

Practice Pointer: Escalating Requests for Prosecutorial Discretion Before ICE ERO and ICE-OCC (Updated 12/30/15)¹

On November 20, 2014, the Department of Homeland Security (DHS) issued a memorandum on enforcement priorities and prosecutorial discretion (PD), "[Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants](#)" (Priorities Memo). This practice pointer explains how AILA members should ask for review of wrongful PD denials, starting at the local offices and moving up the appropriate chain of leadership to ICE Headquarters. For more information on how to write a request for prosecutorial discretion, see the American Immigration Council practice advisory titled [Prosecutorial Discretion: How to Advocate for Your Client](#) (March 18, 2015). For more information on the November 20, 2014 memo, see the American Immigration Council practice advisory titled [Prosecutorial Discretion Requests Under the Johnson Enforcement Priorities Memorandum](#) (March 19, 2015).

While ICE can exercise PD at any stage, attorneys should generally request PD *as early as possible* in the enforcement process or in the removal proceedings.² If a previous request for PD was denied **prior to the November 20, 2014 Priorities Memo** and counsel believes the client merits a favorable exercise of discretion under the Priorities Memo, ICE encourages attorneys to bring requests to the attention of the relevant ICE office, by e-mailing the designated [local OCC mailbox](#) or by contacting the [local ICE ERO Field Office](#), and clearly noting if it is an emergency. Similarly, if new facts or circumstances warrant a review of a previously denied request for prosecutorial discretion for a case pending before the BIA, attorneys should contact the trial attorney initially in charge of the case or the appeal and escalate the request accordingly.

1. Cases Pending Before ICE ERO

On or around March 27, 2015, ICE [posted information](#) to [its website](#) on how to request PD from ICE ERO. Attorneys should first request PD from the local ICE ERO field office responsible for handling the client's case. A list of local ICE ERO offices and their contact information is available on the ICE website at www.ice.gov/contact/ero. An erroneous PD denial must be elevated to the Assistant Field Office Director (AFOD) or Field Office Director (FOD), if they have not yet been made aware of the case. ICE ERO requires that attorneys submit PD requests with a valid [Form G-28](#). Attorneys are encouraged to provide as much substantive and supporting evidence as possible of the various positive equities, and other factors to be considered by ICE.

If the local ICE ERO office denies the request for PD and you believe that the denial was contrary to DHS policy, counsel may seek a review of the decision. Attorneys should escalate the PD request to the ICE ERO PD e-mail box, eroprosecutorialdiscretioninquiries@ice.dhs.gov. This request should include all materials that were submitted with the initial PD request and copies of communications with the local

¹ During AILA's Liaison meeting with ICE on 10/19/15, AILA received additional guidance on best practices for submitting requests for PD to the ICE Office of Chief Counsel (OCC) and ICE Enforcement and Removal Operations (ERO). This practice pointer has been updated to reflect the information from that meeting.

² In an effort to best allocate its resources to pursue its primary mission, ICE may exercise PD authority to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions such as but not limited to administrative closure, termination, grant of a stay of removal or deferred action.

ICE ERO office. The PD request sent to the ERO PD e-mail box will be sent to a second FOD in another city to review the case.

2. Cases Pending Before ICE OCC

At the January 20, 2015 AILA liaison meeting with ICE, ICE indicated that all requests for PD from ICE OCC under the Priorities Memo should first be addressed with the local ICE OCC office which has jurisdiction over the removal proceedings.³

Attorneys should contact the appropriate local ICE OCC office to ensure that the request is submitted according to that office's existing guidelines. Many local ICE OCC offices have set up a specific e-mail box for PD requests. A list of local ICE OCC offices and their contact information is available on the ICE website at <https://www.ice.gov/contact/legal>. Generally speaking, though, attorneys should start by submitting the PD request to the trial attorney assigned to the case (or through the designated PD email box), and then elevating erroneous denials to the Deputy Chief Counsel and/or Chief Counsel with jurisdiction over the case. For those cases pending under an ICE OCC sub-office, the initial PD request must first be submitted to the ICE OCC sub-office. If the ICE OCC sub-office denies the PD request, the request should then be escalated to the ICE OCC office with jurisdiction over the case.

If the local ICE OCC office denies the request for PD and you believe that the denial was contrary to DHS policy, counsel may seek a review of the decision. Attorneys should escalate the PD request to the following e-mail box, OPLA-PD-HQ-FLO@ice.dhs.gov, and CC the ERO e-mail box (eroprosecutorialdiscretioninquiries@ice.dhs.gov). This request should include all materials that were submitted with the initial PD request and copies of communications with the local ICE OCC office. The PD requests sent to this mailbox will be monitored by all Field Legal Operations (FLO) management (not just FLO-East or FLO-West management). ICE headquarters will not review escalated PD requests that have not been reviewed by each level of the chain of command; it will send them back to the local office for review prior to considering them.

³ AILA ICE Liaison Committee Meeting Q&As, AILA Doc No. 15060908, available at <http://www.aila.org/infonet/ice-liaison-committee-meeting-q-n-a-01-20-15>.