Hardship is the principle factor in private immigration bills
  - Cite to precedent
  - The bill itself should give the name of the individual and the specific immigration status that is being requested (usually LPR status)
  - Supporting information for private bills is capped at three to four typewritten pages
  - This information should contain:
    - A detailed statement by the sponsor establishing the equities of the case and explaining why adequate remedy is not otherwise available
    - The alien registration number of the potential beneficiary
    - The Senate bill number and copy of the bill
    - A request that the chair of the immigration subcommittee request a departmental report on the individual (this is usually from ICE)
  - The sponsor is also allowed to submit background material, such as character references, employment or school records, etc., in conjunction with the aforementioned materials
- **What information should I include in, or in support of, the private bill requested from the House?**
  - Typically, the attorney representing the individual will play a large role in the drafting of the private bill
  - Hardship is the principle factor in private immigration bills
  - Cite to precedent, where possible
  - The bill itself should give the name of the individual and the specific immigration status that is being requested (usually LPR status)
  - The following supporting documentation and information must be submitted in triplicate form with the private bill:
    - The date and place of birth of each beneficiary
    - The addresses and telephone numbers of each beneficiary presently in the United States
    - The dates of all entries (legal and illegal) and departures from the United States, along with the type of visa used for admission; the name of the consulate where the beneficiary obtained a visa for entry; the name of the consulate where the beneficiary will be seeking a visa if one is used

- The status of all petitions and immigration proceedings, including immigrant and nonimmigrant petitions that have been filed by the beneficiary or on his or her behalf
  - Copies of all immigration-related letters between agencies in the United States and the beneficiary
  - Copies of all administrative and judicial decisions involving the beneficiary's case
  - The names, addresses, and telephone numbers of interested parties in the United States
  - The names, addresses, dates and places of birth, and immigration or citizenship status of all close relatives
  - The occupations, recent employment records, and salaries of all beneficiaries
  - A signed statement by each beneficiary, or the beneficiary's guardian, that he or she wants the relief requested in the private bill
  - Information on how failure to obtain the relief sought in the private bill will result in extreme hardship to the beneficiary or each beneficiary's U.S. citizen spouse, parent, or child
  - A signed statement by the sponsor of the bill confirming that he or she has personally met the beneficiary or with members of the beneficiary's family
  
- **How does a private bill move through Congress?**
  - The movement of a private bill through congressional procedure occurs in the same way as a public bill, including introduction and referral to a committee
  
- **Is getting the bill introduced the only thing I need to do?**
  - Introduction of the bill is just the beginning
  - You must also build public support for the individual and passage of the bill
  
- **How do I build support?**
  - Contact family and friends of the individual
  - Contact organizations that the individual is involved with
  - Contact non-profit organizations
  - Begin internet and social networking campaigns
  - Contact the media
  
- **How can supporters help the individual's effort?**
  - Write letter of support to be submitted with the bill
  - Fax letter of support to the Congressional offices of the sponsor, committee and subcommittee chairs, and DHS

- Write letters to the editors of local newspapers, drawing attention to the individual's case
  - Knock on doors to garner further support of the individual
  - Use their own contacts within DHS, Congresspersons, and local government
  - Organize a march or rally on Capitol Hill
  - Use the power of the electorate to encourage Congresspersons to pass the bill
- **How do I make use of the media?**
    - Talk to local reporters to try and get them to cover the story
    - On camera interviews
    - Local interest shows
    - Start a blog or Facebook campaign on behalf of the individual
- **What happens after a private bill becomes a private law?**
    - DHS will notify the appropriate district office of its enactment
    - When a private bill provides the beneficiary with lawful permanent resident status, the appropriate visa fee will be paid and the field office will prepare a Form I-181 to be placed in the "A" file
    - The beneficiary will receive relevant documents or forms from the field office once process is complete
- **Can I get a work permit while my private bill request is pending?**
    - There is no independent basis under the regulations for a work permit while the bill is pending
    - The individual must qualify for authorization under 8 CFR §274a.12(c)(14) which authorizes a work permit for those who are granted deferred status
    - Only known vehicle is through deferred action; counsel should apply for deferred action in conjunction with the private bill
    - The individual must file Form I-765
- **What happens if my private bill does not become a law?**
    - The individual may be removed or detained until removal can be effectuated
- **How long does it take for a bill to pass?**
    - Just as with public laws, the length of time required to pass a law varies
    - The bill is active until a new Congress is elected
    - If the private bill is not passed during the Congress it was introduced in, it must be re-introduced
- **Additional resources:**

- Anna Gallagher, *AILA's Focus on Private Bills & Pardons in Immigration* (AILA Lawyers Association, 2008)
- Margaret Mikyung Lee, Private Immigration Legislation (Feb. 28, 2007), CRS Report for Congress No. RL 33024 (*available at* <http://www.ilw.com/immigrationdaily/news/2007,1010-crs.pdf>)
- R. Beth, Private Bills: Procedure in the House (Oct. 21, 2004) CRS Report for Congress No. 98-628 (*available at* [www.rules.house.gov/archives/98-628.pdf](http://www.rules.house.gov/archives/98-628.pdf))

## Best Practices for Pursuing a Private Bill

This information constitutes recommendations gathered from the experiences of practitioners who have made requests for private bills on behalf of their clients. As the decision to introduce a private bill is wholly discretionary, there is no precise formula for success. In addition, because there are only loose guidelines as to procedures for requests, a practitioner must use care when making decisions on which actions they should take and when they should take them. Please use caution when employing the methods described below and be aware of the risks involved, both to your client and to yourself.

### I. INITIAL CONSIDERATIONS

**A. *How sympathetic is my client?***—Evaluate all of the humanitarian and sympathetic factors of your client’s history. These factors include, but are not limited to: age; age at time of entry to the U.S.; family ties to the U.S.; health or medical concerns; ties to the community; involvement with charitable work or a church; qualities of an upstanding citizen; work history; ties to home country; and conditions in home country.<sup>87</sup>

**B. *Is there anything in my client’s history that may negatively affect his/her case?***—Evaluate anything that may be viewed negatively. When considering these factors, be very mindful of the current political climate. These factors may include, but are not limited to criminal history; previous violations of immigration law; history of involvement with drugs or gangs; and allegations of material support for terrorism for client or family members.

**C. *Should I pursue a private bill, deferred action, or both?***—Evaluate which option will likely produce a more favorable outcome. You may wish to pursue both avenues. Even though favorable outcomes are rare with both forms of relief, it is important to keep in mind that: 1. These options represent the last chance for your

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<sup>87</sup> Any advice given in this section, not credited to a specific individual, was a suggestion frequently given by a number of practitioners interviewed for this toolkit.

client to obtain relief; and 2. Even though you may not be successful, pursuing these options will help bring attention to the systems failure to provide relief to deserving individuals. Additionally, since the process of creating a request and preparation of the record are similar, it may be more efficient to request both at the same time.

Consideration by the sponsor to introduce the private bill will involve factors such as the political climate in the locality; the political party/stance of the Members of Congress; the relationship the attorney has with local agencies; how sympathetic your client is; whether or not you feel you and your client will be able to garner community support; etc. It is also important to keep in mind that if an attempt to obtain one of these forms of relief is unsuccessful, it will not preclude you from seeking the other.<sup>88</sup>

## **II. CHOOSING A SPONSOR**

### ***A. Choosing a congressional sponsor for your private bill***

When contemplating a private bill, the first step is to find a Member of Congress to sponsor it.—In most cases, it will be the Congressional representative from the noncitizen’s district or state. Hopefully, this representative will be sympathetic to the plight of your client, or will at least not have political motivation to avoid sponsorship (for example, a need to appear tough on immigration enforcement). Certain regions of the country have a reputation of being more sympathetic to immigrants’ rights than others (e.g., Seattle versus Miami), so it may be desirable to find sponsorship from a Member of Congress outside of your client’s home state. However, this is again dependent on the existing political climate. Also, be aware that many congressional offices have “no private bills” policies. Other considerations include: your own relationship with a Congressperson or member of his or her staff; your client’s relationship with a Member of Congress; whether the Member of Congress is up for reelection; the availability of members of the client’s community who may contact their Congressperson personally or as a group; etc.

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<sup>88</sup> See, e.g., Case Summary of Client D.

In general, it seems to be more difficult, although not impossible, to get Senate sponsorship (mainly because Senators represent a larger constituency than a Representative from the House). However, there are definite procedural advantages to having a private bill introduced through the Senate. The Senate Subcommittee reviewing the private bill has the power to request a report from ICE, which will trigger an automatic stay of removal for the duration of the entire Congressional session. This stay can typically last between two to four years. Note, the decision to request the report is a political one and will not be made in all cases.

The procedures of the House of Representatives requires that a request for a report, and the subsequent stay, can only come after a voice vote in the Committee on the Judiciary, and therefore is very rare. Instead, if a stay is desired, the House may negotiate with the administration for a grant of deferred action until the bill weaves its way through the House procedures and is introduced. This process can result in temporary relief for the noncitizen that can last for quite awhile, but the stay is not triggered automatically, as it may be in the Senate.

### **III. COMPOSING A REQUEST FOR CONSIDERATION**

A request for a private bill will focus largely on the humanitarian factors affecting the individual and the reasons why enforcement against the individual would result in an injustice. It is often up to the attorney to develop a record in support of these factors. The submission, including both the letter and the documentary support, will likely be voluminous (for example, the submission for Client A was roughly 500 pages).<sup>89</sup> Since Members of Congress have the discretion to introduce a private bill, one should pursue all avenues to ensure the thoroughness of the record and to show your client in the best and most humanizing light.

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<sup>89</sup> See Client A, in Case Summary and Redacted Documents.

### ***A. Composing a letter for a private bill***

1. **The Senate Rules**<sup>90</sup> require a Senator seeking to introduce a private bill to submit a letter explaining his or her request. Generally, the Senator's office will seek the aid of the noncitizen's counsel when composing this letter.

In accordance with the Senate Subcommittee rules, the letter may be no more than three or four typewritten pages. This letter will contain a detailed description of the favorable factors of the case. The letter will also explain why an adequate remedy is not otherwise available. In addition, the letter must contain identifying information including: the alien registration number of your client; the Senate bill number and copy of the bill. Finally, the letter should include a request that the chair of the Senate Subcommittee obtain a departmental report on your client. This is extremely important because it is this request that could prompt the stay of removal proceedings for your client. The letter should also include attachments of evidentiary support of your client's favorable equities. These may include: character references, employment or school records, medical records, etc.

2. A request for consideration of a private immigration bill in the **House of Representatives** begins with a letter from the sponsor of the bill to the chairperson of the House Subcommittee. Generally, the Representative's office will seek the aid of the noncitizen's counsel when composing this letter.

The House has far more specific rules than the Senate with regard to the submission and content of this letter.<sup>91</sup> The letter and supporting documents will not be accepted if they are filed by anyone other than the sponsor of the bill. The letter must contain all of the relevant facts in the case and include all supporting documents. The House also provides a list of documentation that must be submitted in triplicate in support of a private bill request:

- The date and place of birth of each noncitizen seeking relief
- The addresses and telephone numbers of each noncitizen seeking relief presently in the United States

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<sup>90</sup> See Appendix B for complete Senate Rules.

<sup>91</sup> See Appendix A for complete House Rules.

- The dates of all entries (legal and illegal) and departures from the United States, along with the type of visa used for admission; the name of the consulate where a visa for entry was obtained; the name of the consulate where a visa will be sought
- The status of all petitions and immigration proceedings, including immigrant and nonimmigrant petitions that have been filed by the noncitizen or on his or her behalf
- Copies of all immigration-related letters between agencies in the United States and the noncitizen
- Copies of all administrative and judicial decisions involving the noncitizen's case
- The names, addresses, and telephone numbers of interested parties in the United States
- The names, addresses, dates and places of birth, and immigration or citizenship status of all close relatives (This requirement can be difficult when dealing with undocumented relatives. Confine your list to qualifying US citizens or LPR relatives)<sup>92</sup>
- The occupations, recent employment records, and salaries of each noncitizen seeking relief
- A signed statement by each noncitizen, or the noncitizen's guardian, that he or she wants the relief requested in the private bill
- Information on how failure to obtain the relief sought in the private bill will result in extreme hardship to the noncitizen or each noncitizen's U.S. citizen spouse, parent, or child
- A signed statement by the sponsor of the bill confirming that he or she has personally met the beneficiary or with members of the beneficiary's family

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<sup>92</sup> Note: it is important to remember that applying for either form of relief may shed light on other noncitizen family members' statuses. When applying for either form of relief, one must take the illumination of other family members' statuses into consideration.

#### IV. COMMUNITY SUPPORT AND ORGANIZING

In the case of private bills, applying pressure through organized community support is very important. Members of Congress tend to be more willing to take action when their constituency effectively expresses support for an issue. This is where attorneys become activists on behalf of their clients, but it is also an opportunity for the individual seeking relief to take an active role on his or her own behalf.<sup>93</sup> It should be noted that it is much easier to garner support for your client when his or her case is both sympathetic and credible. It is crucial, especially in areas where immigration issues are more hotly contested, to put a human face on your client for individuals who may not know the client personally. Although it may be difficult for your client to open up about the hardships he or she has faced or will face if forced to leave the country, it is important to counsel your client that this is his or her last chance. He or she may have to make tough decisions and be vulnerable, in order to obtain relief.

Starting what is essentially a campaign on behalf of your client may seem daunting at first, but one can take very simple steps to begin.

- **Contact family and friends of your client.**<sup>94</sup>—Family and friends may be willing to show support in small ways like signing a petition or providing a letter of support. They may also offer to get organizations like churches or clubs in which they are members involved in the effort to aid your client's request.
- **Drum up support through organizations with which your client is already involved.**—Churches or religious organizations in particular are usually a good resource for community organizing. In addition, your client's employer or labor union<sup>95</sup> may be willing to offer support. Pre-existing groups like these are helpful in organizing events like fax campaigns, letter-writing campaigns, petitions, marches, etc.

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<sup>93</sup> See Client D Case Summary.

<sup>94</sup> Be careful if individuals offering support are also vulnerable to immigration enforcement. While their support is helpful, one should make them aware of the risks involved in making themselves known to authorities.

<sup>95</sup> SEIU is a particularly active union in this arena.

- **Reach out to non-profit or activist organizations** (e.g., Asian Law Caucus, American-Arab Anti-Discrimination Committee, America's Voice, American Civil Liberties Union, Campus Progress, Association of International Educators, etc.)—These organizations already have a solid base that they may be able to call on to act on behalf of your client. They will also often let you post a piece about your case on their website or in a newsletter.
- **Begin internet and social networking media campaigns.**—Facebook campaigns, blogs, comments to pertinent websites are all effective ways to expand your client's support group.

Community outreach is not limited to these options. Any initiative that may lead to positive support of your client is well worth the effort, as you never know what will get the attention of a particular Member of Congress. A congressperson can only react to the known opinions of their constituents to Congress.

## V. CONTACTING THE MEDIA

When there is a chance that a Member of Congress will experience negative publicity if they fail to respond to compelling case, he or she may be more willing to take action. Once again, it is important to consider whether the public will truly view your client in a sympathetic light before you contact the media about your case. Since media usage is a double-edged sword, one should handle it carefully. Find a proper balance to show the government that you are serious about your efforts but are not attempting to strong-arm them into a decision, as this could have negative repercussions against your client. In the beginning, it may be advantageous to use the media to demonstrate that your client's case represents an important issue that you are bringing to the government's attention in an effort to allow them to make a good decision. Additional pressure may become necessary, but it is usually best to apply pressure gently at first.

Reaching out to the media may begin with contacts that you already have. Other places to start include:

- **Letters to the editor and local newspaper coverage**—if possible try to get a featured story including a picture of your client.

(Obviously front page is preferable, or any place where the story is easily found.)

- **Local news channels, or local interest shows**—on camera interviews with your client focusing on your client’s importance to the community or to his or her family; produced pieces or interviews featuring testimonials from family, friends, community leaders, etc.
- **Radio stations**—consider doing interviews with talk radio shows, even those that may not seem to have a sympathetic view on immigration issues. The point is to effectively communicate your client’s story, and build support from all possible avenues.
- **National coverage**—contact national news services about picking up your local article; if your case has a large base of support, contact national news outlets about doing a story. (As deferred action and private bills become more common, the chances of getting coverage increase.)
- **Internet presence**—Facebook groups and blogging increases awareness beyond your client’s initial network and will also sometimes be picked up by traditional news sources.

## Background: Deferred Action

### I. INTRODUCTION

Deferred action is a discretionary decision, made at the agency level, not to prosecute or to remove a noncitizen.<sup>96</sup> One can make a request for deferred action at any stage of the administrative process; administrative exhaustion is not required before making the request.<sup>97</sup> The agency may grant deferred action on an individual basis, or the agency may decide that deferred action is applicable to a class of individuals.<sup>98</sup> Deferred action falls under the umbrella of prosecutorial discretion and is not a grant of immigration status, nor is it an entitlement. However, if a noncitizen's request for deferred action is granted it may be the basis for an entitlement (e.g., noncitizens granted deferred action are considered "lawfully present" for purposes of determining eligibility for Social Security benefits or for employment authorization).<sup>99</sup> Periods of time in deferred action qualify as periods of stay authorized by the Secretary of the Department of Homeland Security (DHS) for purposes of determining inadmissibility of noncitizens who are unlawfully present under INA §§ 212(a)(9)(B) and (C), and may be extended indefinitely.<sup>100</sup>

Deferred action is a limited remedy in that the agency can alternatively choose to terminate it at any time. The agency may also terminate employment authorization based on deferred action. An immigration court cannot grant deferred action and the decision either to grant or to deny a request for deferred

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<sup>96</sup> Ira J. Kurzban, *Immigration Law Sourcebook* 1141 (12th Ed. 2010).

<sup>97</sup> Anna Gallagher, Brent Renison, and Daniel Weiss, *Out in the Cold: People With No Options Under Our Current Immigration System*, AILA Immigration Practice Pointers (11th ed. 2010).

<sup>98</sup> Current and potential classes of noncitizens include, but are not limited to, DREAM Act eligible students, widows of U.S. citizens who were married for less than 2 years and their children, LPRs who have served in the U.S. military, Haitian nationals and victims of natural disaster, foreign students in the U.S. who were displaced by Hurricane Katrina.

<sup>99</sup> See Memorandum from Bo Cooper, General Counsel of Immigration and Naturalization Service, on INS Exercise of Prosecutorial Discretion (INS and DOJ Legal Opinions §99-5 MB 2006). See also 8 C.F.R. §274a.12(c)(14).

<sup>100</sup> See Memorandum from Denise A. Vanison, et al, to Alejandro Mayorkas, on Administrative Alternatives to Comprehensive Immigration Reform.

action is not subject to judicial review.<sup>101</sup> There are no official forms to fill out or specified procedures to request deferred action. Moreover, because it is a discretionary decision, internal agency memoranda and guidance govern the decision-making process.<sup>102</sup> The wholly discretionary nature of deferred action also means that agency decisions to grant or deny deferred action are inconsistent and unpredictable. All of these factors contribute to the hazy nature of deferred action and the difficulties facing an individual seeking this form of relief.

## II. HISTORY

Deferred action was preceded by the “nonpriority” program, which existed under the now-defunct Immigration and Naturalization Service (INS). There was no public knowledge of this program until 1974, when the U.S. ordered John Lennon deported and he challenged his removal order.<sup>103</sup> Lennon’s attorney, Leon Wildes, obtained information about the nonpriority program through a Freedom of Information Act (FOIA) request and revealed its existence and operation.<sup>104</sup> Found in the unpublished INS Operations Instructions, the Instructions described nonpriority as, “an act of administrative choice to give some cases lower priority.”<sup>105</sup> Nonpriority was renamed “deferred action” in 1975 under new and publicly released Operations Instructions, which stated, “In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category.”<sup>106</sup> The Operations Instructions went on to say:

When determining whether a case should be recommended for deferred action category, consideration should include the following:

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<sup>101</sup> See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

<sup>102</sup> Ira J. Kurzban, *Immigration Law Sourcebook* 1141 (12th Ed. 2010).

<sup>103</sup> *Lennon v. Richardson*, 378 F. Supp. 39 (1974).

<sup>104</sup> See Leon Wildes, *The United States Immigration Service v. John Lennon: The Cultural Lag*, 40 BROOK L. REV. 279 (1974); Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42 (1977); Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99 (1980).

<sup>105</sup> Kurzban, *supra* note 79, at 1141 (citing Immigration and Naturalization Service, Operations Instructions, Former O.I. § 242.1(a)(22)(1974)).

<sup>106</sup> (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii)(1975).

(1) advanced or tender age; (2) many years' presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States- effect of expulsion; (5) criminal, immoral or subversive activities or affiliations- recent conduct.<sup>107</sup>

Although these Operations Instructions have since been rescinded, deferred action is still available as a form of relief and these factors remain important, reappearing in agency policy statements and directives. Deferred action, as a sanctioned exercise of prosecutorial discretion, is now primarily outlined through internal manuals and memoranda. ICE has recently published a manual for federal and state prosecutors.<sup>108</sup> Contained in this manual is a brief section on deferred action requests and related prosecutorial discretion tools. While the section in the manual itself is by no means comprehensive, it does provide the most detailed information that ICE has ever shared on how it processes deferred action requests.

### **III. ICE DETENTION AND REMOVAL OPERATIONS POLICY AND PROCEDURE MANUAL**

The Immigration and Customs Enforcement (ICE) Detention and Removal Operations Policy and Procedure Manual (The ICE Manual), formerly the Detention and Deportation Officer's Field Guide, is one resource for information on how the agency makes deferred action determinations.<sup>109</sup> This manual was created as internal guidance for the Deportation and Removal Offices (DRO) personnel,<sup>110</sup> and its public release is only available in redacted form. The relevant portions include a description of what deferred action is, its limitations as a remedy, and factors considered by the agency when deciding whether to grant deferred action. There are also sections describing the procedures for granting, rejecting and reviewing deferred action. The manual contains a disclaimer stating that, "[n]othing in this manual may be construed to create any substantive or procedural right or benefit

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<sup>107</sup> *Id.*

<sup>108</sup> U.S. Immigration and Customs Enforcement, Protecting the Homeland: Tool Kit for Prosecutors (2011)

<sup>109</sup> ICE Detention and Removal Operations Policy and Procedure §1.2 (2006). To see the available relevant portions of the manual in its entirety, please see Appendix G.

<sup>110</sup> Name has since been changed to Enforcement and Removal Offices (ERO).

that is legally enforceable by any party against the United States, its agencies or officers, or any other person.”<sup>111</sup>

Section 20.8 of the ICE Manual authorizes deferred action saying, “A District Director may, in his or her discretion, recommend deferral of (removal) action, an act of administrative choice to give some cases lower priority.”<sup>112</sup> It goes on to state the following justification for the policy: “The deferred action category recognizes that the Service has limited enforcement resources and that every attempt should be made administratively to utilize these resources in a manner which will achieve the greatest impact under the immigration laws.”<sup>113</sup>

The ICE Manual lists factors that may influence a decision to grant or deny deferred action. This list includes:

- 1) **The Likelihood That the Service Will Ultimately Remove the Alien Based on Factors Including:** likelihood that the alien will depart without formal proceedings (e.g., minor child who will accompany deportable parents); age or physical condition affecting ability to travel; the likelihood that another country will accept the alien; the likelihood that the alien will be able to qualify for some form of relief which would prevent or indefinitely delay removal.
- 2) **Sympathetic Factors:** The presence of sympathetic factors which, because of a desire on the part of administrative or judicial authorities to reach a favorable decision, could result in a distortion of the law with unfavorable implications for future cases.
- 3) **Priority Given to a Class of Deportable Aliens:** Whether or not the individual is a member of a class of deportable aliens whose removal has been given a high enforcement priority (e.g., dangerous criminals, alien smugglers, drug traffickers, terrorists, war criminals, habitual immigration violators).
- 4) **Service Cooperation with Other Agencies:** Whether the alien's continued presence in the U.S. is desired by local, state,

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<sup>111</sup> ICE Detention and Removal Operations Policy and Procedure §1.2 (2006).

<sup>112</sup> ICE Detention and Removal Operations Policy and Procedure §20.8(a) (2006).

<sup>113</sup> *Id.*

or federal law enforcement authorities for purposes of ongoing criminal or civil investigation or prosecution.<sup>114</sup>

In addition, the ICE Manual calls for periodic reviews of cases where deferred action has been granted to determine if circumstances have changed and the individual should be removed or if the individual should remain in the deferred action category.<sup>115</sup> Finally, the ICE Manual makes it clear that the decision-maker can terminate the deferred action at any time the decision-maker “determines that circumstances no longer warrant deferred action.”<sup>116</sup>

#### **IV. STAYS OF REMOVAL & PROSECUTORIAL DISCRETION**

A grant of deferred action acts to stay the removal of an applicant. Generally, a formal application requesting a stay is not required to be filed when an applicant requests deferred action. However, some practitioners note that it may be easier to obtain a stay of removal rather than deferred action from DHS. Thus, when seeking deferred action, it may be wise to also file a formal request for a stay of removal, offering DHS an alternative where it may be hesitant to grant deferred action status.

Under 8 C.F.R. § 241.6, DHS can grant a stay of removal to a noncitizen who has been ordered deported or removed from the United States. The decision to grant a stay of removal is solely within the discretionary authority of DHS and there is no administrative or judicial appeal from a denial of a request for a stay. Where an entire family has been ordered removed, separate applications must be filed for each family member seeking a stay of removal. The request must be made on ICE Form I-246, available on the ICE website, and the application package should contain supporting documentation.

An application for a stay must be filed in person with the Enforcement and Removal Operations (ERO) office of ICE with jurisdiction over the applicant’s residence. In order to identify the correct ERO office, visit the ICE website at

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<sup>114</sup>*Id.* at §20.8(b)

<sup>115</sup> ICE Detention and Removal Operations Policy and Procedure §20.8(e) (2006).

<sup>116</sup> ICE Detention and Removal Operations Policy and Procedure §20.8(f) (2006).

<http://www.ice.gov/contact/ero/index.htm>. The following documents must be submitted along with the application:

- Current original passport which is valid for a minimum of six months;
- Copy of birth certificate and/or other identifying documents;
- If the applicant has been involved in the criminal justice system, police reports, dispositions of all arrest, etc.; and
- Supporting documentation.

In order to obtain a stay of removal, proof must also be provided to demonstrate a compelling reason or reasons to justify the stay. Thus, it is important to provide supporting documentation, including the following, where relevant:

- Medical documentation from the client's doctor(s)-- Letters from medical personnel which clearly and concisely explain the condition of your client or their immediate family members should be obtained and submitted.
- Psychological reports which document any psychological condition(s) suffered by relevant family members and the effect that a separation will have on the condition(s)
- Birth certificates/marriage certificates establishing the client's relationship to U.S. citizen or lawful permanent resident family members
- Evidence to support the client's claim that he or she cannot leave the United States-- This can be in the form of supporting letters from other family, members of the community, teachers, etc. An affidavit from the applicant clearly explaining the reasons why they must remain in the United States should also be submitted.
- Any additional documentation, including letters of support, employment letter, etc., in support of the request-- This should include any documents that attest to the good character of the applicant, the fact that they pose no danger to the community, evidence of their employment, etc.

A fee of \$ 155.00 must be paid for each application. Payment must be made out to "Department of Homeland Security" or "Immigration and Customs Enforcement."

In addition to the documentation discussed above, a cover letter, which clearly explains why a stay of removal should be granted should be submitted. In drafting this letter, the following factors should be addressed:

- the likelihood of ultimately removing the individual;
- the presence of sympathetic factors;
- the likelihood that, because of the sympathetic factors, a large amount of adverse publicity will be generated; and
- whether the individual is among a class of deportable aliens whose removal has been given high enforcement priority (e.g. terrorists, drug traffickers).<sup>117</sup>

If ICE grants a stay of removal, the following will occur:

- The client will be issued an Order of Supervision (OSUP) and will be required to comply with any conditions as set forth in the order;
- The client may be granted employment authorization at the discretion of the Field Office Director;
- The client may be required to post a Delivery or Order of Supervision bond, the minimum amount being \$ 1,500;
- The client may be required to submit to any other conditions required by the Field Office Director; and
- The client will be required to update ICE with any change of address.

ICE may revoke a stay of removal based on any of the following:

- Execution of an order of deportation or removal;
- An arrest by any law enforcement agency;
- Conviction of any crime(s);
- A violation of the Order of Supervision;
- A violation of the terms of any immigration bond; and/or
- Safety or security concerns

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<sup>117</sup> See Standard Operating Procedures for Enforcement Officer: Arrest, Detention Processing and Removal, Part X, Doris Meissner, Comm., HQOPP 50/4 (Nov. 17, 2000).

A stay of removal is generally granted in one-year increments. In order to maintain employment authorization, it is important to begin the process of gathering the materials to support an extension request at least ninety days before its expiration, and to file the request itself 30 days before the stay expires.

## **V. THE COOPER MEMO [LEGACY INS]**

Agency memoranda are also instructive when considering a request for deferred action. One such memo is the Cooper Memo, written by then-General Counsel for INS, Bo Cooper, to then-Commissioner Doris Meissner.<sup>118</sup> The Cooper Memo provides information on the legal basis for prosecutorial discretion in the administrative context, as well as proposed limits and examples of proper uses of this power. The Memo's introductory summary explains its purpose, stating:

The memorandum is intended to be the first step in the INS' examination of its use of prosecutorial discretion. As such, the analysis is confined to laying out the legal basis for guidelines or other policy action that may be considered or undertaken in the future. It is not intended to serve as policy guidance itself on the use of prosecutorial discretion. Instead, this memorandum will provide the agency with a foundation to develop such guidance after consultation among the appropriate INS components.<sup>119</sup>

The Cooper Memo also discusses the underlying policy justification for exercising discretion by stating:

Because . . . the INS does not have the resources fully and completely to enforce the immigration laws against every violator, it exercises prosecutorial discretion thousands of times every day. INS enforcement priorities, including the removal of criminal aliens and the deterrence of alien smuggling, are examples of discretionary enforcement decisions on the broad, general level that focus INS enforcement resources in the areas of greatest need.<sup>120</sup>

The Cooper Memo also describes the discretionary use of deferred action:

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<sup>118</sup> Memorandum from Bo Cooper, General Counsel of Immigration and Naturalization Service, on INS Exercise of Prosecutorial Discretion (INS and DOJ Legal Opinions §99-5 MB 2006). To view in its entirety, please see Appendix H.

<sup>119</sup> *Id.*

<sup>120</sup> Memorandum from Bo Cooper, General Counsel of Immigration and Naturalization Service, on INS Exercise of Prosecutorial Discretion (INS and DOJ Legal Opinions §99-5 MB 2006). To view in its entirety, please see Appendix H.

Agencies may exercise enforcement discretion in individual cases based on the particular facts or on enforcement priorities or prosecutorial discretion may be more formalized and generalized through agency regulations or procedures, such as those that govern decisions to place aliens in deferred action status or to grant them voluntary departure.<sup>121</sup>

## VI. THE MEISSNER MEMO [LEGACY INS]

Another primary source for information regarding deferred action is a memo providing guidance on the exercise of prosecutorial discretion written by Doris Meissner and distributed on her last day as INS Commissioner.<sup>122</sup> Although written for the now legacy INS, this memo is still good “law” and remains influential even after the restructuring of the immigration agencies under the Department of Homeland Security. The Meissner Memo states:

Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process—from planning investigations to enforcing final orders—subject to their chains of command and to the particular responsibilities and authority applicable to their specific position. In exercising this discretion, officers must take into account the principles described below in order to promote the efficient and effective enforcement of the immigration laws and the interests of justice.<sup>123</sup>

The Meissner Memo continues:

The “favorable exercise of prosecutorial discretion” means a discretionary decision not to assert the full scope of the INS’ enforcement authority as permitted under the law. Such decisions will take different forms . . . but include decisions such as not issuing an NTA . . . not detaining an alien placed in proceedings . . . and approving deferred action.<sup>124</sup>

Because the agency has an obligation to enforce the immigration laws, the Meissner Memo warns that prosecutorial discretion is not “an invitation to violate or ignore

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<sup>121</sup>*Id.*

<sup>122</sup> Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, on Exercising Prosecutorial Discretion (Nov. 17, 2000) [hereinafter *The Meissner Memo*]. To read *The Meissner Memo* in its entirety, please refer to the Appendix I.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

the law.”<sup>125</sup> Instead, the use of prosecutorial discretion is a means by which the agency makes the best use of its limited resources in order to achieve its primary goals of “protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law.”<sup>126</sup> The following statement offers one rationale for deferred action, “An agency’s focus on maximizing its impact under appropriate principles, rather than devoting resources to cases that will do less to advance these overall interests, is a crucial element in effective law enforcement management.”<sup>127</sup>

Maybe most importantly, the Meissner Memo provides a list of factors enforcement officers should consider when making their decision. These factors form the basis for a request for deferred action:

- **Immigration status:** Lawful permanent residents generally warrant greater consideration. However, other removable aliens may also warrant the favorable exercise of discretion, depending on all the relevant circumstances.
- **Length of residence in the United States:** The longer an alien has lived in the United States, particularly in legal status, the more this factor may be considered a positive equity.
- **Criminal history:** Officers should take into account the nature and severity of any criminal conduct, as well as the time elapsed since the offense occurred and evidence of rehabilitation. It is appropriate to take into account the actual sentence or fine that was imposed, as an indicator of the seriousness attributed to the conduct by the court. Other factors relevant to assessing criminal history include the alien’s age at the time the crime was committed and whether or not he or she is a repeat offender.
- **Humanitarian concerns:** Relevant humanitarian concerns include, but are not limited to, family ties in the United States; medical conditions affecting the alien or the alien’s family; the fact that an alien entered the United States at a very young age;

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

ties to one's home country (e.g., whether the alien speaks the language or has relatives in the home country); extreme youth or advanced age; and home country conditions.

- **Immigration history:** Aliens without a history of violating the immigration laws (particularly violations such as reentering after removal, failing to appear at a hearing, or resisting arrest that show heightened disregard for the legal process) warrant favorable consideration to a greater extent than those with such a history. The seriousness of any such violations should also be taken into account.
- **Likelihood of ultimately removing the alien:** Whether a removal proceeding would have a reasonable likelihood of ultimately achieving its intended effect, in light of the case circumstances such as the alien's nationality, is a factor that should be considered.
- **Likelihood of achieving enforcement goal by other means:** In many cases, the alien's departure from the United States may be achieved more expeditiously and economically by means other than removal, such as voluntary return, withdrawal of an application for admission, or voluntary departure.
- **Whether the alien is eligible or is likely to become eligible for other relief:** Although not determinative on its own, it is relevant to consider whether there is a legal avenue for the alien to regularize his or her status if not removed from the United States. The fact that the Service cannot confer complete or permanent relief, however, does not mean that discretion should not be exercised favorably if warranted by other factors.
- **Effect of action on future admissibility:** The effect an action such as removal may have on an alien can vary—for example, a time-limited as opposed to an indefinite bar to future admissibility—and these effects may be considered.
- **Current or past cooperation with law enforcement authorities:** Current or past cooperation with the [the immigration authorities] or other law enforcement authorities, such as the U.S. Attorneys, the Department of Labor, or National Labor Relations Board, among others, weighs in favor of discretion.

- **Honorable U.S. military service:** Military service with an honorable discharge should be considered as a favorable factor.
- **Community attention:** Expressions of opinion, in favor of or in opposition to removal, may be considered, particularly for relevant facts or perspectives on the case that may not have been known to or considered by the [government]. Public opinion or publicity (including media or congressional attention) should not, however, be used to justify a decision that cannot be supported on other grounds. Public and professional responsibility will sometimes require the choice of an unpopular course.
- **Resources available to the [government]:** As in planning operations, the resources available to the [agency] to take enforcement action in the case, compared with other uses of the resources to fulfill national or regional priorities, are an appropriate factor to consider, but it should not be determinative. For example, when prosecutorial discretion should be favorably exercised under these factors in a particular case, that decision should prevail even if there is detention space available.<sup>128</sup>

The Meissner Memo points out that this list of factors is not exhaustive and when an officer is considering the use of prosecutorial discretion the decision “should be based on the totality of the circumstances, not on any one factor considered in isolation. General guidance such as this [list of factors] cannot provide a ‘bright line’ test that may easily be applied to determine the ‘right’ answer in every case.”<sup>129</sup> The overriding question for an officer deciding whether to exercise discretion, the Meissner Memo notes, is, “How important is the Federal interest in the case, as compared to other cases and priorities?”<sup>130</sup>

## VII. THE HOWARD MEMO [ICE]

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<sup>128</sup>*Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

Another useful document in the chronicling of the agency view of prosecutorial discretion is a memo written by then-Principal Legal Advisor, William J. Howard in 2005.<sup>131</sup> Although written narrowly as guidance for the Office of Principal Legal Advisor (OPLA) attorneys, the Howard Memo confirms agency policy in favor of the exercise of prosecutorial discretion, and reiterates the principles described in the Meissner Memo. When preparing a deferred action request, one can and should use the Howard Memo as persuasive authority. The Howard Memo goes even farther than the Meissner Memo when pointing out the dearth of agency resources. As a result of this limitation, prosecutorial discretion becomes an important tool in assuring that those cases which both demonstrate the best chances of success and further agency goals, are prioritized. The Howard Memo suggests:

Prosecutorial discretion is a very significant tool that sometimes enables you to deal with the difficult, complex and contradictory provisions of the immigration laws and cases involving human suffering and hardship. It is clearly DHS policy that national security violators, human rights abusers, spies, traffickers both in narcotics and people, sexual predators and other criminals are removal priorities. It is wise to remember that cases that do not fall within these categories sometimes require that we balance the cost of action versus the value of the result. Our reasoned determination in making prosecutorial discretion decisions can be a significant benefit to the efficiency and fairness of the removal process.<sup>132</sup>

This memo was written as guidance for agency attorneys and in that regard states, “Attorney discretion doesn’t cease after a final order. We may be consulted on whether a stay of removal should be granted . . . . In addition, circumstances may develop whether the proper and just course of action would be to move to reopen the proceeding for purposes of terminating the NTA.”<sup>133</sup>

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<sup>131</sup> Memorandum from William J. Howard, Principal Legal Advisor of U.S. Immigration and Customs Enforcement, on Prosecutorial Discretion (Oct. 24, 2005)[hereinafter The Howard Memo]. To view The Howard Memo in its entirety, see Appendix J.

<sup>132</sup> Memorandum from William J. Howard, Principal Legal Advisor of U.S. Immigration and Customs Enforcement, on Prosecutorial Discretion (Oct. 24, 2005)[hereinafter The Howard Memo]. To view The Howard Memo in its entirety, see Appendix J.

<sup>133</sup> *Id.*

## VIII. THE MYERS MEMO [ICE]

In 2007 Julie Myers, then-Assistant Secretary of ICE, released a memo addressing prosecutorial and custody discretion.<sup>134</sup> This memo is limited in scope to arrest and custody determinations for nursing mothers; however, it is a significant piece of the prosecutorial discretion puzzle. The Myers Memo urges the favorable use of discretion for nursing mothers in all stages of the enforcement process, and bases this position on the guidance and underlying rationale of the Meissner Memo.<sup>135</sup> In fact, the Meissner Memo is provided as an attachment to the Myers Memo, reaffirming that the guidance provided in the Meissner Memo remains active.<sup>136</sup> The Myers Memo encourages the favorable use of discretion for nursing mothers to avoid detention or, if detention is unavoidable, to secure them in a facility which is able to accommodate their child.<sup>137</sup>

## IX. THE MORTON MEMOS [ICE]

John Morton, the current Assistant Secretary of ICE, composed two influential memos within months of each other: one entitled *Civil Immigration Enforcement: Priorities for the Apprehension, Detention and Removal of Aliens*;<sup>138</sup> and the other called, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions*.<sup>139</sup> Both of these memos were

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<sup>134</sup> Memorandum from Julie Myers, Assistant Secretary of U.S. Immigration and Customs Enforcement, on Prosecutorial and Custody Discretion (Nov. 7, 2007)[hereinafter The Myers Memo]. To read The Myers Memo in full, please see Appendix K.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Memorandum from John Morton, Assistant Secretary of U.S. Immigration and Customs Enforcement to All ICE Employees, on Civil Immigration Enforcement: Priorities for the Apprehension, Detention and Removal of Aliens (Jun. 30, 2010). To read The June Morton Memo in full, please see Appendix L.

<sup>139</sup> Memorandum from John Morton, Assistant Secretary of U.S. Immigration and Customs Enforcement, on Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions (Aug. 20, 2010). To read The August Morton Memo in full, please see Appendix M.

“leaked” and met with controversy due to the existing political climate.<sup>140</sup> However, these memos are instructive for purposes of constructing a case for deferred action.

The first Morton Memo from June 2010 “outlines the civil immigration enforcement priorities of U.S. Immigration and Customs Enforcement (ICE) as they relate to the apprehension, detention, and removal of aliens.” The June Morton Memo contains an estimate that ICE’s limited resources allow for removal of only 400,000 aliens per year, less than 4% of the estimated illegal alien population in the U.S.<sup>141</sup> Although considered controversial at the time of its release, the June Morton Memo is largely a restatement of the practical considerations that have historically formed the basis for immigration officers’ use of discretion. The June Morton Memo establishes priorities that “shall apply across all ICE programs and shall inform enforcement activity, detention decisions, budget requests and execution and strategic planning.” The June Morton Memo breaks down the enforcement priorities by ranking them from the highest to the lowest priority.<sup>142</sup>

In a section entitled, “Prosecutorial Discretion” the June Morton Memo encourages ICE officers to use their discretion at every level of decision-making in support of the listed priorities. In addition, the June Morton Memo specifies that “particular care” should be used in cases of lawful permanent residents, juveniles, and the immediate family of U.S. citizens.<sup>143</sup> The June Morton Memo then states that until new guidance is issued on the use of prosecutorial discretion, ICE officers and attorneys should use the Meissner Memo and the Howard Memo as guidance.<sup>144</sup>

A second memo written by John Morton and released in August of 2010 provides guidance for the handling of removal proceedings. This document is a

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<sup>140</sup> See, e.g., Susan Carroll & Stewart Powell, *Immigration Dismissals Draw Senate Scrutiny*, Houston Chronicle, Oct. 22, 2010 (available at, <http://www.chron.com/disp/story.mpl/special/immigration/7248528.html>); Sivaprasad Wadhia, *Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion*, Immigration Policy Center, American Immigration Council (2010) (available at <http://ssrn.com/abstract=1723165>).

<sup>141</sup> Memorandum from John Morton, Assistant Secretary of U.S. Immigration and Customs Enforcement to All ICE Employees, on Civil Immigration Enforcement: Priorities for the Apprehension, Detention and Removal of Aliens (Jun. 30, 2010). To read The June Morton Memo in full, please see Appendix L.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

good indicator of how ICE intends to use policy changes to manage limited resources and backlog.<sup>145</sup> The August Morton Memo was written in recognition of the 17,000 cases subject to delay in 2009 that ultimately resulted in relief for the noncitizen.<sup>146</sup> The purpose of the August Morton Memo is to establish a policy for ICE personnel, to be followed up later by additional guidance for USCS personnel, which will “ensure that all applications and petitions are adjudicated quickly to realize our shared goal of efficiently resolving cases in removal proceedings.”<sup>147</sup>

In support of that goal, the August Morton Memo encourages ICE agents to exercise their powers of prosecutorial discretion to either aid in expedited adjudication procedures where possible, or to seek outright dismissal of removal proceedings where the noncitizen appears eligible for relief and no investigations or serious adverse factors exist.<sup>148</sup> The August Morton Memo can be interpreted as an overriding policy supporting the favorable exercise of prosecutorial discretion and it may be persuasive in preparing an argument for deferred action.

## **X. “THE COMPREHENSIVE IMMIGRATION REFORM [CIR] ALTERNATIVES MEMO”[USCIS]**

A memo leaked in July 2010 from the DHS Office of Policy to Alejandro Mayorkas, the Director of USCIS, arguably reflects DHS’ current thinking about how agency actions can further the goals of immigration reform without waiting for the statutory scheme to be revamped.<sup>149</sup> The purpose of the CIR Alternatives Memo is to provide “administrative relief options to promote family unity, foster economic growth, achieve significant process improvements and reduce the threat of removal for certain individuals present in the United States without authorization”<sup>150</sup> in the

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<sup>145</sup> Memorandum from John Morton, Assistant Secretary of U.S. Immigration and Customs Enforcement, on Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions (Aug. 20, 2010). To read The August Morton Memo in full, please see Appendix M.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Memorandum from Denise A. Vanison, et al, to Alejandro Mayorkas, on Administrative Alternatives to Comprehensive Immigration Reform.

<sup>150</sup> *Id.*

absence of comprehensive reform of the immigration laws. With these goals in mind, the CIR Alternatives Memo specifically encourages USCIS to grant deferred action for cases where “no relief appears available based on an applicant's employment and/or family circumstances, but *removal is not in the public interest.*” In addition to preventing removal, “[t]his would permit individuals for whom relief may become available in the future to live and work in the U.S. without fear of removal.”<sup>151</sup>

The CIR Alternatives Memo has an entire section devoted to increasing the use of deferred action to protect specific individuals or groups from the threat of removal. Although the CIR Alternatives Memo warns that providing unlimited grants of deferred action would be controversial and expensive, administrative reforms, such as a dedicated form for requesters and a filing fee, could resolve these issues.<sup>152</sup> In addition, the CIR Alternatives Memo suggests that rather than simply opening the floodgates and granting deferred action in all circumstances, blanket grants of deferred action may be tailored for particular groups of noncitizens (e.g., individuals who would be eligible for relief under the DREAM Act).<sup>153</sup> Although these reforms have not yet occurred, the underlying support for the use of deferred action to prevent injustice and promote public policy interests are instructive when preparing a request.

## **X. WORK AUTHORIZATION**

USCIS is responsible for adjudicating requests for employment authorization under 8 CFR § 274a.12. This provision contains a category that provides for employment authorization for individuals who have been granted deferred action.<sup>154</sup> To apply for employment authorization one must file Form I-765 and pay the appropriate fees.<sup>155</sup>

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> 8 CFR § 274a.12(c)(14).

<sup>155</sup> Form is available in Appendix Q of this toolkit.

## Quick Guide: Deferred Action

- **What is deferred action?**
  - Deferred action is a discretionary decision not to prosecute or remove a noncitizen made at the agency level
- **Where does the authority for deferred action come from?**
  - Deferred action is form of prosecutorial discretion that the agency may exercise
  - There are no statutes or case law, rather authority and directives comes from agency manuals and internal memoranda
- **What internal guidance is available?**<sup>156</sup>
  - ICE Detention and Removal Operations Policy and Procedure Manual ([http://www.ice.gov/doclib/foia/dro\\_policy\\_memos/09684drofieldpolicymanual.pdf](http://www.ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf))
  - The Cooper Memo, INS Exercise of Prosecutorial Discretion ([www.shusterman.com/pdf/cooper.pdf](http://www.shusterman.com/pdf/cooper.pdf))
  - The Meissner Memo, Exercising Prosecutorial Discretion (<http://www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00>)
  - The Howard Memo, Prosecutorial Discretion (<http://www.scribd.com/doc/22092975/ICE-Guidance-Memo-Prosecutorial-Discretion-William-J-Howard-10-24-05>)
  - The Myers Memo, Prosecutorial and Custody Discretion (<http://www.scribd.com/doc/22092973/ICE-Guidance-Memo-Prosecutorial-Discretion-Julie-Myers-11-7-07>)
  - The June Morton Memo, Civil Immigration Enforcement: Priorities for the Apprehension, Detention and Removal of Aliens ([www.ilw.com/Immigration/daily/news/2010,0630-ice.pdf](http://www.ilw.com/Immigration/daily/news/2010,0630-ice.pdf))
  - The August Morton Memo, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions (<http://scribid.com/doc/36524371/John-Morton-Memo>)

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<sup>156</sup> Copies of internal guidance and agency memoranda are available in Appendices G-N.

- The USCIS CIR Alternatives Memo, Administrative Alternatives to Comprehensive Immigration Reform (<http://www.abcnews.go.com/images/Politics/memo-on-alternatives-to-comprehensive-immigration-reform.pdf>)
- **What factors are considered compelling in the eyes of the agencies?**
  - Immigration status
  - Length of residency in the U.S.
  - Criminal history
  - Humanitarian concerns (e.g., family ties to the U.S., medical condition, age, or condition in home country)
  - Immigration history
  - Likelihood of ultimately removing the noncitizen
  - Likelihood of achieving enforcement through other means
  - Likelihood that noncitizen will become eligible for other relief
  - Effect of deferred action on future admissibility
  - Cooperation with law enforcement
  - Honorable US military service
  - Community support or media attention
  - Resources available to the agency
- **Where do these factors come from?**
  - Factors are included in internal agency guidance<sup>157</sup>
- **Should I request deferred action on behalf of my client?**
  - If there are no other administrative remedies available to your client, and
  - Client is sympathetic and has a compelling reason to remain in the United States.
- **How do I request deferred action?**
  - There is no form to file
  - You must send a letter or brief requesting deferred action to one or more of the following:
    - Your local ICE Field Office;
    - The local CIS office, if there is one; and/or
    - Any individual who you feel might be able exert some influence on your clients behalf (within DHS, ICE, or USCIS)
- **What should my request letter contain?**
  - The main goal of the letter is to humanize the individual
  - The request should:
    - Identify the individual

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<sup>157</sup> See Appendices H-M for internal agency memoranda

- Highlight all favorable factors
  - Explain any negative factors
  - Provide a statement requesting deferred action
  - Provide a description of what hardships would ensue if relief is not granted
  - Include a procedural summary of the individual's entire case
  - Include the individual's immigration history
  - Include supporting documents
- **What supporting documents should I include with my request?**
  - Supporting documents should be provided to:
    - Identify the client
    - Detail client's immigration history
    - Detail client's contact with law enforcement
    - Highlight all favorable factors (e.g., length of residence in the U.S., family and community ties, activities, awards, education, hardships, etc.)
- **Is preparing the request letter and supporting documentation the only thing I need to do?**
  - In most cases, the letter will not be enough
  - You must also find or build community support for the individual
  - You might also seek political support or media attention
- **How do I build support?**
  - Contact family and friends of the individual
  - Contact organizations that the individual is involved with
  - Contact non-profit organizations
  - Begin internet and social networking campaigns
  - Contact the media
- **How can supporters help the individual's effort?**
  - Write letter of support to be submitted with the request
  - Fax letter of support to the local ICE Field Office
  - Write letters to the editors of local newspapers, drawing attention to the individual's case
  - Knock on doors to garner further support of the individual
  - Use their own contacts within DHS, USCIS, or ICE
  - Pressure local officials to take interest in the individual's case
- **How do I make use of the media?**
  - Talk to local reporters to try and get them to cover the story
  - On camera interviews
  - Local interest shows
  - Start a blog or Facebook campaign on behalf of the individual

- **How is deferred action granted?**
  - It is unclear how the decision within the agency is made and it may vary from Field Office to Field Office
- **How is an individual notified that deferred action has been granted or denied?**
  - There is no standard procedure for notification
  - In some cases, individuals receive a letter or call granting or denying deferred action
  - In other cases, individuals never receive notification of a decision
- **What happens after deferred action is granted?**
  - The individual will not be removed
  - The individual will not have an immigration status, but will be considered “lawfully present”
  - The individual has the option to file for work authorization
- **How do I file for work authorization?**
  - You must submit an I-765 Form to USCIS
  - On the I-765, you will cite 8 CFR 274a.12(c)(14), the regulation for deferred action, for question 17.<sup>158</sup>
- **What happens if my deferred action request is denied?**
  - The individual may be removed or detained until removal can be effectuated
- **How long does it take for a decision to be made?**
  - There is no required time limit for making a decision
  - On average, a decision is made in three months
- **Links to additional resources:**
  - See the internal agency guidance listed above
  - Ira J. Kurzban, *Immigration Law Sourcebook* (12th ed., 2010)
  - Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J. 243 (2010) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1476341](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476341))

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<sup>158</sup> Question 17 on the I-765 asks for the eligibility category of the applicant.

## Best Practices for Pursuing Deferred Action

This information constitutes recommendations gathered from the experiences of practitioners who have made requests for deferred action on behalf of their clients. As the decision to grant deferred action is wholly discretionary, there is no precise formula for success. Also, because there are only loose guidelines as to procedures for requests, a practitioner must make many careful decisions as to which actions to take and when to take them. Please take caution when using the methods described below and be aware of the risks involved, both to your client and to yourself.

### I. INITIAL CONSIDERATIONS

A. ***How sympathetic is my client?***—Evaluate all of the humanitarian and sympathetic factors of your client’s history. These factors include, but are not limited to: age; age at time of entry to the U.S.; family ties to the U.S.; health or medical concerns; ties to the community; involvement with charitable work or a church; qualities of an upstanding citizen; work history; ties to home country; and conditions in home country.<sup>159</sup> Your client may also qualify as a member of a class that the government has granted, or may grant deferred action to. Current and potential classes of noncitizens include, but are not limited to, DREAM Act eligible students, widows of U.S. citizens who were married for less than 2 years, LPRs who have served in the U.S. military, Haitian nationals and victims of natural disaster.

B. ***Is there anything in my client’s history that may negatively affect his/her case?***—Evaluate anything that may be viewed negatively. When considering these factors, be very mindful of the political climate. These factors may include, but are not limited to: criminal history; previous violations of immigration law; history of

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<sup>159</sup> Any advice given in this section that is not specifically credited to an individual was frequently suggested by practitioners interviewed for this toolkit.

involvement with drugs or gangs; and allegations of material support for terrorism for client or family members.

**C. *Should I pursue a private bill, deferred action, or both?***—Evaluate which option will likely produce a more favorable outcome. You may wish to pursue both avenues. Even though favorable outcomes are rare with both of these options, it is important to keep in mind that: 1. These options represent the last chance for your client to obtain relief; and 2. Even though you may not be successful, pursuing these options will bring attention to the fact that the system provides no relief for deserving individuals.

In making a decision, you should look at the following factors: the political climate of the locality; the political party/stance of the Members of Congress; the relationship you as an attorney have with the local agencies; how sympathetic your client is; whether or not you feel you and your client will be able to garner community support; etc. It is also important to keep in mind that if an attempt to obtain one of form of relief is unsuccessful, it does not preclude you from seeking the other. Additionally, since the process of creating a request and preparation of the record are similar, it might make sense to do both at the same time.

## **II. CHOOSING AN AGENCY**

When contemplating a request for deferred action, one will need to decide which agency to apply to. In general, requests for deferred action go to the local ICE field office. Unfortunately, the method by which ICE handles deferred action requests is wholly unclear. It may be helpful to send additional requests to officials in USCIS or DHS. If there is someone with supervisory authority with whom you have a relationship, submitting a copy of the request to that person may be particularly useful as he or she may be able to put pressure on the field office on behalf of your client.<sup>160</sup>

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<sup>160</sup> See Client G Case Summary. A favorable outcome was obtained when the practitioner submitted a request for deferred action, both to the local field office, and to a high-ranking official of DHS, with whom the practitioner had an established professional relationship.

### III. COMPOSING A REQUEST FOR CONSIDERATION

An established set of rules do not govern the request to an agency for a grant of deferred action. The submission may take the form of a letter or a brief. Because there are no formal requirements, it is important to remember to include all of the information that is most likely to assist your client. **The goal is to humanize your client.** This is where the agency guidance, such as the Meissner Memo factors,<sup>161</sup> is instructive. The request should highlight all favorable factors and provide an explanation for any negative factors that may weigh against your client. The request should also provide a statement requesting deferred action from the agency and a description of what hardships would ensue if relief were not granted.

Practitioners have expressed two schools of thought regarding the best approach to composing a request. The first approach is to focus the request on the most compelling factor (e.g., extreme hardship on a U.S. citizen child) and include only short descriptions of other favorable factors. With this method, you avoid watering down what is most important, but there is a risk that you are not presenting a complete case. It is also possible that the agency will not find the main factor compelling enough to use it as the basis for granting relief. The second approach is to put as many favorable factors as possible into the request for relief. This approach may provide many grounds for which the agency may grant deferred action. However, it risks diluting the compelling narrative. It is likely that your particular case will lend itself more fully to one approach over the other.

The request for deferred action should also include supporting documents attached to the letter or brief. Make sure to provide supporting documents to prove your client's identity and his or her immigration history (e.g., passport, I-94 card, state issued identification card, driver's license, etc.). Supporting documents should also include evidence in support of the favorable factors discussed in the request, including: medical records, psychological records, school records, family and

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<sup>161</sup> See Appendix I; see also the Deferred Action Background section.

employment histories, character references, letters of support from community leaders and politicians, faxes from fax campaigns, signed petitions in support of the noncitizen, copies of any media coverage, etc. In addition, you must include information regarding your client's involvement in any criminal proceedings. However, make sure to do so in a way that highlights rehabilitation or mitigating factors (e.g., copies of the completion of any sentence, community or public service programs; participation in programs such as anger management, AA, etc.; where the client has been given probation or parole, obtain a letter from their supervising officer). The submission, including both the letter and the supporting documents, will likely be voluminous (for example, the submission for Client A was roughly 500 pages).<sup>162</sup> It is helpful to include an annotated Table of Contents with the package to make it user friendly.

#### **IV. COMMUNITY SUPPORT AND ORGANIZING**

Even though immigration agencies are not true political organizations, as their employees are not elected, community action still can influence them. In fact, one of the factors for consideration listed in the Meissner Memo is "community attention."<sup>163</sup> This is where attorneys become activists on behalf of their clients. It is also an opportunity for the individual seeking relief to take an active role on his or her own behalf.<sup>164</sup> Please note that it is much easier to garner support for your client when his or her case is both sympathetic and credible. It is crucial, especially in areas where immigration issues are contested, to put a human face on your client for individuals who may not know your client personally. Although it may be difficult for your client to open up about the hardships he or she endured or will endure, it is important to counsel your client that this is their last chance. He or she may have to make tough decisions, and make him or herself vulnerable in order to obtain relief.

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<sup>162</sup> See Client A Case Summary and redacted documents. Even though this submission was made for a private bill, the submission for a deferred action request may be comparable in size.

<sup>163</sup> Appendix I ("Community attention: Expressions of opinion, in favor of or in opposition to removal, may be considered, particularly for relevant facts or perspectives on the case that may not have been known to or considered by the [agency].")

<sup>164</sup> See Client D Case Summary.

Representing a client in a deferred action request requires quite a bit of strategizing. This includes deciding whether to engage in a public campaign or to pursue a more subtle approach. Although there have been successful cases involving large public campaigns, there are instances where a quiet approach may be more effective. It is possible that a field office or agency official, previously besieged by a public campaign, will be resistant to the technique. The locale where the action takes place may not be amenable to such civic engagement. It is important to recognize which approach better serves your client's needs.

Should you decide that a public approach is necessary, there are very simple steps that you can take to begin your campaign.

- **Contact family and friends of your client.**—Family members and friends may be willing to show support in small ways like signing a petition or providing a letter of support. They may also offer to get organizations like churches or clubs to which they belong involved in the effort to aid your client's request. Keep in mind though that some family members may be vulnerable to immigration enforcement. While their support may be helpful, they should be made aware of the risk involved in making themselves known to authorities.
- **Drum up support through organizations with which your client is already involved.**—Churches or religious organizations in particular are usually a good resource for community organizing. In addition, your client's employer or labor union may be willing to offer support. Pre-existing groups like these are helpful in organizing events like fax campaigns, letter-writing campaigns, petitions, marches, etc.
- **Reach out to non-profit or activist organizations** (e.g., Asian Law Caucus, American-Arab Anti-Discrimination Committee, America's Voice, American Civil Liberties Union, Campus Progress, Association of International Educators, etc.) —These organizations already have a solid base that they may be able to call on to act on behalf of your client. They will often also let you post a piece about your case on their website or in a newsletter.
- **Begin internet and social networking media campaigns.**—Facebook campaigns, blog posts, comments to pertinent websites are all effective ways to expand your client's support group.

## V. CONTACTING THE MEDIA

Agencies are not immune to the effects of bad publicity. The Meissner Memo’s “community attention” factor includes media publicity.<sup>165</sup> Although the Meissner Memo includes a warning that negative media attention alone is not enough for the agency to grant a favorable outcome, it is clear that the immigration agencies do not want to create a public outcry over their actions. The agency is also instructed to consider any new facts, perspectives, or opinions that may not have otherwise become known.<sup>166</sup> Once again, it is important to consider whether the public will truly view your client in a sympathetic light before contacting the media about your case. Media attention is a double-edged sword and you should use it carefully. Try to maintain a proper balance in order to show the government that you are serious about your efforts, but that you are not attempting to strong-arm them into a decision, as strong-arm techniques could have negative repercussions against your client. Begin by using the media to demonstrate that your client’s case represents an issue that you are calling to the government’s attention. You should always give the agency the opportunity to make a good decision.

Reaching out to the media may begin with contacts that you already have. Other places to start include:

- **Letters to the editor and local newspaper coverage**—if possible try to get a featured story including a picture of your client (front-page stories, or any place where the story is clearly visible, are preferable.)
- **Local news channels or local interest shows**—participate in on-camera interviews with your client, focusing on your client’s importance to the community, or to his or her family; produce pieces or interviews featuring testimonials from family, friends, community leaders, etc.
- **Radio stations**—consider doing interviews with talk radio shows

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<sup>165</sup> See Appendix I.

<sup>166</sup> See *Id.*

- **National coverage**—contact national news services about picking up your local article; if your case has a large base of support, contact national news outlets about doing a story. (As deferred action and private bills become more common, the chances of getting coverage increase).
- **Internet presence**—Facebook groups and blogging increases awareness beyond your client’s initial network and will also sometimes be picked up by traditional news sources.<sup>167</sup>

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<sup>167</sup> See Client D Case Summary.

**Client A****Type of Case:** Private bill**Location:** Northeastern United States**Outcome:** On October 22, 2007, an immigration judge concluded that Client A had met his burden of proof for asylum eligibility (based on a vast amount of lay and expert testimony on his behalf).**Source:** Chris Nugent**Facts:**

In 1998, Client A, a mentally handicapped individual, and his older brother fled Guinea to live with their aunt and uncle in the Ivory Coast, because their parents felt it was unsafe for the children to remain in their village. Soon after Client A and his brother left Guinea, their father was killed for political reasons during a massacre in their village. Their mother died soon after, leaving them orphans. In 2000, Client A moved with his aunt and uncle to France for six months. During this period, Client A's uncle traveled to Guinea to see if it was safe for the family to return, however, his uncle never came back from Guinea. Client A's aunt, now destitute, moved to Belgium and left Client A with a family friend. At this point, Client A's brother and uncle were presumed dead.

In January 2001, the family friend put Client A on a plane bound for the United States, gave him fraudulent identification, and instructed him to tell U.S. authorities that he was from Congo and seeking asylum. Immigration agents arrested Client A at Dulles Airport and placed him in a Virginia jail. An INS dental assessment suggested that Client A was about 18 years old upon arrival in the U.S.

In August 2001, Client A appeared in front of an Immigration Judge without an attorney. On June 24, 2002, an Immigration Judge ordered Client A to be removed Guinea. On December 23, 2003, Client A was released to the International Friendship House in York, PA and an Immigration Judge ordered that his asylum case be re-opened. In December 2004, the same Immigration Judge denied Client A's asylum request for a second time.

When his pro bono attorneys took up the case, they obtained both his birth certificate and his parents' death certificates, which showed that he was in fact

sixteen-years-old when he entered the United States, and had therefore spent roughly three years in an adult prison while still a minor. Additionally, Client A's attorney discovered that he had the mental capacity of an average ten-year-old.

While pursuing asylum, Client A's attorney also sought to introduce a private bill on his behalf. Seventy-three Members of Congress, numerous public interest organizations, and the international media responded to Client A's plight. There was also outcry from the general public. Congressman Chris Van Hollen (D-MD) introduced two private bills on Client A's behalf during the 108<sup>th</sup> and 109<sup>th</sup> sessions of Congress, however, neither bill passed.

**Client B****Location:** Pennsylvania**Type of Case:** Deferred Action**Outcome:** The initial request for deferred action was denied. However, Client B has since been released from custody. Ms. Weerasinghe has received no further information from ICE regarding the status of her client.**Source:** Disna Weerasinghe**Facts:**

Client B is a forty-eight-year-old woman from Jamaica who had been in the U.S. since she was five-years-old. She received her green card at age nine. While in the U.S., she worked as a nurse and gave birth to five U.S. citizen children. Client B's entire family resides in the U.S. When she was sixteen, Client B was raped, and afterwards, began using drugs. Client B was convicted of thirteen counts of possession of drugs and drug paraphernalia (all class A misdemeanors). She was also charged with one count of prostitution. She was sentenced and served her time. Client B is also HIV positive.

Sometime after Client B's sentence was completed, ICE picked up and detained Client B. A Notice to Appear was issued and she was charged under INA §§237(a)(2)(B)(i) and 237(a)(2)(A)(iii). The Immigration Judge ruled that her drug convictions qualified as aggravated felonies and made her ineligible for cancellation of removal. Despite issuing a final order of removal, the Immigration Judge noted that consideration should be given for Client B to receive deferred action status. Client B's case was taken by Pennsylvania Immigration Resource Center (PIRC), who referred the case to Ms. Weerasinghe. Ms. Weerasinghe took the case on August 21, 2008.

During her detention, Client B was told that she had to be cooperative in getting her travel documents. This proved difficult because Jamaica does not accept HIV positive individuals since it does not have proper medication for them. This policy is not in writing, but the Jamaican Embassy gave Ms. Weerasinghe this information when she called. Ms. Weerasinghe requested deferred action through

the ICE DRO in the correctional facility where Client B was detained. Ms. Weerasinghe addressed the letter requesting Client B's deferred action to the Field Office Director in Philadelphia. While helpful and responsive at first, the DRO eventually stopped taking calls from Ms. Weerasinghe.

The request for deferred action was initially denied, due to Client B's status as an aggravated felon. A letter was sent notifying Client B and Ms. Weerasinghe of the denial, and pointing out that she was subject to mandatory detention based on INA § 241. Ms. Weerasinghe asked for reconsideration at the first custody hearing and Client B was released from custody on October 31, 2008. It unclear what Client B's current immigration status is; ICE has never fully informed Ms. Weerasinghe or Client B of Client B's status.

**Client C****Type of Case:** Deferred Action**Location:** California**Outcome:** Deferred action was denied. Client C was deported to France where his wife has since joined him.**Source:** Randall Caudle**Facts:**

Client C was a well-known food vendor in San Francisco, California, where he operated a popular food cart, selling quiches and tarts near a Mission District subway station. Client C was a citizen of France who entered the U.S. on a visa waiver, which allowed him to be in the U.S. for ninety days, but he overstayed. While in the U.S., Client C married his U.S. citizen wife. Client C retained Randall Caudle to discuss an adjustment of status based on Client C and his wife's marriage. On October 28, 2009, a few months after the initial client meeting, ICE picked up Client C for overstaying his visa waiver and held him in detention. Client C had been in the U. S. for a total of seven months (overstaying his visa by four months). Client C had no criminal history and was a likely candidate for a green card. An ICE official told Mr. Caudle that ICE had begun prioritizing enforcement against visa overstays, and ICE swept up Client C in this process.

In response to Client C's detention, Mr. Caudle filed a request for deferred action with ICE. The request quickly moved through the decision making process, probably due in large part to the amount of press attention that the case received. Client C, his wife, and Mr. Caudle gained the support of Client C's community by using blogs, social networking sites, and local news coverage to tell Client C's story. At the time, however, there was another high profile case for deferred action occurring in the same area. The other case drew more community and local media attention than Client C's case did. The other high profile case was successful, but Client C's request was denied on November 3, 2009, and Client C was removed to France.

## **Client D**

**Type of Case:** Deferred action and private bill

**Location:** Seattle, Washington

**Outcome:** Deferred action granted.

**Source:** Shannon Underwood

### **Facts:**

Client D is a twenty-three year old Peruvian national who resides in Washington State. He has lived in the U.S. since he was fourteen, when his family entered on tourist visas and overstayed. Client D has no criminal history, graduated with honors from high school, and recently received a bachelor's degree in Business Administration from the University of Washington, without the assistance of federal student aid. ICE detained Client D after he missed an exit on the highway and accidentally ended up at the U.S.-Canada border. He was initially detained, and an Immigration Judge granted him voluntary departure.

In an effort to stay in the U.S., Client D retained pro bono representation by attorneys Karol Brown and Shannon Underwood of Global Justice Law Group. Ms. Underwood and Ms. Brown requested deferred action through the Seattle DRO. The request included an online petition with roughly 4,000 signatures and a 17-inch stack of faxed support letters. In addition, while the deferred action request was being considered, Congressman Jim McDermott introduced private bill H.R. 3638 to grant permanent resident status to Client D. The Seattle DRO denied the deferred action request and ICE issued a letter demanding that Client D turn in his parents and two younger siblings.

Ms. Underwood and Client D made heavy use of the media to support his case, by taking interviews with local TV and radio stations. One local television network did an entire piece on Client D's life and struggle, demonstrating how he was a beneficial and caring member of the community. Client D took his case into his own hands and literally went out in his community, knocking on doors to gain support. He made strong use of social networking sites and set up various "e-

petitions” to call attention to his situation and gain further support. He also secured aid from nonprofit organizations and groups who organized on his behalf.

Client D’s case improved when an attorney for the Governor’s office, who was friends with the Secretary of Homeland Security, Janet Napolitano, got involved. This additional influence put high-level pressure on the local ICE office. Soon after this added involvement, Ms. Underwood received a call that ICE was ordered to back off Client D’s case. Ms. Underwood never received any written confirmation as to what had happened or whether a final decision had been made. Ms. Underwood considers the decision a grant of deferred action. Ms. Underwood currently represents Client D’s family in their individual cases, as they have not been granted deferred action, and their removal cases are still pending.

## **Family E**

**Type of Case:** Private Bill

**Location:** New Jersey

**Outcome:** Private Bill signed into law in October of 2004.

**Source:** Various news sources

### **Facts:**

Mr. E was a Pakistani national who lived in Milltown, New Jersey. He came to the United States in 1993 and settled in New Jersey where he ran a number of gas stations in the area. Mr. E temporarily relocated to Dallas, Texas to help his brother run a convenience store. Mr. E was shot and killed in Dallas in 2001 by a white supremacist. Mr. E's killer said that he had murdered Mr. E in response to the 9/11 terrorist attacks to "retaliate on local Arab-Americans or whatever you want to call them."

Prior to his death, Mr. E had filed an application with INS for permanent residency for himself, his wife, and his four daughters based on his employment. Because Mr. E was the principal applicant, his application for himself and his family became invalid upon his death.

Representative Rush Holt (D-NJ) introduced a private bill to the House of Representatives on February 13, 2003. Holt also assisted the family in obtaining temporary work permits that allow them to stay in the U.S. for one year while waiting for the bill to go up for a vote. In September of 2003, sixteen national, religious, and civil liberties leaders<sup>168</sup> sent letters to Rep. John Hostettler (R-IN), Chairman of the Subcommittee on Immigration, Border Security, and Claims, asking him to immediately take action on H.R. 867. The House finally passed the bill in July of 2004 and by the Senate in October of 2004. Presented to the President that

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<sup>168</sup> The letter was signed by leaders at the United Methodist Church, Hebrew Immigrant Aid Society, Anti-Defamation League, Arab American Institute, American-Arab Anti-Discrimination Committee, B'nai B'rith International, American Immigration Lawyers Association, American Jewish Committee, National Council of Churches, Evangelical Lutheran Church of America, Muslim Public Affairs Council, Social Commission of Reform Judaism, Society of Friends, Workmen's Circle, and the National Conference of Pakistani Americans.

month, the bill became a private law on October 30, 2004, and granted the five members of the Family E Legal Permanent Resident status.

## **Brothers F**

**Type of Case:** Private Bill

**Location:** Florida

**Outcome:** Legislation for permanent relief is still pending and the brothers do not know how long they will be able to remain in the United States. As of March 2009, the brothers were given at least eighteen more months to remain in the United States.

**Source:** Various new sources

### **Facts:**

In 1990, two brothers entered the United States (New York) from their native Colombia with their parents on tourist visas. The F Brothers' visas expired after six months but they remained in the United States and moved to Florida. Soon after moving to Florida, the family filed for political asylum. The petition for asylum claimed that the father's brother, niece, and nephew were murdered for political reasons. The father has since received threats from a guerrilla group in Columbia. While their request for asylum was pending, the family members were able to file for and received work permits annually. In 1999, the family was summoned to a Miami Immigration Court hearing and the judge denied their application for asylum. All subsequent appeals were denied. On November 25, 2003, the government made its final decision and notified the entire family that they must leave the country within thirty days. The family ignored the notice and remained in Florida. In July 2007, ICE picked up the family and took them into custody.

While the family was in custody, a friend of one of the brothers began a campaign in support of the family and for passage of the DREAM Act. The F Brothers became representatives for those the DREAM Act was designed to protect. Had the DREAM Act been enacted it would have allowed the brothers to remain in the U.S. Both brothers were students in good standing who intended to go to college, and who were in violation of the immigration laws as minors due only to their parents' decisions. Neither brother had any criminal violations.

A Facebook group was created and over 2,600 people joined. The friend also organized blitzes of the emails and voicemails of Senators and Representatives of Florida. Six days after the family's arrest, this friend, nine other classmates, and one teacher flew to Washington, D.C. and started knocking on doors on Capitol Hill.

The family was released days later after Rep. Lincoln Diaz-Balart (R-FL) filed a private bill to reopen asylum proceedings for the family, however this bill never made it to a vote. Senator Christopher Dodd (D-CT) filed another private bill on behalf of the F Brothers. Dodd's bill allowed the brothers to stay in the United States for an additional two years. Nothing further could be done for the brothers' parents or grandparents, however, and in October 2007, the brothers' parents and grandparents were deported to Colombia.

The F Brothers have since enrolled in college. One brother attended Miami-Dade College. Georgetown University accepted the other brother, and gave him an international student scholarship, thanks to his excellent grades in high school and compelling essay describing his family's ordeal.

**Client G****Type of Case:** Deferred Action**Location:** Florida**Outcome:** Deferred action granted on July 3, 2009.**Source:** Andres Benach**Facts:**

Client G moved to the United State from Argentina with his family at the age of three. Client G grew up in Florida and graduated from high school with a 4.7 GPA. After high school, Client G attended Miami Dade Honors College, as the college allows students to attend regardless of their immigration status, and obtained his Associates Degree in Computer Animation. After exhausting his educational opportunities, Client G began working to help provide for his family.

One day on the way to work, ICE picked up Client G, cuffed him, and took him to a detention center where he remained for twenty days. An immigration judge granted him a voluntary departure order and he was released on bond. Client G was given four months to depart for Argentina with July 6, 2009 was his designated deportation date. When he agreed to voluntary departure however, he was unaware that he would not be able to return to the United States for ten years.

A variety of organizations, such as First Focus and Service Employees International Union (SEIU), rallied around Client G's cause. These groups and others garnered support from the community. Countless calls were made on Client G's behalf to the Department of Homeland Security and signatures of support were collected. DHS headquarters received over five hundred calls in support of Client G. Client G also made use of social networking sites, creating support groups, and told his story via YouTube videos, encouraging individuals to sign petitions in support of his efforts to remain in the United States.

SEIU also brought Client G's case to the attention of Andres Benach, an immigration attorney. At the point that Client G retained Benach as his attorney, Benach learned that ICE was willing to grant Client G deferred action, but no one

had yet requested that relief on his behalf. Benach sent a request for deferred action to both the ICE Field Office in Miami and to the DHS Undersecretary, with whom Benach had a preexisting professional relationship.

The request was largely because Client G matched all of the qualifications listed in the DREAM Act. (Note: At this point, it was believed to be a certainty that the DREAM Act would be passed.) Concerning his request to the Field Office, Benach received a phone call from an employee in the Field Office who told him that the deferred action would be granted. While the deferred action request was pending, Rep. Corrine Brown (D-FL) also introduced a private bill on Client G's behalf.

Two weeks prior to his deportation date, Client G traveled to Washington, D.C. to attend a Dream Act "Mock Graduation." Hundreds of students from all over the U. S. in situations similar to Client G's attended the event. Before the event concluded, Client G met with Senator Bill Nelson (D-FL), who also wrote a letter to DHS asking for a stay Client G's deportation.

Thanks to the efforts of his immigration attorney, and the organized support of organizations and individuals, on July 3, 2009, Client G was granted deferred action.

**Client H****Type of Case:** Private bill**Location:** California**Outcome:** Sen. Dianne Feinstein (D-Calif.), who also requested a stay of deportation while the bill is pending, introduced the private bill. As a result, Client H was released from detention on November 19, 2010.**Source:** Various News Sources**Facts:**

Client H was born in Peru to Chinese parents who had moved to Peru to escape China's one-child policy. Client H's parents then brought Client H to the U.S. when he was eleven- years-old, on a visa that allowed them to remain until 2002. His parents then filed for asylum, but their request was denied. At age twenty, Client H and his parents were arrested in their San Francisco home because of an immigration raid, and detained in Arizona. Only because of the raid, Client H learned he had been ordered removed five years earlier. His parents were given supervised release from detention and fitted with electronic ankle bracelets while they await deportation to China. Client H however, would be deported separately to Peru, where he has no friends or family, and remain in detention until his deportation.

Client H was an honors student and working toward a degree in nursing when ICE picked him up. He was also very active in the community, on his college campus, and in his church. In addition, he was working to help support his family financially. Client H would have been eligible for relief under the DREAM Act if it would have passed.

His case was referred to the Asian Law Caucus and with the support of other groups and the media; a campaign was launched on his behalf. Student groups held rallies in support of Client H. Letters of support were also sent to the offices of Sen. Feinstein, Sen. Barbara Boxer, and Rep. Nancy Pelosi. Sen. Feinstein introduced a private bill for relief for Client H that remains pending.