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Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor

What is Prosecutorial Discretion (PD)?

Requesting Prosecutorial Discretion in Immigration Court Quick Reference Card

PD is the longstanding authority of a law enforcement agency charged to decide where to focus its resources and whether or how to enforce the law against an individual. As the exclusive representative of the Department of Homeland Security (DHS) in immigration removal proceedings before the U.S. Department of

Justice's Executive Office for Immigration Review (EOIR), ICE's Office of the Principal Legal Advisor (OPLA) has the authority to exercise PD in the litigation of removal cases. In practice, PD allows OPLA attorneys to decide which cases to focus on and how they want to proceed in individual cases, such as agreeing to remove a case from the immigration court docket through dismissal or administrative closure, or agreeing to stipulations on issues such as relief, bond, or continuances. PD is authority, exercised by immigration officers, on a case-by-case basis, and does not create a right or entitlement for any noncitizen.

This page addresses many of the common questions that noncitizens in removal proceedings and their legal representatives may have regarding PD.

What is the current PD guidance?

On April 4, 2022, Principal Legal Advisor Kerry E. Doyle issued a memorandum to the OPLA workforce titled *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion* (Doyle Memorandum), which will take effect on April 25, 2022. The Doyle Memorandum is consistent with DHS Secretary Alejandro N. Mayorkas' September 30, 2021 memorandum titled *Guidelines for the Enforcement of Civil Immigration Law*, which took effect on November 29, 2021. Upon its effective date, the Doyle Memorandum rescinds OPLA's prior PD guidance.

How does PD work?

OPLA attorneys will independently evaluate cases to determine whether to exercise PD. You (or your legal representative) may also submit requests for PD to OPLA. When OPLA receives a request for PD, OPLA will first evaluate whether your case is an enforcement priority, guided by Secretary Mayorkas' September 30, 2021 Memorandum and the Doyle Memorandum. OPLA makes the priority designation on an individualized basis by reviewing all available information related to your case, weighing any mitigating and aggravating factors, and consistent with all legal obligations.

May I receive PD from OPLA?

Nonpriority Cases

If OPLA determines that your case is not a priority for enforcement — often referred to as a “nonpriority” — then OPLA will generally exercise PD. OPLA’s preferred method for exercising PD is opting not to file the Notice to Appear (NTA). For cases in which the NTA has already been filed, OPLA’s preferred method for exercising PD is moving to dismiss the removal proceedings without prejudice. OPLA may also, on a case-by-case basis, consider administrative closure, stipulations to part (such as to discrete issues or facts) or all your requests for relief, a continuance, a reduced bond amount, waiving appeal, or, in limited circumstances, a Joint Motion to Reopen, normally combined with a Motion to Dismiss.

Priority Cases

If OPLA determines that your case is a priority for enforcement, then OPLA will generally not agree to exercise PD by declining to file the NTA in your case, dismissing, terminating, or administratively closing proceedings. Even if your case is a priority, however, OPLA may still exercise other forms of PD, such as agreeing to stipulate to part (such as to discrete issues or facts) or all your requests for relief or a continuance.

Additionally, if OPLA has initially designated your case as a priority, you may present evidence in support of a request to change that priority designation. OPLA attorneys will also reassess an initial priority designation in your case if they learn of additional information that is material to whether your case is a priority. If the additional information supports a re-designation of your case’s priority status, then OPLA may determine that the earlier priority designation should be changed. OPLA will consider any evidence that you submit in support of your PD request. For additional instructions on what information you should submit with this request, see the [How to Submit a PD Request](#) section below.

Unrepresented Noncitizens

OPLA does not require your PD request to follow any strict format if you are unrepresented (or “pro se”). If you are unrepresented and your case is a nonpriority, then OPLA will also agree to one continuance by the immigration court before moving to dismiss proceedings so that you may find a lawyer or request a different form of PD than that which OPLA has chosen to offer.

OPLA welcomes assistance from the private immigration bar and pro bono groups to aid unrepresented noncitizens in the submission of PD requests.

Also available as part of the eCourse

[Recent Developments in Immigration Removal Proceedings](#)

First appeared as part of the conference materials for the
2022 A Practical Guide to Immigration Removal Proceedings session
"Recent Developments in Immigration Removal Proceedings"