Appendices

A. U.S. House of Representatives Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law Rules of Procedure for Private Immigration*

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H. 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)

I. Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, on Exercising Prosecutorial Discretion (Nov. 17, 2000)

J. Memorandum from William J. Howard, Principal Legal Advisor of U.S. Immigration and Customs Enforcement, on Prosecutorial Discretion (Oct. 24, 2005)

K. Memorandum from Julie Myers, Assistant Secretary of U.S. Immigration and Customs Enforcement, on Prosecutorial and Custody Discretion (Nov. 7, 2007)

L. 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)

M. 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)

N. Memorandum from Denise A. Vanison, et al, to Alejandro Mayorkas, on Administrative Alternatives to Comprehensive Immigration Reform

O. Reno v. Am-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999)

P. Form I-485, Application to Register Permanent Residence or Adjust Status and Instructions*

*These documents are subject to periodic changes. Please check to make sure you have to most recent versions.

Q. Form I-765, Application for Employment Authorization and Instructions*

R. I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal and Instructions*

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*These documents are subject to periodic changes. Please check to make sure you have to most recent versions.

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON IMMIGRATION,
CITIZENSHIP, REFUGEES,
BORDER SECURITY, AND
INTERNATIONAL LAW

ONE HUNDRED ELEVENTH CONGRESS

RULES OF PROCEDURE
AND STATEMENT OF POLICY
FOR PRIVATE IMMIGRATION BILLS

RULES OF PROCEDURE

1. All requests for consideration of a private immigration bill shall commence with a letter to the Chairman of the Subcommittee from the author of such bill outlining the relevant facts in the case and attaching thereto all pertinent documents. Documentation will not be accepted if submitted by anyone other than the author of the bill. The following must be submitted in triplicate:

(a) Date and place of birth of each beneficiary; addresses and telephone numbers of each beneficiary presently in the United States.

(b) Dates of all entries (legal and illegal) and departures from the United States, along with the type of visas used for admission; consulate where each beneficiary obtained a visa for entry to the United States; consulate where each beneficiary will be seeking a visa if one is made available.

(c) Status of all petitions and proceedings with the Department of Homeland Security, including nonimmigrant or immigrant petitions that have been filed by the beneficiaries or on their behalf.

(d) Names, addresses, and telephone numbers of interested parties in the United States.

(e) Names, addresses, dates and places of birth, and immigration or citizenship status of all close relatives.

(f) Occupations, recent employment records, and salaries of all beneficiaries.

(g) Copies of all immigration related letters to and from agencies of the United States.

(h) Copies of all administrative and judicial decisions involving the beneficiaries' case.

(i) A signed statement by each beneficiary, or the beneficiary's guardian, that he or she desires the relief sought by the bill.

(j) An explanation as to how the 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.

(k) A signed statement by the author of the bill confirming that the author has met personally with

the beneficiary or with members of the beneficiary's family

(l) In support of any private bill relating to adoption, the following additional information must accompany the request for Subcommittee action.

(1) Home-study of the prospective parents;

(2) Evidence of child support; and

(3) Statement detailing ages and occupations of natural parents and brothers and sisters.

(m) In support of a private bill on behalf of a doctor or nurse, the following additional information must accompany the request for Subcommittee action:

(1) Evidence of passage of the Federal Licensing Examination, or its equivalent, for doctors, and the Commission on Graduates of Foreign Nursing School Exam (CGFNS) for nurses.

(2) Evidence of employment by the doctor or the nurse in a health manpower shortage area, or a recommendation by a U.S. Government Agency indicating the doctor or nurse's services are needed.

(3) Evidence of substantial community ties over a long period of time. Extensive periods of employment give the Subcommittee some assurance there is every likelihood the doctor or nurse would remain employed in the area and provide medical services.

(4) Documentation as to a potential employer's efforts to recruit U.S. citizens for the position. Such information shall include salary levels of other doctors or nurses on staff and an explanation as to recruitment techniques on employment of the beneficiary.

(n) In support of a private bill waiving grounds of exclusion or deportation relating to criminal activity, the following addition documents, if available, will be required.

(1) All records relating to offenses, including state, and local police records; and

(2) An affidavit from the beneficiary describing his or her criminal record in full.

(o) Private bills concerning beneficiaries who are receiving medical treatment will require documentation as to the availability of similar medical treatment in the beneficiary's home country.

2. Each private bill must provide that the beneficiaries must apply for the benefits of the enacted law within a specified period of time, which shall be not

more than two years from the date of enactment of the private law.

3. No private bill shall be scheduled for Subcommittee action until all administrative and judicial remedies are exhausted.

4. The Subcommittee will not intervene in deportation proceedings and will not request stays of deportation on behalf of beneficiaries of private bills, except as indicated in Rule 5.

5. The Subcommittee may, at a formal meeting, entertain a motion to request that the Department of Homeland Security provide the Subcommittee with a departmental report on a beneficiary of a private bill. In the past, the Department of Homeland Security has honored requests for departmental reports by staying deportation until final action is taken on the private bill. Only those cases designed to prevent extreme hardship to the beneficiary or a U.S. citizen spouse, parent, or child will merit a request for a report.

6. The Subcommittee may request reports on private bills from appropriate Federal agencies or Departments and shall await receipt of such reports before taking final action.

7. Only the author of a private bill shall be permitted to testify before the Subcommittee on behalf of the private bill. All requests to testify shall be addressed in writing to the Chairman of the Subcommittee.

8. Action on a private bill shall not be deferred more than once due to the failure of the author to appear and testify at a duly noticed hearing.

9. The Subcommittee shall take no further action on a private bill that has been tabled by the full Judiciary Committee.

10. Each of the following types of private bills shall be subject to a point of order unless its consideration is agreed to by a two-thirds vote of the Subcommittee:

(a) Bills not in compliance with these Rules.

(b) Bills that waive the two-year foreign residence requirement for doctors.

(c) Bills that waive any law regarding naturalization.

STATEMENT OF POLICY

In considering private immigration bills, the Subcommittee reviews only those cases that are of such an extraordinary nature that an exception to the law is needed. It is the policy of the Subcommittee generally to act favorably on only those private bills that meet certain precedents.

Members intending to introduce a private immigration bill are strongly encouraged to seek the technical drafting assistance of the Subcommittee staff (or the Office of Legislative Counsel) prior to introducing a private immigration bill. This will facilitate consideration of the bill by avoiding the need for Subcommittee amendments.

The following sets forth common types of private immigration bills and the criteria for reviewing them.

A. Adoption

Existing law provides for the immigration of foreign born adopted children if the adoption takes place while the child is under the age of 16 and (1) the child is an "orphan" as defined by immigration law, or (2) the child has resided with the adoptive parents two years. Favorable precedents exist if the child is young and there has been a longstanding parent-child relationship.

B. Doctors and Nurses

The Immigration and Nationality Act provides for the admission of foreign doctors and nurses who have passed certain exams prior to seeking immigrant status.

In past years, a number of private bills were introduced on behalf of foreign medical graduates. The legislative history relating to this group indicates many doctors enter the United States as nonimmigrants with the intention of remaining permanently. Legislation enacted in 1976 and 1977 sought to tighten the law requiring the return of such doctors to their home country.

The Subcommittee is dismayed to find that doctors who are beneficiaries of private laws often seek more lucrative employment upon gaining permanent residence, thereby leaving medically underserved areas without any medical assistance. Because of these experiences, the Subcommittee views doctor bills unsympathetically.

C. Drugs and Criminal Activity

In the case of a beneficiary who has been convicted of a deportable crime the Subcommittee will wish to review testimony and affidavits relating to the beneficiary's behavior subsequent to any criminal conviction. Such information is helpful in making a determination as to whether legislation will serve the best interests of the community. In this regard, letters of reference, bank records, and employment records are particularly helpful.

D. Medical Cases

The Subcommittee will be reluctant to schedule bills on behalf of persons who entered the United States for the purpose of seeking medical treatment. This type of admission is available to accommodate persons seeking advanced medical treatment in the United States. Many cases have come to the attention of the Subcommittee in which persons obtained admission to the United States for medical reasons and decided to try to stay here permanently. This undermines the intent of the original admission and jeopardizes continuance of the program.

The Subcommittee's reluctance to schedule such bills is based on the premise that persons may seek all available medical assistance while in the United States, but upon completion of any medical treatment the purpose of the visa expires and the alien must return home.

It is therefore the policy of the Subcommittee that advisory opinions be sought by the author from such organizations as the World Health Organization and the Pan American Health Organization as to the availability of adequate medical treatment in the alien's home country.

E. Deferred Action and Parole Cases

The Subcommittee will be reluctant to schedule any bill on behalf of an alien who is in "deferred" status or has been paroled into the United States indefinitely. It is the Subcommittee's understanding that the Department of Homeland Security reserves the conferral of such status to cases of a particularly compelling nature. In view of this, the Subcommittee will view such cases unsympathetically.

F. Waiver of Exclusions

1. HEALTH

All bills waiving the grounds of exclusion for mental or physical infirmities will require the posting of a bond. There are few favorable precedents for cases in this category. In order to obtain the best possible information, the Subcommittee will require all medical records as well as information from government agencies concerning possible public charge aspects of the case.

2. DRAFT EVADERS

There are few precedents for favorable action on behalf of aliens who seek permanent residency to avoid

conscription. It will be the Subcommittee's policy to continue to view such bills unsympathetically.

3. FRAUD

The Subcommittee has been extremely reluctant to act favorably on cases involving visa fraud. It will be the policy of the subcommittee to adhere closely to precedents in such cases.

G. Naturalization

The Subcommittee will require that any bill expediting naturalization be accompanied by evidence indicating that such action would be in the national interest, as opposed to personal interest. There are few precedents for favorable action on bills waiving any naturalization requirements or granting posthumous or honorary citizenship. It is the Subcommittee's intent generally to view unfavorably legislation of this type. More appropriate mechanisms for rewarding individuals may be in the form of medals, awards, or ceremonies.

The Subcommittee is extremely concerned by requests to expedite citizenship on behalf of athletes seeking to compete in national, international, or Olympic games. The Subcommittee does not believe U.S. citizenship should be provided because of a person's athletic ability.

There are few instances of favorable action on behalf of individuals who renounce U.S. citizenship. The Subcommittee will adhere to precedents in such cases.

H. Bills Tabled in a Previous Congress

The Subcommittee has often been confronted with request for reconsideration of private bills that were tabled by the full Committee in previous Congresses. The Subcommittee believes that each bill is given sufficient review during the meetings of the Subcommittee and that authors are afforded ample time to present the merits of the case. Repetitious consideration of these cases detrimentally affects other private bills and reflects poorly on the integrity of the private bill process. For these reasons, the Subcommittee will be reluctant to reconsider its prior action absent new evidence or information not available at the time of initial consideration by the Subcommittee.

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Subcommittee on Immigration, Border Security, and Citizenship

Rules of Procedure of the Senate Subcommittee on Immigration for Private Immigration Bills

1. The introduction of a private bill does not act as a stay of deportation until the committee requests a departmental report. Requests for reports on private bills from the departments shall be made only upon a written request addressed to the chairman of the subcommittee by the author of such bill. That request shall contain the following information:

(a) In the case of an alien who is physically in the United States: The date and place of the alien's last entry into the United States; his or her immigration status at that time (visitor, student, exchange student, crewman, stowaway, illegal border crosser, etc.); his or her age; place of birth; address in the United States; and the location of the U.S. Consulate at which he or she obtained a visa, if any.

(b) In the case of an alien who is physically outside of the United States:
The alien's age; place of birth; address; and the location of the U.S. Consulate before which his or her application for a visa is pending; and the address of the relationship to the person primarily interested in the alien's admission to the United States.

(c) In the case of an alien who is seeking expeditious naturalization:
The date the alien was admitted to the United States for permanent residence; his or her age; place of birth; and address in the United States.

2. The committee shall not address to the Attorney General communications designed to defer deportation of beneficiaries of private bills who have entered the United States as nonimmigrants, stowaways, in transit, deserting crewmen, or by surreptitiously entering without inspection through the land or sea borders of the United States.
Exemption from this rule may be granted by the subcommittee if the bill is designed to prevent unusual hardship to the beneficiary or to U.S. citizens. However, no such exemption may be granted unless the author of the bill has secured and filed with the subcommittee full and complete documentary evidence in support of his or her request to waive the rule.

3. No private bill shall be considered if an adequate judicial or administrative remedy exists, or where court proceedings are pending for the purpose of adjusting or changing the immigration status of the beneficiary.

4. No favorable consideration shall be given to any private bill until the proper department has submitted a report.

5. Upon the receipt of reports from the departments, private bills shall be scheduled for subcommittee consideration in the chronological order of their introduction, except that priority shall be given to bills introduced earliest in any previous Congresses.

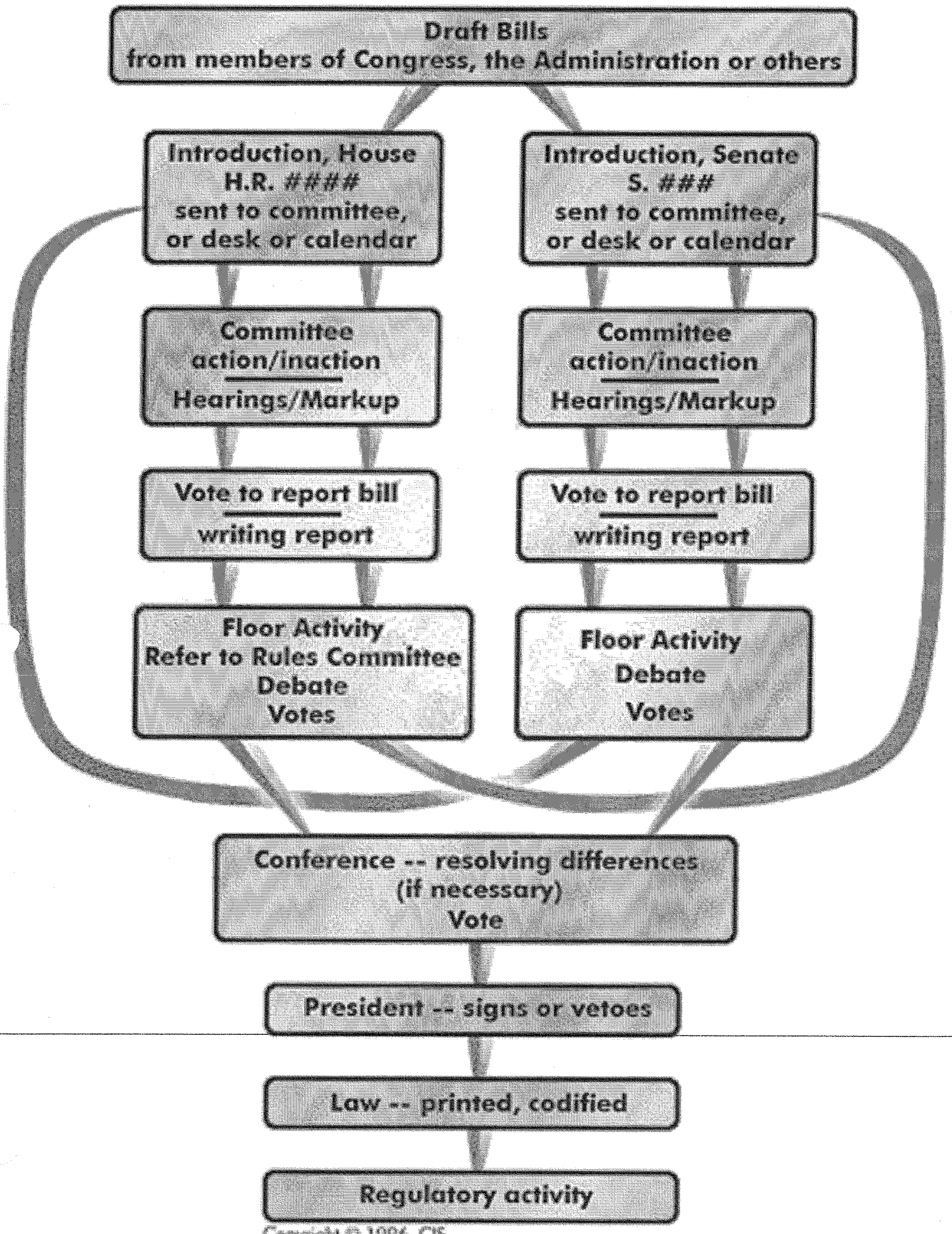
6. Bills previously tabled shall not be reconsidered unless new evidence is introduced showing a material change of the facts known to the committee. In the event of a request for reconsideration

the subcommittee shall, insofar as practicable, dispose of such request at the first meeting of the subcommittee following receipt of such request.

MATERIAL TO BE SUBMITTED BY THE AUTHOR

Supporting information shall be limited to not more than three or four typewritten pages and must include an in depth statement by the author setting forth the equities in the case and why an adequate judicial or administrative remedy is not available. Background material and other pertinent information, including character references, etc., are acceptable.

When a private immigration bill is recommended for favorable action, the supporting information is used for the Senate report and must be typewritten to be cut and pasted for printing. Therefore, do not send originals that you would like to have returned. A valuable document, such as an original of a birth certificate, should be retained by the author - a copy will be sufficient for the subcommittee.



How a Bill Becomes a Law

The following are the steps of legislative procedure:

1. Referral Committee: With few exceptions, bills are referred to standing committees in the House or Senate according to carefully delineated rules of procedure.

2. Committee Action: When a bill reaches a committee it is placed on the committee's calendar. A bill can be referred to a subcommittee or considered by the committee as a whole. It is at this point that a bill is examined carefully and its chances for passage are determined. If the committee does not act on a bill, it is the equivalent of killing it.

3. Subcommittee Review: Often, bills are referred to a subcommittee for study and hearings. Hearings provide the opportunity to put on the record the views of the executive branch, experts, other public officials, supporters, and opponents of the legislation.

4. Mark Up: When the hearings are completed, the subcommittee may meet to "mark up" the bill, that is, make changes and amendments prior to recommending the bill to the full committee. If a subcommittee votes not to report legislation to the full committee, the bill dies.

5. Committee Action to Report a Bill: After receiving a subcommittee's report on a bill, the full committee can conduct further study and hearings, or it can vote on the subcommittee's recommendations and any proposed amendments. The full committee then votes on its recommendation to the House or Senate. This procedure is called "ordering a bill reported."

6. Publication of a Written Report: After a committee votes to have a bill reported, the committee chairman instructs staff to prepare a written report on the bill. This report describes the intent and scope of the legislation, impact on existing laws and programs, position of the executive branch, and views of dissenting members of the committee.

7. Schedule Floor Action: After a bill is reported back to the chamber where it originated, it is placed in chronological order on the calendar.

8. Debate: When a bill reaches the floor of the House or Senate, there are rules and procedures governing the debate on legislation.

9. Voting: After the debate and the approval of any amendments, the bill is passed or defeated by the members voting.

10. Referral to Other Chamber: When a bill is passed by the House or Senate it is referred to the other chamber where it usually follows the same route through committee and floor action. This chamber may approve the bill as received, reject it, ignore it, or change it.

11. Conference Committee Action: If only minor changes are made to a bill by the other chamber, it is common for the legislation to go directly to the President for signature. However,

when the actions of the other chamber significantly alter the bill, a conference committee is formed to reconcile the differences between the House and Senate versions. If the conferees are unable to reach agreement, the legislation dies. If agreement is reached, a conference report is prepared describing the committee members' recommendations for changes. Both the House and Senate must approve the conference report.

12. Final Action: After a bill has been approved by both the House and Senate in identical form, it is sent to the President. If the President approves of the legislation, he signs it and it becomes law. Or, the President can take no action for ten days, while congress is in session, and it automatically becomes law. If the President opposes the bill he can veto it; or if he takes no action after the Congress has adjourned its second session, it is a "pocket veto" and the legislation dies.

13. Overriding a Veto: If the President vetoes a bill, Congress may attempt to "override the veto." This requires a two thirds roll call vote of the members who are present in sufficient numbers for a quorum.

Recent / Pending Private Bills

111th Congress

H.R. 6158: *For the Relief of Maria Eva Duran, Jessica Duran Cortes, Daniel Ivan Duran Cortes, and Jose Antonio Duran Cortes*[1]

On September 20, 2010, Rep. Lucille Roybal-Allard (D-CA) introduced a private bill to the House of Representatives, which was referred to the Committee on the Judiciary. The bill sought to obtain permanent resident status for Maria Eva Duran, Jessica Duran Cortes, Daniel Ivan Duran Cortes, and Jose Antonio Duran Cortes. To date, the bill is waiting for report by the Committee

H.R. 733: *For the Relief of Jayantibhai Desai and Indiraben Patel*[2]

On January 27, 2009, Mrs. Janet Napolitano (U.S. Sec. of Homeland Security) introduced a private bill to the House of Representatives, which was referred to the Committee on the Judiciary. The bill sought to obtain permanent resident status for Jayantibhai Desai and Indiraben Patel. On Feb. 5, 2009, the bill was referred to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law.

H.R. 742: *For the Relief of Flavia Maboloc Cahoon*[3]

On January 28, 2009, Rep. Bob Filner (D-CA) introduced a private bill to the House of Representatives, which was referred to the Committee on the Judiciary. The bill sought to obtain permanent resident status for Flavia Maboloc Cahoon. On Feb. 5, 2009, the bill was referred to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law.

H.R. 3638: *For the Relief of Jorge-Alonso Chehade-Zegarra*[4]

On September 23, 2009, Rep. Jim McDermott introduced a private bill to the House of Representatives, which was referred to the Committee on the Judiciary. The bill sought to obtain permanent resident status for Jorge-Alonso Chehade-Zegarra.

110th Congress:

117 private bills were introduced; 0 were enacted

109th Congress:

21 private bills were introduced; 0 were enacted

108th Congress:

98 private bills were introduced; 4 were enacted

~~**Private Law No. 108-1**~~

S. 103: *A Bill for the Relief of Lindita Idrizi Heath*[5]

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[1] http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.6158.IH:
[2] http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h733:
[3] http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.742.IH:
[4] http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.3638.IH:

Sponsor: Sen Nickles, Don [R-OK] (introduced 1/7/2003)
Committees: Senate Judiciary; House Judiciary
H.Rept. 108-532
Latest Major Action: Enacted 7/22/2004.

Adoption Final after 16th Birthday. As for Private Law 107-6, private bill precedent dictates that in order to make an adoption legitimate for immigration purposes, the adoption must have been at least initiated prior to the child's turning age 16.

Private Law No. 108-3

H.R. 712: *For the Relief of Richi James Lesley*[6]
Sponsor: Rep Wicker, Roger F. [R-MS-1] (introduced 2/11/2003)
Committees: House Judiciary; Senate Judiciary
H.Rept. 108-530
Latest Major Action: Enacted 10/30/2004.

Adjustment of Status for an Orphan Adoptee: The beneficiary was adopted abroad before his 16th birthday (as an infant), but his parents apparently never complied with immigration requirements, perhaps not knowing that they had to apply for an immigrant visa and/or adjustment of status, and, later, naturalization. The beneficiary thought he was a citizen until belatedly discovered otherwise.

Private Law No. 108-4

H.R. 867: *For the Relief of Durreshahwar Durreshahwar, Nida Hasan, Asna Hasan, Anum Hasan, and Iqra Hasan*[7]
Sponsor: Rep Holt, Rush D. [D-NJ-12] (introduced 2/13/2003)
Committees: House Judiciary; Senate Judiciary
H.Rept. 108-531
Latest Major Action: Enacted 10/30/2004.

Death of Petitioner from a 9/11-related Hate Crime During the Pendency of a Petition for Adjustment to Permanent Resident Status for Immediate Relatives. On September 15, 2001, in reaction to the events of September 11, an unstable man killed Mr. Hassan. Because Mr. Hassan was the petitioner for the family's adjustment, that petition became invalid upon his death. Therefore, under the I.N.A. and its regulations, his wife and four daughters who lived in suburban New Jersey faced removal from the United States. According to the House Report, "This private bill, on behalf of the family, would not set any bad precedent. Though he did not die at the World Trade Center or the Pentagon, Mr. Hassan was indeed a victim of the events of September 11th. The Committee is proceeding with this bill only because the *murder is linked to 9/11.* [emphasis added] It is inappropriate, generally, for Congress to pass private bills to give status to the families of noncitizens because those noncitizens were killed while in the United States." A minority comment was that the public law should be amended to permit family-unification petitions to survive the death of the petitioner through no fault of the beneficiaries.

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[5] http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN00103:@@@L&summ2=m&|TOM:/bss/d108query.html|
[6] http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR00712:@@@L&summ2=m&|TOM:/bss/d108query.html|
[7] http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR00867:@@@L&summ2=m&|TOM:/bss/d108query.html|

Private Law No. 108-6

H.R. 530: *For the Relief of Tanya Andrea Goudeau*[8]
Rep Baker, Richard H. [R-LA-6] (introduced 2/4/2003)
Committees: House Judiciary; Senate Judiciary
H.Rept. 108-529
Latest Major Action: Enacted 12/23/2004.

Adoption Final after 16th Birthday. According to private bill precedent, in order to make an adoption legitimate for immigration purposes, the adoption must have been at least initiated prior to the child's turning age 16. The beneficiary satisfied this condition; the adoption process was begun before her 16th birthday, but was not finalized until she had aged out of eligibility for an adopted orphan visa.

[8] http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR00530:@@@L&summ2=m&|TOM:/bss/d108query.html|

Immigration and Naturalization Service Operations Instructions on Private Bills

107.1 Private bills.

(a) General.
A Service employee shall neither recommend the introduction of, nor draft, remedial private immigration or nationality legislation.

(b) Stay of deportation or voluntary departure pending introduction.
A stay of deportation or voluntary departure shall not be authorized solely to permit the introduction of a private bill or in anticipation of receiving a congressional committee request for a report on such a bill.

(c) When report requested by congressional committee.
Upon receipt of a request from the House or Senate Judiciary Committee for a report on a private bill relating to an immigration or nationality matter, a teletype message will be sent to the appropriate district office by the Private Bill Control Unit, Central Office. A copy of this message and the bill will be mailed to the appropriate district investigations branch. If the beneficiary appears to be an alien in the United States, a stay of deportation will generally be authorized.

If a private immigration bill received adverse action at any time and subsequently a new bill was introduced for the same purpose in the House or Senate, a request for a report from the Committee in which the new bill is pending will not be honored by the Service unless the adverse action on the earlier bill is reconsidered. A letter to this effect will be sent concerning the new bill, indicating therein that the previous adverse action was reconsidered. When a field office finds in any case that adve rse action had been taken on a private bill, and a teletype message concerning a new bill is received without mentioning reconsideration of the adversed bill, the Private Bill Control Unit should be contacted.

(d) When report not requested by congressional committee.
If a private immigration bill has been introduced for an alien who appears to be in the United States in other than a lawful immigrant status, but a request for a report from the House or Senate Judiciary Committee is not received within a reasonable period of time by the Private Bill Control Unit, the appropriate district office will be notified and furnished a copy of the bill; in such a case, an investigative report for Congress shall not be prepared nor should deportation be stayed because of the bi ll's introduction.

(e) Effect of introduction.
The introduction of a private bill seeking to adjust the status of an alien nonimmigrant in the United States to that of a lawful permanent resident shall be regarded as prima facie evidence of termination of his lawful nonimmigrant status, if not otherwise previously terminated. Deportation proceedings already commenced shall be carried forward to a final determination. If deportation proceedings have not already been instituted and the beneficiary was in lawful status as a B, C, D, or H nonimmigran t when the private bill was introduced, and either Judiciary Committee has requested a report on the bill, Form I-177, in duplicate, shall be sent to him by registered mail with return receipt requested or handed to him personally, if convenient; should the beneficiary fail, within thirty days from the date the form is received, to depart or to advise the Service that he does not desire to have his status adjusted through private legislation, an order to show cause shall be issued and deportation proceeding s carried forward to a final determination. If the beneficiary advises the Service that he does not desire to have his status adjusted through private legislation, the regular investigation and a report to the appropriate committee in letter form for the Commissioner's signature shall be forwarded immediately to the Private Bill Control Unit setting forth the details and reasons for the beneficiary's action. If a report on the bill is not requested, Form I-177A, in duplicate, shall be sent to him by regis tered mail with return receipt requested or handed to him personally, if convenient, and no report prepared.

If the beneficiary was maintaining status under section 101(a)(15)(A) or (G), or as a treaty trader under the Immigration Act, of 1924, as amended, when the private bill was introduced, the alien may be considered to have voluntary departure for the period the alien remains in that status; in such a case Form I-177 shall not be sent to the alien. If deportation proceedings have not already been instituted, but the beneficiary had terminated status as a lawful nonimmigrant when the private bill was introduced, an order to show cause shall be issued and deportation proceedings carried forward to a final determination upon the expiration of any outstanding voluntary departure time.

If the beneficiary was maintaining status under section 101(a)(15)(E) (F), (I), (J), or (M), Form I-177 shall not be sent to the alien and deportation proceedings shall not be instituted. Any such alien's application for extension of stay shall be denied unless the alien overcomes the presumption of termination of status raised by the bill's introduction. However, voluntary departure shall be granted in increments of one year, conditioned upon the alien's otherwise completely maintaining nonimmigrant status or upon abiding by the terms and conditions of the alien's exchange program. Generally, an exchange alien shall not be granted voluntary departure beyond the limits set forth in 22CFR 63.23; also, see OI 242.10(b). Should the beneficiary fail to apply for additional voluntary departure time before the expiration of the last extension, the alien shall be interviewed, and, providing the alien is otherwise maintaining status, shall be granted voluntary departure under similar conditions. Other aliens of these classes who have already been placed under deportation proceedings solely because of the bill's introduction shall be granted extensions of voluntary departure or stays of deportation under like conditions.

Deportation proceedings shall not be instituted or reactivated in any case involving appealing humanitarian factors (see OI 103.1(a)(1)(ii)).

(f) Action by field office.

(1) Investigations Branch.

The mail copy of the teletype message shall be forwarded without index or file check directly to the Investigations Branch. If the Investigations Branch receives this copy of the teletype message before it receives the original, that branch will commence its action on the basis of that copy. When the Investigations Branch ascertains that the investigations "control office" function in relation to the private bill investigation is to be performed by any office other than the office to which the teletype message was addressed, the latter office shall transfer that function and send a copy of its teletype message or Form G-166 report to the Private Bill Control Unit. The private bill report shall be prepared and forwarded in accordance with outstanding investigations instructions.

In any private bill case involving citizenship or naturalization matters, the case is to be submitted to the Citizenship Section for determination as to whether the bill would accomplish the purpose for which it is intended. suggestions for any change it appears desirable to make in the bill in order to accomplish its intended purpose, where necessary, are to be included in the transmittal letter of the private bill report.

When a private bill which was introduced in successive Congresses for the same purpose is again reintroduced in the present one and a full report was made to the same branch of any preceding congress, additional material information obtained from review of the file, new national agency checks, or interview of the beneficiary shall be furnished in a supplemental letter. If additional material information is not developed, a memorandum to that effect shall be addressed directly to the Private Bill Control Un it, stating the date of each of the new agency-check responses. When the previous full report was made to a different branch or to a previous Congress and thereafter the bill was not re-introduced in any succeeding Congress until the present one (i.e., a bill introduced in the 89th Congress or earlier was first reintroduced in the 91st), a new, complete report shall be submitted.

If a reintroduced bill is for a different purpose than one in the preceding Congress, a new, complete report shall be submitted.

(2) Deportation Branch.

(i) *Initial departure date.*

When a report has been requested by a congressional committee and a stay has been authorized by the Central Office, the date set for deportation or voluntary departure under a final order shall be February 1 of the next odd-numbered year. Thus, a bill introduced in the First or Second Session of a Congress would be authorized a stay to February 1 of the First Session of the next

Congress.

(ii) *Summary deportation.*
The grant of a lesser period of time than that specified in subdivision (i) or the execution of the order of deportation when the beneficiary's continued presence here would be contrary to the best interests of the United states is not precluded, since deportation may be effected notwithstanding the private bill; if the case falls in this category, the district director shall on the cover sheet note a summary of the facts, including Service ability to promptly effect departure, togethe r with his recommendation, and forward the private bill report and the entire file to the regional office. If the regional office concurs, it shall include its comments on the cover sheet and forward the entire file to the Private Bill Control Unit, Central Office. After consulting with the committee and author of the bill, the Private Bill Control Unit will notify the appropriate district and regional offices of the decision and return the file. The foregoing procedure shall be followed at any time info rmation is received which, in the opinion of the district director, warrants summary deportation.

(iii) *Non-reintroduced bills.*
If on February 2 of a new congress notification of the Private Bill Control Unit, prompt steps shall be taken to require the deportable former bill beneficiary's departure from the United States; however, the district director's discretionary authority to stay deportation or extend departure time may be exercised. The Private Bill Control Unit shall be advised of any stay or extension of departure time and of the closing action.

(iv) *Adverse disposition.*
When adverse action has been taken on a private bill which was introduced to adjust the immigration status of an alien who is in the United States, the Private Bill Control Unit will notify the appropriate district and regional offices and will usually direct that departure be effected by a specified date. Although every effort should be made to complete the action within the time specified, the district director's discretionary authority to stay deportation or extend departure time m ay be exercised. The Private Bill Control Unit shall be advised of any stay or extension of departure time and of the closing action.

(v) *Notification of non-reintroduced bill or adverse disposition.*
The alien and his attorney or other recognized representative shall be notified by letter when Congress has failed to approve, or has taken adverse action, on the private bill. If the alien is in a voluntary departure status the letter should read substantially as shown below; the language in the first sentence will depend upon whether the 1961 and 1969 edition of Form G-386 was used when the alien was informed of the introduction of the bill:

You were previously notified that a private bill in your behalf was introduced in Congress and (you would be permitted to remain in the United States until February 1, 1969, or 30 days following adverse action on the bill, whichever occurred sooner) (you were granted an extension of time to depart voluntarily to February 1, 1969, or until adverse action was taken on the bill,

whichever occurred sooner). You are now advised that (the 90th Congress adjourned without having approved the bill) (Congress has ta ken adverse action on the bill).

In view of the above, you are being granted until (date) to depart voluntarily from the United States. You must notify this office, Room No.___, at least 7 days prior to the date of your departure of the arrangements you have made to depart, giving the date, place, and means of departure.

Failure to depart on or before the specified date will result in action being taken to effect your deportation.

If the deport part of an alternate order has taken effect, or a straight deportation order was issued, the wording of the letter should be similar to the following:

You were previously notified that a private bill in your behalf was introduced in Congress and (you would be permitted to remain in the United States until February 1, 1969, or 30 days following adverse action on the bill, whichever occurred sooner) (you were granted a stay of deportation until February 1`, 1969, or until adverse action was taken on the bill, whichever occurred sooner). You are now advised that (the 90th Congress adjourned without having approved the bill) (Congress has taken adverse actio n on the bill).

As an order to deport you from the United States is still outstanding in your case, arrangements are being made for your deportation on or about (date). You should arrange your affairs accordingly. You will be informed at a later date as to the exact date and time to surrender to this Service for deportation.

The wording of the letter may be altered to meet local conditions or individual circumstances of a case. The date set for voluntary departure or deportation should be 30 days from that of the letter in cases where the 1961 edition of Form G-386 was used, a reasonable lesser or greater period for voluntary departure or deportation may be set, depending upon the facts in the individual case.

(g) Supplemental private bill report.

If, following the submission of the private bill report any material information is received or any material action is taken with respect to the beneficiary which might favorably or unfavorably affect the committee's consideration of the bill, the section in control of the file shall promptly transfer it to the Investigation Branch for the preparation of a supplemental report. When the information indicates that administrative relief is available or has been granted, or when the information is particul arly adverse, the Private Bill Control Unit shall be notified immediately so that is can advise the committee informally and request that action be deferred pending transmittal of the supplemental report.

In order to ensure that supplemental information is submitted timely, the investigations Branch shall maintain a call-up system to coincide with any pending action, i.e. hearing dates, anticipated adjudication completion dates, and visa availability dates and, at a minimum, the case shall be called-up and reviewed every six months. (added)

(h) Notification of congressional action.
(1) *Passage of one branch of Congress.*
Upon the passage of a private bill in the first branch of Congress, the Private Bill Control Unit will send a copy of the act and the committee report to the appropriate district office. All procedures in progress shall continue since the bill may still not be enacted.

(2) *Enactment of private law.*
Upon the approval of a private bill by the President and receipt by the Private Bill Control Unit of copies of the private law affective the immigration or nationality status of an individual, that unit will notify the appropriate district office of enactment. Thereafter, the appropriate field office shall, when the private law directs that permanent resident status be granted an alien beneficiary who is in the United States upon payment of the required visa fee, collect $150 and forward it to the Director, Office of Finance, Department of State, Washington, DC 20520; the letter of transmittal should refer to the private law number. Upon receipt of the fee, the field office shall prepare a Form I-181 which shall be placed in the Service file relating to the alien. Form I-357 shall be delivered to every alien who has been accorded permanent resident status. The date of delivery of Form I-357 shall be entered in the designated space on the record copy of Form I-181. If the privat e law directs a numerical reduction, a copy of Form I-181 shall be forwarded to the Director, Visa Office, Attention:

Visa Control Office. If the alien is a nonimmigrant subject to central office control, the procedure in AM 2790 shall be followed. Form I-551 shall then be delivered to the alien.

Whenever the private law directs that permanent resident status be granted to an alien beneficiary who is in the United States, the employee who executes the Form I-181 in accordance with the above paragraph shall refer any person who requests a social security card, after such adjustment, to the nearest Social Security Office.

If the private law directs that permanent resident status be granted to an alien beneficiary who is in the United States and a visa fee is not required, the same record procedure shall be followed as in the case requiring a visa fee.

When the private law directs that an alien beneficiary be granted immediate relative or preference status for the purpose of procuring an immigrant visa, the field office shall send Form G-388 to the appropriate interested party; if a visa petition is required, but has not been filed, the interested party should be notified of the necessity for filing such a petition. If a public charge bond is required, the appropriate party, if in the United States, should be advised of the

requirement and upon acceptanc e of a bond, the Director, Visa Office, Department of State, should be informed that the bond has been deposited.

If the private law directs that the pending deportation proceedings shall be terminated, the fi office shall notify the beneficiary that such proceedings have been terminated by reason of the enactment of the private law. When the private law grants some other benefit or waiver under the immigration or nationality laws, the field office shall notify the beneficiary or interested party thereof and offer appropriate advice and assistance.

The Service shall not institute subsequent exclusion or deportation proceedings against an alien beneficiary of a private law which granted him the status of a permanent resident or which terminated deportation proceedings in his case on grounds based solely on facts contained in the Judiciary Committees' reports on the bill.

Detention and Removal Operations

DRO Policy and Procedure Manual

Section 20.8 Deferred Action

Attorney and the Office of General Counsel through your District Counsels office is essential to insure compliance with the order of the court.

(e) Adjudication and Decision. Title 8 CFR 241.6 governs administrative stays of removal. An alien ordered removed may apply for a stay of deportation or removal on Form I-246, Application for Stay of Deportation or Removal. The application for administrative stay of removal should be filed with the District Director having jurisdiction over where the alien resides. There are a multitude of reasons for filing for a stay. Common reasons include the need for urgent medical treatment, disposition of property, and unrelated legal proceedings. The adjudication of a stay of deportation or removal is often delegated to a deportation officer. Care should be exercised to verify any claimed facts, such as serious medical problems, etc. The decision of the District Director is final and may not be appealed administratively. Neither the filing of the application request nor the failure to receive notice of disposition of the request shall delay removal or relieve the alien from strict compliance with any outstanding notice to surrender for deportation or removal.

(f) Employment Authorization. There is no statutory or regulatory authority to grant employment authorization to an alien based on a grant of a stay of deportation or removal.

20.8 Deferred Action.

(a) General. 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 and in no way an entitlement, in appropriate cases. 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. In making deferred action determinations, the factors listed in paragraph (b), among others, should be considered.

Deferred action does not confer any immigration status upon an alien, nor is it in any way a reflection of an alien's immigration status. It does not affect periods of unlawful presence as defined in section 212(a)(9) of the Act, and does not alter the status of any alien who is present in the United States without being inspected and admitted. Under no circumstances does deferred action operate to cure any defect in status under any section of the Act for any purpose. Since deferred action is not an immigration status, no alien has the right to deferred action. It is used solely in the discretion of the Service and confers no protection or benefit upon an alien. Deferred action does not preclude the Service from commencing removal proceedings at any time against an alien. Any request by an alien (or another party on behalf of such alien) for deferred action should be considered in the same manner as other correspondence. The alien should be advised that he or she may not apply for deferred action, but that the Service will review the facts presented and consider deferred action as well as any other appropriate course of action.

(b) Factors to be Considered. The following factors, among others, should be evaluated as part of a deferred action determination:

(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, or federal law enforcement authorities for purposes of ongoing criminal or civil investigation or prosecution.

(c) Procedures. Normally a decision to recommend deferred action is made by the District Director, but in limited circumstances, the decision may be made by the Eastern Service Center Director.

(1) District Director. If the District Director recommends that removal action in an alien's case be deferred, the Director shall advise the Regional Director of such recommendation using Form G-312, Deferred Action Case Summary. The District Director shall sign the recommendation and shall explain the basis for his or her recommendation. The Regional Director shall consider the recommendation and determine whether further action on the alien's case should be deferred. The decision whether or not to defer action shall be communicated in writing by the Regional Director to the District Director. Upon receipt of notification of deferral by the Regional Director, the District Director shall notify the applicant, by letter, of the action taken and advise the alien that he or she may apply for employment authorization in accordance with 8 CFR 274a.12(c)(14). A decision not to defer action in such a case does not need to be separately communicated to the alien.

(2) Center Director (Eastern). In limited circumstances, Eastern Service Center Director may defer action on removal of an alien. Upon approval of an Form I-360 petition by a battered or abused spouse or child in his or her own behalf, the director shall separately consider the particular facts of each case and determine if deferred action is appropriate. Although the approval of such a petition will weigh in favor of deferred action, each decision must be considered individually, based on all the facts present and the factors discussed above. Upon deferral of action, the Center Director shall advise the alien, by letter, of the action taken and advise him or her of eligibility to request employment authorization. A decision not to defer action in such a case does not need to be separately communicated to the alien. Upon deferral of removal action, the Center Director shall include a copy of the G-312 in the alien's A-file and forward the file to the local Service office having jurisdiction over the alien's residence for docket control.

(d) Employment Authorization. Although deferred action is not an immigration status, an alien may be granted work authorization based on deferred action in his or her case, pursuant to 8 CFR 274a.12(c)(14).

(e) Periodic Review. Interim or biennial reviews should be conducted by both District and Regional Directors to determine whether deferred action cases should be continued or the alien removed from the deferred action category. District reviews must determine if there is any change in the circumstances of the case and report any pertinent facts to the Regional Director. Results of the review and a recommendation to continue or terminate deferred action shall be reported to the Regional Director via memorandum. The Regional Director shall endorse the memorandum with his or her decision and return it to the District Director for inclusion in the alien's file.

District Directors must also review deferred action cases within their jurisdiction which were originally granted by the Eastern Service Center Director. Changed circumstances in such cases must be reported to the Center Director for consideration of terminating the deferred action.

Regions should compare statistics among their districts to ensure consistent application of this highly sensitive program.

(f) Termination of Deferred Action. During the course of the periodic review, or at any other time if the District Director determines that circumstances of the case no longer warrant deferred action, he or she shall notify the Regional Director of the changed circumstances and recommend termination. The Regional Director shall determine if the deferred action should be terminated and notify the District Director of the decision. The District Director shall, in turn, notify the alien of the decision by letter. The alien is not entitled to an appeal of this decision. The Eastern Service Center Director may also terminate deferred action in any case he or she originally granted. If the Eastern Service Center Director terminates deferred action, he or she must report the decision to the Regional Director and to the appropriate District Director.

Upon termination of deferred action, any relating employment authorization must be revoked.

20.9 Exercising Discretion.

(a) Distinguishing Prosecutorial from Adjudicative Discretion. In the course of their duties, Service officers are likely to encounter a variety of situations in which they may be called upon to make discretionary decisions. The legal requirements, and the available scope of discretion, will depend upon the type of discretionary decision being made. There are two general types of discretion: prosecutorial (or enforcement) discretion, and adjudicative discretion.

Prosecutorial discretion is a decision by an agency charged with enforcing the law to enforce, or not enforce, the law against someone. To put it another way, a prosecutorial decision is a choice whether to exercise the coercive power of the state in order to deprive an individual of a liberty or property interest, under a law that provides the agency with authority to take such an action. The term "prosecutorial" can be deceptive, because the scope of decisions covered by this doctrine include decisions, such as whether to arrest a suspected violator, other than the specifically "prosecutorial" decision whether to file legal charges against someone. Adjudicative discretion, by contrast, involves the affirmative decision whether to grant a benefit under adjudicative standards and procedures provided by statute, regulation or policy that provide the agency with a measure of discretion in determining whether to provide the benefit.

The distinction between the discretion exercised in an adjudicative decision regarding an affirmative grant of a benefit and a prosecutorial decision is a fundamental one; yet, it is sometimes blurred and difficult to determine in the immigration context. Some decisions that may, on their face, look like a benefit grant -- such as an INS stay of removal or grant of deferred action -- really are just mechanisms for formalizing an exercise of prosecutorial discretion. Others, such as voluntary departure, include elements of both "benefit" and enforcement. Many proceedings combine both adjudicative and prosecutorial discretion, such as a removal proceeding in which an asylum application, adjustment of status, or a request for cancellation of removal, is at issue. Officers who are in doubt about what standards may apply to a decision because of uncertainty about what type of discretion is involved should consult their supervisor and/or Service counsel.

Service enforcement decisions involving prosecutorial discretion may involve either a liberty or a property interest. Decisions involving a liberty interest that are likely to be relevant to a deportation officer's duties include:

whom to arrest;

whom to refer for criminal prosecution;

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INS and DOJ Legal Opinions

INS and DOJ Legal Opinions

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ß 99-5 INS exercise of prosecutorial discretion

GENCO OPINION 99-5

MEMORANDUM FOR THE COMMISSIONER

THROUGH: THE DEPUTY COMMISSIONER

FROM: Bo Cooper
General Counsel

SUBJECT: INS Exercise of Prosecutorial Discretion

I. Summary

This memorandum sets out the legal basis upon which, and the extent to which, the Immigration and Naturalization Service (INS) may exercise prosecutorial discretion in its enforcement activities, including placing aliens in removal proceedings by serving them with Notices to Appear (NTAs). The structure of the memorandum is a series of questions and answers about prosecutorial discretion and the application of the doctrine to INS operations. It is our opinion that the INS has prosecutorial discretion to place a removable alien in proceedings, or not to do so, but it does not have prosecutorial discretion to admit an alien into the United States who is inadmissible under the immigration laws, or to provide any immigration benefit to any alien ineligible to receive it.

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. In particular, our legal conclusion that the INS has prosecutorial discretion to determine not to put a removable alien in proceedings is not intended to suggest that in any particular case such a determination should be made as a policy matter, or to supersede any current INS policy or procedures for charging removable aliens.

II. Discussion of INS Prosecutorial Discretion

Question 1. What is "prosecutorial discretion?"

Prosecutorial discretion is a decision by an individual or law enforcement agency charged with enforcing a law to enforce -- or not to enforce -- that law against someone; in other words, to decide to proceed against person A, but not person B, even though the law would authorize action against both. Although prosecutorial discretion is sometimes viewed solely as the decision of a prosecutor whether or not to bring charges against an individual, the term also can apply to a broad spectrum of discretionary enforcement decisions taken by a law enforcement agency, including: the decision to focus investigative resources on particular offenses or conduct; the decision of an investigating officer whether to stop or arrest a suspect; the decision of a prosecutor whether to charge an individual believed to have broken the law; the selection of what charge to bring in the very frequent situations in which more than one is available; the decision to drop some or all charges in an ongoing case; and the decision whether or not to seek to settle a case by plea bargain. Often, an individual who is not actually a prosecutor has broad "prosecutorial" discretion; for example, police officers have broad prosecutorial authority to charge minor offenses such as traffic violations.

For these reasons, the term "prosecutorial discretion" can be something of a misnomer, unless the focus is specifically on the decision of a prosecutor to bring a charge. Other applicable terms could include "enforcement discretion" or "administrative discretion" (generally), or "investigative discretion" (the discretion to focus investigative resources on particular priorities or targets).

Question 2: Why do law enforcement agencies have prosecutorial discretion?

The idea that the prosecutor is vested with broad discretion in deciding when to prosecute, and when not to prosecute, is firmly entrenched in American law. W. LaFave and J. Israel, Criminal Procedure ß 13.2 (2d ed. 1992). Reasons for discretionary enforcement include (1) legislative "overcriminalization," such as the continued existence of crimes on the statute books that society does not wish to enforce, or does not wish to enforce as broadly as they are written (for example, morals offenses such as adultery); (2) limitations in available enforcement resources that make it impossible for a law enforcement agency to prosecute all offenses that come to its attention; and (3) the need to address the equities of individual cases in a way that rigid application of a broadly-drawn statute often cannot do.

The courts have recognized that attempting to review the discretionary enforcement decisions that prosecutors necessarily must make is a task "particularly ill-suited to judicial review." *Wayte v. United States, 470 U.S. 598, 607 (1985).* As the Supreme Court has stated, "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake ... Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Id. at 607-08.*

Question 3: How does the general concept of prosecutorial discretion apply in the Immigration enforcement context?

The INS is often involved, as the investigating agency that presents suspected criminal offenses involving the immigration laws to U.S. Attorneys for possible prosecution, in questions of prosecutorial discretion in the classic context of a criminal prosecutor's decision to charge. However, this answer focuses on the INS' exercise of discretion in the administrative context, when the INS itself

is the decisionmaker. Because the INS is simultaneously in removal and detention matters the investigating agency, the prosecuting agency, the custodian, and the removing agency, the administrative enforcement discretion generally deferred to by courts extends far more broadly to a wide variety of INS decisions than the strictly "prosecutorial" decision to institute removal proceedings.

The concept of prosecutorial discretion applies in the civil, administrative arena as much as it does in criminal law. The Supreme Court "has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney, 470 U.S. 821, 831 (1985).* Courts have long recognized that the INS may exercise prosecutorial discretion in its enforcement activities. E.g., *Johns v. Department of Justice, 653 F.2d 884, 890 (5th Cir. 1981); Matter of Geronimo, 13 I & N 680, 681 (BIA 1971).* In a case decided last term, the Supreme Court specifically reaffirmed that the concept of applicable law that sets guidelines for determining when the approval should be given. Chaney, prosecutorial discretion applies to INS enforcement activity such as a decision to place a particular alien in deportation proceedings. *Reno v. American-Arab Anti-Discrimination Committee, 119 S. Ct. 936 (1999)* ("AADC"). In AADC, the Court stated that the IIRIRA provision (section 242(g) of the INA) at issue in the case "was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *Id. at 944 n. 9.*

Because -- like other law enforcement agencies -- 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. When illegal border crossers are voluntarily returned to Mexico, or removable aliens are allowed to withdraw their applications for admission at a port of entry, without being placed in removal proceedings, those are exercises of prosecutorial discretion. Similarly, an INS grant of deferred action is an act of prosecutorial discretion. *AADC, 119 S. Ct at 943.*

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.

Question 4: What are the limits on INS prosecutorial discretion?

Under the Supreme Court's decision in Chaney, there is a rebuttable presumption that an agency's discretionary decision not to take enforcement action is not reviewable by the courts under the Administrative Procedure Act (APA), *5 U.S.C. ß 501* et seq. *Chaney, 470 U.S. at 832-33;* see *Texas v. United States, 106 F.2d 661, 667 (5th Cir. 1997)* (rejecting "out-of-hand" Texas' argument that the INS failed to enforce the INA adequately, and that the alleged breach was reviewable under the APA for abuse of discretion). AADC confirms that affirmative discretionary decisions to select an individual violator for enforcement proceedings are also generally unreviewable. In other words, unlike discretionary decisions that are reviewable for abuse of discretion based on the facts of the case -- such as a grant or denial of a waiver by an immigration judge -- courts will not review an exercise of prosecutorial discretion for abuse of discretion. There are significant limitations to prosecutorial discretion, however.

First, in order to be a nonreviewable exercise of prosecutorial discretion, the decision must be a decision to enforce, or not to enforce, the law. An enforcement decision must be distinguished from an affirmative act of approval, or grant of a benefit, under a statute or other applicable law that sets guidelines for determining when the approval should be given. *Chaney, 470 U.S. at 831.* An enforcement decision is an exercise -- or nonexercise -- of an agency's coercive power over an individual's liberty or property. *Id. at 832.*

The doctrine of prosecutorial discretion applies to enforcement decisions, not benefit decisions. For example, a decision to charge, or not to charge, an alien with a ground of deportability is clearly a prosecutorial enforcement decision. By contrast, a grant of an immigration benefit, such as naturalization or adjustment of status, is a benefit decision that is not a subject for prosecutorial discretion. See *Chaney, 470 U.S. at 831* (distinguishing *Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)).* An agency must grant or deny a benefit based on its application of the criteria established by statute and implementing regulations. For example, if the INS selectively applied the naturalization requirements by granting some applications filed by aliens who had been lawful permanent residents less than five years, but denying others, it would be difficult to defend that action on the ground that the agency had "prosecutorial discretion" not to "enforce" the five-year requirement; rather, its application of the law would be vulnerable to a claim that it was arbitrary and capricious in violation of the APA.

It is important not to confuse the discretion that the INS has with respect to many benefit decisions with unreviewable prosecutorial discretion. For example, a grant of asylum under section 208 of the INA to an applicant meeting the statutory requirements is a discretionary action, but an applicant denied asylum by the INS will be given the opportunity to have his or her claim considered by an immigration judge, and an immigration judge's exercise of the Attorney General's discretionary authority to deny asylum is reviewable for abuse of discretion on appeal to the Board of Immigration Appeals and a Circuit Court of Appeals. This type of discretion is not prosecutorial discretion. There are also situations in which the INS' discretionary grant or denial of an immigration benefit is not reviewable. For example, *8 C.F.R. ß 274.13(c)* provides that a denial of an application for employment authorization may not be appealed, but that unreviewability does not make such a denial an act of prosecutorial discretion.

Chaney's distinction between decisions involving the exercise of coercive power over liberty or property, and those involving administrative systems for the adjudication of affirmative approvals or benefits, provides substantial assistance in attempting to define the scope of the INS' prosecutorial discretion. This distinction is not always an easy, bright-line rule to apply, however. The distinction between an enforcement decision and an affirmative act of approval is often blurred. A decision not to enforce the immigration laws by placing an alien present in the United States in proceedings will (although it is not a grant of an immigration benefit per se) result in the alien's continued presence in violation of law, and in some cases to the eventual grant of a benefit such as adjustment of status. In some situations, the exercise of INS prosecutorial discretion serves directly as the basis for benefit eligibility. For example, aliens who are the beneficiaries of deferred action are considered "lawfully present" for the purpose of eligibility for Title II Social Security benefits under *8 C.F.R. ß 103.12(a)(4)(vi)*, and are eligible for employment authorization under *8 C.F.R. ß 274a.12(c)(14).* Furthermore, a removal proceeding often combines both an affirmative adjudication of a benefit (such as a request for asylum) and the exercise of the coercive power of the agency.

There are also situations in which the INS cannot as a practical matter exercise its legal authority to refrain from placing an alien in proceedings, because alternatives to proceedings are not reasonably available. For example, a lawful permanent resident alien seeking admission at a port-of-entry who is found to be inadmissible with no available waiver cannot be admitted, so there is no satisfactory alternative to removal proceedings (this topic is discussed further in the answers to questions 7 and 8 below).

Second, the presumption that agency prosecutorial discretion is unreviewable may be rebutted where the substantive statute has provided clear guidelines for the agency to follow in exercising its enforcement powers. *Chaney, 470 U.S. at 832-33.* "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Id. at 833.* Although extreme examples of legislative control of executive enforcement activity - such as, to take a hypothetical example, a statute directing an agency to commence an enforcement action against a specific individual -- would raise Constitutional concerns regarding the separation of powers, Congress may as a general matter direct and guide agency action by statute. Because a decision not to take enforcement action is presumptively unreviewable, however, only Congress' clear legislative intention to circumscribe agency enforcement discretion, and its provision of "meaningful standards for defining the limits of that discretion," will overcome the presumption against judicial review of a decision not to enforce the law. *Id. at 834.*

Section 242(g) of the INA, as interpreted by the Supreme Court in AADC, provides that INS enforcement decisions whether or not to commence proceedings or execute removal orders against any alien are not judicially reviewable. *AADC, 119 S. Ct. at 943-44.* With respect to those discretionary enforcement decisions, then, not only has Congress not clearly circumscribed the INS' enforcement discretion while providing meaningful standards defining the limits of that discretion, but it has firmly and specifically preserved INS discretion in this area.

With respect to detention, however, Congress made it clear in IIRIRA that, in order to ensure the removal of certain aliens, it intended to limit the enforcement discretion previously provided by the INA to INS decisions not to detain certain aliens under the INA's detention authority. The subject of detention is discussed more thoroughly in the answer to question 9, below.

Third, prosecutorial discretion is subject to constitutional constraints. Equal protection prohibits a decision to prosecute that is based upon an unjustifiable standard such as race, religion, or other arbitrary classification. *United States v. Armstrong, 517 U.S. 456, 464 (1996).* Because of the broad discretion granted to prosecutorial decisions, however, a "selective prosecution" case is a very difficult one to make (selective prosecution is further discussed in the answer to question 5).

Fourth, prosecutorial discretion to enforce the law can extend only up to the substantive and jurisdictional limits of that law. Although a law enforcement agency can strictly enforce the law as written against every violator if it wishes to do so and has sufficient resources, it cannot go beyond the law. For example, the INS cannot pursue a removal case against someone it knows to be a U.S. citizen because removing that individual is not an action within the substantive limits of the INA. Nor may the INS pursue an enforcement action that might be entirely appropriate if done by some other agency, but is not within the legal jurisdiction of the INS.

We also emphasize the important distinction between prosecutorial discretion to enforce the law, and the legal requirements applicable to the enforcement proceeding itself. See *Geronimo, 13 I & N at 681* (it is the district director's discretionary decision whether to institute deportation proceedings; the immigration judge's function is not to review the wisdom of the district director's initiation of the proceedings, but to determine whether the deportation charge is sustained by the requisite evidence). Those legal requirements must always be followed, and INS compliance with them may be reviewed by the appropriate court.

An example of this distinction is an INS arrest of an alien believed to be present in the United States in violation of the INA. The INS has the discretionary authority not to arrest such an alien, even if there is probable cause to believe he is in the United States unlawfully. If the INS encounters several aliens and has probable cause to believe all of them are present unlawfully, the INS has the discretionary authority to arrest some of them, but not others, and the arrested aliens do not have a cognizable claim that their arrests were illegal merely because they were singled out -- just as a speeder pulled over on the highway will not be heard to complain that his ticket should be dismissed because others were speeding, but were not pulled over. What the INS does not have the authority to do, under prosecutorial discretion or any other rule of law, is to arrest someone without probable cause to do so.

Question 5: Who enforces the limitations on INS prosecutorial discretion?

Another way of examining the limitations on INS' prosecutorial discretion is to ask, who may question an INS decision to enforce, or not to enforce, the immigration laws with respect to an alien, or category of aliens? There are basically three possible sources of legal limitation on INS' discretion: The federal courts, Congress, and INS or the Department of Justice itself.

Court challenges to prosecutorial discretion come in two forms. First, and most common, is a claim by someone who is the subject of enforcement that the enforcement is illegal because he has been improperly singled out for prosecution. For example, in AADC, aliens who had failed to maintain lawful immigration status complained that the INS sought to deport them, as opposed to other similarly situated aliens not placed in proceedings, because of their exercise of First Amendment rights. The Supreme Court rejected the claim, holding that when an alien's continued presence in the United States is in violation of the immigration laws, the INS does not violate the Constitution by selecting his case for enforcement because it believes him to be a member of an organization that supports terrorist activity. *AADC, 119 S. Ct. at 946.* As a result of the broad discretion courts grant to prosecutors' exercise of discretion, selective enforcement claims very rarely succeed, and then only when the defendant is able to produce clear evidence displacing the presumption that the prosecutor has acted lawfully. Id.; *Armstrong, 517 U.S. at 464.* In order to prevail on a selective prosecution claim that he was singled out on the basis of his race, the defendant must prove that the government's prosecutorial policy declined to prosecute similarly situated suspects of other races, and that the policy was motivated by a discriminatory purpose. *Armstrong, 517 U.S. at 465.*

Although federal courts generally have upheld INS prosecutorial discretion by rejecting selective prosecution arguments in immigration cases, *Pasquini v. Howerton, 700 F.2d 658, 662 (11th Cir. 1983),* they have on occasion been receptive to such arguments. *Lennon v. INS, 527 F.2d 187, 195 (2d Cir. 1975).* AADC's firm rejection of a selective prosecution argument raises the bar for such arguments in removal cases, however, even higher than the already extremely deferential Armstrong standard applicable to criminal cases. *AADC, 119 S.Ct at 946-47.* For several reasons, the concerns that make courts properly hesitant to examine the decision whether to prosecute are

"greatly magnified in the deportation context." Id. Consequently, although the Supreme Court did not rule out the possibility of "a rare case in which the alleged basis of discrimination is so outrageous" that these concerns can be overcome, AADC has made selective prosecution claims in immigration cases substantially more difficult to prevail upon than was previously the case.

Less common than a selective prosecution claim, but not unknown, is a judicial claim by someone asking a court to order an agency to take enforcement action against someone else. For example, in Chaney, death row inmates sought an order requiring the FDA to enforce the drug laws in ways that would make it essentially impossible for states to use any drugs for lethal injections. *Chaney, 470 U.S. at 823.* These claims likewise usually fail, if not for threshhold grounds of judicial standing (i.e., that the claimant does not have a sufficient personal stake in the issue to raise the claim), then as a result of courts' deference to an agency decision not to enforce.

Congress may also limit an agency's prosecutorial discretion by a variety of means, ranging from changes in the substantive law of the offense to channeling funding through the budget process to particular areas of concern. A basic legal question common to prosecutorial discretion issues, then, is whether the relevant statute limits discretion with respect to a particular enforcement activity. As prosecutorial discretion is an authority inherent in the law enforcement function, a statutory limitation must be clear and specific. If prosecutorial discretion is specifically limited by law, that limitation is likely to be enforceable in court by a person aggrieved by its violation, returning the question to a judicial forum. If the law does not limit discretion, however, then the only question for the Executive agency -- and it is not a legal one - is whether the manner in which it exercises its enforcement authority is likely to invite future statutory limitations.

The third source of limitation on prosecutorial discretion comes from within the law enforcement agency itself, or from higher Executive Branch authorities (such as, in the case of INS, the Attorney General or the President). Whether by regulation or policy directive, an agency may channel and guide the discretion of its employees entrusted with the responsibility of making discretionary enforcement decisions in order to ensure that such decisions are made fairly and judiciously. Indeed, appropriate policy guidance, reinforced by training, is necessary in order for a law enforcement agency to carry out an enforcement function properly. Such guidance serves a variety of policy goals, including promoting public confidence in the fairness and consistency of the agency's enforcement action; ensuring that employees carrying out the agency's discretionary functions are delegated the degree of discretionary authority appropriate to their position, training, qualifications and experience; maintaining proper chains of command and accountability; removing potential opportunities for corruption or misconduct; and protecting employees from false accusations of corruption or misconduct.

The INS has provided a variety of materials, of differing legal formality, to instruct and guide its officers on how and when removal proceedings should be instituted, and who has authority to institute them. For example, INS regulations at *8 C.F.R. ßß 239.1* and *239.2* identify which INS officers are authorized to issue NTAs, and describe who may cancel them and on what grounds. INS enforcement priorities that focus INS prosecutorial resources where they will do the most good, such as removing criminal aliens and deterring alien smuggling, are examples of informal guidance that broadly govern the exercise of prosecutorial discretion. (By "informal" we mean only that enforcement priorities are not legally codified and binding substantive law -- nor are they required to be under the APA -- not that they are unimportant, or need not be adhered to by INS personnel.) The INS also provides field manuals and other enforcement procedure documents for detention and de-

portation officers, special agents, and others who must make investigative and prosecutorial decisions. See, e.g., interim Enforcement Procedures (June 5, 1997) (discussing, among other things, factors to be considered in granting voluntary departure or deferred action).

The need for suitable policy guidance must be balanced, however, with the realization that if the agency provides regulations or instructions on the exercise of prosecutorial discretion that are so strict, formalized, or rigid as to establish a substantive process conferring a benefit on an alien, the otherwise discretionary enforcement decisions in that process may be considered judicially reviewable, on the ground that the law now provides workable standards for a court to apply. See *Nicholas v. INS, 590 F.2d 802, 805-08 (9th Cir. 1979).* As Justice Scalia's opinion for the Court in AADC noted with respect to pre-IIRIRA litigation involving INS decisions regarding grant or denial of deferred action, "since no generous act goes unpunished ... the INS's exercise of this discretion opened the door to litigation in instances where the INS chose not to exercise it." *AADC, 119 S. Ct. at 944.*

It sometimes is appropriate for the INS to bind itself with rules (such as *8 C.F.R. ß 239.1*) upon which the public reasonably may rely, even if those rules limit the exercise of prosecutorial discretion in a particular case. Generally, however, policies that affect prosecutorial discretion -- especially those that address the prosecutorial discretion of the agency as a whole -- are properly classified and issued as general statements of policy that do not impose rights and obligations on the public, and are not subject to the rulemaking requirements of the APA. See, e.g., *Romeiro de Silva v. Smith, 773 F.2d 1021, 1024 (9th Cir. 1985); Pasquini, 700 F.2d at 662;* J. Stein, G. Mitchell & B. Mezines, Administrative Law ß 15.07[4] (1999). Therefore, they may be changed at any time, and do not legally bind the agency or provide any substantive or procedural rights to aliens. For example, it would not be in order for an alien to move to terminate his immigration proceeding on the ground that his case does not fall within one of the INS' enforcement priorities, or for an immigration judge to entertain such a claim.

Question 6: Does the INS have prosecutorial discretion not to pursue a removal proceeding against a removable alien?

Yes. Section 242(g) of the INA, as interpreted by the Supreme Court in AADC, provides that the INS' decision not to pursue a removal proceeding against an alien is an exercise of prosecutorial discretion that is not judicially reviewable.

Question 7: Does the INS have prosecutorial discretion to admit an inadmissible alien at a port-of-entry?

No. Inspection and admission of aliens involves elements of both enforcement and benefit adjudication. Admitting an alien with an authorized status and length of stay is an affirmative act of approval under the INA. Section 235(b)(2) of the INA prohibits an immigration officer from admitting an applicant for admission unless the alien is clearly and beyond a doubt entitled to be admitted. If there is any such doubt, section 240(a)(3) provides that (unless otherwise specified in the INA, such as expedited removal or stowaways) a removal proceeding before an immigration judge is the sole and exclusive procedure for determining whether an alien may be admitted to the United States.

Serving an NTA on an inadmissible alien is an enforcement decision that is subject to prosecutorial discretion. In the exercise of prosecutorial discretion, the INS also may allow an alien applicant for admission to withdraw his or her application and depart immediately from the United States. What the INS may not do, however, is admit an inadmissible alien as an exercise of prosecu-

torial discretion. This is true both because the doctrine of prosecutorial discretion is limited under cases such as Chaney to decisions to exercise the enforcement power of the agency rather than affirmative acts that grant a status, and because the statutory provisions relating to admission clearly limit any such discretion on the part of the agency. If there is any doubt about the admissibility of an alien, the INS cannot admit the alien. At that point it has the discretionary option to allow the alien voluntarily to withdraw his application for admission, or to place him in proceedings. (Parole is also an option if the alien qualifies under section 212(d) of the INA, but is neither an admission nor a permanent answer to the question of the alien's admissibility.)

Question 8: What other concerns or practical difficulties are relevant to the exercise of the INS' prosecutorial discretion not to place removable aliens in proceedings?

First, the fact that a violation of the immigration laws is a continuing violation leads to practical difficulties with the exercise of prosecutorial discretion. In particular, an INS decision to forego placing an alien -- such as an LPR with a criminal record making him or her removable -- in proceedings does not cure the violation, and is likely to cause future problems. If the alien travels outside the United States and attempts to reenter, the alien will not be admissible. Admission to the United States as the result of immigration inspection is not a matter of prosecutorial discretion. An inadmissible alien for whom a waiver is not available may not be admitted.

In other words, the fact that the INS can forego commencing a removal proceeding does not mean that the INS can grant a status for which an alien is not eligible, so the alien remains in a continuing, difficult state of limbo and illegality. Unlike criminal law, immigration law does not contain generally applicable statutes of limitation that grant repose to past violators of law to go on with their lives without fear of prosecution after sufficient time has elapsed.

Second, unlike a typical criminal prosecution decision that involves making the decision whether an individual should be punished for past, completed misconduct, a decision not to bring a removal proceeding perpetuates a continuing violation of the immigration laws. Removal from the United States is not a punishment; rather, it is a civil correction of an ongoing violation. *AADC, 119 S. Ct. at 947.* This is a factor the INS should consider when it declines to place in proceedings an alien whom Congress has declared by law to be removable.

Third, INS prosecutors lack much of the flexibility that criminal prosecutors possess to make, as a discretionary matter, the consequences of misconduct fit the offense. For example, as removal from the United States is not a punishment, immigration law does not contain criminal law concepts of gradualized sentencing based upon the specific facts of the individual's offense or, for the most part, different consequences based upon the specific ground of removability. This gives INS prosecutors little of the discretion criminal prosecutors have to select appropriate charges from a range of offenses covering the defendants' misconduct, or to "plea bargain" a case.

Question 9: How does the concept of prosecutorial discretion relate to detention questions such as mandatory detention?

Section 236(a) of the INA provides the INS with the general authority -- and the discretion -- to detain an alien pending a decision on whether the alien is to be removed from the United States. As detaining aliens is an exercise of the coercive authority of a law enforcement agency over liberty, legal concepts of enforcement discretion apply despite the fact that detention is not a strictly "prosecutorial" decision. Detention decisions (whether in individual cases or collectively as a matter of agency policy) typically involve consideration of factors not dissimilar from those a prosecutor

considers in deciding whether to prosecute, including the adequacy of agency resources available for the task, competing agency mandates or priorities, and other relevant legal or policy considerations (such as, in the case of detention, ensuring that detainees are not subjected to unlawful overcrowding or other conditions adversely affecting their health and safety). The INS traditionally has had the discretion to choose not to detain a removable alien. That discretion has been tempered with other legal authority and policies, such as bond determinations, designed to ensure that such decisions have been made based on a determination that the alien is not a threat to public safety and is likely to appear for further proceedings. Whether an alien should be detained without bond, and conditions of release such as the appropriate amount of bond, are INS and/or immigration judge determinations reviewable by the Executive Office for immigration Review.

In short, an INS determination to exercise its detention authority over an alien is reviewable on the merits, just as an INS decision to seek the removal of an alien by placing him or her in proceedings will be adjudicated on the merits in most categories of cases by the immigration judge. An INS decision to release an alien whom the agency otherwise might seek to detain was, until the enactment of IIRIRA, an unreviewable act of enforcement discretion under the INA in the same way a decision not to charge a removable alien was, and is, an unreviewable discretionary act.

In IIRIRA, however, Congress expressly limited the INS' administrative discretion under the INA not to detain criminal aliens, once the decision is made to place them in removal proceedings. The mandatory detention provisions, sections 236(c) and 241(a)(2) of the INA, require the INS (with limited exceptions) to detain criminal aliens during the pendency of their removal proceedings, and during the 90-day removal period following the entry of their removal order.

Thus, although Congress reaffirmed in IIRIRA the INS' prosecutorial discretion to commence removal proceedings against an alien, it did the opposite with respect to the agency's enforcement discretion to release criminal aliens once the INS has determined to institute proceedings, and the proceeding is pending or has concluded with the entry of a removal order. Congress stated a clear intention expressly to limit the discretion the INS otherwise would presumptively have had to make discretionary determinations regarding the need to detain a criminal alien, and provided meaningful standards regarding mandatory detention categories.

III. Conclusion

The INS has broad prosecutorial discretion in its law enforcement activities, although that discretion is not unlimited. This authority includes the prosecutorial discretion not to place a removable alien in proceedings, but the INS does not have prosecutorial discretion to admit an inadmissible alien into the United States. The INS does not have prosecutorial discretion to provide any benefit under the INA to an alien who is not eligible to receive it.

U.S. Department of Justice
Immigration and Naturalization Service

HQOPP 50/4

Office of the Commissioner

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NOV 17 2000

MEMORANDUM TO REGIONAL DIRECTORS
DISTRICT DIRECTORS
CHIEF PATROL AGENTS
REGIONAL AND DISTRICT COUNSEL

FROM: Doris Meissner
Commissioner
Immigration and Naturalization Service

SUBJECT: Exercising Prosecutorial Discretion

Since the 1996 amendments to the Immigration and Nationality Act (INA) which limited the authority of immigration judges to provide relief from removal in many cases, there has been increased attention to the scope and exercise of the Immigration and Naturalization Service's (INS or the Service) prosecutorial discretion. This memorandum describes the principles with which INS exercises prosecutorial discretion and the process to be followed in making and monitoring discretionary decisions. 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.

More specific guidance geared to exercising discretion in particular program areas already exists in some instances,[1] and other program-specific guidance will follow separately.

[1] For example, standards and procedures for placing an alien in deferred action status are provided in the Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing, and Removal (Standard Operating Procedures), Part X. This memorandum is intended to provide general principles, and does not replace any previous specific guidance provided about particular INS actions, such as "Supplemental Guidelines on the Use of Cooperating Individuals and Confidential Informants Following the Enactment of IIRIRA," dated December 29, 1997. This memorandum is not intended to address every situation in which the exercise of prosecutorial discretion may be appropriate. If INS personnel in the exercise of their duties recognize apparent conflict between any of their specific policy requirements and these general guidelines, they are encouraged to bring the matter to their supervisor's attention, and any conflict between policies should be raised through the appropriate chain of command for resolution.

However, INS officers should continue to exercise their prosecutorial discretion in appropriate cases during the period before more specific program guidance is issued.

A statement of principles concerning discretion serves a number of important purposes. As described in the "Principles of Federal Prosecution,"[2] part of the U.S. Attorneys' manual, such principles provide convenient reference points for the process of making prosecutorial decisions; facilitate the task of training new officers in the discharge of their duties; contribute to more effective management of the Government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of different offices and between their activities and the INS' law enforcement priorities; make possible better coordination of investigative and prosecutorial activity by enhancing the understanding between the investigative and prosecutorial components; and inform the public of the careful process by which prosecutorial decisions are made.

Legal and Policy Background

"Prosecutorial discretion" is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone. The INS, like other law enforcement agencies, has prosecutorial discretion and exercises it every day. In the immigration context, the term applies not only to the decision to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions, including among others: Focusing investigative resources on particular offenses or conduct; deciding whom to stop, question, and arrest; maintaining an alien in custody; seeking expedited removal or other forms of removal by means other than a removal proceeding; settling or dismissing a proceeding; granting deferred action or staying a final order; agreeing to voluntary departure, withdrawal of an application for admission, or other action in lieu of removing the alien; pursuing an appeal; and executing a removal order.

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, depending on the status of a particular matter, but include decisions such as not issuing an NTA (discussed in more detail below under "Initiating Proceedings"), not detaining an alien placed in proceedings (where discretion remains despite mandatory detention requirements), and approving deferred action.

[2] For this discussion, and much else in this memorandum, we have relied heavily upon the Principles of Federal Prosecution, chapter 9-27.000 in the U.S. Department of Justice's United States Attorneys' Manual (Oct. 1997). There are significant differences, of course, between the role of the U.S. Attorneys' offices in the criminal justice system, and INS responsibilities to enforce the immigration laws, but the general approach to prosecutorial discretion stated in this memorandum reflects that taken by the Principles of Federal Prosecution.

Courts recognize that prosecutorial discretion applies in the civil, administrative arena just as it does in criminal law. Moreover, the Supreme Court "has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831 (1985). Both Congress and the Supreme Court have recently reaffirmed that the concept of prosecutorial discretion applies to INS enforcement activities, such as whether to place an individual in deportation proceedings. INA section 242(g); Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999). The "discretion" in prosecutorial discretion means that prosecutorial decisions are not subject to judicial review or reversal, except in extremely narrow circumstances. Consequently, it is a powerful tool that must be used responsibly.

As a law enforcement agency, the INS generally has prosecutorial discretion within its area of law enforcement responsibility unless that discretion has been clearly limited by statute in a way that goes beyond standard terminology. For example, a statute directing that the INS "shall" remove removable aliens would not be construed by itself to limit prosecutorial discretion, but the specific limitation on releasing certain criminal aliens in section 236(c)(2) of the INA evidences a specific congressional intention to limit discretion not to detain certain criminal aliens in removal proceedings that would otherwise exist. Personnel who are unsure whether the INS has discretion to take a particular action should consult their supervisor and legal counsel to the extent necessary.

It is important to recognize not only what prosecutorial discretion is, but also what it is not. The doctrine of prosecutorial discretion applies to law enforcement decisions whether, and to what extent, to exercise the coercive power of the Government over liberty or property, as authorized by law in cases when individuals have violated the law. Prosecutorial discretion does not apply to affirmative acts of approval, or grants of benefits, under a statute or other applicable law that provides requirements for determining when the approval should be given. For example, the INS has prosecutorial discretion not to place a removable alien in proceedings, but it does not have prosecutorial discretion to approve a naturalization application by an alien who is ineligible for that benefit under the INA.

This distinction is not always an easy, bright-line rule to apply. In many cases, INS decisionmaking involves both a prosecutorial decision to take or not to take enforcement action, such as placing an alien in removal proceedings, and a decision whether or not the alien is substantively eligible for a benefit under the INA. In many cases, benefit decisions involve the exercise of significant discretion which in some cases is not judicially reviewable, but which is not prosecutorial discretion.

Prosecutorial discretion can extend only up to the substantive and jurisdictional limits of the law. It can never justify an action that is illegal under the substantive law pertaining to the

conduct, or one that while legal in other contexts, is not within the authority of the agency or officer taking it. Prosecutorial discretion to take an enforcement action does not modify or waive any legal requirements that apply to the action itself. For example, an enforcement decision to focus on certain types of immigration violators for arrest and removal does not mean that the INS may arrest any person without probable cause to do so for an offense within its jurisdiction. Service officers who are in doubt whether a particular action complies with applicable constitutional, statutory, or case law requirements should consult with their supervisor and obtain advice from the district or sector counsel or representative of the Office of General Counsel to the extent necessary.

Finally, exercising prosecutorial discretion does not lessen the INS' commitment to enforce the immigration laws to the best of our ability. It is not an invitation to violate or ignore the law. Rather, it is a means to use the resources we have in a way that best accomplishes our mission of administering and enforcing the immigration laws of the United States.

Principles of Prosecutorial Discretion

Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law.

It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals. The INS has used this principle in the design and execution of its border enforcement strategy, its refocus on criminal smuggling networks, and its concentration on fixing benefit-granting processes to prevent fraud. 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.

The Principles of Federal Prosecution governing the conduct of U.S. Attorneys use the concept of a "substantial Federal interest." A U.S. Attorney may properly decline a prosecution if "*no substantial Federal interest would be served by prosecution.*" This principle provides a useful frame of reference for the INS, although applying it presents challenges that differ from those facing a U.S. Attorney. In particular, as immigration is an exclusively Federal responsibility, the option of an adequate alternative remedy under state law is not available. In an immigration case, the interest at stake will always be Federal. Therefore, we must place particular emphasis on the element of substantiality. How important is the Federal interest in the case, as compared to other cases and priorities? That is the overriding question, and answering it requires examining a number of factors that may differ according to the stage of the case.

As a general matter, INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial.[3] Except as may be provided specifically in other policy statements or directives, the responsibility for exercising prosecutorial discretion in this manner rests with the District Director (DD) or Chief Patrol Agent (CPA) based on his or her common sense and sound judgment.[4] The DD or CPA should obtain legal advice from the District or Sector Counsel to the extent that such advice may be necessary and appropriate to ensure the sound and lawful exercise of discretion, particularly with respect to cases pending before the Executive Office for Immigration Review (EOIR).[5] The DD's or CPA's authority may be delegated to the extent necessary and proper, except that decisions not to place a removable alien in removal proceedings, or decisions to move to terminate a proceeding which in the opinion of the District or Sector Counsel is legally sufficient, may not be delegated to an officer who is not authorized under 8 C.F.R. § 239.1 to issue an NTA. A DD's or CPA's exercise of prosecutorial discretion will not normally be reviewed by Regional or Headquarters authority. However, DDs and CPAs remain subject to their chains of command and may be supervised as necessary in their exercise of prosecutorial discretion.

Investigations

Priorities for deploying investigative resources are discussed in other documents, such as the interior enforcement strategy, and will not be discussed in detail in this memorandum. These previously identified priorities include identifying and removing criminal and terrorist aliens, deterring and dismantling alien smuggling, minimizing benefit fraud and document abuse, responding to community complaints about illegal immigration and building partnerships to solve local problems, and blocking and removing employers' access to undocumented workers. Even within these broad priority areas, however, the Service must make decisions about how best to expend its resources.

Managers should plan and design operations to maximize the likelihood that serious offenders will be identified. Supervisors should ensure that front-line investigators understand that it is not mandatory to issue an NTA in every case where they have reason to believe that an alien is removable, and agents should be encouraged to bring questionable cases to a supervisor's attention. Operational planning for investigations should include consideration of appropriate procedures for supervisory and legal review of individual NTA issuing decisions.

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[3] In some cases even a substantial immigration enforcement interest in prosecuting a case could be outweighed by other interests, such as the foreign policy of the United States. Decisions that require weighing such other interests should be made at the level of responsibility within the INS or the Department of Justice that is appropriate in light of the circumstances and interests involved.

[4] This general reference to DDs and CPAs is not intended to exclude from coverage by this memorandum other INS personnel, such as Service Center directors, who may be called upon to exercise prosecutorial discretion and do not report to DDs or CPAs, or to change any INS chains of command.

[5] Exercising prosecutorial discretion with respect to cases pending before EOIR involves procedures set forth at 8 CFR 239.2 and 8 CFR Part 3, such as obtaining the court's approval of a motion to terminate proceedings.

Careful design of enforcement operations is a key element in the INS' exercise of prosecutorial discretion. Managers should consider not simply whether a particular effort is legally supportable, but whether it best advances the INS' goals, compared with other possible uses of those resources. As a general matter, investigations that are specifically focused to identify aliens who represent a high priority for removal should be favored over investigations which, by their nature, will identify a broader variety of removable aliens. Even an operation that is designed based on high-priority criteria, however, may still identify individual aliens who warrant a favorable exercise of prosecutorial discretion.[6]

Initiating and Pursuing Proceedings

Aliens who are subject to removal may come to the Service's attention in a variety of ways. For example, some aliens are identified as a result of INS investigations, while others are identified when they apply for immigration benefits or seek admission at a port-of-entry. While the context in which the INS encounters an alien may, as a practical matter, affect the Service's options, it does not change the underlying principle that the INS has discretion and should exercise that discretion appropriately given the circumstances of the case.

Even when an immigration officer has reason to believe that an alien is removable and that there is sufficient evidence to obtain a final order of removal, it may be appropriate to decline to proceed with that case. This is true even when an alien is removable based on his or her criminal history and when the alien–if served with an NTA–would be subject to mandatory detention. The INS may exercise its discretion throughout the enforcement process. Thus, the INS can choose whether to issue an NTA, whether to cancel an NTA prior to filing with the immigration court or move for dismissal in immigration court (under 8 CFR 239.2), whether to detain (for those aliens not subject to mandatory detention), whether to offer an alternative to removal such as voluntary departure or withdrawal of an application for admission, and whether to stay an order of deportation.

The decision to exercise any of these options or other alternatives in a particular case requires an individualized determination, based on the facts and the law. As a general matter, it is better to exercise favorable discretion as early in the process as possible, once the relevant facts have been determined, in order to conserve the Service's resources and in recognition of the alien's interest in avoiding unnecessary legal proceedings. However, there is often a conflict

[6] For example, operations in county jails are designed to identify and remove criminal aliens, a high priority for the Service. Nonetheless, an investigator working at a county jail and his or her supervisor should still consider whether the exercise of prosecutorial discretion would be appropriate in individual cases.

between making decisions as soon as possible, and making them based on evaluating as many relevant, credible facts as possible. Developing an extensive factual record prior to making a charging decision may itself consume INS resources in a way that negates any saving from forgoing a removal proceeding.

Generally, adjudicators may have a better opportunity to develop a credible factual record at an earlier stage than investigative or other enforcement personnel. It is simply not practicable to require officers at the arrest stage to develop a full investigative record on the equities of each case (particularly since the alien file may not yet be available to the charging office), and this memorandum does not require such an analysis. Rather, what is needed is knowledge that the INS is not legally required to institute proceedings in every case, openness to that possibility in appropriate cases, development of facts relevant to the factors discussed below to the extent that it is reasonably possible to do so under the circumstances and in the timeframe that decisions must be made, and implementation of any decision to exercise prosecutorial discretion.

There is no precise formula for identifying which cases warrant a favorable exercise of discretion. Factors that should be taken into account in deciding whether to exercise prosecutorial discretion include, but are not limited to, the following:

- 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; 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 past history of violating the immigration laws (particularly violations such as reentering after removal, failing to appear at 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 INS 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. See Standard Operating Procedures Part V.D.8 (issuing an NTA against current or former member of armed forces requires advance approval of Regional Director).
- 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 INS. 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 INS: As in planning operations, the resources available to the INS 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.

Obviously, not all of the factors will be applicable to every case, and in any particular case one factor may deserve more weight than it might in another case. There may be other factors, not on the list above, that are appropriate to consider. The decision should be based on the totality of the circumstances, not on any one factor considered in isolation. General guidance such as this cannot provide a "bright line" test that may easily be applied to determine the "right" answer in every case. In many cases, minds reasonably can differ, different factors may point in different directions, and there is no clearly "right" answer. Choosing a course of action in difficult

cases must be an exercise of judgment by the responsible officer based on his or her experience, good sense, and consideration of the relevant factors to the best of his or her ability.

There are factors that may not be considered. Impermissible factors include:

- An individual's race, religion, sex, national origin, or political association, activities or beliefs;[7]
- The officer's own personal feelings regarding the individual; or
- The possible effect of the decision on the officer's own professional or personal circumstances.

In many cases, the procedural posture of the case, and the state of the factual record, will affect the ability of the INS to use prosecutorial discretion. For example, since the INS cannot admit an inadmissible alien to the United States unless a waiver is available, in many cases the INS' options are more limited in the admission context at a port-of-entry than in the deportation context.

Similarly, the INS may consider the range of options and information likely to be available at a later time. For example, an officer called upon to make a charging decision may reasonably determine that he or she does not have a sufficient, credible factual record upon which to base a favorable exercise of prosecutorial discretion not to put the alien in proceedings, that the record cannot be developed in the timeframe in which the decision must be made, that a more informed prosecutorial decision likely could be made at a later time during the course of proceedings, and that if the alien is not served with an NTA now, it will be difficult or impossible to do so later.

Such decisions must be made, however, with due regard for the principles of these guidelines, and in light of the other factors discussed here. For example, if there is no relief available to the alien in a removal proceeding and the alien is subject to mandatory detention if

[7] This general guidance on factors that should not be relied upon in making a decision whether to enforce the law against an individual is not intended to prohibit their consideration to the extent they are directly relevant to an alien's status under the immigration laws or eligibility for a benefit. For example, religion and political beliefs are often directly relevant in asylum cases and need to be assessed as part of a prosecutorial determination regarding the strength of the case, but it would be improper for an INS officer to treat aliens differently based on his personal opinion about a religion or belief. Political activities may be relevant to a ground of removal on national security or terrorism grounds. An alien's nationality often directly affects his or her eligibility for adjustment or other relief, the likelihood that he or she can be removed, or the availability of prosecutorial options such as voluntary return, and may be considered to the extent these concerns are pertinent.

placed in proceedings, that situation suggests that the exercise of prosecutorial discretion, if appropriate, would be more useful to the INS if done sooner rather than later. It would be improper for an officer to assume that someone else at some later time will always be able to make a more informed decision, and therefore never to consider exercising discretion.

Factors relevant to exercising prosecutorial discretion may come to the Service's attention in various ways. For example, aliens may make requests to the INS to exercise prosecutorial discretion by declining to pursue removal proceedings. Alternatively, there may be cases in which an alien asks to be put in proceedings (for example, to pursue a remedy such as cancellation of removal that may only be available in that forum). In either case, the INS may consider the request, but the fact that it is made should not determine the outcome, and the prosecutorial decision should be based upon the facts and circumstances of the case. Similarly, the fact that an alien has not requested prosecutorial discretion should not influence the analysis of the case. Whether, and to what extent, any request should be considered is also a matter of discretion. Although INS officers should be open to new facts and arguments, attempts to exploit prosecutorial discretion as a delay tactic, as a means merely to revisit matters that have been thoroughly considered and decided, or for other improper tactical reasons should be rejected. There is no legal right to the exercise of prosecutorial discretion, and (as stated at the close of this memorandum) this memorandum creates no right or obligation enforceable at law by any alien or any other party.

Process for Decisions

Identification of Suitable Cases

No single process of exercising discretion will fit the multiple contexts in which the need to exercise discretion may arise. Although this guidance is designed to promote consistency in the application of the immigration laws, it is not intended to produce rigid uniformity among INS officers in all areas of the country at the expense of the fair administration of the law. Different offices face different conditions and have different requirements. Service managers and supervisors, including DDs and CPAs, and Regional, District, and Sector Counsel must develop mechanisms appropriate to the various contexts and priorities, keeping in mind that it is better to exercise discretion as early in process as possible once the factual record has been identified.[8] In particular, in cases where it is clear that no statutory relief will be available at the immigration hearing and where detention will be mandatory, it best conserves the Service's resources to make a decision early.

Enforcement and benefits personnel at all levels should understand that prosecutorial discretion exists and that it is appropriate and expected that the INS will exercise this authority in appropriate cases. DDs, CPAs, and other supervisory officials (such as District and

[8] DDs, CPAs, and other INS personnel should also be open, however, to possible reconsideration of decisions (either for or against the exercise of discretion) based upon further development of the facts.

Sector Counsels) should encourage their personnel to bring potentially suitable cases for the favorable exercise of discretion to their attention for appropriate resolution. To assist in exercising their authority, DDs and CPAs may wish to convene a group to provide advice on difficult cases that have been identified as potential candidates for prosecutorial discretion.

It is also appropriate for DDs and CPAs to develop a list of "triggers" to help their personnel identify cases at an early stage that may be suitable for the exercise of prosecutorial discretion. These cases should then be reviewed at a supervisory level where a decision can be made as to whether to proceed in the ordinary course of business, to develop additional facts, or to recommend a favorable exercise of discretion. Such triggers could include the following facts (whether proven or alleged):

Lawful permanent residents;
Aliens with a serious health condition;
Juveniles;
Elderly aliens;
Adopted children of U.S. citizens;
U.S. military veterans;
Aliens with lengthy presence in United States (i.e., 10 years or more); or
Aliens present in the United States since childhood.

Since workloads and the type of removable aliens encountered may vary significantly both within and between INS offices, this list of possible trigger factors for supervisory review is intended neither to be comprehensive nor mandatory in all situations. Nor is it intended to suggest that the presence or absence of "trigger" facts should itself determine whether prosecutorial discretion should be exercised, as compared to review of all the relevant factors as discussed elsewhere in these guidelines. Rather, development of trigger criteria is intended solely as a suggested means of facilitating identification of potential cases that may be suitable for prosecutorial review as early as possible in the process.

Documenting Decisions

When a DD or CPA decides to exercise prosecutorial discretion favorably, that decision should be clearly documented in the alien file, including the specific decision taken and its factual and legal basis. DDs and CPAs may also document decisions based on a specific set of facts not to exercise prosecutorial discretion favorably, but this is not required by this guidance.

The alien should also be informed in writing of a decision to exercise prosecutorial discretion favorably, such as not placing him or her in removal proceedings or not pursuing a case. This normally should be done by letter to the alien and/or his or her attorney of record, briefly stating the decision made and its consequences. It is not necessary to recite the facts of the case or the INS' evaluation of the facts in such letters. Although the specifics of the letter

will vary depending on the circumstances of the case and the action taken, it must make it clear to the alien that exercising prosecutorial discretion does not confer any immigration status, ability to travel to the United States (unless the alien applies for and receives advance parole), immunity from future removal proceedings, or any enforceable right or benefit upon the alien. If, however, there is a potential benefit that is linked to the action (for example, the availability of employment authorization for beneficiaries of deferred action), it is appropriate to identify it.

The obligation to notify an individual is limited to situations in which a specific, identifiable decision to refrain from action is taken in a situation in which the alien normally would expect enforcement action to proceed. For example, it is not necessary to notify aliens that the INS has refrained from focusing investigative resources on them, but a specific decision not to proceed with removal proceedings against an alien who has come into INS custody should be communicated to the alien in writing. This guideline is not intended to replace existing standard procedures or forms for deferred action, voluntary return, voluntary departure, or other currently existing and standardized processes involving prosecutorial discretion.

Future Impact

An issue of particular complexity is the future effect of prosecutorial discretion decisions in later encounters with the alien. Unlike the criminal context, in which statutes of limitation and venue requirements often preclude one U.S. Attorney's office from prosecuting an offense that another office has declined, immigration violations are continuing offenses that, as a general principle of immigration law, continue to make an alien legally removable regardless of a decision not to pursue removal on a previous occasion. An alien may come to the attention of the INS in the future through seeking admission or in other ways. An INS office should abide by a favorable prosecutorial decision taken by another office as a matter of INS policy, absent new facts or changed circumstances. However, if a removal proceeding is transferred from one INS district to another, the district assuming responsibility for the case is not bound by the charging district's decision to proceed with an NTA, if the facts and circumstances at a later stage suggest that a favorable exercise of prosecutorial discretion is appropriate.

Service offices should review alien files for information on previous exercises of prosecutorial discretion at the earliest opportunity that is practicable and reasonable and take any such information into account. In particular, the office encountering the alien must carefully assess to what extent the relevant facts and circumstances are the same or have changed either procedurally or substantively (either with respect to later developments, or more detailed knowledge of past circumstances) from the basis for the original exercise of discretion. A decision by an INS office to take enforcement action against the subject of a previous documented exercise of favorable prosecutorial discretion should be memorialized with a memorandum to the file explaining the basis for the decision, unless the charging documents on their face show a material difference in facts and circumstances (such as a different ground of deportability).

Legal Liability and Enforceability

The question of liability may arise in the implementation of this memorandum. Some INS personnel have expressed concerns that, if they exercise prosecutorial discretion favorably, they may become subject to suit and personal liability for the possible consequences of that decision. We cannot promise INS officers that they will never be sued. However, we can assure our employees that Federal law shields INS employees who act in reasonable reliance upon properly promulgated agency guidance within the agency's legal authority – such as this memorandum–from personal legal liability for those actions.

The principles set forth in this memorandum, and internal office procedures adopted hereto, are intended solely for the guidance of INS personnel in performing their duties. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Training and Implementation

Training on the implementation of this memorandum for DDs, CPAs, and Regional, District, and Sector Counsel will be conducted at the regional level. This training will include discussion of accountability and periodic feedback on implementation issues. In addition, following these regional sessions, separate training on prosecutorial discretion will be conducted at the district level for other staff, to be designated. The regions will report to the Office of Field Operations when this training has been completed.

Office of the Principal Legal Advisor

U.S. Department of Homeland Security
425 I Street, NW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

October 24, 2005

MEMORANDUM FOR: All OPLA Chief Counsel

FROM: William J. Howard
Principal Legal Advisor

SUBJECT: Prosecutorial Discretion

As you know, when Congress abolished the Immigration and Naturalization Service and divided its functions among U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (CIS), the Office of the Principal Legal Advisor (OPLA) was given exclusive authority to prosecute all removal proceedings. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 442(c), 116 Stat. 2135, 2194 (2002) ("the legal advisor * * * shall represent the bureau in all exclusion, deportation, and removal proceedings before the Executive Office for Immigration Review"). Complicating matters for OPLA is that our cases come to us from CBP, CIS, and ICE, since all three bureaus are authorized to issue Notices to Appear (NTAs).

OPLA is handling about 300,000 cases in the immigration courts, 42,000 appeals before the Board of Immigration Appeals (BIA or Board), and 12,000 motions to reopen each year. Our circumstances in litigating these cases differ in a major respect from our predecessor, the INS's Office of General Counsel. Gone are the days when INS district counsels, having chosen an attorney-client model that required client consultation before INS trial attorneys could exercise prosecutorial discretion, could simply walk down the hall to an INS district director, immigration agent, adjudicator, or border patrol officer to obtain the client's permission to proceed with that exercise. Now NTA-issuing clients or stakeholders might be in different agencies, in different buildings, and in different cities from our own.

Since the NTA-issuing authorities are no longer all under the same roof, adhering to INS OGC's attorney-client model would minimize our efficiency. This is particularly so since we are litigating our hundreds of thousands of cases per year with only 600 or so attorneys; that our case preparation time is extremely limited, averaging about 20 minutes a case; that our caseload will increase since Congress is now providing more resources for border and interior immigration enforcement; that many of the cases that come to us from NTA-issuers lack supporting evidence like conviction documents; that we must prioritize our cases to allow us to place greatest emphasis on our national security and criminal alien dockets; that we have growing collateral duties such as

assisting the Department of Justice with federal court litigation; that in many instances we lack sufficient staff to adequately brief Board appeals or oppositions to motions to reopen; and that the opportunities to exercise prosecutorial discretion arise at many different points in the removal process.

To elaborate on this last point, the universe of opportunities to exercise prosecutorial discretion is large. Those opportunities arise in the pre-filing stage, when, for example, we can advise clients who consult us whether or not to file NTAs or what charges and evidence to base them on. They arise in the course of litigating the NTA in immigration court, when we may want, among other things, to move to dismiss a case as legally insufficient, to amend the NTA, to decide not to oppose a grant of relief, to join in a motion to reopen, or to stipulate to the admission of evidence. They arise after the immigration judge has entered an order, when we must decide whether to appeal all or part of the decision. Or they may arise in the context of DRO's decision to detain aliens, when we must work closely with DRO in connection with defending that decision in the administrative or federal courts. In the 50-plus immigration courtrooms across the United States in which we litigate, OPLA's trial attorneys continually face these and other prosecutorial discretion questions. Litigating with maximum efficiency requires that we exercise careful yet quick judgment on questions involving prosecutorial discretion. This will require that OPLA's trial attorneys become very familiar with the principles in this memorandum and how to apply them.

Further giving rise to the need for this guidance is the extraordinary volume of immigration cases that is now reaching the United States Courts of Appeals. Since 2001, federal court immigration cases have tripled. That year, there were 5,435 federal court cases. Four years later, in fiscal year 2004, that number had risen to 14,699 federal court cases. Fiscal year 2005 federal court immigration cases will approximate 15,000. The lion's share of these cases consists of petitions for review in the United States Courts of Appeal. Those petitions are now overwhelming the Department of Justice's Office of Immigration Litigation, with the result that the Department of Justice has shifted responsibility to brief as many as 2,000 of these appellate cases to other Departmental components and to the U.S. Attorneys' Offices. This, as you know, has brought you into greater contact with Assistant U.S. Attorneys who are turning to you for assistance in remanding some of these cases. This memorandum is also intended to lessen the number of such remand requests, since it provides your office with guidance to assist you in eliminating cases that would later merit a remand.

Given the complexity of immigration law, a complexity that federal courts at all levels routinely acknowledge in published decisions, your expert assistance to the U.S. Attorneys is critical.[1] It is all the more important because the decision whether to

[1] As you know, if and when your resources permit it, I encourage you to speak with your respective United States Attorneys' Offices about having those Offices designate Special Assistant U.S. Attorneys from OPLA's ranks to handle both civil and criminal federal court immigration litigation. The U.S.

proceed with litigating a case in the federal courts must be gauged for reasonableness, lest, in losing the case, the courts award attorneys' fees against the government pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412. In the overall scheme of litigating the removal of aliens at both the administrative and federal court level, litigation that often takes years to complete, it is important that we all apply sound principles of prosecutorial discretion, uniformly throughout our offices and in all of our cases, to ensure that the cases we litigate on behalf of the United States, whether at the administrative level or in the federal courts, are truly worth litigating.

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With this background in mind, I am directing that all OPLA attorneys apply the following principles of prosecutorial discretion:

1) Prosecutorial Discretion Prior to or in Lieu of NTA Issuance:

In the absence of authority to cancel NTAs, we should engage in client liaison with CBP, CIS (and ICE) via, or in conjunction with, CIS/CBP attorneys on the issuance of NTAs. We should attempt to discourage issuance of NTAs where there are other options available such as administrative removal, crewman removal, expedited removal or reinstatement, clear eligibility for an immigration benefit that can be obtained outside of immigration court, or where the desired result is other than a removal order.

It is not wise or efficient to place an alien into proceedings where the intent is to allow that person to remain unless, where compelling reasons exist, a stayed removal order might yield enhanced law enforcement cooperation. See Attachment A (Memorandum from Wesley Lee, ICE Acting Director, Office of Detention and Removal, Alien Witnesses and Informants Pending Removal (May 18, 2005)); see also Attachment B (Detention and Removal Officer's Field Manual, Subchapters 20.7 and 20.8, for further explanation on the criteria and procedures for stays of removal and deferred action).

Examples:

- **Immediate Relative of Service Person-** If an alien is an immediate relative of a military service member, a favorable exercise of discretion, including not issuing an NTA, should be a prime consideration. Military service includes current or former members of the Armed Forces, including: the United States Army, Air Force, Navy, Marine Corps, Coast Guard, or National Guard, as well as service in the Philippine Scouts. OPLA counsel should analyze possible eligibility for citizenship under

Attorneys' Offices will benefit greatly from OPLA SAUSAs, especially given the immigration law expertise that resides in each of your Offices, the immigration law's great complexity, and the extent to which the USAOs are now overburdened by federal immigration litigation.

sections 328 and 329. See Attachment C (Memorandum from Marcy M. Forman, Director, Office of Investigations, Issuance of Notices to Appeal, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service (June 21, 2004)).

- **Clearly Approvable I-130/I-485-** Where an alien is the potential beneficiary of a clearly approvable I-130/I-485 and there are no serious adverse factors that otherwise justify expulsion, allowing the alien the opportunity to legalize his or her status through a CIS-adjudicated adjustment application can be a cost-efficient option that conserves immigration court time and benefits someone who can be expected to become a lawful permanent resident of the United States. See Attachment D (Memorandum from William J. Howard, OPLA Principal Legal Advisor, Exercising Prosecutorial Discretion to Dismiss Adjustment Cases (October 6, 2005)).

- **Administrative Voluntary Departure-** We may be consulted in a case where administrative voluntary departure is being considered. Where an alien is eligible for voluntary departure and likely to depart, OPLA attorneys are encouraged to facilitate the grant of administrative voluntary departure or voluntary departure under safeguards. This may include continuing detention if that is the likely end result even should the case go to the Immigration Court.

- **NSEERS Failed to Register-** Where an alien subject to NSEERS registration failed to timely register but is otherwise in status and has no criminal record, he should not be placed in proceedings if he has a reasonable excuse for his failure. Reasonably excusable failure to register includes the alien's hospitalization, admission into a nursing home or extended care facility (where mobility is severely limited); or where the alien is simply unaware of the registration requirements. See Attachment E (Memorandum from Victor Cerda, OPLA Acting Principal Legal Advisor, Changes to the National Security Entry Exit Registration System (NSEERS)(January 8, 2004)).

- **Sympathetic Humanitarian Factors-** Deferred action should be considered when the situation involves sympathetic humanitarian circumstances that rise to such a level as to cry for an exercise of prosecutorial discretion. Examples of this include where the alien has a citizen child with a serious medical condition or disability or where the alien or a close family member is undergoing treatment for a potentially life threatening disease. DHS has the most prosecutorial discretion at this stage of the process.

2) **Prosecutorial Discretion after the Notice to Appear has issued, but before the Notice to Appear has been filed:**

We have an additional opportunity to appropriately resolve a case prior to expending court resources when an NTA has been issued but not yet filed with the immigration court. This would be an appropriate action in any of the situations

identified in #1. Other situations may also arise where the reasonable and rational decision is not to prosecute the case.

Example:

- **U or T visas**- Where a "U" or "T" visa application has been submitted, it may be appropriate not to file an NTA until a decision is made on such an application. In the event that the application is denied then proceedings would be appropriate.

3) Prosecutorial Discretion after NTA Issuance and Filing:

The filing of an NTA with the Immigration Court does not foreclose further prosecutorial discretion by OPLA Counsel to settle a matter. There may be ample justification to move the court to terminate the case and to thereafter cancel the NTA as improvidently issued or due to a change in circumstances such that continuation is no longer in the government interest.[2] We have regulatory authority to dismiss proceedings. Dismissal is by regulation without prejudice. See 8 CFR §§ 239.2(c), 1239.2(c). In addition, there are numerous opportunities that OPLA attorneys have to resolve a case in the immigration court. These routinely include not opposing relief, waiving appeal or making agreements that narrow issues, or stipulations to the admissibility of evidence. There are other situations where such action should also be considered for purposes of judicial economy, efficiency of process or to promote justice.

Examples:

[2] Unfortunately, DHS's regulations, at 8 C.F.R. 239.1, do not include OPLA's attorneys among the 38 categories of persons given authority there to issue NTAs and thus to cancel NTAs. That being said, when an OPLA attorney encounters an NTA that lacks merit or evidence, he or she should apprise the issuing entity of the deficiency and ask that the entity cure the deficiency as a condition of OPLA's going forward with the case. If the NTA has already been filed with the immigration court, the OPLA attorney should attempt to correct it by filing a form I-261, or, if that will not correct the problem, should move to dismiss proceedings without prejudice. We must be sensitive, particularly given our need to prioritize our national security and criminal alien cases, to whether prosecuting a particular case has little law enforcement value to the cost and time required. Although we lack the authority to sua sponte cancel NTAs, we can move to dismiss proceedings for the many reasons outlined in 8 CFR § 239.2(a) and 8 CFR § 1239.2(c). Moreover, since OPLA attorneys do not have independent authority to grant deferred action status, stays of removal, parole, etc., once we have concluded that an alien should not be subjected to removal, we must still engage the client entity to "defer" the action, issue the stay or initiate administrative removal.

- **Relief Otherwise Available**- We should consider moving to dismiss proceedings without prejudice where it appears in the discretion of the OPLA attorney that relief in the form of adjustment of status appears clearly approvable based on an approvable I-130 or I-140 and appropriate for adjudication by CIS. See October 6, 2005 Memorandum from Principal Legal Advisor Bill Howard, supra. Such action may also be appropriate in the special rule cancellation NACARA context. We should also consider remanding a case to permit an alien to pursue naturalization.[3] This allows the alien to pursue the matter with CIS, the DHS entity with the principal responsibility for adjudication of immigration benefits, rather than to take time from the overburdened immigration court dockets that could be expended on removal issues.

- **Appealing Humanitarian Factors**- Some cases involve sympathetic humanitarian circumstances that rise to such a level as to cry for an exercise of prosecutorial discretion. Examples of this, as noted above, include where the alien has a citizen child with a serious medical condition or disability or where the alien or a close family member is undergoing treatment for a potentially life threatening disease. OPLA attorneys should consider these matters to determine whether an alternative disposition is possible and appropriate. Proceedings can be reinstituted when the situation changes. Of course, if the situation is expected to be of relatively short duration, the Chief Counsel Office should balance the benefit to the Government to be obtained by terminating the proceedings as opposed to administratively closing proceedings or asking DRO to stay removal after entry of an order.

- **Law Enforcement Assets/CIs**- There are often situations where federal, State or local law enforcement entities desire to have an alien remain in the United States for a period of time to assist with investigation or to testify at trial. Moving to dismiss a case to permit a grant of deferred action may be an appropriate result in these circumstances. Some offices may prefer to administratively close these cases, which gives the alien the benefit of remaining and law enforcement the option of calendaring proceedings at any time. This may result in more control by law enforcement and enhanced cooperation by the alien. A third option is a stay.

4) **Post-Hearing Actions:**

Post-hearing actions often involve a great deal of discretion. This includes a decision to file an appeal, what issues to appeal, how to respond to an alien's appeal, whether to seek a stay of a decision or whether to join a motion to reopen. OPLA

[3] Once in proceedings, this typically will occur only where the alien has shown prima facie eligibility for naturalization and that his or her case involves exceptionally appealing or humanitarian factors. 8 CFR §1239.1(f). It is improper for an immigration judge to terminate proceedings absent an affirmative communication from DHS that the alien would be eligible for naturalization but for the pendency of the deportation proceeding. Matter of Cruz, 15 I&N Dec. 236 (BIA 1975); see Nolan v. Holmes, 334 F.3d 189 (2d Cir. 2003) (Second Circuit upholds BIA's reliance on Matter of Cruz when petitioner failed to establish prima facie eligibility.).

attorneys are also responsible for replying to motions to reopen and motions to reconsider. The interests of judicial economy and fairness should guide your actions in handling these matters.

Examples:

- **Remanding to an Immigration Judge or Withdrawing Appeals-** Where the appeal brief filed on behalf of the alien respondent is persuasive, it may be appropriate for an OPLA attorney to join in that position to the Board, to agree to remand the case back to the immigration court, or to withdraw a government appeal and allow the decision to become final.

- **Joining in Untimely Motions to Reopen-** Where a motion to reopen for adjustment of status or cancellation of removal is filed on behalf of an alien with substantial equities, no serious criminal or immigration violations, and who is legally eligible to be granted that relief except that the motion is beyond the 90-day limitation contained in 8 C.F.R. § 1003.23, strongly consider exercising prosecutorial discretion and join in this motion to reopen to permit the alien to pursue such relief to the immigration court.

- **Federal Court Remands to the BIA-** Cases filed in the federal courts present challenging situations. In a habeas case, be very careful to assess the reasonableness of the government's detention decision and to consult with our clients at DRO. Where there are potential litigation pitfalls or unusually sympathetic fact circumstances and where the BIA has the authority to fashion a remedy, you may want to consider remanding the case to the BIA. Attachments H and I provide broad guidance on these matters. Bring concerns to the attention of the Office of the United States Attorney or the Office of Immigration Litigation, depending upon which entity has responsibility over the litigation. See generally Attachment F (Memorandum from OPLA Appellate Counsel, U.S. Attorney Remand Recommendations (rev. May 10, 2005)); see also Attachment G (Memorandum from Thomas W. Hussey, Director, Office of Immigration Litigation, U.S. Department of Justice, Remand of Immigration Cases (Dec. 8, 2004)).

- **In absentia orders.** Reviewing courts have been very critical of in absentia orders that, for such things as appearing late for court, deprive aliens of a full hearing and the ability to pursue relief from removal. This is especially true where court is still in session and there does not seem to be any prejudice to either holding or rescheduling the hearing for later that day. These kinds of decisions, while they may be technically correct, undermine respect for the fairness of the removal process and cause courts to find reasons to set them aside. These decisions can create adverse precedent in the federal courts as well as EAJA liability. OPLA counsel should be mindful of this and, if possible, show a measured degree of flexibility, but

only if convinced that the alien or his or her counsel is not abusing the removal court process.

5) **Final Orders- Stays and Motions to Reopen/Reconsider:**

Attorney discretion doesn't cease after a final order. We may be consulted on whether a stay of removal should be granted. See Attachment B (Subchapter 20.7). 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.

Examples:

- **Ineffective Assistance**- An OPLA attorney is presented with a situation where an alien was deprived of an opportunity to pursue relief, due to incompetent counsel, where a grant of such relief could reasonably be anticipated. It would be appropriate, assuming compliance with Matter of Lozada, to join in or not oppose motions to reconsider to allow the relief applications to be filed.
- **Witnesses Needed, Recommend a Stay**- State law enforcement authorities need an alien as a witness in a major criminal case. The alien has a final order and will be removed from the United States before trial can take place. OPLA counsel may recommend that a stay of removal be granted and this alien be released on an order of supervision.

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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 an 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.

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This memorandum is protected by the Attorney/Client and Attorney Work product privileges and is for Official Use Only. This memorandum is intended solely to provide legal advice to the Office of the Chief Counsels (OCC) and their staffs regarding the appropriate and lawful exercise of prosecutorial discretion, which will lead to the efficient management of resources. It is not intended to, does not, and may not be relied upon to create or confer any right(s) or benefit(s), substantive or procedural, enforceable at law by any individual or other party in

removal proceedings, in litigation with the United States, or in any other form or manner. Discretionary decisions of the OCC regarding the exercise of prosecutorial discretion under this memorandum are final and not subject to legal review or recourse. Finally this internal guidance does not have the force of law, or of a Department of Homeland Security Directive.

Office of the Assistant Secretary

U.S. Department of Homeland Security
425 I Street, NW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

NOV - 7 2007

MEMORANDUM FOR: All Field Office Directors
All Special Agents in Charge

FROM: Julie L. Myers
Assistant Secretary

SUBJECT: Prosecutorial and Custody Discretion

This memorandum serves to highlight the importance of exercising prosecutorial discretion when making administrative arrest and custody determinations for aliens who are nursing mothers. The commitment by ICE to facilitate an end to the "catch and release" procedure for illegal aliens does not diminish the responsibility of ICE agents and officers to use discretion in identifying and responding to meritorious health related cases and caregiver issues.

The process for making discretionary decisions is outlined in the attached memorandum of November 7, 2000, entitled "Exercising Prosecutorial Discretion." Field agents and officers are not only authorized by law to exercise discretion within the authority of the agency, but are expected to do so in a judicious manner at all stages of the enforcement process.

For example, in situations where officers are considering taking a nursing mother into custody, the senior ICE field managers should consider:

- Absent any statutory detention requirement or concerns such as national security, threats to public safety or other investigative interests, the nursing mother should be released on an Order of Recognizance or Order of Supervision and the Alternatives to Detention programs should be considered as an additional enforcement tool;
- In situations where ICE has determined, due to one of the above listed concerns or a statutory detention requirement to take a nursing mother into custody, the field personnel should consider placing a mother with her non-U.S. citizen child in the T. Don Hutto or Berks family residential center, provided there are no medical or legal issues that preclude their removal and they meet the placement factors of the facility. For a nursing mother with a U.S. citizen child, the pertinent state social service agencies should be contacted to identify and address any caregiver issues the alien mother might have in order to maintain the unity of the mother and child if the above listed release condition can be met;
- The decision to detain nursing mothers shall be reported through the programs' operational chain of command.

Requests for Headquarters assistance to address arrests and custody determinations as they relate to this issue may be addressed to the appropriate Assistant Director for Operations within OI or DRO.

Attachment

U.S. Department of Justice
Immigration and Naturalization Service

HQOPP 50/4

Office of the Commissioner

425 I Street NW
Washington, DC 20536

NOV 7 2000

MEMORANDUM TO REGIONAL DIRECTORS
DISTRICT DIRECTORS
CHIEF PATROL AGENTS
REGIONAL AND DISTRICT COUNSEL

FROM: Doris Meissner
Commissioner
Immigration and Naturalization Service

SUBJECT: Exercising Prosecutorial Discretion

Since the 1996 amendments to the Immigration and Nationality Act (INA) which limited the authority of immigration judges to provide relief from removal in many cases, there has been increased attention to the scope and exercise of the Immigration and Naturalization Service's (INS or the Service) prosecutorial discretion. This memorandum describes the principles with which INS exercises prosecutorial discretion and the process to be followed in making and monitoring discretionary decisions. 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.

More specific guidance geared to exercising discretion in particular program areas already exists in some instances,[1] and other program-specific guidance will follow separately

[1] For example, standards and procedures for placing an alien in deferred action status are provided in the Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing, and Removal (Standard Operating Procedures), Part X. This memorandum is intended to provide general principles, and does not replace any previous specific guidance provided about particular INS actions, such as "Supplemental Guidelines on the Use of Cooperating Individuals and Confidential Informants Following the Enactment of IIRIRA," dated December 29, 1997. This memorandum is not intended to address every situation in which the exercise of prosecutorial discretion may be appropriate. If INS personnel in the exercise of their duties recognize apparent conflict between any of their specific policy requirements and these general guidelines, they are encouraged to bring the matter to their supervisor's attention, and any conflict between policies should be raised through the appropriate chain of command for resolution.

However, INS officers should continue to exercise their prosecutorial discretion in appropriate cases during the period before more specific program guidance is issued.

A statement of principles concerning discretion serves a number of important purposes. As described in the "Principles of Federal Prosecution,"[1] part of the U.S. Attorneys' manual, such principles provide convenient reference points for the process of making prosecutorial decisions; facilitate the task of training new officers in the discharge of their duties; contribute to more effective management of the Government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of different offices and between their activities and the INS' law enforcement priorities; make possible better coordination of investigative and prosecutorial activity by enhancing the understanding between the investigative and prosecutorial components; and inform the public of the careful process by which prosecutorial decisions are made.

Legal and Policy Background

"Prosecutorial discretion" is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone. The INS, like other law enforcement agencies, has prosecutorial discretion and exercises it every day. In the immigration context, the term applies not only to the decision to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions, including among others: Focusing investigative resources on particular offenses or conduct; deciding whom to stop, question, and arrest; maintaining an alien in custody; seeking expedited removal or other forms of removal by means other than a removal proceeding; settling or dismissing a proceeding; granting deferred action or staying a final order; agreeing to voluntary departure, withdrawal of an application for admission, or other action in lieu of removing the alien; pursuing an appeal; and executing a removal order.

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, depending on the status of a particular matter, but include decisions such as not issuing an NTA (discussed in more detail below under "Initiating Proceedings"), not detaining an alien placed in proceedings (where discretion remains despite mandatory detention requirements), and approving deferred action.

[1] For this discussion, and much else in this memorandum, we have relied heavily upon the Principles of Federal Prosecution, chapter 9-27.000 in the U.S. Department of Justice's United States Attorneys' Manual (Oct. 1997). There are significant differences, of course, between the role of the U.S. Attorneys' offices in the criminal justice system, and INS responsibilities to enforce the immigration laws, but the general approach to prosecutorial discretion stated in this memorandum reflects that taken by the Principles of Federal Prosecution.

Courts recognize that prosecutorial discretion applies in the civil, administrative arena just as it does in criminal law. Moreover, the Supreme Court "has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831 (1985). Both Congress and the Supreme Court have recently reaffirmed that the concept of prosecutorial discretion applies to INS enforcement activities, such as whether to place an individual in deportation proceedings. INA section 242(g); Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999). The "discretion" in prosecutorial discretion means that prosecutorial decisions are not subject to judicial review or reversal, except in extremely narrow circumstances. Consequently, it is a powerful tool that must be used responsibly.

As a law enforcement agency, the INS generally has prosecutorial discretion within its area of law enforcement responsibility unless that discretion has been clearly limited by statute in a way that goes beyond standard terminology. For example, a statute directing that the INS "shall" remove removable aliens would not be construed by itself to limit prosecutorial discretion, but the specific limitation on releasing certain criminal aliens in section 236(c)(2) of the INA evidences a specific congressional intention to limit discretion not to detain certain criminal aliens in removal proceedings that would otherwise exist. Personnel who are unsure whether the INS has discretion to take a particular action should consult their supervisor and legal counsel to the extent necessary.

It is important to recognize not only what prosecutorial discretion is, but also what it is not. The doctrine of prosecutorial discretion applies to law enforcement decisions whether, and to what extent, to exercise the coercive power of the Government over liberty or property, as authorized by law in cases when individuals have violated the law. Prosecutorial discretion does not apply to affirmative acts of approval, or grants of benefits, under a statute or other applicable law that provides requirements for determining when the approval should be given. For example, the INS has prosecutorial discretion not to place a removable alien in proceedings, but it does not have prosecutorial discretion to approve a naturalization application by an alien who is ineligible for that benefit under the INA.

This distinction is not always an easy, bright-line rule to apply. In many cases, INS decisionmaking involves both a prosecutorial decision to take or not to take enforcement action, such as placing an alien in removal proceedings, and a decision whether or not the alien is substantively eligible for a benefit under the INA. In many cases, benefit decisions involve the exercise of significant discretion which in some cases is not judicially reviewable, but which is not prosecutorial discretion.

Prosecutorial discretion can extend only up to the substantive and jurisdictional limits of the law. It can never justify an action that is illegal under the substantive law pertaining to the

conduct, or one that while legal in other contexts, is not within the authority of the agency or officer taking it. Prosecutorial discretion to take an enforcement action does not modify or waive any legal requirements that apply to the action itself. For example, an enforcement decision to focus on certain types of immigration violators for arrest and removal does not mean that the INS may arrest any person without probable cause to do so for an offense within its jurisdiction. Service officers who are in doubt whether a particular action complies with applicable constitutional, statutory, or case law requirements should consult with their supervisor and obtain advice from the district or sector counsel or representative of the Office of General Counsel to the extent necessary.

Finally, exercising prosecutorial discretion does not lessen the INS' commitment to enforce the immigration laws to the best of our ability. It is not an invitation to violate or ignore the law. Rather, it is a means to use the resources we have in a way that best accomplishes our mission of administering and enforcing the immigration laws of the United States.

Principles of Prosecutorial Discretion

Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law.

It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals. The INS has used this principle in the design and execution of its border enforcement strategy, its refocus on criminal smuggling networks, and its concentration on fixing benefit-granting processes to prevent fraud. 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.

The Principles of Federal Prosecution governing the conduct of U.S. Attorneys use the concept of a "substantial Federal interest." A U.S. Attorney may properly decline a prosecution if "*no substantial Federal interest would be served by prosecution.*" This principle provides a useful frame of reference for the INS, although applying it presents challenges that differ from those facing a U.S. Attorney. In particular, as immigration is an exclusively Federal responsibility, the option of an adequate alternative remedy under state law is not available. In an immigration case, the interest at stake will always be Federal. Therefore, we must place particular emphasis on the element of substantiality. How important is the Federal interest in the case, as compared to other cases and priorities? That is the overriding question, and answering it requires examining a number of factors that may differ according to the stage of the case.