

AUG 20 2010



U.S. Immigration
and Customs
Enforcement

MEMORANDUM FOR: Peter S. Vincent
Principal Legal Advisor

James Chaparro
Executive Associate Director,
Enforcement and Removal Operations

FROM: John Morton
Assistant Secretary

A handwritten signature in black ink, appearing to read "John Morton", written over a horizontal line.

SUBJECT: Guidance Regarding the Handling of Removal Proceedings of
Aliens with Pending or Approved Applications or Petitions

Purpose

This memorandum establishes U.S. Immigration and Customs Enforcement (ICE) policy for the handling of removal proceedings before the Executive Office for Immigration Review (EOIR) involving applications or petitions filed by, or on behalf of, aliens in removal proceedings. This policy outlines a framework for ICE to request expedited adjudication of an application or petition for an alien in removal proceedings that is pending before U.S. Citizenship and Immigration Services (USCIS) if the approval of such an application or petition would provide an immediate basis for relief for the alien.¹ This policy will allow ICE and EOIR to address a major inefficiency in present practice and thereby avoid unnecessary delay and expenditure of resources.

Background

Historically, where a *Petition for Alien Relative* (hereinafter Form I-130 or petition) was pending before USCIS, this fact tended to promote delays in removal proceedings. Indeed, in July of 2009, EOIR identified approximately 17,000 removal cases that have been continued pending the outcome of USCIS decisions on petitions. Recognizing that many of these cases may ultimately result in relief for the alien, ICE has been working with USCIS and EOIR to identify more effective procedures to resolve these pending petitions along with other applications to promote increased docket efficiency.

¹ This memo applies only to applications or petitions that USCIS legally has jurisdiction to adjudicate during removal proceedings.

To this end, USCIS will issue guidance to complement this memorandum and will endeavor to complete the adjudication of all applications and petitions referred by ICE within 30 days for detained aliens and 45 days for non-detained aliens. Close coordination and communication between the ICE Offices of Chief Counsel (OCC) and USCIS will ensure that all applications and petitions are adjudicated quickly to realize our shared goal of efficiently resolving cases in removal proceedings.

New ICE Policy

As a matter of prosecutorial discretion and to promote the efficient use of government resources, I hereby issue new ICE policy to govern the handling of removal proceedings involving aliens with applications or petitions pending with USCIS. This policy extends both to the prosecution of removal proceedings by OCCs and to any associated detention decisions by Enforcement and Removal Operations (ERO).

1. Expedited Adjudication

- A. In any case involving a detained alien whose application or petition is pending with USCIS, OCC shall affirmatively request that USCIS expedite the adjudication of the application or petition. ICE should promptly transfer the applicant's A-file to USCIS. USCIS will endeavor to adjudicate all the detained cases referred to it by ICE within 30 days of receiving the A-files. ICE will ensure that, if needed, USCIS has access to the detained individual to conduct an interview.
- B. In any case involving a non-detained alien whose application or petition is pending with USCIS, OCC shall affirmatively request that USCIS expedite the adjudication of the application or petition. ICE should promptly transfer the applicant's A-file to USCIS. USCIS will endeavor to adjudicate all non-detained cases referred to it by ICE within 45 days of receiving the A-files.

2. Dismissal without Prejudice of Certain Cases in Removal Proceedings

Detained Cases

Where there is an underlying application or petition filed with USCIS by or on behalf of a detained alien and ICE determines as a matter of law and in the exercise of discretion that such alien appears eligible for relief from removal, OCC shall promptly consult with the Field Office Director (FOD) and Special Agent in Charge (SAC) to determine if there are any investigations or serious, adverse factors weighing against dismissal of proceedings.² Adverse factors include, but are not limited to, criminal convictions, evidence of fraud or other criminal misconduct, and national security and public safety considerations. If no investigations or serious adverse factors

² ICE offices in the Fifth and Ninth Circuits must be sensitive to the issue of *res judicata* that may arise in dismissing proceedings without prejudice. See, e.g., *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007); *Medina v. INS*, 993 F.2d 499, 503 (5th Cir. 1993). To protect the government's interests, motions to dismiss without prejudice in the 5th and 9th Circuits should be made in writing, i.e., not orally. The Office of the Principal Legal Advisor (OPLA) has developed a template for motions to dismiss without prejudice for use in these two circuits.

exist, the OCC should promptly move to dismiss proceedings without prejudice before EOIR, and notify the FOD of the motion. Once the FOD is notified, the FOD must release the alien pursuant to the dismissal of proceedings.

Non-Detained Cases

Where there is an underlying application or petition and ICE determines in the exercise of discretion that a non-detained individual appears eligible for relief from removal, OCC should promptly move to dismiss proceedings without prejudice before EOIR.³

Standard for Dismissal

Only removal cases that meet the following criteria will be considered for dismissal:

- The alien must be the subject of an application or petition filed with USCIS to include a current priority date, if required, for adjustment of status;⁴
- The alien appears eligible for relief as a matter of law and in the exercise of discretion;
- The alien must present a completed *Application to Register Permanent Residence or Adjust Status* (Form I-485), if required; and
- The alien beneficiary must be statutorily eligible for adjustment of status (a waiver must be available for any ground of inadmissibility).

An alien in removal proceedings may appear eligible for relief but for a variety of reasons, ICE may oppose relief on the basis of discretion. In those cases, ICE should continue prosecution of the case before EOIR regardless of whether USCIS has approved the underlying application or petition.

Standard Operating Procedures

In coordination with the local USCIS field office, each OCC must develop a standard operating procedure (SOP) to identify removal cases that involve an application or petition pending before USCIS. This SOP should address the categories of cases discussed above: (1) those identified for expedited adjudication, and (2) those for which dismissal of proceedings may be appropriate. The request to expedite shall be made to by OCC to USCIS. No obligation for such requests shall be placed on the alien's attorney, accredited representative, or the immigration judge. The SOP regarding requests to expedite must establish the following:

- A mechanism whereby the ICE attorney who handles the master calendar hearing in a case determines whether a request to expedite the pending petition or application is appropriate;
- A structure to communicate the ICE request to expedite to USCIS;

³ As more fully stated in footnote 2, ICE offices in the Fifth and Ninth Circuits must be sensitive to the issue of *res judicata* that may arise in dismissing proceedings without prejudice. OPLA has developed a template for motions to dismiss without prejudice for use in these two circuits.

⁴ At the OCC's discretion, other cases not meeting this criterion may be appropriate for dismissal.

- A system to ensure that decisions about the application or petition are received from USCIS, uploaded into GEMS, and received by the ICE attorney scheduled to handle the subsequent hearing; and
- A method by which A-files will be routed as appropriate so as to avoid delays in either the adjudication or the immigration court proceedings.

Any questions regarding this memorandum should be directed to OPLA Field Legal Operations or ERO Field Operations through appropriate channels.⁵

cc: Alejandro Mayorkas
Director, U.S. Citizenship and Immigration Services

⁵ This document provides only internal ICE guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil, or criminal. Likewise, no limitations are placed on otherwise lawful enforcement or litigative prerogatives of DHS or ICE.