



U.S. Department of Justice
Executive Office for Immigration Review

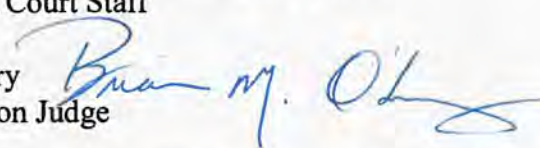
Office of the Chief Immigration Judge

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April 6, 2015

MEMORANDUM

TO: All Immigration Judges
All Court Administrators
All Attorney Advisors and Judicial Law Clerks
All Immigration Court Staff

FROM: Brian M. O'Leary 
Chief Immigration Judge

SUBJECT: Operating Policies and Procedures Memorandum 15-01:
Hearing Procedures for Cases Covered by new DHS Priorities and Initiatives

I. Introduction

This Operating Policies and Procedures Memorandum (OPPM) provides background and guidance on hearings for aliens who might be covered by new immigration-related enforcement priorities and initiatives established by the Department of Homeland Security (DHS). This OPPM supplements OPPM 13-01, entitled *Continuances and Administrative Closure*, issued on March 7, 2013.

II. Authority

On November 20, 2014, the Secretary of Homeland Security (Secretary) announced several immigration policy initiatives affecting a number of DHS programs. Most notably for purposes of this OPPM, the Secretary announced revised civil immigration enforcement priorities for all of DHS, emphasizing priorities on removing national security threats, convicted felons, gang members and aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States, and setting other second and third-tier enforcement priorities for DHS. See "*Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants*," available at <http://www.dhs.gov/sites/default/files/publications>.¹

¹ On November 20, 2014, the Secretary also announced an expansion of the 2012 Deferred Action for Childhood Arrivals (DACA) program, which offered deferred action to certain

The Secretary's memorandum makes clear that DHS personnel are expected to exercise discretion based on individual circumstances and pursue these priorities at all stages of the enforcement process, from the earliest investigative stages to enforcing final orders of removal. The memorandum also emphasized the importance of exercising prosecutorial discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing enforcement and removal of higher priority cases. This memorandum is therefore likely to affect some of the cases currently pending on immigration court dockets. Through individualized review of pending cases, Immigration and Customs Enforcement (ICE) attorneys will be determining which cases are enforcement priorities and which are not. Cases that DHS determines through the exercise of prosecutorial discretion are not enforcement priorities are subject to requests for administrative closure or dismissal.

III. Role of the Immigration Court

A central requirement of due process is "the opportunity to be heard at 'a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Further, immigration hearings must be "fundamentally fair." See *Matter of Sibrun*, 18 I&N Dec. 354, 356 (BIA 1983); *Constanza-Martinez v. Holder*, 739 F.3d 1100, 1102 (8th Cir. 2014). As we strive to adjudicate cases in our courts as efficiently as possible, these central due process principles must remain paramount. Likewise, while DHS' revised priorities may impact a number of cases in our courts over the coming years, our courts' responsibility to protect due process and the opportunity to be heard remains unchanged.

As noted in OPPM 13-01, the role of the immigration court, like any other tribunal, is to resolve disputes. At the present time, there are over 428,000 pending proceedings on our dockets, and some of these may be affected by the memorandum. In light of the memorandum it is imperative that we apply our limited adjudication resources to resolve actual cases in dispute.

To that end, one mechanism for DHS to identify pending cases in the removal system that are not enforcement priorities and communicate that to the court is to use already scheduled hearings on court dockets, particularly upcoming master calendar hearings. On April 6, 2015, ICE instructed its attorneys to exercise prosecutorial discretion as early in the case or

individuals who are unlawfully in the United States after having entered the country as children, and a new program for certain undocumented parents of U.S. citizens and lawful permanent residents, the Deferred Action for Parental Accountability (DAPA) policy. On February 16, 2015, the U.S. District Court for the Southern District of Texas temporarily enjoined DHS from implementing the DAPA and expanded DACA policies. See *Texas v. United States*, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015). DHS has therefore instructed its officers, agents and attorneys to not consider the DAPA and expanded DACA policies as a basis for exercising prosecutorial discretion or for determining whether deferred action is appropriate, unless and until further guidance is given. Therefore, this OPPM only pertains to DHS's exercise of prosecutorial discretion with regard to its revised enforcement priorities – which are not enjoined by the temporary injunction – and not the DAPA and expanded DACA policies.

proceedings as possible in order to preserve government resources that would otherwise be expended in pursuing enforcement and removal of high priority cases. Consequently, ICE attorneys have been directed to (1) review their cases and any requests for prosecutorial discretion *prior* to hearings, including master calendar hearings before Immigration Judges; and (2) be prepared at the next hearing to respond to questions from the Immigration Judge, and requests by respondents, about whether the ICE attorney believes that the case should: (i) remain on the court docket because it is a removal priority or (ii) be administratively closed or dismissed because the case is not a removal priority or appears eligible for some form of prosecutorial discretion.

Therefore, Immigration Judges should be prepared to ask ICE attorneys appearing before them at master calendar hearings, on the record, whether the case remains a removal priority for ICE and whether ICE is seeking dismissal or administrative closure. Before deciding whether to close or dismiss the matter, the judge should of course ask the respondent or his or her representative for the respondent's position on these matters.

Judges are encouraged to use the docketing tools available to them to ensure the fair and timely resolution of cases before them. That includes continuances, termination and administrative closure in appropriate cases. See OPPM 13-01 and *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012). The process outlined herein is not intended to be the only mechanism for ICE to exercise prosecutorial discretion for cases pending in the immigration courts.

Note that this OPPM does not change EOIR's current adjudication priorities. Rather it provides guidance and information concerning cases of aliens who might be covered by DHS' new immigration-related enforcement priorities and memorandum.

IV. Conclusion

It is our expectation that the parameters of the new DHS memorandum will focus DHS resources on cases that meet the stated priorities. Judges are encouraged to use docketing practices that ensure respondents receive fair and timely adjudications, and act consistently with the role of the immigration courts in resolving disputes. That includes closing cases that ICE has determined do not fit within the Secretary's enforcement priorities. If you have any questions, please contact your Assistant Chief Immigration Judge.

Nothing in this OPPM is intended to replace independent research, the application of case law and regulations to individual cases or the decisional independence of Immigration Judges as defined in 8 C.F.R. § 1003.10.