

## Update on Prosecutorial Discretion

By Kirk A. Carter, Esq.

In March of 2011 the Bureau of Immigration and Customs Enforcement (“ICE”) within the Department of Homeland Security (“DHS”) outlined a new set of priorities for the apprehension, detention and removal of aliens. These priorities are based on the concept of “prosecutorial discretion,” which refers to DHS’ authority to not enforce immigration laws against certain individuals and groups. Outlined in two memos, the first calls on ICE attorneys and employees to refrain from pursuing noncitizens with close family, educational, military, or other ties in the U.S. and instead spend the agency’s limited resources on persons who pose a serious threat to public safety or national security. The second memo focuses on exercising discretion in cases involving victims, witnesses to crimes, and plaintiffs in good faith civil rights lawsuit.

ICE has also revised its detention policy which now states that “absent extraordinary circumstances or the requirements of mandatory detention” it would not expend detention resources on aliens who are suffering from serious physical or mental illness, or who are disabled, elderly, pregnant, or nursing, or demonstrate that they are primary caretakers of children or infirmed person.

The concept of “prosecutorial discretion” is based on two premises. The first is the need to use limited resources wisely. ICE calculates that it only has the resources to remove 400,000 aliens per year (less than 4 % of the estimated undocumented population). Consequently prioritization is required in order to focus on those who pose the greatest danger to the U.S. Second, it’s based on the idea that the law should be administered in a humane and compassionate way – taking into account factors such as the tender age, or old age of an individual, the existence of a medical or mental health condition, the presence of family in the U.S., and other positive contributions the alien has made to the United States. One of the first recipients of “prosecutorial discretion” more than thirty years ago was the music legend, John Lennon.

In addition to the above factors, ICE will consider the following when deciding whether prosecutorial discretion is warranted including: the agency’s civil immigration enforcement priorities; the length of a person’s presence; the circumstance of their arrival and manner of entry; their educational status and pursuit of higher education; the military service of immediate relatives; their criminal history; their immigration history; their ties to and conditions in their home country; whether the person’s nationality

renders removal unlikely; and whether the person is likely to be granted legal status or some other form of relief.

The implementation of the new “Prosecutorial Discretion” policy is currently underway. Last November ICE launched a comprehensive training program on the appropriate use of this policy. Soon thereafter ICE attorneys began reviewing all incoming removal cases – those initiated by ICE officers as a result of arrest, as well as those initiated by USCIS as a result of the denial of benefits. This review is designed to identify cases most clearly eligible and ineligible for a favorable exercise of discretion with a goal of weeding out the cases that would be a waste of judicial resources. US prosecutors in Denver and Baltimore just completed a pilot program which covered the review of thousands of pending deportation cases in those offices to determine which aliens might have their cases administratively closed. Similar reviews are planned across the country to allow ICE to identify those cases that reflect a high enforcement priority. It is expected that this process could result in between ten and twenty percent of the existing cases being administratively closed.

While some have criticized this program as a backdoor “amnesty” it should be noted that a grant of prosecutorial discretion does not confer legal status on an otherwise undocumented immigrant. Nor are those granted prosecutorial discretion eligible to receive work authorization or put on a pathway to legalization. It does not pardon the alien’s past immigration transgressions either. It merely leaves the alien alone for the time being, and is subject to review by ICE in the future should their enforcement priorities change.

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