PROSECUTORIAL DISCRETION IN REMOVAL PROCEEDINGS

Part 1: Strategies for Seeking Prosecutorial Discretion During Uncertain Times

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This two-part advisory explores updates and strategy options when assessing how the government's prosecutorial discretion policies may further a client's goals in removal proceedings—or hinder them. Part 1 below explores the various factors advocates should consider when deciding whether to seek a favorable exercise of prosecutorial discretion and if so, what type of action to request. Part 1 also highlights new regulations and changes in law and practice and discusses how the upcoming presidential election may impact prosecutorial discretion. Part 2, *Navigating Unfavorable Exercises of Discretion in Removal Proceedings*, explores legal strategy and advocacy options when OPLA exercises its prosecutorial discretion against your client's interests, by moving to dismiss removal proceedings over your client's objection or by failing to appear in court.[1]

This advisory builds on previous practice advisories published by the ILRC in partnership with the National Immigration Project of the National Lawyers Guild (NIPNLG) and the Immigrant Defense Project (IDP). See ILRC, NIPNLG, Advocating for Prosecutorial Discretion in Removal Proceedings Under the Doyle Memo (July 2022); IDP, ILRC, NIPNLG, The Biden Administration's Final Enforcement Priorities (Nov. 2021). The ILRC also encourages readers to review a 2023 update to these advisories published by NIPNLG, Advocating for Prosecutorial Discretion Under the Biden Administration's Prosecutorial Discretion Guidance (Sep. 15, 2023).

Part 1 of this two-part advisory includes:

[1] Many thanks to Cori Hash and Jehan Laner, Senior Staff Attorneys at the ILRC, and Erin Quinn, Senior Managing Attorney at the ILRC, for their close reads, helpful edits, and insightful brainstorming on this Practice Advisory.

I. A Brief History of Prosecutorial Discretion in Immigration Enforcement

The concept of prosecutorial discretion, or "PD," has always existed in immigration law: enforcement agencies have always had the discretion "not to assert the full scope of [enforcement] authority available to the agency in a given case."[2] From 2011 to 2016, the Department of Homeland Security (DHS) utilized a broad prosecutorial discretion policy to administratively close many cases pending before EOIR, but that policy was rescinded by former president Donald Trump in 2017.[3] From 2017 to 2021, DHS employed more aggressive enforcement policies, exercising prosecutorial discretion only "on a case-by-case basis."[4] Although the government still exercised favorable discretion in some cases, there was no formal policy of deprioritizing certain cases during the Trump presidency.

In 2021, Secretary of Homeland Security Alejandro Mayorkas issued a new memo, *Guidelines for the Enforcement of Civil Immigration Law* ("Mayorkas Memo"), which reintroduced the concept of prosecutorial discretion as a central component of DHS's immigration

[2] John Morton, DHS, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of [Noncitizens]* (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.
[3] John Kelly, DHS, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.
[4] *Id.* at 4.

enforcement.[5] The Mayorkas Memo stated that DHS would "prioritize for apprehension and removal noncitizens who are a threat to our national security, public safety, and border security," and further defined those categories. The Mayorkas Memo also instructed enforcement officials to consider additional factors when prioritizing enforcement, including protecting noncitizens' civil rights and civil liberties, and protecting against retaliation for noncitizens' assertion of legal rights. In April 2022, the Immigration & Customs Enforcement (ICE) Office of the Principal Legal Advisor (OPLA) issued its own memo, providing guidance to ICE attorneys on how to apply the Mayorkas Memo to noncitizens in removal proceedings ("the Doyle Memo").[6] Together, the Mayorkas and Doyle Memos clarify DHS's enforcement priorities and provide guidance to ICE attorneys in how to favorably exercise their discretion in the prosecution of removal cases. These memos are summarized in detail in practice advisories published in 2022 and 2023 by IDP, the ILRC, and NIPNLG, linked above.

In June 2022, a federal district court in Texas vacated the Mayorkas Memo, finding that it violated certain provisions of the INA and the Administrative Procedures Act.[7] The Mayorkas Memo, and by extension the Doyle Memo and ICE's formal application of the policies therein, remained vacated until June 2023, when the Supreme Court reversed this ruling and ordered the lower courts to reinstate the Mayorkas Memo.[8] Shortly after that, DHS reinstated both the Mayorkas and Doyle Memos and resumed exercising prosecutorial discretion pursuant to those memos' guidance.

NOTE: It is important to remember that DHS's enforcement priorities are not enshrined in the INA or implementing regulations, but rather are determined by political appointees in the Department's leadership. Because they are inherently political, enforcement priorities may change under a new presidential administration or in response to national political trends. Practitioners should stay informed of current enforcement priorities and procedures and discuss the enforcement climate with clients so that clients can make informed decisions about their cases.

II. Beyond the *Mayorkas* and *Doyle* Memos: Other Sources of Prosecutorial Discretion Guidance

Although the Mayorkas and Doyle Memos are known as the central documents governing prosecutorial discretion today, it is important to remember that there are other sources of guidance that immigration agents rely on when making decisions about how to use their limited enforcement resources. In addition to the memoranda and directives detailed below, OPLA has published a list of Frequently Asked Questions and Additional Instructions on the Doyle

[5] Alejandro Mayorkas, DHS, *Guidelines for the Enforcement of Civil Immigration Law* (Sep. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf (hereinafter "Mayorkas Memo").
[6] Kerry E. Doyle, ICE OPLA, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion* (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf (hereinafter "Doyle Memo").
[7] *Texas v. United States*, 606 F. Supp. 3d 437, 502 (S.D. Tex. 2022).
[8] *United States v. Texas*, 599 U.S. 670, 143 S. Ct. 1964 (2023).

Memo, available on its website.[9] There are many ways to advocate for prosecutorial discretion, and many resources to draw on to make your case. This section summarizes a few of the current memoranda and other agency directives that advocates may rely on to build a strong case for the favorable exercise of discretion.

A. ICE Directives and Memoranda

ICE has issued several directives that provide additional guidance to ICE officials on how to exercise their discretion with respect to certain categories of noncitizens. Unlike the *Mayorkas* and *Doyle* Memos, these directives were not challenged in the *US v. Texas* litigation over prosecutorial discretion, and they have remained in force since being published. While these directives are also vulnerable to being revoked if there is a change in presidential administration, because they are narrowly tailored and have been subject to less political scrutiny, they may remain in place even if a new administration purports to "eliminate" prosecutorial discretion. Below are short summaries of some of these directives.

Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2021). The "Victim-Centered Approach Directive" provides ICE personnel guidance on handling the cases of noncitizens who have been victims of crimes in the U.S., including human trafficking, domestic violence, and other crimes.[10] Importantly, the Victim-Centered Approach Directive is not limited to only noncitizens who have applied for survivor-based immigration benefits (U, T, VAWA, SIJS, etc.), but also individuals who may be eligible for such benefits, even if they have not applied.[11] It instructs ICE officers and agents to "exercise prosecutorial discretion in appropriate circumstances to facilitate access to justice and victim-based benefits" for these individuals in all aspects of immigration enforcement, including but not limited to deciding whether to detain or release from ICE custody; coordinating with USCIS to seek expedited processing of certain applications; coordinating with OPLA to facilitate prosecutorial discretion in removal proceedings; and deciding whether to grant deferred action and stays of removal.[12]

Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual (Oct. 12, 2021). The "Worksite Enforcement Memo" instructs DHS agencies to focus worksite enforcement efforts on "unscrupulous employers who exploit the vulnerability of undocumented workers," with the goal of using immigration enforcement policies to promote fair wages, workplace safety, labor rights, and other laws that protect workers.[13] Under the Worksite Enforcement Memo, the component agencies are instructed to adopt policies to protect and support

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[9] ICE OPLA, *Doyle Memorandum: Frequently Asked Questions and Additional Instructions* (last updated May 15, 2024), https://www.ice.gov/about-ice/opla/prosecutorial-discretion ("OPLA FAQs").
[10] ICE, *Using a Victim-Centered Approach with Noncitizen Crime Victims* (Aug. 10, 2021), https://www.ice.gov/doclib/news/releases/2021/11005.3.pdf (hereinafter "*Victim Centered Approach Directive*").
[11] *Victim-Centered Approach Directive* at 2.
[12] *See generally Victim-Centered Approach Directive.*
[13] DHS, *Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual* (Oct. 12, 2021), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf.

noncitizens who are victims of or witness worksite exploitation, labor trafficking, and other workplace harms. These policies include exercising favorable discretion to grant deferred action, parole, and other available relief, and facilitating noncitizens' participation in investigations of workplace exploitation.[14] The Worksite Enforcement Memo led to the creation of Labor Deferred Action, which offers deferred action and employment authorization for up to four years for noncitizens who have been involved in workplace labor disputes.[15]

Consideration of U.S. Military Service When Making Discretionary Determinations with Regard to Enforcement Actions Against Noncitizens (May 23, 2022). The "Military Service Directive" reaffirms ICE's policy to consider a noncitizen's U.S. military service when deciding whether to take enforcement actions against them, including decisions related to detention and release; issuance of NTAs; issuance of administrative removal orders; and reinstatement of prior removal orders.[16] It states that, while not dispositive, U.S. military service is a "significant mitigating factor" when deciding whether to take enforcement action against a noncitizen. In addition, noncitizens with an immediate family member currently serving on active duty in the U.S. military must also receive special consideration.[17]

Interests of Noncitizen Parents and Legal Guardians of Minor Children or Incapacitated Adults (Jul. 14, 2022). While ICE has long provided its agents guidance on how to enforce immigration laws against noncitizens who are parents, the 2022 "Parental Interests Directive" is more protective than previous guidance and applies to parents and legal guardians of minor children and incapacitated adults, as well as those who are involved in family court, probate, guardianship, or child welfare proceedings involving minors or incapacitated adults.[18] The Parental Interests Directive applies regardless of the citizenship or immigration status of the minor child, and instructs ICE officers to ensure that enforcement activities "do not unnecessarily disrupt or infringe upon the parental or guardianship rights of" parents and caregivers.[19] The Parental Interests Directive instructs ICE officers to consider noncitizens' parental or caregiver obligations when making decisions about arrest and detention; transfer; and visitation while in immigration custody. It also directs officers to facilitate parents' participation in legal proceedings related to their parental rights, including granting parole for parents to return to the U.S. to attend necessary hearings.[20]

These, along with a handful of other DHS memoranda and directives, serve as additional guidance for ICE officers on how to deploy their agencies' limited resources. They can be particularly helpful in cases where the respondent may be an enforcement priority under the

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[14] *Id.*
[15] USCIS, *DHS Support of the Enforcement of Labor and Employment Laws* (Jul. 23, 2024), https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/dhs-support-of-the-enforcement-of-labor-and-employment-laws.
[16] ICE, *Consideration of U.S. Military Service When Making Discretionary Determinations with Regard to Enforcement Actions Against Noncitizens* (May 23, 2022), https://www.ice.gov/doclib/news/releases/2022/10039.2.pdf.
[17] *Id.*at 10.
[18] ICE, *Interests of Noncitizen Parents and Legal Guardians of Minor Children or Incapacitated Adults* (Jul. 14, 2022), https://www.ice.gov/doclib/news/releases/2022/11064.3.pdf.
[19] *Id.* at 1.
[20] *Id.* at 12-13.

Mayorkas Memo but is also part of a covered group that DHS has identified for additional PD consideration. Moreover, these policy documents were not targeted by the *Texas* litigation and may not be immediately revoked if there is a change in administration, so advocates should be familiar with their contents and continue to use them to advocate for a favorable exercise of discretion.

B. EOIR Guidance for Adjudicators on Prosecutorial Discretion

In September 2023, EOIR also published a memorandum providing guidance to IJs on DHS's enforcement priorities and how Immigration Judges (IJs) should accommodate PD negotiations during removal proceedings.[21] The EOIR PD Memo instructs that IJs and the BIA should generally "focus on cases where the respondent is a civil enforcement priority or desires a full adjudication of a claim for immigration relief," and should not "expend [] limited judicial resources on cases that do not fall into either of those categories."[22] EOIR adjudicators should thus "focus on resolving disputes between the parties, and need not spend time on questions or issues about which the parties agree or about which the party has the prerogative to decide."[23]

According to the EOIR PD Memo, in cases where OPLA informs the court that the respondent is not an enforcement priority, the IJ should solicit the parties' views on whether PD will play a role in the resolution of the case. The guidance urges IJs to solicit this input early, ideally at master calendar hearings or through scheduling orders, rather than waiting until the final individual hearing.[24] Although the Memo acknowledges that OPLA prefers to dismiss nonpriority cases, it warns that IJs should adjudicate such motions "as is appropriate under the law, taking into consideration any objection to dismissal by the respondent."[25] IJs should also consider the parties' willingness to narrow issues or stipulate to relief, not only in deference to the parties' agreement but also as a matter of judicial efficiency.

At the BIA, the EOIR PD Memo urges appellate IJs to request supplemental briefing on the question of PD, and to adjudicate motions to dismiss or administratively close proceedings as appropriate under the law, taking into account whether the parties agree to the outcome and/or the basis of any opposition.[26]

It is important to understand the authoritative limits of the EOIR PD Memo. Neither immigration judges nor the BIA has any authority to consider requests for prosecutorial discretion; only ICE officials have this authority. Conversely, the EOIR PD Memo is not binding, and may not even be persuasive to ICE personnel, who take their guidance from their own agency heads. Nevertheless, advocates should be familiar with the EOIR PD Memo and understand how IJs may be relying on it to make case processing decisions where PD is an issue. The EOIR PD

[21] EOIR, *Guidance to EOIR adjudicators on Department of Homeland Security enforcement priorities and prosecutorial discretion initiatives* (Sep. 28, 2023), https://www.justice.gov/d9/2023-10/dm-23-04_0.pdf (hereinafter "EOIR PD Memo").
[22] *Id.* at 3-4.
[23] *Id.* at 3.
[24] *Id.* at 4-5.
[25] *Id.*
[26] *Id.* at 6.

Memo can also be helpful when asking the IJ to take certain actions to facilitate PD negotiations, see **Section III.B**, or when defending against exercises of PD that are against your client's interests, as discussed in Part 2 of this advisory.

III. Advocating for Prosecutorial Discretion: Considering Dismissal of Proceedings and Other PD Options

It is always important to assess whether advocating for a more favorable exercise of discretion will help your client. While the Mayorkas and Doyle Memos are in effect, advocates have an opportunity to make formal requests to OPLA for specific actions in the exercise of discretion, in keeping with their stated policies. Seeking or "asking for PD" is shorthand for making this type of affirmative request: reaching out to OPLA, providing some evidence and argument, and asking that opposing counsel take a specific action in your client's case. While OPLA's preferred form of PD is dismissal of removal proceedings, it may exercise its discretion in a number of ways at nearly every stage of proceedings: choosing whether to file or cancel an NTA; agreeing to continuances; stipulating to elements of a claim or relief eligibility; administrative closure; reopening proceedings after a removal order; stipulating to bond or release; and choosing whether to appeal to the BIA.[27]

It is important to assess every case to determine if prosecutorial discretion may further your client's goals. Central to this assessment is a conversation with your client: what are their goals and priorities, how urgently do they want to achieve those goals, and what is their risk tolerance? While avoiding removal and gaining immigration status tend to be central goals, your client may have other priorities or concerns that will inform whether to seek PD and in what form. For example, respondents who have suffered severe trauma may wish to avoid a contentious court hearing or may struggle to testify effectively in court. Parents or caregivers who are the primary breadwinners for their family may view maintaining work authorization as paramount. Noncitizens in ICE detention may want to resolve their case as soon as possible, even if it means leaving the United States. It is important to listen to your client with an open mind and revisit the conversation often to be sure you are always helping to further their goals.

> **Example:** Betsy is in removal proceedings. She has an approved I-130 family petition filed by her U.S. citizen spouse, and she is prima facie eligible for adjustment of status. Although Betsy could apply before USCIS if her proceedings were dismissed, processing times are very slow at her local USCIS Field Office. Betsy wants to gain LPR status as soon as possible so that she can visit her terminally ill mother in her home country. Betsy and her counsel submit a PD request to OPLA, asking that they stipulate to most eligibility requirements and join in a motion to advance and hear the case as a "short matter." The PD request highlights Betsy's eligibility for relief and includes evidence of her mother's illness.
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> **Example:** Tamer has applied for asylum in immigration court, and for U nonimmigrant status before USCIS. He has a work permit based on his pending asylum application, which he needs to support his family. If Tamer's removal proceedings are dismissed, he risks losing his work authorization until USCIS makes a bona fide determination on his

[27] *See generally* Doyle Memo at 10-15.

U visa application. Tamer's PD request includes evidence that he is the primary breadwinner and asks for administrative closure so that his asylum application will remain pending, and he can maintain his work authorization.

A. Special Considerations in Common Scenarios if Dismissal is on the Table

Depending on your client's situation and the applications they have pending or plan to file, dismissal or another form of PD may or may not actually help or further their goals. It is important to consider your client's specific situation and priorities when considering whether to seek or accept PD, and to carefully discuss the pros and cons of accepting any offer with your client.

NOTE: OPLA prefers dismissal of proceedings over other forms of PD, and frequently moves for dismissal without first meeting and conferring with the respondent or their counsel. Accordingly, it is important to discuss the possibility of dismissal early on and revisit the topic throughout your representation, so you understand how it aligns with their case goals. If dismissal is not a desired outcome for your client, think about how best to frame your PD request to achieve your client's goals.

1. Asylum

If granted, asylum provides protection from removal, employment authorization, a path to lawful permanent residency and eventually citizenship, and the opportunity to extend protections to family members. Thus, a critical consideration when assessing dismissal for an asylum-seeker client is the likelihood of success on the merits of their claim. This will depend on the factual and legal strength of their claim, but also on the immigration judge and the attitudes of your local OPLA office. If the claim is not likely to succeed, or if you know that the particular IJ is likely to deny asylum, then dismissal may be a better option.

In October 2023, the USCIS Asylum Division implemented special procedures for processing affirmative asylum applications filed by respondents who were previously in removal proceedings, and whose proceedings were dismissed as a matter of prosecutorial discretion.[28] Under these procedures, if an asylum applicant's court case is dismissed and they re-file an I-589 with USCIS, USCIS will honor the *original filing date*—that is, the date the application was first filed—for purposes of determining compliance with the one-year filing deadline; eligibility for employment authorization; interview-scheduling priority; and age determinations for derivative children and unaccompanied child (UC) principal applicants.[29]

To benefit from this policy, asylum applicants whose court cases are dismissed must re-file their asylum application with USCIS on the most current version of Form I-589. The new filing must be a paper filing—not electronic—and should include a copy of the IJ's order dismissing

[28] USCIS, *How USCIS Processes a Form I-589 Filed After Removal Proceedings are Dismissed or Terminated* (last updated Feb. 12, 2024), https://www.uscis.gov/humanitarian/refugees-and-asylum/how-uscis-processes-a-form-i-589-filed-after-removal-proceedings-are-dismissed-or-terminated.
[29] *Id.*

removal proceedings, as well as any new information and evidence that has arisen since the initial filing.[30]

> **Example:** Anaya first filed her asylum application in immigration court in 2019, five months after she arrived in the U.S. Anaya's daughter, Sameera, was 19 years old at the time and qualified as a derivative on Anaya's application. In 2023, the immigration judge granted a motion by OPLA to dismiss proceedings as a matter of prosecutorial discretion. Anaya re-filed her asylum application with USCIS. The application is considered timely, even though Anaya has now been in the US for more than five years, because her first filing was within one year of entry. In addition, Sameera still qualifies as a derivative applicant because she was 19 years old at the time of the original filing, even though she is now 24. Finally, Anaya and Sameera can maintain their employment authorizations and do not have to wait an additional 180 days to file a new I-765.

While this USCIS process resolves many questions about the impact of PD dismissal on asylum claims and offers crucial protections to asylum seekers whose cases are dismissed, there are some important caveats to consider.

First, the guidance does not specify a deadline to re-file after dismissal to guarantee these protections. Arguably, re-filing at any time should be sufficient to safeguard the applicant's rights, since they already complied with the one-year filing deadline and locked in EAD eligibility and age protections at that original filing date. But to be safe, it is advisable to re-file "within a reasonable period of time,"[31] which will differ depending on the specific facts and circumstances of each case. Although the regulation does not specify what constitutes a "reasonable period of time," USCIS has historically used six months as the benchmark in other contexts, so applicants should strive to re-file with USCIS within that timeframe if possible.[32]

Second, although the guidance states that USCIS will consider the original filing dates for purposes of prioritizing asylum interviews, as a practical matter, in recent years most of USCIS's limited resources have been devoted to conducting screening interviews at the southwest border and adjudicating a limited number of affirmative asylum applications. From FY 2022 to 2023—the period during which OPLA began widespread PD dismissal—USCIS's receipt of affirmative asylum applications nearly doubled, from roughly 232,000 applications to roughly 444,000.[33] In the 2023 fiscal year, USCIS only adjudicated about 10% of the nearly

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[30] *Id.*

[31] 8 CFR §§ 208.4(a)(4)(ii), 208.4(a)(5). This regulation describes exceptions to the one-year filing deadline for asylum based on changed or extraordinary circumstances, which include changes in the applicant's circumstances and loss of other lawful immigration status. If USCIS challenges the timeliness of a new filing, practitioners should argue that the dismissal of a timely filed asylum application is analogous to a "changed circumstance" in the initial filing context, and that any delay before re-filing was "reasonable" given the applicant's circumstances during that period.

[32] In 2000, a proposed USCIS rule that was never finalized suggested that a delay of more than six months after an exceptional or changed circumstance would not be considered reasonable. *See* 65 Fed. Reg. 76121, 17124 (Dec. 6, 2000). Circuit courts have also used six months as a general benchmark for reasonableness. *See, e.g.*, *Wakkary v. Holder*, 558 F.3d 1049, 1057-58 (9th Cir. 2008).

[33] DHS, Off. of Inspector General, *Final Report: USCIS Faces Challenges Meeting Statutory Timelines and Reducing its Backlog of Affirmative Asylum Claims* (Jul. 3, 2024), https://www.oig.dhs.gov/sites/default/files/assets/2024-07/OIG-24-36-Jul24.pdf.

half a million affirmative asylum applications it received.[34] These massive backlogs result in years-long delays for affirmative asylum applicants. Thus, while dismissal and re-filing will preserve an asylum applicant's rights to work and maintain asylum eligibility, it will not guarantee swift adjudication of their claim, and in most cases will result in years of additional delay before the case is resolved.

Third, the re-filing procedure is not likely to benefit asylum applicants whose claims were already considered by an asylum officer and referred to EOIR due to an eligibility issue, or whose original application was referred to EOIR for failure to comply with biometrics or interview appearances. For these applicants, USCIS has stated that it will automatically issue a "discretionary NTA" to send the case back to EOIR. If an asylum applicant in this situation wants USCIS to consider their application anew, their re-filed application should include clear, compelling reasons why USCIS should do so. For example, if the applicant's case was previously referred to court because they failed to appear at a scheduled interview, the re-filed application should include evidence of any exceptional circumstances that prevented the applicant from appearing.[35] If USCIS previously found that the applicant was ineligible for asylum and referred to EOIR on the merits, the re-filed application should highlight any new or changed circumstances that warrant USCIS taking a fresh look at the case.[36]

USCIS's published procedures do not contemplate exceptions to this general policy of automatically re-referring such cases, and there is a risk that the applicant might get referred right back to court and once again face removal. But if applicants are placed in the difficult position of having to re-file after already being referred, asking USCIS to consider the application anew may be the best option to eventually get a decision.

ALTERNATIVES TO DISMISSAL: If dismissal of proceedings will not benefit your asylum-seeking client, consider instead whether OPLA might stipulate to certain elements of the claim, or to asylum relief in general. Are there ways you can bolster your client's credibility, perhaps through corroborating evidence or offering your client up for limited cross-examination, in exchange for a shortened or uncontested hearing? Or, if your client does not have a strong claim or doesn't want to go forward, but needs to maintain work authorization, administrative closure might also be a possibility. Remember, however, that remaining in removal proceedings, even when administratively closed, always involves a risk of removal, so it is important to discuss the pros and cons in depth with your client before seeking or accepting any form of PD.

[34] *Id.*

[35] *See* 8 CFR § 208.10 ("Failure to appear for a scheduled interview may result in dismissal of the application or waiver of the right to an interview," but "will be excused if the applicant demonstrates that such failure to appear was the result of exceptional circumstances.").

[36] INA § 208(a)(2)(C) (Applicant may not be granted asylum if previously applied and was denied.) Under 8 CFR § 208.4(a)(3), this bar only applies where the *IJ or BIA* has *denied* asylum, not where proceedings were dismissed, so applicants should not be required to further justify USCIS reviewing the new application. But given USCIS's stated policy of automatically issuing NTAs in these cases, the ILRC recommends showing why the new application differs from the previous one.

2. Non-LPR Cancellation of Removal

Cancellation of Removal for Certain Nonpermanent Residents, or "Non-LPR Cancellation," grants LPR status for certain individuals who have been continuously present in the U.S. for at least ten years, who have maintained good moral character for ten years, and whose removal would result in extreme and exceptionally unusual hardship to a qualifying relative.[37] Unlike asylum, Non-LPR Cancellation is only available as a defense to removal; USCIS does not have jurisdiction over this form of relief and only individuals in removal proceedings before EOIR may apply.[38] Thus, noncitizens who may be eligible for Non-LPR Cancellation must be advised that dismissal of removal proceedings will prevent them from applying for that relief.

As with asylum, applicants for Non-LPR Cancellation qualify for employment authorization while their application is pending.[39] If removal proceedings are dismissed, then, the person is no longer eligible for employment authorization and will not be able to renew their EAD once it expires.[40] At the time of writing, EADs based on pending Non-LPR Cancellation are being issued with five-year validity periods. Individuals seeking PD dismissal in Non-LPR Cancellation cases should be advised of the loss of employment authorization that will follow and may consider renewing their EAD before seeking or accepting dismissal.

ALTERNATIVES TO DISMISSAL: If the applicant has a strong claim for Non-LPR Cancellation, OPLA may stipulate to one or more eligibility requirements, such as the applicant's continuous presence for 10 years, their good moral character, or even the hardship to a qualifying relative in certain circumstances. Or, if the claim is not as strong but the applicant's family has particular vulnerabilities, such as a co-parent being unable to work or US-citizen children having unique needs, administrative closure may allow them to continue to work lawfully without proceeding to merits. Again, remember to discuss the inherent risks of remaining in administratively closed proceedings with your client before seeking that form of PD.

3. Withholding of Removal Only Proceedings

Individuals who have been previously removed, re-enter the U.S. without authorization, and are again encountered by ICE may be subject to reinstatement of removal under INA § 241(a)(5), which allows ICE to reinstate their prior order and remove them immediately. If individuals subject to reinstatement pass a reasonable fear screening, they are placed in streamlined court proceedings for the limited purpose of applying for withholding of removal or

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[37] For more information on Non-LPR Cancellation of Removal, see ILRC, *Non-LPR Cancellation of Removal: An Overview of Eligibility for Immigration Practitioners* (June 2018), https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf.

[38] *See* INA § 240A(b).

[39] 8 CFR § 274a(c)(9).

[40] USCIS regulations allow USCIS to revoke employment application where the underlying basis for the employment authorization no longer exists. *See* 8 CFR § 274a.14(b)(1). This revocation is not automatic, however, and USCIS is required to first issue a notice of intent to revoke employment authorization and provide the noncitizen with an opportunity to submit evidence of ongoing eligibility. *Id.* at § 274a.14(b)(2). In practice, USCIS has not generally moved to revoke employment authorization following dismissal of removal proceedings, except in unique cases, so most EAD holders will be able to maintain their work authorization until the expiration date, even if their removal proceedings—and the underlying relief application—have been dismissed.

protection under the Convention Against Torture, and they cannot be removed until those proceedings end. These proceedings are commonly known as "Withholding-Only Proceedings." Reinstatement of removal also bars most other forms of relief before both EOIR and USCIS.[41]

Unlike asylum applicants, noncitizens in withholding-only proceedings cannot pursue protection after dismissal, as only EOIR may adjudicate applications for withholding of removal and protection under the Convention Against Torture.[42] Therefore, dismissal of withholding-only proceedings leaves the noncitizen in a vulnerable position: the noncitizen is technically still subject to a reinstatement order and can be removed at any time without an opportunity to be heard in court. Practically speaking, as long as the current enforcement priorities remain in place, ICE is unlikely to take action against these noncitizens because they have already been designated as non-priority. But if PD policy changes under a new administration, or the individual's circumstances change—for example, they are arrested—they are at risk of being removed quickly without an opportunity to fight their case. Moreover, the dismissal of the withholding-only proceedings will result in eventual loss of any I-589-based work permits. These are serious risks that generally counsel against dismissal of withholding-only proceedings, except in very unique cases.

ALTERNATIVES TO DISMISSAL: In withholding-only proceedings, respondents may be able to negotiate with OPLA for administrative closure or other options in the exercise of PD. Another possible option is to ask that the reinstatement order be rescinded so that a regular NTA may be issued. From there, the respondent may seek dismissal or have a broader range of options for relief in court. Reinstatement orders are usually issued by either ICE or CBP, so OPLA frequently responds that they lack authority to rescind the reinstatement order. Advocates may be able to negotiate with ICE or CBP, although anecdotally the agencies have rarely been willing to rescind reinstatement absent extremely compelling circumstances.

The reinstatement statute includes a bar on reopening the prior removal order,[43] which most circuits interpret as a jurisdictional bar to any reopening of a prior removal order once it has been reinstated. Some circuits have nevertheless held that the statute does not bar motions to rescind a prior *in absentia* removal order where based on lack of notice.[44] In the recent case of *Suate-Orellana v. Garland*, the Ninth Circuit also held that the reopening limitation is a non-jurisdictional claim-processing rule, and therefore can be waived if DHS does not timely raise it.[45] In *Suate-Orellana*, the petitioner's prior removal order was reinstated, and she subsequently filed a motion to reconsider and terminate her underlying proceedings based on

[41] INA §§ 241(a)(5), 241(b)(3); 8 CFR § 208.31.
[42] INA § 241(b)(3); 8 CFR §§ 208.16(a), 1208.16(a).
[43] INA § 241(a)(5); *see also Sanchez-Gonzalez v. Garland,* 4 F.4th 411, 414-15 (6th Cir. 2021); *Rodriguez-Saragosa v. Sessions*, 904 F.3d 349, 354-55 (5th Cir. 2018); *Cordova-Soto v. Holder*, 732 F.3d 789, 793-96 (7th Cir. 2013); *Gutierrez-Gutierrez v. Garland*, 991 F.3d 990, 994 (8th Cir. 2021); *Alfaro-Garcia v. U.S. Att'y Gen.,* 981 F.3d 978, 981-83 (11th Cir. 2020); *cf. Garcia Sarmiento v. Garland*, 45 F.4th 560, 564 (1st Cir. 2022).
[44] *See, e.g.*, *Mejia v. Whitaker*, 913 F.3d 482, 488 (5th Cir. 2019); *Miller v. Sessions*, 889 F.3d 998, 1002 (9th Cir. 2008).
[45] 101 F.4th 624, 632 (9th Cir. 2024).

a change in law.[46] The Ninth Circuit determined that, because OPLA had not raised the reinstatement bar to reopening earlier in proceedings, the BIA had jurisdiction to consider the merits of the petitioner's motion.

In light of *Suate-Orellana*, practitioners representing respondents in withholding-only proceedings in the Ninth Circuit should assess whether there is any basis to reopen the prior removal order, now that the circuit court has made clear that such motions are not barred as a matter of jurisdiction under INA §241(a)(5).[47] In some cases, it may be wise to ask OPLA to join in or not oppose such a motion as a matter of prosecutorial discretion, although there is a risk that OPLA would object and thereby trigger the bar as a claim-processing rule. In other cases, it may be preferable to simply file the motion to reopen without meeting and conferring with OPLA, asserting that the court has jurisdiction unless OPLA specifically raises the bar.[48]

4. Applications Pending with USCIS

Many individuals in removal proceedings are seeking an immigration benefit before USCIS, such as U nonimmigrant status (for survivors of certain crimes); T nonimmigrant status (for survivors of human trafficking); Special Immigrant Juvenile Status (SIJS); or relief under the Violence Against Women Act (VAWA).

In most cases, dismissal of proceedings is the safest and most beneficial form of PD for these clients, as it allows the applicant to await adjudication by USCIS without the imminent threat of removal. This is especially helpful as USCIS benefits can take years to reach final adjudication due to statutory caps, causing long delays before the applicant is actually granted lawful status. Moreover, USCIS's introduction of deferred action programs for certain applicants in recent years allows for continued employment authorization while the application is pending, alleviating the need to rely on in-court applications to maintain work authorization.[49]

OPLA offices and immigration courts vary, however, in their preferences on timing of dismissal of such cases. In some jurisdictions, OPLA may agree to dismissal as soon as the initial petition is filed, while other offices may require a bona fide determination letter or provisional approval before agreeing to dismiss. For example, according to its FAQs, OPLA will consider a pending or approved Form I-360, petition for SIJS, as a "strong mitigating factor in determining whether the juvenile noncitizen is an enforcement priority and eligible for PD."[50] It is a good

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[46] *Id.* at 628.
[47] *See* ILRC, *Motions with the BIA* (Mar. 2020), https://www.ilrc.org/sites/default/files/resources/motions_with_bia-final.pdf; NILA, AIC, *The Basics of Motions to Reopen EOIR-Issued Removal Orders* (Apr. 25, 2022), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory_0.pdf.
[48] For more information and practice tips in light of *Suate-Orellana*, visit https://immigrationlitigation.org/wp-content/uploads/2024/09/24.05.31-Suate-Orellana-Alert-FINALx.pdf .
[49] *See* 6 USCIS-PM J.4.G (SIJS deferred action); 3 USCIS-PM C.5 (bona fide determination process and deferred action for U petitioners); 8 CFR § 214.14(d)(2) (deferred action for U petitioners placed on waitlist); 8 CFR § 214.205(e) (bona fide determination process and deferred action for T petitioners); 3 USCIS-PM D.5.C (deferred action for VAWA self-petitioners).
[50] OPLA FAQs.

idea to reach out to colleagues or your local AILA liaison to get the latest on OPLA's dismissal policies in your court.

Remember that applicants for survivor-based benefits before USCIS generally fall within ICE's *Victim-Centered Approach Directive*, which offers an additional framework for prosecutorial discretion even for individuals whom DHS otherwise considers to be enforcement priorities.[51] While the *Victim-Centered Approach Directive* does not mandate dismissal of proceedings for applicants in removal proceedings, it does encourage favorable exercise of discretion, particularly where USCIS has already deemed the application bona fide.[52]

ALTERNATIVES TO DISMISSAL: If OPLA will not agree to dismissal and the applicant is awaiting a decision from USCIS, advocates may consider a request to join in a motion for administrative closure instead. Otherwise, the options will be to wait until a later stage in proceedings for OPLA to agree to dismissal, or file an independent motion to terminate proceedings based on new regulations, see **Section IV.A**.[53] If your client is a priority for enforcement, for example, a T visa applicant who also has several criminal convictions of her own, administrative closure or even repeated continuances may be the only available PD option in court. If an applicant for a survivor-based benefit receives an administratively final order of removal, the *Victim-Centered Approach Directive* states they should "generally be issued a stay of removal" to await adjudication by USCIS.[54]

For clients seeking survivor-based benefits who are detained in ICE custody, remember that the Doyle Memo and the *Victim-Centered Approach Directive* both instruct ICE personnel to consider the detained person's status as a crime victim when deciding whether to continue detention, set bond, or agree to custody redetermination and alternatives to detention.[55] This is true even for individuals who fall under DHS's enforcement priorities, including those who may be eligible for a survivor-based benefit but have not yet applied.

5. Family-Based Relief

For individuals who may be eligible for adjustment of status or consular processing through a family member, dismissal of removal proceedings will often be beneficial, though there may be some scenarios when a different form of PD is preferable.

Where the respondent has filed Form I-485, Application to Adjust Status, before the IJ, dismissal of proceedings should prompt OPLA to automatically transfer the application to the local USCIS field office for adjudication; unlike asylum, adjustment applicants should not need to re-file a fresh application with USCIS. At least one USCIS field office has reported that OPLA is supposed to transfer the adjustment file within sixty days of dismissal of removal proceedings, though in practice advocates report that this does not always happen. To avoid confusion and delay, if OPLA moves to dismiss proceedings in which an adjustment application is already pending, advocates should push OPLA to commit to transferring the

[51] *Victim-Centered Approach Directive* at 9.
[52] *Id.*
[53] Section III.A discusses options to independently move for termination of proceedings in certain cases.
[54] *Victim-Centered Approach Directive* at 8.
[55] Doyle Memo at 15; *Victim-Centered Approach Directive* at 9.

case to USCIS before agreeing to dismissal, or ask the IJ to order the file transfer as part of the dismissal order. If this does not happen, some USCIS field offices have suggested filing a *copy* of the application with the *local field office*—not the lockbox—along with a copy of the IJ's dismissal order. If all else fails, the applicant may need to schedule an in-person appointment with USCIS to move the case forward.[56]

Other respondents may be eligible to consular process based on an I-130 filed on their behalf by a qualifying family member. These individuals may need a waiver of inadmissibility before traveling, or they may have alternative applications for relief pending that allow them to work lawfully or avoid accruing unlawful presence, while they await petition approval or visa availability. A full analysis of family-based immigration and consular processing is beyond the scope of this practice advisory, but advocates and clients should consider how and when dismissal may play a role in ensuring a smooth consular process.

ALTERNATIVES TO DISMISSAL: If your client is seeking adjustment of status, in some cases it may be preferable to proceed in immigration court rather than before USCIS. For example, if your case is before a particularly friendly IJ, or if you know the IJ has space in their calendar to adjudicate the application quickly, then you might ask OPLA to exercise discretion by filing a joint motion to advance the case and stipulating to certain eligibility requirements, or to a grant of relief on the papers. Or, if your client will be eligible for family-based relief down the road, but is only now filing the I-130, administrative closure might allow them to await adjudication without needing to seek repeated continuances.

B. Strategies to Encourage a PD Decision Early in the Case

Once you submit a request for prosecutorial discretion to OPLA, it can be difficult to get a response. Citing limited personnel and resources, OPLA generally prioritizes PD determinations based on the date of the final merits hearing, frequently moving to dismiss proceedings just a few weeks before the hearing or even on the day of the hearing itself. Practitioners report that, even when a PD request is submitted early in the case, many OPLA offices decline to consider the request until the merits hearing. Unfortunately, these delays result in noncitizens, advocates, and the court expending energy and resources on cases—gathering supporting evidence, drafting legal briefs, and preparing for merits hearings—even when it is likely that the case will be dismissed. While each jurisdiction is unique, below are some general strategies that may help press PD requests forward earlier in the case.

Seek a Status or Pre-Hearing Conference. Prior to the merits hearing, either party may request a pre-hearing conference, or the IJ may schedule one on their own motion, with the purpose of meeting to narrow issues, obtain stipulations between the parties, exchange information voluntarily, and "otherwise simplify and organize the proceeding."[57] In a 2022 memo, then-EOIR Director Tracy Short issued additional guidance on pre-hearing conferences, encouraging IJs to "actively and routinely encourage parties to engage in pre-

[56] For more information on family-based adjustment of status, see ILRC, *Family-Based Adjustment of Status Options* (Oct. 1, 2024), https://www.ilrc.org/resources/family-based-adjustment-status-options.
[57] 8 CFR § 1003.21(a); Imm. Ct. Prac. Man. Ch. 4.18(a).

hearing communications ….”[58] Although EOIR guidance instructs that pre-hearing conferences should not be scheduled for the sole purpose of discussing prosecutorial discretion, PD may be discussed as long as a permissible purpose is articulated for the conference.[59] Permissible purposes for pre-hearing conferences include discussing stipulations to relief; narrowing issues; discussing the manner of presenting evidence at the individual hearing; and ensuring applications are complete and the cases is ready for a final hearing.[60]

EOIR’s Additional Reference Materials make clear that attendance at pre-hearing conferences is mandatory for both parties; OPLA may not decline to appear at a pre-hearing conference as a matter of prosecutorial discretion.[61] Therefore, if a pre-hearing conference is scheduled for another purpose, for example, to resolve a specific legal issue before proceeding to merits, OPLA must appear and engage with respondent’s counsel. If a PD request has already been submitted, advocates can use this hearing to inform the IJ that OPLA has received a PD request, and press OPLA to make a timely decision on the request. Scheduling a pre-hearing conference can be a way to force OPLA to the table on a pending PD request, potentially saving the advocate, the client, and the court much time and energy.

Ask the IJ to Order Timelines to Meet and Confer. Although OPLA has exclusive authority over its exercise of discretion in prosecuting cases, immigration judges have authority to manage removal proceedings, including setting deadlines, issuing scheduling orders, and granting continuances.[62] The EOIR PD Memo instructs IJs, where practicable, to “solicit, on the record at master calendar hearings, OPLA’s views on whether the respondent is a civil enforcement priority and the parties’ views on how the case should proceed in light of OPLA’s determination.”[63] Some immigration judges’ initial scheduling orders always instruct the parties to meet and confer about prosecutorial discretion by a certain deadline. If the immigration judge in your case does not so instruct or solicit OPLA’s position, you can request that the court set deadlines to encourage OPLA to review your case and consider a PD request. Some practitioners have also had success by filing a motion to continue proceedings after submitting a PD request, informing the court that a request is pending and OPLA needs time to consider it. While the IJ cannot order OPLA to make a PD decision, informing the court that your client is seeking PD might prompt OPLA to review the case sooner than it normally would.

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[58] EOIR, *Pre-hearing Conferences in Immigration Proceedings Program* (Jun. 3, 2022), https://www.aila.org/library/eoir-issues-guidance-on-pre-hearing-conferences (citing EOIR, *Encouraging and Facilitating Pro Bono Legal Services* (Nov. 5, 2021)).
[59] *Id.* at 1.
[60] *Id.*
[61] EOIR, *Additional Reference Materials*, Ch. 14, Preamble, https://www.justice.gov/eoir/reference-materials/general/chapter-14. Part 2 of this practice advisory discusses strategies when OPLA exercises its discretion by failing to appear at master calendar or merits hearings.
[62] *See, e.g.* 8 CFR §§1003.10(b) (discussing powers and duties of immigration judges); 1003.29 (continuances); Immig. Ct. Prac. Man. Ch. 3.1(b)(1) (scheduling orders).
[63] EOIR Memo at 5.

C. Escalating the Request for Prosecutorial Discretion

If you submitted a PD request and you believe that OPLA has improperly denied the request, you can escalate the case for review through the OPLA field office chain of command.[64] Reach out to the Deputy Chief Counsel and then Chief Counsel; contact information for all Chiefs Counsel is available to AILA members on AILA's website.[65] Unfortunately, OPLA has not instituted a case escalation process to National Headquarters or Principal Legal Advisor Doyle. If, after escalation, OPLA still declines to exercise PD, consider asking the client's local congressperson to conduct a congressional inquiry or launching a public deportation defense campaign in partnership with community organizers.[66] The next section also discusses options to terminate or administratively close removal proceedings when prosecutorial discretion is not available to your client.

IV. Getting Your Client Out of Proceedings When PD is Not Available

Even if OPLA declines to exercise PD in a particular case, there may be other strategies to reach your client's desired outcome that do not require OPLA's cooperation. As of July 29, 2024, EOIR's regulations have been updated to include provisions for mandatory and discretionary termination and administrative closure of removal proceedings.

A. Options to Terminate Proceedings

If a respondent wishes to have their removal proceedings terminated, the new regulation lays out criteria for both "mandatory" and "discretionary" termination.[67] Where the parties jointly request termination, or one party "affirmatively indicate[s] its nonopposition," termination is mandatory.[68] But even without OPLA's agreement, the IJ must terminate proceedings if the charge(s) of removability cannot be sustained; if the noncitizen has obtained U.S. citizenship or lawful immigration status; or if "[f]undamentally fair proceedings are not possible because the noncitizen is mentally incompetent and adequate safeguards are unavailable."[69] The criteria for discretionary termination include when (1) the respondent is an unaccompanied minor and has applied for asylum with USCIS; (2) the respondent has applied and is prima facie eligible for relief before USCIS; (3) the respondent is a beneficiary of Temporary Protected Status, deferred action, or Deferred Enforcement Departure; (4) the respondent has an approved provisional waiver and is eligible to consular process; (5) the respondent has filed Form I-751, petition to remove conditions on residency, or (6) in comparable circumstances

[64] Both the Doyle Memo and OPLA FAQs are silent on case escalation procedures. At AILA Liaison meetings, OPLA has stated that advocates seeking review of enforcement priority determinations, or individual requests for PD, should escalate the request to the local Deputy Chief Counsel and Chief Counsel. AILA National ICE Committee Fall Liaison Agenda (Oct. 26, 2023), AILA Doc. 23100933.
[65] DHS/ICE/OPLA Chief Counsel Contact Information (Sep. 1, 2022), AILA Doc. 22041837.
[66] *See, e.g.*, Emily Tucker et al., Building the Movement, Vera Institute for Justice, May 2020; Mijente and Just Futures Law, Deportation Defense Toolkit, Nov. 2021.
[67] 8 CFR § 1003.18(d). Similarly, 8 CFR § 1003.1(m) allows the BIA to terminate proceedings.
[68] 8 CFR § 1003.18(d)(1)(9)(G).
[69] 8 CFR § 1003.18(d)(1)(i)(B).

where "termination is similarly necessary or appropriate for the disposition or alternative resolution of the case."[70] Although the regulation prohibits termination for "purely humanitarian reasons" without DHS consent or "affirmative" non-opposition, these mandatory and discretionary categories leave room for creative arguments in favor of terminating proceedings even where OPLA does not agree. A motion to terminate under 8 CFR § 1003.18(d) should be supported by evidence relevant to the particular basis for termination in that case.

> **Example:** Nadia arrived in the U.S. in March 2021. She is now married to a U.S. citizen and wants to consular process to become a lawful permanent resident. OPLA will not agree to dismissing her proceedings because she is an enforcement priority under the "border security" category. Nadia moves to terminate proceedings under 8 CFR § 1003.18(d)(1)(ii)(D) because she has an approved I-601A provisional waiver. She attaches her approval notice as evidence. The IJ grants her motion to terminate proceedings under their discretionary termination authority.
>
> **Example:** Boris has lived in the U.S. for over 20 years. About five years ago Boris began to experience psychiatric symptoms, including paranoid thinking and disorganized thoughts. Boris's delusions are so severe that he does not understand the nature and object of his removal proceedings and he cannot assist his attorney in his defense. OPLA considers Boris to be an enforcement priority because he has a recent arrest for assault, so will not agree to dismissal of proceedings as an exercise of prosecutorial discretion. Instead, Boris's attorney moves to terminate proceedings under 8 CFR § 1003.18(d)(1)(i)(B), arguing that fundamentally fair proceedings are not possible because Boris is mentally incompetent. The motion is supported by evidence of Boris's diagnosis and affidavits from counsel and other service providers who attest to Boris's incompetency. The IJ grants his motion to terminate under their mandatory authority.

In addition to the regulatory bases for termination, in recent years the BIA and circuit courts have grappled with the question whether termination is appropriate where the respondent's NTA lacks the time, date, and place of proceedings required under INA § 239(a)(1)(G).[71] In *Matter of Fernandes*, the BIA held that Section 239(a)(1)(G) is a claim-processing rule, and therefore a respondent who timely raises a violation is entitled to an "appropriate remedy," which has been interpreted to include termination of proceedings.[72] Most recently, however, the BIA found that IJs may, upon motion by the DHS, amend the NTA to include the required information.[73] While advocates should continue to argue that termination is the only appropriate remedy, IJs will likely consider amending the NTA when OPLA makes such a motion and refrain from terminating proceedings. Nevertheless, respondents who have been

[70] 8 CFR § 1003.18(d)(1)(ii).
[71] *Matter of Fernandes*, 28 I&N Dec. 605 (BIA 2022).
[72] *Id.* In *Matter of Aguilar-Hernandez*, 28 I&N Dec. 774 (BIA 2024), the BIA subsequently held that DHS may not remedy a *Fernandes* violation by filing a Form I-261, Additional Charges of Inadmissibility/Deportability, to *supplement* the deficient NTA, because the regulation at 8 CFR § 1003.30 does not permit such use of this form.
[73] *Matter of R-T-P-*, 28 I&N Dec. 828, 841 (BIA 2024).

issued a defective NTA and wish to terminate proceedings should still preserve this argument, as the law may change in the future.

B. Options to Administratively Close Proceedings

Administrative closure is a procedural tool that allows IJs and the BIA to temporarily suspend a case until one of the parties requests that it be recalendared.[74] While a case is administratively closed, no hearings are scheduled and no action is taken to move the case forward. Administrative closure can be a useful tool if the respondent does not want to go forward with their case, but termination or dismissal is not an option, either because the IJ will not agree or because the respondent has some reason to keep their removal case open. Examples of such scenarios are discussed in **Section III.A**.

The BIA first outlined considerations for administrative closure in *Matter of Avetisyan*, and articulated a multi-factor test for determining when administrative closure is appropriate to await adjudication of a collateral application for relief.[75] In 2018, however, the Attorney General overruled prior BIA precedent and prohibited IJs and the BIA from administratively closing proceedings except where expressly authorized by regulation or judicial settlement.[76] Then in 2021, a new Attorney General reinstated administrative closure as a permissible practice.[77]

To prevent this political back-and-forth, EOIR's 2024 regulations codify administrative closure.[78] Where the parties file a joint motion or one party affirmatively indicates its non-opposition to a motion, the IJ must administratively close the case.[79] In all other cases, the regulation enumerates factors the IJ must consider in determining whether to administratively close a case, including (1) the reason administrative closure is sought; (2) the basis for any opposition; (3) whether a pending application requires administrative closure of the court case; (4) the likelihood that the noncitizen will succeed on any collateral benefit they are pursuing; (5) the anticipated duration of administrative closure; (6) the responsibility of any party in contributing to case processing delays; (7) the anticipated outcome of proceedings; and (8) the detention status of the noncitizen.[80] The regulation also provides factors that IJs should consider when deciding whether to recalendar a case. The regulation largely adopts the factors and analysis set forth in *Avetisyan* and *Matter of W-Y-U-*, but also makes some important changes, including making recalendaring proceedings a discretionary, factor-based decision left to the adjudicator rather than automatic upon motion of one party.[81]

In cases where the respondent does not wish to proceed to their merits hearing and dismissal or termination is not an option, advocates might consider moving to administratively close proceedings under the new regulation. Administrative closure may preserve important rights or benefits for the respondent, while mitigating or at least delaying their risk of receiving a final

[74] *See* 8 CFR § 1003.18(c); *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012); *see also Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017).
[75] 25 I&N Dec. at 696.
[76] *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).
[77] *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021).
[78] 8 CFR § 1003.18(c).
[79] 8 CFR § 1003.18(c)(3).
[80] 8 CFR § 1003.18(c)(3)(i).
[81] 8 CFR § 1003.18(c)(3)(ii).

order of removal. A motion for administrative closure should address the factors set forth in 8 CFR § 1003.18(c) and should be supported by evidence, such as USCIS receipt notices; proof of USCIS processing times or upcoming court dates or interview notices; letters from experts, where appropriate; and any correspondence with OPLA regarding their position on the request.

> **Example:** Clara is in removal proceedings and has applied for non-LPR cancellation of removal, but she is very afraid to testify in court. Pursuant to that application, Clara has a work permit, which is important for her to support her family. Clara's wife, Aarthi, has applied for T nonimmigrant status and included Clara as a derivative; if those petitions are approved, Clara will be granted T nonimmigrant status as well. OPLA will not agree to exercise PD, and Clara does not want to seek termination of proceedings because she cannot afford to lose her work permit. Clara files a motion for administrative closure to await adjudication of the T nonimmigrant petitions. The IJ administratively closes proceedings.

V. The Future of Prosecutorial Discretion & Protecting Clients Under a New Administration

Following the 2016 election of President Trump, practitioners were unsure of how best to protect clients who had benefited from prosecutorial discretion during the previous administration. Because that previous era of PD had resulted in tens of thousands of cases being administratively closed, advocates feared that the Trump administration would recalendar all those cases and press for removal orders. These fears became even more acute when the Attorney General stripped immigration judges of their authority to administratively close cases in 2018.[82]

In fact, while some cases were recalendared during the Trump years, the vast majority of administratively closed cases on EOIR's docket were not disturbed, as the agencies focused their resources on restrictive border policies and speeding up processing times in court. Nevertheless, some cases were recalendared, particularly for respondents with new interaction with the criminal court system. Also, respondents who were denied relief by USCIS were at greater risk of having their cases recalendared due to USCIS's aggressive NTA policy at the time.[83]

What do these experiences tell us about how best to prepare for a potential change in administration now? If President Trump assumes power for a second term in January 2025, we are likely to see immediate reversal of the current PD program, including rescission of the Mayorkas and Doyle Memos, as well as rescission of ICE Directives benefiting survivors, military families, those involved in labor disputes, and others. In contrast, under a potential Harris administration, the existing PD program would likely remain in place, and we would continue to face many of the same challenges we have for the past three years. With anti-

[82] *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).
[83] USCIS, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable [Noncitizens]* (Jun. 28, 2018) (rescinded), https://www.uscis.gov/sites/default/files/document/memos/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf.

immigrant rhetoric rising across the political spectrum, however, we may see restrictions on PD even under a Harris administration.

Review all Cases for Prosecutorial Discretion Eligibility NOW. With the possibility of increased enforcement and the elimination of PD, practitioners should review all pending cases to identify which clients might be candidates for prosecutorial discretion, either through dismissal or other forms of PD identified in the Doyle Memo. This review process must include conversations with eligible clients about the benefits and risks of seeking PD, the different ways in which OPLA might exercise discretion in each case, and whether the client desires such action. It is important to document these conversations in any case notes or client management system and maintain a record of each client's decision. For clients who choose not to pursue PD at this time, discuss the potential impact of that decision in light of the various possible policy changes. In addition, have a plan to revisit PD eligibility with your client on an ongoing basis in the future. The political and legal landscape may change and result in different options for your client. Your client's circumstances may also change, requiring a new analysis of the benefits and risks of seeking PD.

Seek PD Now for Clients Who Want it. Given OPLA's practice of delaying most PD determinations, it is a good idea to submit PD requests as early as possible and follow-up repeatedly, particularly if we are facing a second Trump presidency in January 2025. In late 2016 and early 2017, certain OPLA offices rushed to exercise PD in as many cases as possible, anticipating that the policy would be rescinded when Trump took office in January 2017. Other offices began to wind down their PD practice before the administration even changed. If this situation arises again, we do not know how OPLA would prepare for the change, though we do know that the immigration court backlog has ballooned since 2016 and OPLA offices have fewer resources to dedicate to case review now than they did eight years ago. To ensure every client can consider all available options, have conversations early and submit PD requests for clients who will benefit.

Advise Clients of Risks of Accepting PD Now, in Particular Administrative Closure. In cases where OPLA agrees to administratively close proceedings as a matter of PD, it is especially important that the client understands the status of their case and the potential risks that could arise if there is a change in PD policy, such as a risk that administratively closed cases could be recalendared. Respondents who accept PD now must be advised of the nature of administrative closure, in particular the risk of recalendaring. Clients should understand that this risk will exist in any political climate but will likely be even more acute under a potential second Trump administration.

Have a Plan for Continued Representation (or Withdrawal) from Administratively Closed Cases. In cases where the client accepts prosecutorial discretion, both attorney and client should have a clear understanding and expectations about the scope of continuing representation, if any. For example, if the removal case has been administratively closed, both parties should agree on whether the attorney will remain attorney of record in the case; what will happen if the case is recalendared; and the client's obligations to maintain communication with the attorney even though the case is inactive. In previous years, EOIR has at times required attorneys to remain on record in administratively closed cases or required that a case be recalendared before considering any motion to substitute or withdraw counsel.

Although EOIR's new regulations do not directly address whether IJs may adjudicate motions to withdraw or substitute counsel in administratively closed case, the Final Rule Notice addresses this issue and clarifies that "the EOIR adjudicator may adjudicate such motions without recalendaring the case."[84] But advocates should remember that motions to substitute or withdraw as counsel must still comply with the requirements for such motions, including providing evidence that the respondent has been notified, or counsel has attempted to notify the respondent, of the proposed change or withdrawal from representation, and that the respondent consents to that change.[85] In addition, attorneys requesting withdrawal must demonstrate attempts to notify the respondent of their obligations in the proceedings, including an explanation that the case is administratively closed and what that means.[86] If you intend to withdraw from an administratively closed case, it is critical to advise your client of all of these issues in writing, both so that they have the information they need to protect themselves moving forward and so you have a record of having given these important advisals.

If the case is dismissed but the client's relief application remains pending before USCIS, both counsel and respondent should agree on their obligations to work together on any future tasks that arise in the case, even though EOIR proceedings are now closed. If the original retainer agreement does not anticipate these scenarios, attorney and client should sign a new agreement memorializing these understandings, so that both parties know their duties and responsibilities moving forward.

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About the Immigrant Legal Resource Center
The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.

[84] 89 Fed. Reg. at 46748.
[85] Imm. Ct. Prac. Man. Ch. 2.1(b)(3)(B) and (C).
[86] 89 Fed. Reg at 46748.