From: (b)(6); (b)(7)(C)
Sent: Mon, 2 May 2022 13:46:57 +0000
To: OPLA HQ Personnel;OPLA Field Personnel
Subject: Summary of Terms and Requirements of the Settlement Agreement in W.A.O. v. Jaddou, No. 19-11696 (D.N.J. filed April 29, 2019), Relating to New Jersey Special Immigrant Juvenile Applicants
Attachments: ECF 127 - Order Granting Final Approval of Settlement & Dismissing Case.pdf, ECF 119-1 - Final Settlement Agreement.pdf

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Disseminated on behalf of (b)(6); (b)(7)(C) ***and*** (b)(6); (b)(7)(C)

On April 20, 2022, the U.S. District Court for the District of New Jersey approved a Settlement Agreement in *W.A.O. v. Jaddou*, No. 19-11696 (D.N.J. filed Apr. 29, 2019), a class action relating to New Jersey Special Immigrant Juvenile (SIJ) applicants.

Under the terms of the agreement, "Class Member(s)" are defined as:

1. Individuals who have filed or will file petitions for Special Immigrant Juvenile (SIJ) classification;
2. Based on the Superior Court of New Jersey, Chancery Division, Family Part (Family Part) Orders;
3. That were entered between the petitioners' 18th and 21st birthdays; and
4. Whose SIJ petitions are, have been, or will be delayed, questioned, denied, or revoked on the ground that the Family Part lacks the authority, power, or jurisdiction to make the required child welfare findings as to petitioners in this age group (18 to 21 years of age).

"Presumed Class Member(s)" are defined as:

1. Applicants whose SIJ petitions were pending at any time between January 1, 2018, and July 10, 2019;
2. Who were between the ages of 18 and 21 at the time of filing such petitions;
3. Who listed a residential address in New Jersey; and
4. Whose SIJ petitions were approved as of December 6, 2021, excluding any Unidentified Potential Class Members (as defined in Section II of the Settlement Agreement).

To identify Class Members and Presumed Class Members, an event note has been added to each Class Member's PLAnet record, containing the following:

> **W.A.O. v. JADDOU CLASS ACTION GUIDANCE**. This individual may be part of the class in *W.A.O. v. Jaddou*, No. 19-11696 (D.N.J. filed April 29, 2019). Under the terms of a Settlement Agreement, OPLA is required to take, or barred from taking, certain actions with regard to class members. The settlement terms and related guidance

can be found on DCLD's SharePoint page here: District Court Litigation Division - WAO - All Documents (sharepoint.com)

The Settlement Agreement provides, *inter alia*, that:

> *Except as otherwise indicated in this subsection, Defendants shall join, or alternatively not oppose, a Motion for a Continuance, Placement on the Status Docket (where available), or Administrative Closure filed with the Executive Office for Immigration Review ("EOIR") by a Presumed Class Member who must wait for a priority date to become current. A Presumed Class Member making a Motion for a Continuance, Placement on the Status Docket, or Administrative Closure must cite to this Agreement in his or her Motion.*
>
> *Defendants shall join, or, alternatively, not oppose a Motion to Terminate Removal Proceedings Without Prejudice filed with EOIR by a Presumed Class Member who has reached his or her priority date, except as otherwise indicated in this subsection. The Presumed Class Member must file his or her Motion to Terminate Removal Proceedings Without Prejudice within one year of reaching his or her priority date and must cite to this Agreement in his or her Motion.*
>
> *Except as otherwise indicated in this subsection, Defendants shall join, or alternatively, not oppose a Motion to Reopen Removal Proceedings, in conjunction with a Motion to Stay Removal (if any), filed with EOIR by a Presumed Class Member, provided that the Presumed Class Member has an approved SIJ petition but is subject to a previously entered removal order. The Presumed Class Member must file his or her Motion to Reopen Removal Proceedings and any accompanying Motion to Stay Removal within one year of the Effective Date of this Agreement and must cite to this Agreement in his or her Motion.*

U.S. Immigration and Customs Enforcement (ICE) retains the discretion to oppose any motions enumerated above in the following circumstances:

a. *When the Presumed Class Member has been convicted of an aggravated felony as defined in INA § 101(a)(43) or convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or is not younger than 16 years of age and intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization;*

b. *When the Presumed Class Member engaged in or is suspected of engaging in terrorism or terrorism-related activities; has engaged in or is suspected of engaging in espionage or espionage-related activities; or whose apprehension, arrest, or custody is otherwise necessary to protect the national security of the United States; or*

c. *In extraordinary cases that do not [sic] fall within the enumerated categories above but are nonetheless national security or public safety risks. In such cases, the ICE Chief Counsel of the relevant Office of the Principal Legal Advisor (OPLA) field location must approve ICE's opposition.*

It should be noted that nothing in the Settlement Agreement prevents Office of the Principal Legal Advisor (OPLA) attorneys from exercising their prosecutorial discretion, including to seek dismissal of removal proceedings, for reasons not explicitly addressed in the Settlement Agreement. Such discretion should continue to be exercised consistent with Principal Legal Advisor Kerry E. Doyle's April 3, 2022 memorandum, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion*.

In addition, as you are advising Enforcement and Removal Operations on issues relating to this settlement, ICE is required to provide no fewer than 14 days' notice to Class Counsel before executing a removal order against any Presumed Class Member, even after the Presumed Class Member has moved to another Area of Responsibility (AOR). ICE must also provide Class Counsel the name of the detention facility where the Presumed Class Member is detained and ICE Newark's outreach email address so Class Counsel may request assistance in contacting the Presumed Class Member and ICE can appropriately route the communication request. ICE must also provide the Presumed Class Member contact information for Class Counsel no less than 14 days before executing a removal order against the Presumed Class Member.

This message summarizes ICE's obligations under the Settlement Agreement. The Settlement Agreement requires that the agreement itself, this summary explanation, and the final order approving the agreement be shared with OPLA and Enforcement and Removal Operations personnel within the Newark AOR. However, because these applicants may end up moving out of the Newark AOR, all OPLA field attorneys must be aware of the terms of the Settlement Agreement and understand their obligations.

The Settlement Agreement is attached for reference, and additional information is available on the District Court Litigation Division's (DCLD) SharePoint page (District Court Litigation Division - WAO - All Documents (sharepoint.com).

Questions about the *W.A.O.* settlement agreement and this guidance should be directed to DCLD at OPLA-DCLD@ice.dhs.gov.

This message includes internal guidance provided for internal OPLA use only and is not intended for public disclosure. Please ensure that it is treated consistent with applicable guidance.

Thank you,

(b)(6); (b)(7)(C)

Office of the Principal Legal Advisor

U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

(b)(6); (b)(7)(C)

Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

W.A.O., *et al.*, on behalf of themselves and all others similarly situated, *Plaintiffs,* v. UR M. JADDOU, *et al.* *Defendants.*	*Civil Action No.* 2:19-cv-11696-MCA-MAH **[PROPOSED] FINAL APPROVAL AND ORDER**

(b)(5)

(b)(5)

Having approved the Parties' proposed form and methods of notice to the Cla and having held a hearing pursuant to F.R.C.P. 23(e)(2); the Court determines th the Parties' Settlement Agreement of January 4, 2022 merits final approval.

In support of this conclusion, the Court finds as follows:

A. Class Representatives W.A.O., H.H.M.C., N.L.J., and K.M.R.L. adequately represented the Class, as defined in the Court's September 17, 2019, Order (ECF No. 29) certifying the Class pursuant to Federal Rule of Civil Procedure 23(b)(2).

B. Class Counsel at Lowenstein Sandler adequately represented the Class.

C. The Parties negotiated the Settlement Agreement at arm's length.

D. The relief provided to the Class is adequate. In particular, the Settlement Agreement provides that:

i. Class Members will not be disqualified from classification as Special Immigrant Juveniles on the basis of the policy challenged in this litigation;

ii. As of December 6, 2021, the United States Citizenship and Immigration Services (USCIS) had granted the Special Immigrant Juvenile (SIJ) petitions of 715 Potential Class Members (as defined in the Settlement Agreement);

iii. Class Counsel had a fair opportunity to review relevant materials filed with the SIJ petitions of Potential Class Members whose petitions were not approved; any objections have been resolved; the Parties agree that none of the final denials conflicted with the Court's July 3, 2019 Preliminary Injunction Order (ECF No. 20) or any other order of this Court; and the Parties agree that USCIS has adjudicated the SIJ petitions of all known Potential Class Members without relying on the policy challenged in this litigation;

iv. Previously Unidentified Class Members (as defined in the Settlement Agreement) will have the ability to identify themselves and seek assistance within six months of the posting of the Notice of Proposed Settlement, which was completed on February 28, 2022;

v. For Class Members who identify themselves as such and are still in removal proceedings, Defendants have agreed to join, or not oppose, certain

motions the Class Member may make, unless Defendants decline this relief in accordance with exceptions in the Settlement Agreement;

vi. For Class Members who face removal, Defendants have agreed to provide notice to Class Counsel and to facilitate communication between Class Counsel and the Class Member (as specifically set forth in Section III of the Settlement Agreement);

vii. The Settlement Agreement thus takes the circumstances of all Class Members into account and treats them equitably relative to one another;

viii. The Parties have agreed to a reasonable settlement in the amount of $505,000 for attorney's fees and costs, with the attorney's fees payable within 60 days of the entry of this order; and

ix. The terms of the Settlement Agreement are therefore fair, reasonable, and adequate in light of the costs, risks, and delay of trial and appeal.

Having determined the above, the Court hereby GRANTS the Parties' Joint Motion for Final Approval of the Settlement Agreement, and orders the following:

1. The Settlement Agreement is approved as fair, reasonable, adequate, in the best interest of the Class Members, and binding on all Class Members, and its terms shall be effectuated as set forth in the Settlement Agreement;

2. Objections to the Settlement Agreement, if any, are overruled;

3. The case is dismissed with prejudice as to all Settled Claims, as defined in the Settlement Agreement; and

4. The Court retains jurisdiction to enforce the Settlement Agreement for the purpose of enforcing any of its provisions and terms, until the Settlement Agreement terminates. The Settlement Agreement and the Court's exclusive jurisdiction to enforce the Settlement Agreement shall both terminate automatically eighteen months following the completion of the posting of the Notice of Proposed Settlement on February 28, 2022. The Court may extend its jurisdiction in response to a motion filed by the Plaintiffs alleging a breach of the Settlement Agreement, if such a motion is filed before the termination date.

IT IS SO ORDERED.

DATE: 4/20/2022

MICHAEL A. HAMMER
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

W.A.O., H.H.M.C., N.L.J., and K.M.R.L., on behalf of themselves and all others similarly situated, Plaintiffs, v. UR M. JADDOU, Director, U.S. Citizenship and Immigration Services; ALEJANDRO N. MAYORKAS, Secretary, U.S. Department of Homeland Security; TERRI ROBINSON, Director, National Benefits Center, U.S. Citizenship and Immigration Services; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; and UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, Defendants.	Civil Action No. 2:19-cv-11696 (MCA) (MAH) **STIPULATION OF SETTLEMENT AND DISMISSAL**

Plaintiffs W.A.O., H.H.M.C., N.L.J., and K.M.R.L ("Plaintiffs"), on behalf of themselves and all Class Members, and Defendants Ur M. Jaddou, in her official capacity as the Director of U.S. Citizenship and Immigration Services; Alejandro N. Mayorkas, in his official capacity as Secretary of U.S. Department of Homeland Security; Teri Robinson, in her official capacity of Director of National Benefits Center, U.S. Citizenship and Immigration Services; United States Department of Homeland Security; and United States Citizenship and Immigration Services (collectively, "Defendants"), by and through their attorneys, hereby enter into this Settlement

Agreement on this 4th day of January, 2022, and effective upon the Effective Date defined below. Plaintiffs and Defendants are jointly referred to as the "Parties."

I. RECITALS

Filing

A. On April 29, 2019, Plaintiffs commenced this litigation against Defendants for declaratory and injunctive relief based on allegations that United States Citizenship and Immigration Services ("USCIS") relied on an extra-statutory eligibility requirement for Special Immigrant Juvenile ("SIJ") classification which Plaintiffs alleged was contrary to state and federal law and violated the Administrative Procedure Act ("APA").

B. In support of their claims, Plaintiffs alleged that: (1) beginning sometime in 2018, Defendants unlawfully imposed a new SIJ eligibility requirement that violated 8 U.S.C. § 1101(a)(27)(J) ("SIJ Statute"); (2) pursuant to state law, to which federal law requires USCIS to defer, the Superior Court of New Jersey, Chancery Division, Family Part (the "Family Part") has jurisdiction to make the findings required by the SIJ Statute ("SIJ Findings"), including the power to order a juvenile over the age of 18 to return to the custody of a parent; and (3) USCIS's new requirement would disqualify Plaintiffs and Class Members from eligibility for SIJ classification.

Preliminary Injunction

C. The Court entered a Preliminary Injunction on July 3, 2019 (ECF No. 20). The Court made several conclusions of law, including:

(1) Defendants' imposition of a new requirement for SIJ classification, and delay, denial, or revocation of Plaintiffs' and Class Members' SIJ petitions, violates the APA by (1) exceeding the agency's statutory authority under the Immigration and Nationality Act ("INA"), (2) usurping the authority granted to state courts by the INA, (3) depriving Plaintiffs and Class Members of due process of law, and (4) failing to follow prescribed procedures;

(2) In adjudicating SIJ petitions, USCIS is required to defer to state courts on matters of state law;

(3) The Family Part is a "juvenile court" for the purpose of making SIJ Findings; and

(4) New Jersey law establishes the circumstances under which the Family Part is authorized to assert jurisdiction over a juvenile between his or her 18th and 21st birthday for the purpose of making SIJ Findings.

D. The Court ordered, among other things, that USCIS shall not delay, deny, or revoke SIJ petitions on the ground that the Family Part lacks jurisdiction to make SIJ Findings as to juveniles who are between 18 and 21 years old, so long as New Jersey law establishes that the juvenile is subject to such jurisdiction.

Class Certification

E. On September 17, 2019, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, the Court certified the Class as:

> Individuals who have filed or will file petitions for Special Immigrant Juvenile ("SIJ") classification based on New Jersey Family Part Orders that were entered between the petitioners' 18th and 21st birthdays, and whose SIJ petitions are, have been, or will be delayed, questioned, denied, or revoked on the ground that the Family Part lacks the authority, power, or jurisdiction to make the required child welfare findings as to petitioners in this age group.

Class Cert. Order at 6 (ECF No. 29). Individuals who meet this definition are Class Members. The Court appointed Lowenstein Sandler LLP as Class Counsel. *Id.*

Identification of Potential Class Members and Adjudication of Their SIJ Petitions

F. In a Joint Status Report ("JSR") filed on September 16, 2019 (ECF No. 28), Defendants identified 759 Potential Class Members, as defined in Section II.

G. In compliance with a series of court orders and negotiated agreements throughout the litigation, USCIS reopened and readjudicated the petitions of Potential Class Members that had already been denied or revoked as of July 3, 2019, when the Preliminary Injunction was entered; reviewed all petitions with a pending RFE, NOID, or NOIR and withdrew those RFEs, NOID, or NOIRs that conflicted with the Preliminary Injunction; and reviewed and adjudicated all pending petitions.

H. USCIS has adjudicated all SIJ petitions filed by Potential Class Members and had granted 715 of these petitions as of December 6, 2021. Under the terms of a protective order and in compliance with periodic orders of the Court, USCIS shared relevant documents of Potential Class Members whose petitions were denied, withdrawn, or excluded so that Class Counsel could review the basis of the denial, withdrawal, or exclusion to ensure that it did not conflict with the preliminary injunction or other orders entered by the Court. Class Counsel reviewed these documents; contacted individual immigration counsel for the petitioners when necessary and possible; and confirmed that most of the denials, withdrawals, and exclusions did not relate to issues in this litigation. The Parties negotiated and resolved cases in which there were potential conflicts, and none of the final denials were determined to be in violation of the Court's July 3, 2019 Preliminary Injunction Order

I. Accordingly, the Parties agree that Defendants have now adjudicated the SIJ petitions of all known Class Members or Potential Class Members without relying on the Challenged Policy in this litigation (as defined in Section II).

Due Consideration of Settlement

J. Plaintiffs and Defendants, through counsel, have conducted discussions and arm's length negotiations regarding a compromise and settlement of the Action.

K. This Agreement shall not be construed or deemed as an admission or concession by any Party of the truth of any allegation or the validity of any purported claim or defense asserted in any of the pleadings.

L. Defendants deny all liability with respect to the Action, deny that they have engaged in any wrongdoing, deny the allegations in the Complaint, deny that they committed any violation of law, deny that they acted improperly in any way, and deny liability of any kind to the Plaintiffs or Class Members. Nonetheless, Defendants have agreed to the settlement and dismissal of the Action with prejudice in order to: (i) avoid the substantial expense, inconvenience, and distraction of further protracted litigation, including trial and appeal; (ii) terminate the Action.

M. Class Counsel and Plaintiffs are satisfied that the terms and conditions of this Agreement are fair, reasonable, adequate, and equitable, and that a settlement of the Action is in the best interests of Class Members.

NOW, THEREFORE, it is hereby AGREED, by and among the Parties to this Settlement, through their respective attorneys, subject to the approval of the Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, in consideration of the benefits flowing to the Parties from the Agreement, that the Settled Claims shall be compromised, settled, forever released, barred, and dismissed with prejudice, upon and subject to the following terms and conditions.

II. DEFINITIONS

Capitalized terms in this Agreement shall be defined as follows:

"Action" means the civil action captioned *W.A.O, et al. v. Ur. M. Jaddou, et al.*, 2:19-cv-11696 (MCA) (MAH).

"Agreement" means this Class Action Settlement Agreement, including all exhibits.

"Class Member(s)" means individuals who have filed or will file petitions for Special Immigrant Juvenile ("SIJ") classification based on New Jersey Family Part Orders that were entered between the petitioners' 18th and 21st birthdays, and whose SIJ petitions are, have been, or will be delayed, questioned, denied, or revoked on the ground that the Family Part lacks the authority, power, or jurisdiction to make the required child welfare findings as to petitioners in this age group (18 to 21 years of age). *See* Class Cert. Order at 6 (ECF No. 29).

"Defendants" means U.S. Citizenship and Immigration Services ("USCIS"); Department of

Homeland Security ("DHS"); Ur M. Jaddou, in her official capacity as Director, USCIS; Alejandro Mayorkas, in his official capacity as Secretary, DHS; and Terri Robinson, in her official capacity as Director, USCIS National Benefits Center; their predecessors and successors, their departments and agencies, and their past or present agents, employees, and contractors.

"Challenged Policy" or **"Policy Challenged in this Litigation"** means the policy Plaintiffs alleged in their Complaint (ECF No. 1) under which Defendants are purported to have delayed, questioned, denied, or revoked the SIJ petitions of Class Members on the ground that the Family Part lacks the authority, power, or jurisdiction to place a person between the ages of 18 and 21 in the custody of, or to order the reunification of such a person with, a parent or another responsible adult or entity.

"Defendants' Counsel" means Assistant U.S. Attorney Hajdarpasic or any subsequently designated responsible Assistant U.S. Attorney.

"Effective Date" means the date when all of the following shall have occurred: (a) entry of the Preliminary Approval of the Settlement Agreement; (b) approval by the Court of this Settlement Agreement, following notice to the Class and a fairness hearing, as prescribed by Rule 23 of the Federal Rules of Civil Procedure; (c) entry by the Court of the Final Approval and Order approving the Settlement Agreement in all material respects and dismissing the case with prejudice with regard to all Settled Claims.

"Execution" of this Agreement means (1) signature by Class Counsel, and (2) signature by authorized representatives of Defendants, on the condition that the Court enters an Order of Final Approval of the Agreement.

"Final Order" means entry by the Court of an order substantially in the form of Exhibit C that grants final approval of this Agreement as binding upon the Parties and the Class Members, and dismisses the case, with prejudice respecting the Settled Claims.

"NOID" means Notice of Intent to Deny.

"NOIR" means Notice of Intent to Revoke.

"Parties" means Plaintiffs and Defendants.

"PI" means the Preliminary Injunction entered in this Action.

"Potential Class Member(s)" means applicants for SIJ classification whose petitions were pending at any time between January 1, 2018, and July 10, 2019; who were between the ages of 18 and 21 at the time of filing; and who listed a residential address in New Jersey.

"Plaintiffs' Counsel" or "Class Counsel" means Lowenstein Sandler LLP.

"Presumed Class Member" means applicants whose SIJ petitions were pending at any time between January 1, 2018, and July 10, 2019; who were between the ages of 18 and 21 at the time of filing such petitions; who listed a residential address in New Jersey; and whose SIJ petitions were approved as of December 6, 2021, excluding any Unidentified Potential Class Members.

"RFE" means Request for Evidence.

"Settled Claims" means all claims for relief that were brought on behalf of Class Members based on the facts and circumstances alleged in the Complaint.

"SIJ" means Special Immigrant Juvenile, as defined in 8 U.S.C. § 1101(a)(27)(J).

"SIJ petition" means a Form I-360, "Petition for Amerasian, Widow(er), or Special Immigrant," where a Special Immigrant Juvenile is one subset of petitioners who are eligible to file the Form I-360, as defined below:

1. Is present in the United States;
2. Is unmarried and less than 21 years of age;
3. Has been declared dependent upon a juvenile court in the United States, or whom such a court has legally committed to or placed under the custody of an agency or department of a state, or an individual or entity appointed by a state or juvenile court;
4. Has been the subject of a determination by a juvenile court in the United States that reunification with one or both of the juvenile's parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and

5. Has been the subject of administrative or judicial proceedings that determined that it would not be in the juvenile's best interest to be returned to the juvenile's or his or her parent's country of citizenship or nationality or last habitual residence.

"Unidentified Potential Class Members" means any persons (1) who received an order from the New Jersey Family Part on or before October 15, 2019; and (2) who filed a SIJ petition with USCIS on or by October 15, 2019, after turning 18 years old but prior to their 21st birthday, and (3) whose SIJ petitions were delayed, questioned, denied, or revoked on the ground that the Family Part lacks jurisdiction to make SIJ Findings as to juveniles who are between 18 and 21 years old; and (4) who were not previously identified by Plaintiffs or Defendants as a Class Member or Potential Class Member.

III. AGREED UPON TERMS

A. Ongoing Compliance. Going forward, USCIS agrees not to delay, deny, question, or revoke the SIJ petitions of New Jersey applicants on the ground of the Challenged Policy. USCIS further acknowledges that the Court has made the following determinations in its July 3, 2019 Preliminary Injunction Order regarding the jurisdiction of the New Jersey Family Part based upon the law as it existed at that time. USCIS's acknowledgement shall not be construed or deemed as a ratification of the Court's determinations. Further, USCIS agrees that it will continue to apply the below determinations set forth in the Court's Order to all Class Members absent changes in relevant controlling law or regulations:

1. In the context of a child custody proceeding, the Family Part must make findings establishing that the child remains dependent on a parent or caretaker. Relevant factors include, but are not limited to, whether the juvenile is still in school, remains financially and emotionally dependent on a caretaker, and/or remains "within the parental 'sphere of influence and responsibility.'" *A.E.C. v. P.S.C.*, 453 N.J. Super. 19, 28–29 (quoting *Filippone v. Lee*, 304 N.J. Super. 301, 308 (App. Div. 1997)). Such findings establish that the juvenile is unemancipated, but New Jersey law does not require an explicit

declaration of non-emancipation so long as the Family Part makes underlying factual findings showing the juvenile's ongoing dependency. *Id.* at 29 ("[T]o address the SIJ issue, we conclude that either a declaration of unemancipation or a custody order would justify the court in noting, for the purposes of an SIJ finding, that the child is 'dependent' on the court.").

2. In the context of a juvenile in the foster care system, the Family Part retains jurisdiction over the child so long as abuse or neglect proceedings are instituted before the juvenile turns 18. N.J. Stat. Ann. § 9:6-8.24 ("In determining the jurisdiction of the court under this act, the age of the child at the time the proceedings are initiated is controlling."); N.J. Stat. Ann. § 9:6- 8.21(c) (defining "[a]bused or neglected child" as one "less than 18 years of age"). If proceedings are begun before the juvenile turns 18, the juvenile remains under the jurisdiction of the Family Part, which is authorized to make or continue a foster or other placement after the juvenile turns 18, so long as the juvenile consents. N.J. Stat. Ann. § 9:6-8.54(c); *see also* N.J. Stat. Ann. § 30:4C-2.3 (requiring the Department of Children and Families to provide continuing services to juveniles between the ages of 18 and 21 so long as the juvenile does not refuse and the commissioner determines "that a continuation of services would be in the individual's best interest and would assist the individual to become an independent and productive adult"). Thus, foster children whose abuse or neglect proceedings were initiated before their 18th birthdays remain subject to the Family Part's jurisdiction, including for custodial placements, after they turn 18, without any separate findings related to non-emancipation.
3. In the context of a juvenile adjudicated as a delinquent, New Jersey law makes them wards of the State. N.J. Stat. Ann. § 2A:4A-21(e) (providing "that children under the jurisdiction of the court are wards of the State, subject to the discipline and entitled to the protection of the State, which may intervene to safeguard them from neglect or injury

and to enforce the legal obligations due to them and from them"). Only a juvenile who commits an offense before the age of 18 is subject to a delinquency adjudication (as opposed to a criminal prosecution), N.J. Stat. Ann. § 2A:4A-22(a) (defining a "juvenile" for the purpose of delinquency adjudications as "under the age of 18 years"); *see also* N.J. Stat. Ann. § 2A:4A- 24(d), but once adjudicated as a delinquent, a young person remains subject to the jurisdiction of the Family Part throughout the term of the disposition (analogous to a criminal sentence), even after the youth turns 18 years old, N.J. Stat. Ann. § 2A:4A-45; *see also State v. S.T.*, 254 N.J. Super. 1 (App. Div. 1991) (holding that Family Part retains jurisdiction over youth who violated probation after turning 18); *In re K.F.*, 313 N.J. Super. 319 (App. Div. 1998) (upholding delinquency disposition ordering the Division of Youth and Family Services to pay for services for juvenile over 18, relying in part on authority granted by N.J. Stat. Ann. § 9:17B-3). Thus, the Family Part has jurisdiction over youth subject to delinquency dispositions after their 18th birthdays, without having to make separate findings of non-emancipation.

4. The jurisdiction of the Family Part over other juveniles between the ages of 18 and 21, and the court's authority to declare them dependent or place them in the custody of a responsible adult or agency, will depend on the context in which the case arises. New Jersey law governs in establishing the authority of the Family Part to assume jurisdiction over a juvenile in this age group and to make the factual findings necessary for a subsequent SIJ petition.

B. Identification of and Remedies for Previously Unidentified Potential Class Members. The Parties acknowledge that there may be Class Members who have not been previously identified by Plaintiffs or Defendants, despite good faith efforts of the Parties to identify all Class Members. Unidentified Potential Class Members may seek relief by the following means

within six months of the posting of the notice by Plaintiffs and Defendants pursuant to Section IV.B. of this Settlement Agreement:

1. The petitioner shall contact Class Counsel. If Class Counsel believes that the individual is a Class Member, then Class Counsel will inform Defendants' Counsel that they have a good faith reason to believe that the individual is a Class Member. Class Counsel will provide the name and A-number of the potential Class Member, and the I-360 receipt number.
2. If Defendants adjudicate the case in accordance with all legal requirements as well as the PI and settlement agreement, the case will be considered resolved. Should Plaintiffs believe that a case under this section is not adjudicated in accordance with the PI, Class Counsel shall submit a written response to Defendants' Counsel, and the Parties shall thereafter meet and confer. After exhausting both requirements, Class Counsel may seek resolution before the Court.

C. Joint or Unopposed Motions.

1. **Continuances, Placement on Status Docket, or Administrative Closure.** Except as otherwise indicated in this subsection, Defendants shall join, or alternatively not oppose, a Motion for a Continuance, Placement on the Status Docket (where available), or Administrative Closure filed with the Executive Office for Immigration Review ("EOIR") by a Presumed Class Member who must wait for a priority date to become current. A Presumed Class Member making a Motion for a Continuance, Placement on the Status Docket, or Administrative Closure must cite to this Agreement in his or her Motion.
2. **Termination of Removal Proceedings Without Prejudice.** Defendants shall join, or, alternatively, not oppose a Motion to Terminate Removal Proceedings Without Prejudice filed with EOIR by a Presumed Class Member who has reached his or her priority date, except as otherwise indicated in this

subsection. The Presumed Class Member must file his or her Motion to Terminate Removal Proceedings Without Prejudice within one year of reaching his or her priority date and must cite to this Agreement in his or her Motion

3. **Reopening Removal Proceedings.** Except as otherwise indicated in this subsection, Defendants shall join, or alternatively, not oppose a Motion to Reopen Removal Proceedings, in conjunction with a Motion to Stay Removal (if any), filed with EOIR by a Presumed Class Member, provided that the Presumed Class Member has an approved SIJ petition but is subject to a previously entered removal order. The Presumed Class Member must file his or her Motion to Reopen Removal Proceedings and any accompanying Motion to Stay Removal within one year of the Effective Date of this Agreement and must cite to this Agreement in his or her Motion.
4. **Circumstances in which Defendants May Decline to Join Motions.** Immigration and Customs Enforcement ("ICE") retains the discretion to oppose any Presumed Class Member's Motion enumerated in this subsection in the following circumstances:
    a. When the Presumed Class Member has been convicted of an aggravated felony as defined in INA § 101(a)(43) or convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or is not younger than 16 years of age and intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization;
    b. When the Presumed Class Member engaged in or is suspected of engaging in terrorism or terrorism-related activities; has engaged in or is

suspected of engaging in espionage or espionage-related activities; or whose apprehension, arrest, or custody is otherwise necessary to protect the national security of the United States; or

c. In extraordinary cases that do not do not fall within the enumerated categories above but are nonetheless national security or public safety risks. In such cases, the ICE Chief Counsel of the relevant Office of the Principal Legal Advisor (OPLA) field location must approve ICE's opposition.

5. Nothing in this section (III.C.) shall be interpreted to prevent Presumed Class Members from seeking, or to prevent Defendants from initiating or agreeing to, forms of relief from removal proceedings that are not explicitly outlined in this section.

D. Notice of Removal. Defendants shall provide no less than 14 days' notice to Class Counsel before executing a removal order against any Presumed Class Member. Defendants shall provide Class Counsel the name of the detention facility where the Presumed Class Member is detained and ICE's Newark outreach email address so that Class Counsel may request assistance in contacting the Presumed Class Member and ICE can appropriately route the communication request. Defendants shall also provide the Presumed Class Member contact information for Class Counsel no less than 14 days before executing a removal order against the Presumed Class Member. Notwithstanding the requirements of this section, the Parties acknowledge that Defendants lack authority to require a Presumed Class Member to communicate with Class Counsel. If Class Counsel, having emailed ICE's Newark outreach email address or having reached out to the detention facility and identified themselves as Class Counsel and cited this litigation, is unable to communicate with the Presumed Class Member within three calendar days of the notice of removal, Class Counsel shall notify Defendants' Counsel, and the parties shall undertake reasonable efforts to resolve any communication issues.

IV. NOTICE AND APPROVAL PROCEDURE

A. **Preliminary Approval.** As soon as practicable after the Execution of this Agreement, the Parties shall jointly move for a Preliminary Approval Order, substantially in the form of Exhibit A, preliminarily approving this Agreement and this settlement to be fair, just, reasonable, and adequate, approving the Notice of Proposed Settlement to Presumed Class Members, as described in Section IV.B., and setting a hearing to consider Final Approval of the Settlement, and any objections thereto.

B. **Notice of Fairness Hearing.** By the later of February 28, 2022, or five business days after the entry of the Preliminary Approval Order (unless otherwise modified by the Parties or by order of the Court), the Parties shall effectuate the following:

1. Plaintiffs shall post a Notice of Proposed Settlement, Exhibit B, (in English and Spanish) on the Class Counsel website and the website of the New Jersey Chapter of the American Immigration Lawyers Association (NJ-AILA);
2. Plaintiffs shall email a copy of the Notice of Proposed Settlement (in English and Spanish) to all members of the New Jersey Consortium for Immigrant Children, composed of the primary nonprofit organizations and law schools offering representation to immigrant children in New Jersey;
3. Plaintiffs shall email the Notice of Proposed Settlement (in English and Spanish) to those lawyers who have made themselves known to Class Counsel as legal representatives of individual Presumed Class Members;
4. USCIS shall post the Notice of Proposed Settlement (in English and Spanish) on USCIS's website on the "Legal Resources, Legal Settlement Notices" and the "Special Immigrant Juveniles" sections; and
5. USCIS shall mail the Notice of Proposed Settlement (in English and Spanish) to all Presumed Class Members.

C. **Objections.** Any Presumed, Unidentified, or other Class Member who wishes to object to the settlement and/or be heard at the Final Approval hearing must submit a written notice of objection and/or request to be heard at the Final Approval Hearing, postmarked within 35 days after the Preliminary Notice Date (or such other deadline as the Court might order), by mailing the notice of objection and/or request to be heard to the Clerk of the Court for the District of New Jersey, or by filing the notice of objection and/or request to be heard with the Court. Each notice of objection or request to be heard must include: (1) the case name and number, (2) the Class Member's name, (3) the Class Member's current address and telephone number, or current address and telephone number of the Class Member's legal representative, and (4) an explanation of why the Class Member objects to the Settlement, including the grounds therefore, any supporting documentation, and the reasons, if any, for requesting the opportunity to appear and be heard at the Final Approval hearing.

D. **Opt-Outs.** Due to the nature of the relief offered to the Class Members, Class Members are not permitted to opt-out.

E. **Individual Immigration Remedies Preserved.** Nothing in this Agreement shall be construed as affecting any Class Member's right or interest in challenging or appealing the adjudication of his or her individual I-360, I-485, or I-765 Application for Employment Authorization, or challenging or appealing any removal order. Class Members expressly maintain the right to challenge and appeal the adjudication of such petitions and orders.

F. **Final Approval and Order.** At the Final Approval Hearing, the Parties shall jointly move for entry of the Final Approval and Order, substantially in the form of Exhibit C, granting final approval of this Agreement as fair, reasonable, adequate, and binding on all Class Members; overruling any objections to the Agreement; ordering that the terms be effectuated as set forth in this Agreement; dismissing all Claims in the Action with prejudice; and retaining jurisdiction to enforce this Agreement until termination of the Agreement consistent with Section VI.B. The Parties waive any appeal of the Final Approval and Order entered, so long as it is

substantially in the form of Exhibit C or the Parties expressly agree to any modifications to the Agreement.

G. **Notice of Final Approval and Order.** Not later than five business days after both the entry of Final Approval and Order (unless otherwise modified by the Parties or by order of the Court), and the final approval by both Parties of the form and content of Spanish and English versions of the Final Approval and Order, the Parties shall post and provide the Final Approval and Order (Exhibit C) to the same websites and distribution lists as set forth in Section IV.B. In addition:

1. USCIS shall share with Class Counsel a partial service list, composed of those Presumed Class Members for whom no lawyer or accredited representative has filed a G-28 Notice of Entry of Appearance as Attorney or Accredited Representative with USCIS in connection with the Presumed Class Member's SIJ petition. Class Counsel will assess the list and make whatever efforts they consider reasonable to reach out to Presumed Class Members on the list to explain the terms of the settlement.

2. Defendants shall create a summary explanation of the terms of this Agreement. Defendants shall ensure that the Final Approval and Order, this Agreement, and the summary explanation are shared with the personnel of the Office of the Principal Legal Advisor ("OPLA") and ICE Enforcement and Removal Operations within the Newark Area of Responsibility within 10 business days of the final approval of this Settlement. Defendants shall ensure that these employees understand their obligations under this Agreement.

V. SETTLEMENT BASED ON COURT APPROVAL OF TERMS

A. This Settlement is subject to and contingent upon Court approval under Rule 23(e) of the Federal Rules of Civil Procedure.

B. Except as otherwise provided herein, in the event the Agreement is terminated or modified in any material respect or fails to become effective for any reason, then the Agreement shall be without prejudice and none of its terms shall be effective or enforceable; the Parties to this Agreement shall be deemed to have reverted to their respective status in the Action as of the date and time immediately prior to the Execution of this Agreement; and except as otherwise expressly provided, the Parties shall proceed in all respects as if this Agreement and any related orders had not been entered. In the event that the Agreement is terminated or modified in any material respect, the Parties shall be deemed not to have waived, not to have modified, and not be estopped from asserting any additional defenses or arguments available to them. In such event, neither this Agreement nor any draft thereof, nor any negotiation, documentation, or other part or aspect of the Parties' settlement discussions, nor any other document filed or created in connection with this settlement, shall have any effect or be admissible in evidence for any purpose in the litigation or in any other proceeding, and all such documents or information shall be treated as strictly confidential and may not, absent a court order, be disclosed to any person other than the Parties' counsel, and in any event only for the purposes of the litigation.

VI. RETENTION OF JURISDICTION

A. This Agreement shall become effective upon the Court's entry of the Final Approval and Order (Exhibit C).

B. This court retains exclusive jurisdiction over this Agreement for the purpose of enforcing any of its provisions and terms, and the Court's retention of such jurisdiction shall be noted in the dismissal of this action. The Agreement and the Court's exclusive jurisdiction to enforce the Agreement, both shall terminate automatically one (1) year following the six-month period described in Section III.B. of the Agreement. Plaintiffs reserve the right to request that the Court extend its exclusive jurisdiction over the Agreement should Defendants breach this Agreement after the Court's entry of the Final Approval and Order (Exhibit C) until the termination of this Agreement.

C. The Parties agree to work cooperatively and in good faith and agree to use their best efforts to effectuate the purposes of this Agreement and to resolve informally any differences regarding interpretation of and compliance with this Agreement before bringing such matters to the Court for resolution.

D. The Parties shall have the right to seek from the Court relevant modifications of this Agreement to ensure that its purposes are fully satisfied, provided that any request for a modification has been preceded by good faith negotiations between the Parties.

VII. RELEASES

A. As of the Effective Date, Plaintiffs and Class Members, on behalf of themselves; their heirs, executors, administrators, representatives, attorneys, successors, assigns, agents, affiliates, and partners; and any persons they represent, by operation of any final judgment entered by the Court, shall have fully, finally, and forever released, relinquished, and discharged the Defendants of and from any and all of the claims in this Action, and Plaintiffs and Presumed Class Members shall forever be barred and enjoined from bringing or prosecuting any claims raised by Plaintiffs in this Action against any of the Defendants, and all of their past and present agencies, officials, employees, agents, attorneys, and successors. This Release shall not apply to claims that arise or accrue after the termination of this Agreement.

B. Nothing in this Agreement should be construed as establishing any right or interest in challenging an adverse SIJ petition adjudication, or any other DHS or USCIS action, decision, determination, order, form, instruction, training material, delay, or process or procedure, beyond those expressly provided herein or under law.

C. In consideration of the terms and conditions set forth herein, Plaintiffs hereby release and forever discharge Defendants, and all of their past and present agencies, officials, employees, agents, attorneys, successors, and assigns from any and all obligations, damages, liabilities, causes of action, claims, and demands of any kind and nature whatsoever, whether suspected or unsuspected, arising in law or equity, arising from or by reason of any and all known,

unknown, foreseen, or unforeseen injuries, and the consequences thereof, resulting from the facts, circumstances and subject matter that gave rise to the Action, including all claims that were asserted in the Action.

D. No Admission of Wrongdoing. This Agreement, whether or not executed, and any proceedings taken pursuant to it:

1. shall not be construed to waive, reduce, or otherwise diminish the authority of the Defendants to enforce the laws of the United States against Presumed Class Members, consistent with the Constitution and laws of the United States and applicable regulations;

2. shall not be offered or received against the Defendants as evidence of, or construed as or deemed to be evidence of, any presumption, concession, or admission by any of the Defendants of the truth of any fact alleged by the Plaintiffs or the validity of any claim that was asserted in the Action or in any litigation or the deficiency of any defense that has been or could have been asserted in the Action or of any liability, negligence, fault, or wrongdoing of the Defendants, or any admission by the Defendants of any violation of or failure to comply with the Constitution, law, or regulations; and

3. shall not be offered or received against the Defendants as evidence of a presumption, concession, or admission of any liability, negligence, fault, or wrongdoing, or in any way referred to for any other reason as against any of the Parties to this Agreement, in any other civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of this Agreement; provided, however, that if this Agreement is approved by the Court, Defendants may refer to it and rely upon it to effectuate the liability protection granted them hereunder.

VIII. ATTORNEYS' FEES, COSTS, AND EXPENSES

Defendants agree to pay the following amounts in full satisfaction of any claim under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d) and 5 U.S.C. § 504 et seq: $503,836.67 in attorneys' fees and $1,163.33 in costs. Defendants will make attorneys' fees payments within 60 days after the Court enters the Final Approval and Order. Separately, Defendants agree to submit Plaintiffs' request for $1,163.33 in costs to the Bureau of the Fiscal Service within 10 days after the Court enters the Final Approval and Order for payment from the Judgment Fund.

IX. MISCELLANEOUS PROVISIONS

A. **Best Efforts.** The Parties' counsel shall use their best efforts to cause the Court to grant Preliminary Approval of this Agreement and Settlement as promptly as practicable, to take all steps contemplated by this Agreement to effectuate the Settlement on the stated terms and conditions, and to obtain Final Approval of this Agreement and Settlement.

B. **Time for Compliance.** The dates described herein refer to calendar days, unless otherwise stated. If the date for performance of any act required by or under this Agreement falls on a Saturday, Sunday, or court holiday, that act may be performed on the next business day with the same effect as if had been performed on the day or within the period of time specified by or under this Agreement.

C. **Entire Agreement.** The terms and conditions set forth in this Agreement constitute the complete and exclusive statement of the agreement between the Parties relating to the subject matter of this Agreement, superseding all previous negotiations and understandings, and may not be contradicted by evidence of any prior or contemporaneous agreement. The Parties further intend that this Agreement constitute the complete and exclusive statement of its terms as between the Parties, and that no extrinsic evidence whatsoever may be introduced in any judicial or other proceeding, if any, involving the interpretation of this Agreement. Any amendment or modification of the Agreement must be in a writing signed by Class Counsel and Defendants' Counsel.

D. **Advice of Counsel.** The determination of the terms of, and the drafting of, this Agreement have been by mutual agreement after negotiation, with consideration by and participation of all Parties and their counsel.

E. **Binding Agreement.** This Agreement shall be binding upon and inure to the benefit of the Parties' respective heirs, successors, and assigns.

F. **No Waiver.** The waiver by any Party of any provision or breach of this Agreement shall not be deemed a waiver of any other provision or breach of this Agreement.

G. **Requirement of Execution.** This Agreement shall be valid and binding as to Class Members and Defendants upon (1) signature by Class Counsel, and (2) signature by authorized representatives of Defendants, on the condition that the Court enters an order of Final Approval of the Agreement.

H. **Execution in Counterparts.** This Agreement shall become effective upon its execution by all of the undersigned. The Parties may execute this Agreement in counterparts and/or by fax or electronic mail, and execution of counterparts shall have the same force and effect as if all Parties had signed the same instrument.

I. **Extensions of Time.** The Parties reserve the right, by agreement and subject to the Court's approval, to grant any reasonable extension of time to carry out any of the provisions of this Agreement.

J. **Interpretation and Enforcement of this Agreement.** The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning and not strictly for or against any of the Parties. The Court shall have, and after Final Approval shall retain, jurisdiction to enforce, interpret, and implement this Agreement as set forth in Section VI. Should any provision of this Agreement be declared illegal, invalid, or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable, or invalid part, term or provision shall be deemed not to be part of this Agreement.

January 4, 2022

s/ *Catherine Weiss*
Catherine Weiss
(cweiss@lowenstein.com)

LOWENSTEIN SANDLER LLP
One Lowenstein Drive
Roseland, NJ 07068
(973) 597-2438

Pro Bono Counsel for Plaintiffs
W.A.O., H.H.M.C., N.L.J., and K.M.R.L.,
on behalf of themselves
and all others similarly situated

PHILIP R. SELLINGER
United States Attorney

s/ *J. Andrew Ruymann*
J. Andrew Ruymann
Assistant U.S. Attorney
Chief, Civil Division
970 Broad Street, Suite 700
Newark, NJ 07102
Tel: (973) 645-2756
John.Ruymann@usdoj.gov
Counsel for Defendants

/s *Enes Hajdarpasic*
Enes Hajdarpasic
Assistant U.S. Attorney
970 Broad Street, Suite 700
Newark, NJ 07102
Tel: (973) 297-2046
Enes.Hajdarpasic@usdoj.gov
Counsel for Defendants

From: (b)(6); (b)(7)(C)
Sent: Wed, 22 Sep 2021 18:07:42 +0000
To: ^Los Angeles OPLA Distribution List
Subject: UPDATED Broadcast Message: Procedures on the Handling of Joint Motions for a Continuance or Administrative Closure for Ms. L Class Members, Potential Class Members, and Their Children
Attachments: SOP_Tracking Case Initiatives in PLAnet_Ms. L and EO 14011_2021.07.02.pdf

All:

Please review the below guidance for cases relating to *Ms. L* class members. It is important to note that ERO will contact us if there are any *Ms L* cases that need a motion to either continue or administratively close. Our role is to coordinate the filing of the motion with EOIR and update PLAnet. As such, if you encounter such cases, please ensure you are following the PLAnet SOP. I have attached the SOP to this email. If you have any questions, please contact your DCC or me. Thank you.

(b)(6); (b)(7)(C)

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Disseminated on behalf of (b)(6); (b)(7)(C) ***and*** (b)(6); (b)(7)(C)

On June 26, 2018, the U.S. District Court for the Southern District of California issued a nationwide preliminary injunction in *Ms. L. v. I.C.E.*, requiring, subject to limited exceptions, including those separated in the interior of the United States, the reunification of noncitizen parents and their children from whom they were previously separated by the U.S. Department of Homeland Security (DHS). 310 F.Supp.3d 1133 (S.D. Cal. 2018). Reunification of the separated families remains ongoing. On November 15, 2018, a partial settlement agreement was entered into, establishing the mechanism by which certain separated parents and their children may pursue asylum or other protection in the United States. The parties have since resumed negotiations with a goal of reaching agreement on a comprehensive settlement consistent with President Biden's February 2, 2021, Executive Order, titled *Executive Order on the Establishment of Interagency Task Force on the Reunification of Families*." Exec. Order No. 14,011, 86 Fed. Reg. 8273 (Feb. 2, 2021) (E.O. 14,011) (establishing a task force whose objectives include facilitating reunification of children separated from their families at the United States-Mexico border between January 20, 2017, and January 20, 2021, under the prior administration's "Zero-Tolerance" Policy and providing additional services and support to the families, including trauma and mental health services).

During the pendency of settlement negotiations in *Ms. L.*, the Office of the Principal Legal Advisor (OPLA) has agreed to join in motions for a continuance or administrative closure of removal proceedings submitted by *Ms. L.* class members, potential class members, and their children with the exception of those noncitizens who fall within presumed priorities one (1) (national security) or three (3) (public safety), or who meet the "other priority" threshold as contemplated under ICE Acting Director Tae Johnson's February 18, 2021, memorandum, titled *Interim Guidance: Civil Immigration Enforcement and Removal Priorities*. Please note that OPLA field locations within the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit will not be able to join in motions for administrative closure, in light of the Circuit Court's holding in *Hernandez-Serrano v. Barr*, 981 F.3d 459, 464 (6th Cir. 2020), which, consistent with *Matter of Castro-Tum*, 27 I&N Dec. 271, 272 (A.G. 2018), found that the regulations at 8 C.F.R. §§ 1003.1(d) and 1003.10 do not impliedly confer immigration judges and the Board of Immigration Appeals (Board) general administrative closure authority.

Where ICE has agreed to join in a motion for a continuance, the submitted joint motion will request that the Immigration Court continue the noncitizen's removal proceeding for a period of one year, pending resolution of the *Ms. L.* settlement negotiations. In cases in which ICE has agreed to the administrative closure of a case, whether before the Immigration Court or the Board, the motion will also be premised on the parties awaiting the outcome of *Ms. L.* settlement negotiations. ICE may move to recalendar cases for *Ms. L.* class members, potential class members, and their children who, subsequent to having their cases administratively closed under this process, are identified as falling within presumed priorities one (1) (national security) or three (3) (public safety), or who meet the "other priority" threshold.

Determinations as to whether a noncitizen meets the above noted criteria will be made by ICE Enforcement and Removal Operations (ERO). OPLA's role is to coordinate the filing of the joint motion for a continuance or administrative closure upon notification from ERO of the noncitizen's eligibility pursuant to this agreement. In order to effectuate this process, OPLA field locations will be required to coordinate with their local ERO office in identifying which mailbox ERO is to use when making such notifications.

Noncitizens who believe they meet the noted criteria may unilaterally or through counsel submit a written request to SeparationSupplementalInformation@ice.dhs.gov, which is monitored by ERO's Juvenile and Family Residential Management Unit (JFRMU). Requests to join in motions for a continuance or administrative closure for cases pending before the Immigration Court must be emailed *no more than 60 calendar days in advance* of the noncitizen's scheduled hearing before the Immigration Court. Requests to join in motions for administrative closure for cases pending before the Board may be submitted at any time. All requests must include the following information:

- the noncitizen's name and A-number;
- that the request is for ICE to join a motion for a continuance or administrative closure, as appropriate, of the removal proceeding pending resolution of the *Ms. L.* settlement negotiations;
- the Executive Office for Immigration Review (EOIR) component with jurisdiction over the noncitizen's removal proceedings (*e.g.,* EOIR Dallas or the Board);

- the date of the upcoming master calendar hearing or merits hearing or whether the Board has issued a briefing schedule;
- the name and contact information for the noncitizen's attorney (if represented); and
- a Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, Form EOIR-28, *Notice of Entry of Appearance as Attorney or Accredited Representative Before the Immigration Court*, or Form EOIR-27, *Notice of Entry of Appearance as Attorney or Accredited Representative Before the Board of Immigration Appeals*, for the noncitizen's attorney (if represented).

Upon receipt of a request, JFRMU will determine whether the request was submitted within the required time frame (where applicable) and if the noncitizen has been identified as a *Ms. L.* class member or potential class member or is the separated child of a class member or potential class member. If the noncitizen fails to meet either of these threshold criteria, JFRMU will respond to the noncitizen or his or her attorney's email and advise that ICE is declining to join in a motion to continue or administratively close the noncitizen's removal proceeding. Where the noncitizen's request is timely submitted and the noncitizen is found to be a *Ms. L.* class member or potential class member or is the separated child of a class member or potential class member, JFRMU will email the local ERO field office within the jurisdiction where the removal proceeding is pending or took place if the case is on appeal, attaching the original email request from the noncitizen or his or her attorney, to determine whether the noncitizen falls within civil immigration enforcement priorities one (1) (national security) or three (3) (public safety), or meets the "other priority" threshold. If upon a review of the noncitizen's case ERO determines the noncitizen is an enforcement priority, ERO will inform the noncitizen or his or her attorney that ICE has declined to join in the request for a joint motion for a continuance or administrative closure, as appropriate, and that any other requests for the exercise of prosecutorial discretion must be sent directly to the appropriate OPLA field location for consideration. If a determination is made that the noncitizen does not fall within the noted enforcement priorities, the local ERO field office will forward the email sent from JFRMU, including the original request for continuance or administrative closure, to the local OPLA field location and advise the following:

> The attached email is being forwarded to you as part of U.S. Immigration and Customs Enforcement's (ICE) initiative for the review of requests for joint motions for continuance or administrative closure of removal proceedings pending the outcome of settlement negotiations in *Ms. L v. ICE*, relating to family separations. ICE's Enforcement and Removal Operations, Juvenile and Family Residential Management Unit (JFRMU) has identified the below listed noncitizen as being a *Ms. L* class member, potential *Ms. L* class member, or is the separated child of a class member or potential class member. Additionally, the noncitizen does not fall within presumed immigration enforcement priorities one (1) (national security) or three (3) (public safety), or meet the "other priority" threshold, as contemplated under ICE Acting Director Tae Johnson's February 18, 2021, memorandum, titled *Interim Guidance: Civil Immigration Enforcement and Removal Priorities*. Accordingly, your office is cleared to facilitate the filing of

the joint motion for continuance or administrative closure, as appropriate, before the Immigration Court or Board of Immigration Appeals.

The OPLA field location is responsible for contacting the noncitizen or his or her attorney regarding the preparation and filing of the joint motion before the Immigration Court or Board, as appropriate. The following template joint motions have been created for this process and should be used:

- Template Joint Motion to Continue – Ms. L;
- Template Joint Motion for Administrative Closure (EOIR) – Ms. L; and
- Template Joint Motion for Administrative Closure (BIA) – Ms. L.

Additionally, OPLA is providing a standard operating procedure (SOP) that provides instructions on how these cases must be documented in PLAnet, including the use of the new "Case Initiative" Event and "Ms.L/EO 14011" Action fields.

If you have any questions about the process or the SOP, please contact OPLA Field Legal Operations.

This message includes internal guidance provided for internal OPLA use only and is not intended for public disclosure. Please ensure that it is treated consistent with applicable guidance.

Best regards,

(b)(6); (b)(7)(C)

Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement

(b)(6); (b)(7)(C)

Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

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Tracking Case Initiatives in PLAnet: Ms. L/EO 14011

This document establishes the standard operating procedure (SOP) for tracking Case Initiatives in PLAnet related to the *Ms. L. v. I.C.E.*, No. 18-428 (S.D. Cal. filed Feb. 26, 2018) ("*Ms. L*") class action lawsuit. Upon receiving written confirmation from the appropriate local Enforcement and Removal Operations (ERO) office that a noncitizen has been identified as a *Ms. L* class member or potential class member and has not been found to be a civil immigration enforcement priority (other than Presumed Priority 2, relating to Border Security), the OPLA field location must coordinate with the noncitizen, or his or her counsel, in the filing of a joint motion to continue the removal proceeding before the Immigration Court.

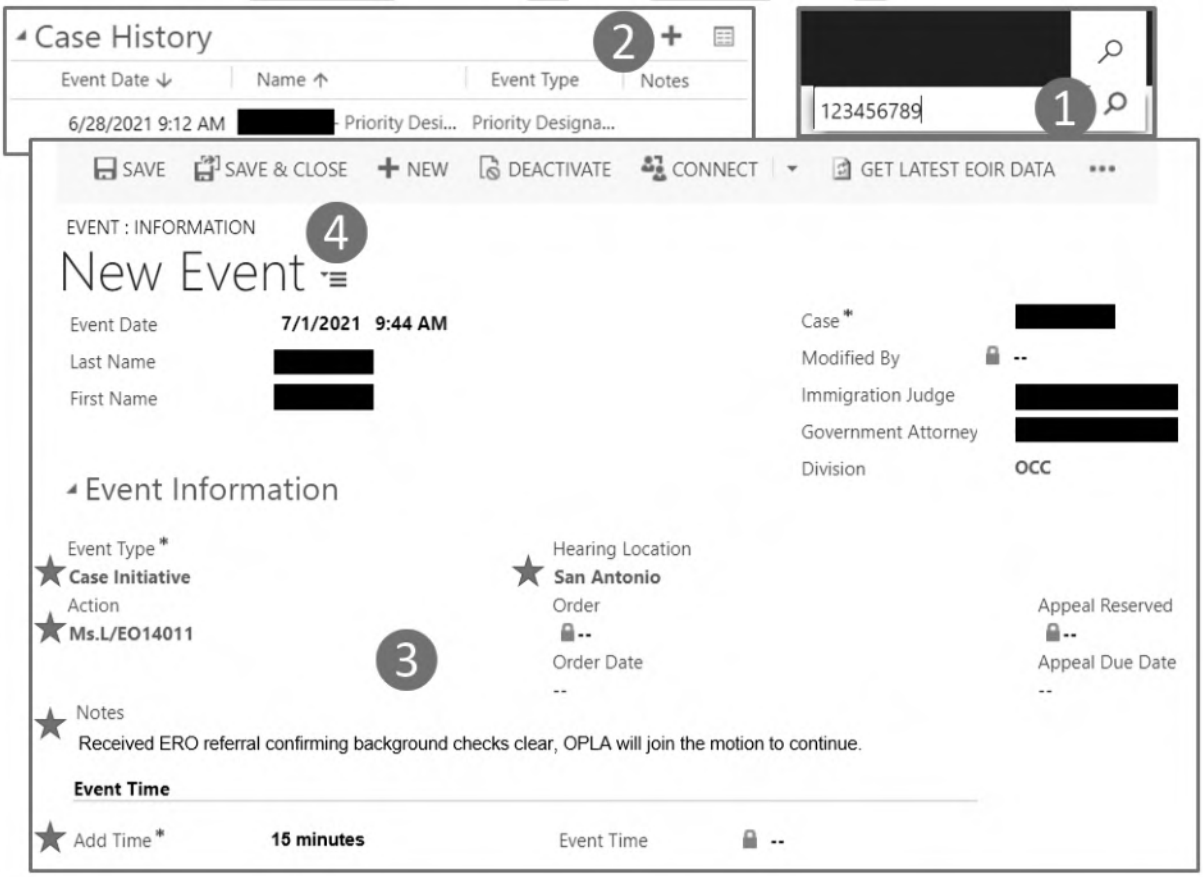
OPLA attorneys must follow general practice under the PLAnet User Manual to input any Motion Event (e.g., Motion to Continue or Motion to Administratively Close). However, for *Ms. L* referred cases, OPLA attorneys must also record a **Case Initiative** Event and select the Action, **Ms.L/EO 14011**. To add a Case Initiative Event, follow the instructions below.

1. Navigate to the appropriate case in PLAnet by entering the case's A-number.

2. Under **Case Information**, click the plus sign to add a new Event.

3. When the **New Event** window opens, complete the required fields and the **Event Information** as follows:
   a. Event Type – "Case Initiative"
   b. Action – "Ms.L/EO 14011"
   c. Hearing Location – Court location where the motion is to be filed.
   d. Notes – Provide any additional information that should be noted in PLAnet.
   e. Add Time – Record the amount of time invested in completing the entry.

4. Click **Save & Close** at the top of the screen.



From: (b)(6); (b)(7)(C)
Sent: Thu, 22 Jul 2021 11:17:59 +0000
To: OPLA HQ Personnel;OPLA Field Personnel
Subject: Broadcast Message: Implementing Matter of Cruz-Valdez, 28 I&N Dec. 326 (A.G. 2021)

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Disseminated on behalf of (b)(6); (b)(7)(C) ***and*** (b)(6); (b)(7)(C) **.**

On July 15, 2021, Attorney General (AG) Garland issued *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021), vacating then-AG Sessions' decision in *Matter of Castro-Tum*, which had held that immigration judges and the Board of Immigration Appeals (Board) "do not have the general authority to suspend indefinitely immigration proceedings by administrative closure," and directed immigration judges and the Board to only administratively close cases if "a previous regulation or a previous judicially approved settlement expressly authorizes such an action[,]" 27 I&N Dec. 271, 272 (A.G. 2018). *Cruz-Valdez* directs immigration judges and the Board to apply the framework for administrative closure prior to *Castro-Tum*, set forth in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), and *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017), except to the extent that a court of appeals in the relevant jurisdiction has held in a precedent decision that immigration judges and the Board lack administrative closure authority under existing regulations.

As the AG noted in *Cruz-Valdez*, the U.S. Courts of Appeals for the Third, Fourth, and Seventh Circuits overruled *Castro-Tum*. *See Arcos Sanchez v. Att'y Gen.*, 997 F.3d 113, 121-22 (3d Cir. 2021); *Meza Morales v. Barr*, 973 F.3d 656, 667 (7th Cir. 2020); *Romero v. Barr*, 937 F.3d 282, 292 (4th Cir. 2019). The Sixth Circuit Court of Appeals, on the other hand, agreed with *Castro-Tum* in *Hernandez-Serrano v. Barr*, 981 F.3d 459, 464 (6th Cir. 2020), but subsequently ruled that immigration judges and the Board have the authority to grant administrative closure to allow noncitizens to apply for provisional unlawful presence waivers in *Garcia-DeLeon v. Garland*, 999 F.3d 986, 989 (6th Cir. 2021).

In light of *Cruz-Valdez*, OPLA attorneys should consider the following practice pointers:

- As directed in *Cruz-Valdez*, "immigration judges and the Board should apply the standard for administrative closure set out in *Avetisyan* and *W-Y-U-*." 28 I&N Dec. at 329. OPLA attorneys should generally follow prior OPLA guidance issued following *Avetisyan* and *W-Y-U-*. Although prior guidance on implementing *W-Y-U-* directed OPLA attorneys to argue that "DHS has a legitimate interest in litigating cases of removable aliens to a resolution on the merits, absent strong reasons for administrative closure in the record," that practice pointer no longer applies in all cases. Instead the prior guidance should be read in light of the principles of upholding the rule of law; discharging duties ethically in accordance with the law and professional standards of conduct; following the guidelines and strategic directives of senior leadership; and exercising considered judgment and

doing justice in individual cases, consistent with DHS and ICE priorities, as set forth in more recent guidance issued by Principal Legal Advisor John Trasviña, titled *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021) (Trasviña Memorandum).

- OPLA attorneys must not seek administrative closure of immigration proceedings while a respondent is detained. If prosecutorial discretion will be exercised to administratively close the proceedings of a detained respondent, and the respondent is not subject to mandatory detention pursuant to Section 236(c) of the Immigration and Nationality Act (INA), the respondent's release must be coordinated with ERO prior to administrative closure. If an immigration judge administratively closes the proceedings of a detained respondent, and the OPLA attorney has not confirmed that ERO intends to release the noncitizen from custody, OPLA attorneys should reserve appeal and immediately bring the case to the attention of their supervisor.

- Although administrative closure would never be appropriate in the case of a respondent detained pursuant to INA § 236(c), there may be circumstances in which the exercise of prosecutorial discretion in the form of a motion to dismiss without prejudice would be appropriate in such cases. Should a motion to dismiss be granted by the immigration judge in such a case, the noncitizen would not be in removal proceedings (and so not subject to mandatory detention) and should be released.

- There may be circumstances in which a noncitizen requests that OPLA exercise its prosecutorial discretion in the form of administrative closure rather than dismissal of removal proceedings. OPLA attorneys should evaluate such requests for administrative closure on their own procedural history and merits, in accordance with the Trasviña Memorandum, "giving favorable consideration to cases that are not priorities and where dismissal would be considered under Section V [of the Trasviña Memorandum,]" *id*. at 12. This includes cases involving compelling humanitarian factors, and noncitizens who have a viable avenue available to regularize their immigration status outside of removal proceedings through temporary or permanent relief. *Id*. at 9-10.

- OPLA attorneys should remain cognizant of the fact that none of the factors listed in *Avetisyan* and *W-Y-U-* contemplate indefinite administrative closure. Accordingly, administrative closure will not be an appropriate alternative form of prosecutorial discretion to dismissal in many cases. As *W-Y-U-* observes, the choice between moving to dismiss proceedings, versus seeking or agreeing to administrative closure, may follow from the respondent's interest in having their case resolved on the merits. *See* 27 I&N Dec. at 20 n.6. The case of a respondent seeking administrative closure may be more appropriate for dismissal, and vice versa. Each case should be considered based on its individual facts and circumstances, consistent with relevant precedent.

OPLA attorneys handling cases within the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit should consider the following practice pointers:

- The Sixth Circuit in *Hernandez-Serrano* held, consistent with *Castro-Tum*, that the regulations at 8 C.F.R. §§ 1003.1(d) and 1003.10 do not impliedly confer general administrative closure authority. 981 F.3d at 462-66. The Sixth Circuit, however, did not defer to *Castro-Tum.* Rather, it found that the regulatory language was not genuinely ambiguous. Thus, *Cruz-Valdez* does not alter the law within the Sixth Circuit and *Hernandez-Serrano* continues to limit the authority of immigration judges and the Board to administratively close proceedings in the Sixth Circuit.

- Where a noncitizen is seeking a provisional unlawful presence waiver, however, the Sixth Circuit's more recent decision in *Garcia-DeLeon* provides that immigration judges and the Board may administratively close proceedings. *See* 999 F.3d at 993. Accordingly, OPLA attorneys practicing within the Sixth Circuit should apply *Avetisyan* and *W-Y-U-* to the limited circumstance in which a noncitizen is requesting administrative closure to seek a provisional unlawful presence waiver.

This message includes internal guidance provided for internal OPLA use only and is not intended for public disclosure. Please ensure that it is treated consistent with applicable guidance. If there are any legal questions about this guidance, please do not hesitate to reach out to ILPD (ILPD-E or ILPD-W), as appropriate.

Thank you,

(b)(6); (b)(7)(C)

Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

(b)(6); (b)(7)(C)

Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

Office of the Principal Legal Advisor

U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

April 3, 2022

MEMORANDUM FOR: All OPLA Attorneys

FROM: Kerry E. Doyle
Principal Legal Advisor

KERRY E DOYLE

Digitally signed by KERRY E DOYLE
Date: 2022 04.03 17:34 53 -04'00'

SUBJECT: Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion

On September 30, 2021, Secretary of Homeland Security Alejandro N. Mayorkas issued a memorandum titled, *Guidelines for the Enforcement of Civil Immigration Law* (Mayorkas Memorandum), which took effect on November 29, 2021.[1] The Mayorkas Memorandum lays out the Department of Homeland Security's (DHS or Department) civil immigration enforcement priorities to ensure that finite DHS resources are used in a way that accomplishes the Department's enforcement mission most effectively and justly. In accordance with the Mayorkas Memorandum, the memorandum issued by our General Counsel, Jonathan E. Meyer, titled, *Exercising Prosecutorial Discretion in the Enforcement of Civil Immigration Law* (Meyer Memorandum),[2] and the enduring principles of prosecutorial discretion, I am providing this guidance to the U.S. Immigration and Custom Enforcement (ICE) Office of the Principal Legal Advisor (OPLA) attorneys assigned to handle proceedings before the Executive Office for Immigration Review (EOIR), to guide them in appropriately executing DHS's enforcement priorities and exercising prosecutorial discretion.[3]

Prosecutorial discretion is an indispensable feature of any functioning legal system. The exercise of prosecutorial discretion, where appropriate, can preserve limited government resources, achieve just and fair outcomes in individual cases, and advance DHS's mission of administering

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[1] Memorandum from Alejandro N. Mayorkas, Secretary of Homeland Security, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021). Upon its effective date, the Mayorkas Memorandum rescinded then-Acting Secretary of Homeland Security David Pekoske's memorandum, *Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021), and U.S. Immigration and Customs Enforcement Acting Director Tae D. Johnson's memorandum, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021). At that time, OPLA personnel were advised via an internal email broadcast message to apply the Mayorkas Memorandum priorities to their litigation activities. This memorandum supersedes that broadcast message.

[2] Memorandum from Jonathan E. Meyer, General Counsel, DHS, *Exercising Prosecutorial Discretion in the Enforcement of Civil Immigration Law* (Apr. 3, 2022).

[3] Upon the effective date of this memorandum set forth in Section V, *infra*, the memorandum issued by former Principal Legal Advisor John D. Trasviña, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), shall be automatically rescinded.

and enforcing the immigration laws of the United States in a smart and sensible way that promotes public confidence. As DHS's representative before EOIR with respect to exclusion, deportation, and removal proceedings, 6 U.S.C. § 252(c), OPLA plays a critical role in advancing the Department's enforcement priorities and exercising the Secretary's prosecutorial discretion.[4] In performing their duties, including through implementation of this memorandum, OPLA attorneys should remain mindful that "[i]mmigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when justice is done."[5] As a result, they are both authorized by law and expected to exercise discretion in accordance with the factors and considerations set forth in the Mayorkas Memorandum, the Meyer Memorandum, and this guidance at all stages of the enforcement process.

I. The Civil Immigration Enforcement Priorities

The Mayorkas Memorandum establishes three priorities for civil immigration enforcement. Consistent with those priorities, OPLA attorneys are directed to focus efforts and prioritize cases involving noncitizens who pose a threat to our national security, public safety, or border security. This section recites those priorities, provides interpretative guidance surrounding the priorities, and discusses how OPLA personnel are to make priority determinations.

A. The Mayorkas Memorandum Priorities

The three priorities are defined as follows:

> **Priority A - Threat to National Security**. A noncitizen who engaged in or is suspected of terrorism or espionage, or terrorism-related or espionage-related activities, or who otherwise poses a danger to national security, is a priority for apprehension and removal.
>
> **Priority B - Threat to Public Safety**. A noncitizen who poses a current threat to public safety, typically because of serious criminal conduct, is a priority for apprehension and removal. Whether a noncitizen poses a current threat to public safety is not to be determined according to bright lines or categories. It instead requires an assessment of the individual and the totality of the facts and circumstances.

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[4] Indeed, OPLA's recently issued Strategic Plan for 2022 - 2026 specifically includes as our second overarching strategic goal, the "Complet[ion of] Litigation Activities Efficiently and in the Pursuit of Justice."

[5] *Matter of S-M-J-*, 21 I&N Dec. 722, 727 (BIA 1997) (en banc). In remarks delivered at the Second Annual Conference of United States Attorneys more than 80 years ago, Attorney General Robert H. Jackson said, "Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done." Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18, 18-19 (1940).

> **Priority C - Threat to Border Security**. A noncitizen who poses a threat to border security is a priority for apprehension and removal. A noncitizen is a threat to border security if: (a) they are apprehended at the border or port of entry while attempting to unlawfully enter the United States; or (b) they are apprehended in the United States after unlawfully entering after November 1, 2020. There could be other border security cases that present compelling facts that warrant enforcement action. In each case, there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action. Our personnel should evaluate the totality of the facts and circumstances and exercise their judgment accordingly.

These priorities are not intended to require or prohibit taking or maintaining a civil immigration enforcement action against any individual noncitizen or to contravene any legal obligations. Rather, OPLA attorneys are expected to focus their efforts and limited resources consistent with the law and ICE's important national security, public safety, and border security mission.

B. Construing the Three Enforcement Priorities

The Mayorkas Memorandum provides DHS personnel with significant discretion in construing the three enforcement priorities. In order to promote consistency and a common understanding of those priorities within OPLA, I am elaborating on their meaning for purposes of our work before EOIR.

1. Priority A: Threat to National Security

In assessing whether a noncitizen is a threat to national security, OPLA attorneys must consider all available information indicating that the noncitizen is engaged in or is suspected of terrorism or espionage, or terrorism-related or espionage-related activities, or otherwise poses a danger to national security. For purposes of the national security enforcement priority, the terms "terrorism or espionage" and "terrorism-related or espionage-related activities" should be applied consistent with (1) the definitions of "terrorist activity" and "engage in terrorist activity" in section 212(a)(3)(B)(iii)–(iv) of the Immigration and Nationality Act (INA) and (2) the manner in which the term "espionage" is generally applied in the immigration laws. In evaluating whether a noncitizen is a potential national security priority, OPLA attorneys should consider whether a noncitizen poses a threat to United States sovereignty, territorial integrity, national interests, or institutions. Consideration may also be given to whether the noncitizen would be ineligible for an exemption from certain terrorism-related inadmissibility grounds pursuant to INA § 212(d)(3)(B)(i).

When determining whether a noncitizen *otherwise* poses a danger to national security, OPLA attorneys should include in their determination process whether the noncitizen is engaged in or suspected of serious human rights violations. The values of our nation as a place of refuge for those fleeing persecution do not support providing a safe haven to those who have voluntarily participated in persecution or other human rights violations. The presence of such perpetrators in the United States not only poses an ongoing threat to their fleeing victims, but also risks the stability of our communities and threatens our strong national interest in welcoming refugees.

Indeed, the INA provisions governing removability for "security and related grounds" specifically encompass some categories of human rights violators, reflecting Congress' judgment that such individuals threaten our nation's security.[6]

2. Priority B: Threat to Public Safety

Whether a noncitizen poses a current threat to public safety generally turns on the seriousness of a noncitizen's criminal conduct and an assessment of the individual and the totality of the facts and circumstances. In conducting a totality of the facts and circumstances analysis, not all factors need to be weighed equally. Importantly, an individual's convictions or prosecutions are not the only indicators of whether or not an individual poses a current threat to public safety. For instance, a removable noncitizen may play a role in the criminal activities of a violent organization but may not yet have been arrested or prosecuted in connection with their association with such organization or its crimes. Such individual may be deemed a significant threat, nonetheless. Relatedly, the existence of a criminal history alone, regardless of severity, will not necessarily indicate that a noncitizen presently poses a current public safety threat pursuant to the Secretary's priorities. The Mayorkas Memorandum provides a number of aggravating and mitigating factors to help inform public safety assessments:

- Aggravating factors may include but are not limited to: the gravity of the offense of conviction and the length and nature of the sentence imposed; the nature and degree of harm caused to the victim or the community by the criminal offense; the sophistication of the criminal offense; use or threatened use of a firearm or dangerous weapon; and a serious prior criminal record.

- Mitigating factors may include but are not limited to: advanced or tender age; lengthy presence in the United States; a mental condition that may have contributed to the criminal conduct, or a physical or mental condition requiring care or treatment;[7] status as a victim of crime or victim, witness, or party in legal proceedings, including relating to human trafficking and labor exploitation;[8] the impact of removal on family in the United

[6] *See* INA §§ 212(a)(3)(E) and 237(a)(4)(D).

[7] As a reminder, under established guidance, special care must be taken in the identification and handling of mental competency cases in proceedings before EOIR. OPLA attorneys play a critical role in identifying indicia of incompetency, sharing information about potential incompetency issues with ICE and EOIR, and ensuring these sensitive and significant cases are handled in accordance with ICE's policies and procedures. Please contact OPLA's national mental competency POCs here when handling cases with mental competency issues.

[8] On August 10, 2021, Acting Director Johnson issued ICE Directive 11005.3: *Using a Victim-Centered Approach with Noncitizen Crime Victims*, setting forth civil immigration enforcement policy for noncitizen crime victims, including applicants for and beneficiaries of victim-based immigration benefits and Continued Presence. This directive builds upon long-standing ICE policy directing that ICE officers, special agents, and attorneys exercise all appropriate discretion on a case-by-case basis when making decisions regarding noncitizen crime victims, witnesses, and individuals pursuing legitimate civil rights complaints, with particular focus on victims of domestic violence, human trafficking, and other serious crimes. *See* ICE Directive 10076.1: *Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs* (June 17, 2011). OPLA attorneys should, accordingly, give particular consideration to noncitizen crime victims when determining whether a noncitizen poses a current public safety threat or is otherwise

States, such as loss of provider or caregiver; whether the noncitizen may be eligible for humanitarian protection or other immigration relief (including any corresponding waivers of ineligibility); military or other public service of the noncitizen or their immediate family; time since an offense and evidence of rehabilitation; and whether a conviction was vacated or expunged.

Beyond these factors, OPLA attorneys may also consider any other relevant factors in assessing whether a removable noncitizen poses a threat to public safety. Other aggravating factors may include, but are not limited to, whether the noncitizen victimized a child or other vulnerable person as part of their criminal activity; whether any criminal activity involved violence or was of a sexual nature; whether criminal conduct was in furtherance of the activities of a "criminal street gang" as defined under 18 U.S.C. § 521(a);[9] or whether the individual's criminal conduct resulted in harm to public health or pandemic response efforts.[10] Other mitigating factors may include, but are not limited to, whether the noncitizen is pregnant, postpartum, or nursing; whether the noncitizen is a lawful permanent resident (LPR) (particularly where LPR status was obtained many years ago and/or at a young age); whether the circumstances of a noncitizen's arrest indicate an underlying discriminatory motive or retaliation for asserting their legal rights;[11] whether the type of criminal conduct committed by a noncitizen has since been decriminalized; and the noncitizen's status as a cooperating witness or confidential informant or other assistance sought from the noncitizen by, or provided by the noncitizen to, federal, state, local or tribal law enforcement, including labor and civil rights law enforcement agencies.[12]

3. Priority C: Threat to Border Security

As defined in the Mayorkas Memorandum and based on subsequent communications, the border security priority category applies directly to noncitizens apprehended at the border or port of

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a priority for enforcement. In general, if a noncitizen has a pending application or petition for any of the following victim-based immigration benefits and appears prima facie eligible for such relief, OPLA should treat the case as a nonpriority matter until U.S. Citizenship and Immigration Services (USCIS) adjudicates the application or petition: T visas; U visas; Violence Against Women Act relief for qualifying domestic violence victims; and Special Immigrant Juvenile classification for qualifying children who have been abused, neglected, or abandoned by one or both parent.

[9] OPLA attorneys should be mindful that inclusion in one or more gang databases is not determinative of whether a particular individual is, in fact, a gang member or associate. *Cf. Ortiz v. Garland*, 23 F.4th 1, 17-22 (1st Cir. 2022) (en banc) (overturning noncitizen's adverse credibility finding based on shortcomings of gang database-derived material and discussing scholarly criticism of such databases); Mayorkas Memorandum at 4 ("Our personnel should not rely on the fact of conviction or the result of a database search alone.").

[10] This could be the case if, for instance, the individual intentionally defrauded a program administered by federal, state, local, or tribal agencies.

[11] Sections III and IV of the Mayorkas Memorandum provide further details on such civil rights and civil liberties issues.

[12] Such agencies may include, but are not limited to, the DHS Office of Inspector General, Office for Civil Rights and Civil Liberties, Department of Justice (DOJ) Civil Rights Division Immigrant and Employee Rights Section, Department of Labor, National Labor Relations Board, Equal Employment Opportunity Commission, ERO, Homeland Security Investigations, and any relevant state counterparts.

entry while attempting to unlawfully enter the United States after November 1, 2020, as well as to noncitizens apprehended by DHS in the United States who unlawfully entered the United States subsequent to that date. In addition to those who surreptitiously enter the United States, "unlawful entry" in this context should be construed to include individuals who apply for admission to the United States but are inadmissible at the time, including due to criminal activity or an inability to satisfy relevant documentary requirements.

The Mayorkas Memorandum further explains that this priority category could apply to other border security cases that present compelling facts warranting enforcement action. Such compelling facts may include individuals who are knowingly involved in the smuggling of noncitizens, regardless of whether they have been charged with smuggling offenses, particularly when available information indicates that the smuggled noncitizens were abused or mistreated. This category could also include those who engage in serious immigration benefit fraud that threatens the integrity of the immigration system. Examples of serious immigration benefit fraud may include fraud that has been criminally prosecuted, including under 8 U.S.C. § 1325(c) (knowingly entering into a marriage for purposes of evading any immigration law) and 18 U.S.C. § 1546 (knowingly forging, counterfeiting, altering or falsely making certain immigration documents or their use, possession, or receipt); fraud that has resulted in or is significantly likely to result in a frivolous asylum bar finding under INA § 208(d)(6) and 8 C.F.R. § 1208.20; serious types of fraud that cannot be waived as a matter of law (e.g., certain false claims to U.S. citizenship); and fraud that reflects an attempt to circumvent the immigration laws by multiple persons (e.g., document mill forgers), particularly when other noncitizens are victimized in the process. Use of fraudulent documents as a means of fleeing persecution alone, *cf.* 8 C.F.R. § 270.2(j) (precluding issuance of civil document fraud Notices of Intent to Fine under INA § 274C "for acts of document fraud committed by an alien pursuant to direct departure from a country in which the alien has a well-founded fear of persecution"), or solely for employment purposes, as well as statements and claims made by minors, will not ordinarily constitute serious immigration benefit fraud in the absence of additional aggravating factors.[13]

Similar to the public safety priority, the Mayorkas Memorandum acknowledges that there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action in a border security case. To that end, the non-exhaustive mitigating factors enumerated in the preceding subsection, among others, may be relevant in determining whether a noncitizen poses an actual threat to border security.

In construing and applying all three of the aforementioned priorities, OPLA attorneys should also be guided by formal ICE policy directives that elaborate upon the agency's approach to its enforcement discretion. Many such directives are explicitly cited in this memorandum, but others are not. Moreover, it is inevitable that the agency will issue relevant directives in the future, including directives that supersede those cited in this memorandum. To the extent that policy choices and changes reflected in ICE directives illuminate aggravating and mitigating factors

[13] Of course, use of a fraudulent document by a terrorist seeking entry into the United States could also implicate Priority A (threat to national security), just as use of fraudulent documents by a violent criminal seeking to conceal their identity from immigration authorities could also implicate Priority B (threat to public safety).

beyond those identified above, they should be considered by OPLA attorneys to inform their determinations whether a noncitizen's case falls within or outside one of the Mayorkas Memorandum priorities.[14]

C. Making and Documenting Enforcement Priority Determinations

OPLA attorneys play a unique and critical role in ensuring that government resources are focused on current priority cases. Upon first encountering a case that has not yet been classified for prioritization under the Mayorkas Memorandum, OPLA attorneys should initially review the readily available information for any indicia that the case is an enforcement priority (e.g., serious or recent criminality, national security charges, recent unauthorized entry into the United States). If removal proceedings were initiated before EOIR by ICE, USCIS, or U.S. Customs and Border Protection (CBP) subsequent to the November 29, 2021 effective date of the Mayorkas Memorandum, OPLA will generally defer to that initiating component's priority determination, which would have been made in compliance with the Mayorkas Memorandum, in any litigation it handles concerning the matter. If, based on this initial OPLA review or the determination of the DHS component that issued the Notice to Appear (NTA), the noncitizen appears to pose a threat to national security, public safety, or border security, the case should be classified in PLAnet under the corresponding priority category.[15] If, however, the readily available case information fails to indicate that the noncitizen potentially falls within one or more of the three Mayorkas Memorandum priorities or any such indication is clearly overcome by readily available, persuasive evidence of mitigating factors, the case should initially be classified, and recorded in PLAnet, as a nonpriority case.

The Chief Counsel are ultimately responsible for the priority determinations made by the attorneys in their OPLA Field Locations (OFLs). In particular, in cases where the NTA-issuing component has not already made such a determination under the Mayorkas Memorandum, any determination that a noncitizen poses a threat to national security or public safety must be approved by the Chief Counsel. Determinations that a noncitizen poses a threat to border security based on compelling facts warranting enforcement action must also be approved by the Chief Counsel. A Chief Counsel may delegate these approval authorities to a Deputy Chief Counsel, but they may not be further redelegated, and the Chief Counsel remains responsible for overall implementation of the Mayorkas Memorandum within their area of responsibility.[16] Moreover, a determination that a case does not appear to constitute an enforcement priority (i.e., not a national security or public safety threat) or that a noncitizen poses a threat to border security based solely on their date of unlawful entry or attempted unlawful entry into the United States requires no further management review.

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[14] ICE policy directives may be accessed here.

[15] PLAnet guidance on priority classifications and the exercise of prosecutorial discretion under this memorandum is available here.

[16] The responsibilities assigned to specific OPLA personnel under this memorandum may also be exercised by those serving in a specifically named position in an "acting" capacity.

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D. Enduring Principles of Prosecutorial Discretion

As the General Counsel has directed, "DHS attorneys involved in immigration matters should adhere to the enduring principles that apply to all of their activities: upholding the rule of law; discharging duties ethically in accordance with the law and professional standards of conduct; following the guidelines and strategic directives of senior leadership; and exercising considered judgment in individual cases, consistent with DHS objectives and mindful of the Department's limited resources."[17] Independent of the guidelines provided in the Mayorkas Memorandum, OPLA attorneys should always keep in mind these enduring principles to guide the exercise of prosecutorial discretion in the preparation and litigation of cases before EOIR. In other words, distinct from any particular policy framework or articulated priorities, prosecutorial discretion is an inherent part of what OPLA attorneys do every day, a reality that is particularly acute in an era of increasingly constrained resources.[18]

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[17] Meyer Memorandum at 3.

[18] *See* DHS, Fiscal Year 2023 Congressional Justification, DHS ICE Budget Overview, at ICE-O&S-36, https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Immigration%20and%20Customs%20Enforcement_Remediated.pdf (last visited Apr. 3, 2022) (explaining that OPLA currently faces a staffing budgetary shortfall of several hundred positions).

[19] Though OPLA plays a vital role in the cases before the immigration courts and Board of Immigration Appeals (BIA), it is fundamentally EOIR that must ensure that due process is afforded to all respondents through the immigration judges' rulings and court conduct. The BIA likewise plays a vital role in reviewing and guiding the judges' activities. *See*, *e.g.*, INA § 240(b)(1); *Quintero v. Garland*, 998 F.3d 612 (4th Cir. 2021) (finding that an immigration judge's authority to conduct hearings under INA § 240(b)(1) inherently requires the judge to develop the court record and to ensure a full and fair hearing to which individuals are entitled under the Due Process Clause of the Fifth Amendment); *Matter of M-A-M-*, 25 I&N Dec. 474, 479 (BIA 2011) ("Included in the rights that the

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II. Exercising Prosecutorial Discretion

The Mayorkas Memorandum establishes a new analytical framework under which a noncitizen's enforcement priority classification and DHS's decision whether to exercise prosecutorial discretion converge. In implementing this framework, OPLA attorneys must be particularly mindful of the resource constraints under which we operate at a time when the immigration courts' dockets total over 1.5 million cases nationwide. Sound prioritization of our litigation efforts through the appropriate use of prosecutorial discretion can preserve limited government resources, achieve just and fair outcomes in individual cases, reduce government redundancies, and advance DHS's mission of administering and enforcing the immigration laws of the United States in an efficient and sensible way that promotes public confidence.

(b)(5)

Due Process Clause requires in removal proceedings is the right to a full and fair hearing."); *see also* INA § 240(b)(4)(B) (providing that "the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government").

[20] *Cf. Quintero*, 998 F.3d at 628 (holding that the "immigration judges' duty to fully develop the record becomes particularly important in cases involving uncounseled noncitizens").

In preparing their cases for litigation, OPLA attorneys should exercise prosecutorial discretion in accordance with the case's priority designation, and as described in greater detail below.

A. Priority Cases

Any case determined to be an enforcement priority will not be amenable to prosecutorial discretion in the forms of non-filing of the NTA, dismissal or termination of proceedings, or administrative closure. Instead, OPLA attorneys are expected to litigate priority cases to completion. If a noncitizen previously determined to be an enforcement priority seeks such prosecutorial discretion, the noncitizen should generally be expected to file an affirmative request, with supporting evidence, in accordance with Section IV of this guidance, to allow OPLA to reassess the priority designation.

B. Nonpriority Cases

Noncitizens determined not to be priorities for enforcement may receive prosecutorial discretion. The OPLA-preferred forms of prosecutorial discretion for nonpriority cases are either non-filing of the NTA or, if the NTA has already been filed, dismissal of proceedings. OPLA attorneys may, in appropriate cases, consider alternative forms of prosecutorial discretion, including administrative closure, stipulations to issues or relief, continuances, not pursing an appeal, joining motions to reopen, and stipulations in bond hearings, but OPLA's strong preference is to efficiently remove nonpriority cases from the docket altogether to best focus enforcement resources on Departmental priority cases.

Chief Counsel must establish local procedures to ensure that a fingerprint-based background check from the Federal Bureau of Investigation (FBI) is completed prior to exercising prosecutorial discreti[redacted (b)(6); (b)(7)(C)] If the noncitizen's fingerprints are *not* contained in a DHS database, the noncitizen will be required to submit a fingerprint-based background check from the FBI.

1. Notices to Appear

When a legally sufficient, appropriately documented NTA has been issued by a DHS component consistent with the component's issuing and enforcement guidelines,[21] it will generally be filed with the immigration court and proceedings litigated to completion unless the Chief Counsel exercises prosecutorial discretion based on their assessment of the case.[22] As prosecutorial

[21] This includes NTAs submitted to OPLA by ICE operational components as well as USCIS and CBP for review. "Appropriately documented" in this context means that, in OPLA's litigation judgment, sufficient information has been provided by the NTA-issuing component to carry any DHS burden of proof. *See* INA § 240(c); 8 C.F.R. § 1240.8.

[22] Independent of the enforcement priority framework outlined in the Mayorkas Memorandum, certain noncitizens have an established right to be placed into removal proceedings. *See, e.g.*, 8 C.F.R. §§ 208.14(c)(1) (requiring

discretion is expected to be exercised at all stages of the enforcement process and at the earliest moment practicable, it may thus be appropriate for the Chief Counsel to conclude that even a legally sufficient, appropriately documented administrative immigration case warrants non-filing of an NTA (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Where an NTA is issued but not filed with the immigration court pursuant to this section, OPLA should document the reasoning for this position in PLAnet and the OFL should work with its corresponding ERO Field Office to cancel the NTA and inform the noncitizen of the cancellation.[23]

2. Dismissal of Proceedings

For unrepresented noncitizens who are not priorities for enforcement, as early in the process as practicable, OPLA attorneys should advise the immigration judge that: (i) the case is a nonpriority, (ii) OPLA believes dismissal of proceedings is appropriate, and (iii) OPLA will agree to a continuance to allow the noncitizen to seek counsel and consider whether to agree to dismissal. Should the individual remain unrepresented, an oral or written motion to dismiss should be made or filed with the immigration court unless, on a case-by-case basis, the OPLA attorney concludes in consultation with their Chief Counsel (or, as designated, their Deputy Chief Counsel) that another action or form of prosecutorial discretion would be more appropriate. For represented nonpriority noncitizens, as early in the process as practicable, OPLA attorneys are authorized to move to dismiss such cases pursuant to 8 C.F.R. § 1239.2(c), without seeking prior management approval or concurrence from the respondent, but may not unilaterally (i.e., in the absence of an affirmative request or consent) move to dismiss nonpriority cases described in note 22, *supra*, regardless of representation status.[24] OPLA attorneys may also

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referral for removal proceedings of a removable noncitizen whose affirmative asylum application is not granted by USCIS); 216.4(d)(2) (requiring NTA issuance to noncitizen whose joint petition to remove conditional basis of LPR status is denied by USCIS); 216.5(f) (same; USCIS denial of application for waiver of the joint petition requirement). In other cases, USCIS may issue an NTA on a discretionary basis to a noncitizen who wishes to pursue immigration benefits before the immigration court. Although such cases may not fall within the priority framework, absent an affirmative, timely request by such a noncitizen for the favorable exercise of prosecutorial discretion to dismiss removal proceedings or consent to dismissal provided in writing or on the record in removal proceedings, OPLA attorneys should generally litigate these cases to completion. If such noncitizens are ordered removed, requests for prosecutorial discretion would then most properly be made to ERO for evaluation in accordance with DHS's stated priorities.

[23] The NTA cancellation regulation vests immigration officers who have the authority to *issue* NTAs with the authority to also cancel them. 8 C.F.R. § 239.2(a). The regulation expresses a preference for certain NTAs to be cancelled by the same officer who issued them "unless it is impracticable" to do so. *Id.* § 239.2(b). Given the enormous size of the EOIR docket, current OPLA staffing levels, and complexities associated with routing any significant number of NTAs back to specific issuing officers stationed around the country, it would be impracticable to require OPLA attorneys to do so. By contrast, the local ERO Field Offices with which OFLs routinely interact are well suited to cancel NTAs and notify noncitizens of such cancellation promptly and efficiently.

[24] Although the Immigration Court Practice Manual recommends that that the party filing a motion "make a good faith effort to ascertain the opposing party's position on the motion" and that a "description of the efforts made to contact opposing counsel" be included if the filing party is unable to ascertain the opposing party's position, EOIR Policy Manual, Chapter II.5.2(i) (Feb. 14, 2022), OPLA attorneys are *not* required to obtain the noncitizen's

join in or non-oppose a motion to dismiss filed by a noncitizen who is a nonpriority for enforcement, whether or not represented, including when such a motion is filed with the BIA.

3. Administrative Closure

Administrative closure temporarily pauses removal proceedings by taking a case off the immigration courts' active calendars, but it does little to permanently address the surging growth in their dockets. As such, OPLA strongly prefers dismissal of proceedings as a discretionary tool in nonpriority cases. OPLA attorneys may, however, agree to administratively close nonpriority cases when the noncitizen does not oppose and there are specific facts that militate in favor of this alternative outcome (e.g., illness of the noncitizen that currently prevents their participation in removal proceedings to pursue a form of relief not otherwise available to them where the illness is expected to resolve in the foreseeable future).[25] There may also be instances in which, consistent with *Matter of Avetisyan* and *Matter of W-Y-U-*, OPLA wishes to unilaterally request that the immigration judge administratively close cases regardless of any request or assent from the noncitizen (e.g., the noncitizen is incarcerated while removal proceedings are pending).[26]

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concurrence with unilateral DHS motions to remove nonpriority cases from the immigration court dockets filed pursuant to this memorandum. Such motions are based upon DHS's conclusion that a case is not a priority for enforcement and an assessment that continuation of the proceedings is therefore "no longer in the best interest of the government," 8 C.F.R. § 1239(a)(7), matters upon which the noncitizen is simply not in a position to opine. Moreover, obtaining concurrence of the noncitizen or their legal representative prior to filing such a motion would, in many cases, require the expenditure of more effort than the preparation, filing, and service of the motion itself. That being said, OPLA attorneys may certainly seek such concurrence where circumstances permit and should explicitly state in their motions whether they made contact with the noncitizen or their legal representative, to inform the immigration judge's proper handling and disposition of the motion.

[25] A request for administrative closure with which both parties agree should generally be granted by EOIR without further explanation. *Cf. Matter of Yewondwosen*, 21 I&N Dec. 1025, 1026 (BIA 1997) ("We believe the parties have an important role to play in these administrative proceedings, and that their agreement on an issue or proper course of action should, in most instances, be determinative."); EOIR Director's Memorandum 22-03: *Administrative Closure*, at 3 (Nov. 22, 2021) ("Under case law, where DHS requests that a case be administratively closed because a respondent is not an immigration enforcement priority, and the respondent does not object, the request should generally be granted and the case administratively closed." (citing *Yewondwosen*, 21 I&N Dec. at 1026)). However, administrative closure is generally unavailable within the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit. *See* EOIR Director's Memorandum 22-03 at 2 & n.2 ("[T]he Sixth Circuit initially held that the regulations do not delegate to immigration judges or the Board the general authority to administratively close cases. *Hernandez-Serrano v. Barr*, 981 F.3d 459, 466 (6th Cir. 2020). But the Sixth Circuit later held that the regulations provide adjudicators 'the authority for administrative closure' to allow respondents to apply with U.S. Citizenship and Immigration Services for provisional unlawful presence waivers. *Garcia-DeLeon v. Garland*, 999 F.3d 986, 991 (6th Cir. 2021).").

[26] *Matter of Avetisyan*, 25 I&N Dec. 688, 690 (BIA 2012) ("The issue before us is whether an Immigration Judge or the Board has the authority to administratively close a case if either party to the proceeding opposes."); *see also Matter of Cruz-Valdez*, 28 I&N Dec. 326, 327 n.1 (A.G. 2021) ("In *Avetisyan*, the Board authorized immigration judges and the Board to administratively close a case over the objection of one party . . . ."); *Matter of W-Y-U-*, 27 I&N Dec. 17, 20 & n.5 (BIA 2017) (distilling *Avetisyan* down to an exercise in evaluating "whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits[,]" and further explaining that "[t]his decision is intended to provide additional guidance where one of the parties opposes administrative closure. However, it is not applicable to cases in which the parties jointly agree to administrative closure . . . .").

4. Stipulations to Issues and Relief

OPLA attorneys are encouraged to stipulate to relief, orally or in writing, in nonpriority cases where the OPLA attorney is satisfied that the noncitizen both qualifies for the relief sought under the law and, where required, merits relief as a matter of discretion.[27] Additionally, OPLA attorneys are encouraged to narrow issues and may choose to stipulate appropriately on any procedural, factual, or legal issue(s), particularly – but not exclusively – in nonpriority cases.

There may be instances in which a noncitizen who is a priority for enforcement nevertheless can clearly demonstrate to the satisfaction of the OPLA attorney that they are eligible for mandatory protection from removal to a particular country under section 241(b)(3) of the INA and/or the regulations implementing United States obligations under Article 3 of the Convention Against Torture (CAT), 8 C.F.R. §§ 1208.16–.18, which both impose significant burdens of proof (i.e., qualifying mistreatment must be "more likely than not" to occur). In such instances, the OPLA attorney should give serious consideration to stipulating to such mandatory forms of protection with respect to the relevant country of removal. *Cf. Matter of S-M-J-*, 21 I&N Dec. at 727 (noting obligation "to uphold international refugee law, including the United States' obligation to extend refuge where such refuge is warranted").[28]

5. Continuances

OPLA attorneys retain the authority to handle pending cases on EOIR's docket by deciding whether to agree to a respondent's request for a continuance for "good cause shown" under 8 C.F.R. § 1003.29.[29] Nonetheless, OPLA attorneys should be mindful that there is a strong preference for more durable and efficient forms of prosecutorial discretion than repeated continuances to accommodate adjudication of any ancillary applications or petitions pending with USCIS or other agencies (e.g., a federal, state, local, or tribal law enforcement agency's consideration of a Form I-918, *Supplement B, U Nonimmigrant Status Certification*). The fact that a noncitizen is a nonpriority for enforcement will be a significant factor informing the position that OPLA attorneys should take in response to motions to continue, while being mindful that noncitizens who are enforcement priorities may also qualify for continuances under the "good cause shown" standard. It is ultimately the responsibility of the immigration judge to make a case-by-case assessment whether continuance motions are supported under the law, with

[27] *See, e.g.*, INA §§ 208 (asylum), 240A(a) (cancellation of removal for certain permanent residents), 240A(b) (cancellation of removal and adjustment of status for certain nonpermanent residents), 240B (voluntary departure), 245 (adjustment of status), 249 (registry). In stipulating to asylum in nonpriority cases, however, OPLA attorneys should be mindful of *Matter of Fefe*, 20 I&N Dec. 116, 117 (BIA 1989) (contemplating that, "[a]t a minimum, … an applicant for asylum and withholding [should] take the stand, be placed under oath, and be questioned as to whether the information in the written application is complete and correct").

[28] (b)(5) (b)(6)

[29] *See also Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) (interpreting this regulation).

OPLA sharing in EOIR's responsibility to ensure that pending matters move efficiently through the adjudicative system.

6. Pursuing Appeal

OPLA attorneys continue to have discretion to take legally viable appeals (including bond appeals)[30] of immigration judge decisions and present appropriate arguments in response to noncitizen appeals and motions. Appellate advocacy should focus on priority cases, absent a compelling basis to appeal a nonpriority case. OPLA attorneys may waive appeal or, in consultation with ILPD and consistent with local procedures, withdraw an already-filed appeal in a nonpriority case. This does not prevent OPLA attorneys from reserving DHS's right of appeal in order to ensure the articulation of a fully reasoned decision by an immigration judge to help inform whether the appeal should ultimately be perfected. The need to seek clarity on an important legal issue or correct systematic legal errors can be a compelling basis to justify appeal in a nonpriority case, but such appeals should be taken judiciously, mindful of compelling discretionary factors in a given case.[31] Additionally, a determination whether a nonpriority case presents a compelling basis for appeal should be made consistent with existing appeal review procedures.

7. Joining Motions to Reopen[32]

OPLA attorneys may join motions to reopen where the purpose for reopening is to dismiss proceedings to allow the noncitizen to proceed on an application for permanent or temporary relief outside of immigration court or to pursue relief in immigration court that has not already

[30] It may also be appropriate for OPLA to seek a discretionary or automatic stay under 8 C.F.R. § 1003.19(i) in conjunction with a DHS bond appeal, particularly where issues of national security or public safety are implicated. OPLA attorneys should work closely with the Immigration Law and Practice Division (ILPD) and other relevant OPLA headquarters divisions to identify instances where use of this authority may be warranted.

[31] When deciding on an appeal, OPLA attorneys should consider whether the noncitizen is detained, the impact of the appeal on detention, and if it is in the government's interest to expend additional resources to appeal a case in which the noncitizen remains detained pending appeal. Relatedly, for detained cases in which asylum, withholding of removal, or deferral of removal is granted, OFLs should immediately notify ERO. *See* Tae D. Johnson, Acting Director, ICE, *REMINDER: Detention Policy Where an Immigration Judge has Granted Asylum, Withholding of Removal, or Convention Against Torture Protection, and DHS has Appealed* (June 7, 2021)) (citing ICE Directive 16004.1: *Detention Policy Where an Immigration Judge has Granted Asylum and ICE has Appealed* (Feb. 9, 2004)).

[32] Consistent with prior guidance provided to OPLA field managers on July 30, 2021, DOJ's Office of Immigration Litigation (OIL) will continue to assess whether cases at the petition for review (PFR) stage of appellate litigation are DHS enforcement priorities. Upon determining that a case is not a DHS enforcement priority, and that the noncitizen is not detained in ICE custody, OIL generally will work with the noncitizen to make the appropriate motion to the circuit court to close the case. If the noncitizen is interested in pursuing alternative prosecutorial discretion options, such as a joint motion to reopen, OIL will direct the noncitizen to OPLA for that purpose, and OFLs should consider any subsequent request for prosecutorial discretion submitted by a noncitizen consistent with the parameters of this memorandum, coordinating with OIL as set forth in the July 30, 2021 guidance.

been considered and for which the noncitizen is newly eligible.[33] An OPLA attorney should be satisfied that the noncitizen qualifies for the relief sought under law and merits relief as a matter of discretion. Similarly, where reopening and dismissal of a case would restore a noncitizen to LPR status and they are not an enforcement priority, OPLA attorneys should generally join motions to reopen and dismiss in such cases. OPLA attorneys may also continue addressing requests for joint motions to reopen on a case-by-case basis and consistent with local guidance. Generally, however, in consideration of the severe immigration court backlog, OPLA attorneys should focus DHS's finite resources on pursuing priority cases rather than relitigating previously completed cases (i.e., where due process has been availed and the purpose for reopening is not to dismiss proceedings to pursue an application before USCIS).

C. Bond Proceedings

While the Mayorkas Memorandum pertains to apprehension and removal and does not address detention, OPLA attorneys should make appropriate legal and factual arguments to ensure that DHS's interests, enforcement priorities, and custody authority are defended. In particular, in bond proceedings, OPLA attorneys should give due regard to custody determinations made by an authorized immigration officer pursuant to 8 C.F.R. § 236.1(c)(8), while not relinquishing the OPLA attorney's own responsibility to review and assess the facts under the current law and prevailing guidance. In any case, priority or nonpriority, where a noncitizen subject to a discretionary detention authority produces new information that credibly mitigates flight risk or danger concerns, OPLA attorneys have the discretion to agree or stipulate to a bond amount or other conditions of release, including (in appropriate consultation with ERO) alternatives to detention, and to waive appeal of an immigration judge's order redetermining the conditions of release in such cases.[34] Of course, nothing in this guidance is meant to override statutory prohibitions on the release of certain noncitizens, *see*, *e.g.*, INA §§ 236(c) (during pendency of removal proceedings) and 241(a)(2)(during the removal period), and OPLA attorneys should promote compliance with such mandates in the course of their litigation before EOIR.

III. Assigning OPLA Attorneys

Whether to assign an attorney to represent DHS in a particular case is a matter of prosecutorial

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[33] While nothing in this memorandum is intended to prevent a Chief Counsel from exercising their independent discretion and litigation judgment to take appropriate positions in response to any joint motion request, this memorandum is not intended to relieve a noncitizen with a final order of removal from meeting the requirements of 8 C.F.R. §§ 1003.2(c)(3)(ii) and 1003.23(b)(4)(i) (relating to motions to reopen for asylum and withholding of removal). Joint motions that would result in the addition of cases to the immigration court dockets for further substantive adjudication should be filed judiciously, in recognition of resource constraints facing OPLA and the immigration courts.

[34] DHS and EOIR regulations recognize that, as a prerequisite for consideration for discretionary release by an ICE officer under section 236(a) of the INA, a noncitizen "must demonstrate *to the satisfaction of the officer* that such release would not pose a danger to property or persons, and that the [noncitizen] is likely to appear for any future proceeding." 8 C.F.R. §§ 236.1(c)(8) and 1236.1(c)(8) (emphasis added). Additionally, prior to agreeing to non-monetary conditions of release, OPLA attorneys should consult with their local ERO Field Offices to ensure that such conditions are practicable (e.g., GPS monitoring, travel restrictions).

discretion because applicable regulations do not require DHS to assign counsel to every removal proceeding.[35] As such, in an effort to prioritize limited resources, except where required by regulation and in accordance with this guidance, Chief Counsel may waive DHS's appearance in the following categories of non-detained hearings: (1) master calendar hearings; (2) in absentia hearings where evidence of removability has been submitted to the court or removability has been previously established; and (3) individual calendar hearings on a case-by-case basis (b)(5)

(b)(5)

Field Legal Operations (FLO). (b)(6); (b)(7)(C)

(b)(5)

OPLA attorneys may also determine that prosecutorial discretion will be warranted such that the case may be addressed through motions or a brief position statement, thereby eliminating the need to appear at a hearing.

IV. Responding to Inquiries and Client and Stakeholder Engagement

Each OFL should maintain local standard operating procedures (SOPs), including email inboxes, dedicated to receiving inquiries related to this memorandum, particularly requests for OPLA to favorably exercise its discretion. The OFLs will socialize the existence and use of these SOPs with their respective local immigration bars and other nongovernmental organizations and community-based organizations assisting immigrant communities or representing noncitizens before EOIR. OFLs should strive to be as responsive to such inquiries as resources permit, focusing on cases in active removal proceedings to conserve judicial and OPLA resources. Pending detained cases, in particular, should be prioritized for review under this guidance.

In addition, Chief Counsel are encouraged to establish long-lasting local relationships with such nongovernmental and community organizations and stakeholders. The Chief Counsel are likewise encouraged to continue to be receptive to outreach from labor enforcement agencies and other government entities that may interact regularly with noncitizens. The goals for these engagements should include responding to inquiries relating to OPLA's prosecutorial discretion guidance, providing materials on how to seek prosecutorial discretion and the information to be included in such requests, and informing the public of the availability of prosecutorial discretion for unrepresented individuals and how they may seek prosecutorial discretion. As a whole, OPLA should help facilitate public-facing content in multiple languages to explain the exercise of our prosecutorial discretion in a manner that noncitizens can readily understand.

OPLA may also provide general feedback, as appropriate, to NTA-issuing components to aid them in implementing the Mayorkas Memorandum enforcement priorities. For instance, during

[35] Pursuant to the regulations, DHS shall assign counsel in four categories of cases: (1) when the unrepresented noncitizen is incompetent, or under 18 years of age, and is not accompanied by a guardian, relative, or friend, 8 C.F.R. § 1240.2(b); (2) when removal proceedings would result in an order of removal and the noncitizen's nationality is at issue, *id.*; (3) when DHS is moving to rescind adjustment of status, 8 C.F.R. § 1246.5(a); or (4) when the immigration judge cannot determine removability, 8 C.F.R. § 1240.10(c). In all other cases, the General Counsel may "[i]n his or her discretion, whenever he or she deems such assignment necessary or advantageous, . . . assign a[n OPLA] attorney to any other case at any stage of the proceeding." 8 C.F.R. § 1240.2(b).

local client engagements, OFLs can discuss whether particular areas of inquiry would be helpful to document on Form I-213, *Record of Deportable/Inadmissible Alien*, to better inform priority determinations and the related exercise of prosecutorial discretion by OPLA.

V. Oversight, Monitoring, and Effective Date

It is critical that prosecutorial discretion decision-making information be promptly and accurately documented in PLAnet under applicable national and local SOPs. Wherever possible, copies of requests for prosecutorial discretion, supporting documentation, and any other related materials should be uploaded to PLAnet.[36] Chief Counsel should develop any local SOPs that may be required to comply with the Mayorkas Memorandum and this guidance. To ensure successful development of relevant SOPs and stakeholder outreach, this memorandum will take effect on April 25, 2022.

Official Use Disclaimer

This memorandum contains legally privileged information and is intended *For Official Use Only*. It is intended solely to provide internal direction to OPLA attorneys and support staff regarding the implementation of Executive Orders and DHS guidance. It is not intended to, does not, and may not be relied upon to create or confer any right or benefit, substantive or procedural, enforceable at law or equity by any individual or other party, including in removal proceedings or other litigation involving DHS, ICE, or the United States, or in any other form or manner whatsoever. Likewise, this guidance does not and is not intended to place any limitations on DHS's otherwise lawful enforcement of the immigration laws or DHS's litigation prerogatives.

[36] If the case involves classified information, the OPLA attorney must transmit such information only in accordance with the DHS Office of the Chief Security Officer Publication, *Safeguarding Classified & Sensitive But Unclassified Information Reference Pamphlet* (Feb. 2012, or as updated), and all other applicable policies governing the handling of classified information.