August 20, 2021 (temporary update) - *This Policy Memorandum may be affected by the recent decision in* Texas, et. al v. United States, et. al, *21-cv-006 (SDTX). Please seek clarification regarding relevant points before application to a particular case.*

OOD
PM 21-25

Effective: June 11, 2021

To: All Immigration Court Personnel & Board of Immigration Appeals Personnel
From: Jean King, Acting Director
Date: June 11, 2021

JEAN KING Digitally signed by JEAN KING Date: 2021.06.11 16:27:19 -04'00'

EFFECT OF DEPARTMENT OF HOMELAND SECURITY ENFORCEMENT PRIORITIES

PURPOSE:	Provides EOIR policies regarding the effect of Department of Homeland Security enforcement priorities and initiatives.
OWNER:	Office of the Director
AUTHORITY:	8 C.F.R. § 1003.0(b)
CANCELLATION:	None.

I. Introduction

President Biden issued Executive Order 13993 on January 20, 2021, and directed relevant agencies to take appropriate action to review and "reset the policies and practices for enforcing civil immigration laws to align enforcement" with the Administration's priorities "to protect national and border security, address the humanitarian challenges at the southern border, and ensure public health and safety." Exec. Order No. 13993, 86 Fed. Reg. 7,051 (Jan. 20, 2021).

Accordingly, the Department of Homeland Security (DHS) has issued a number of memoranda and guidance documents regarding its enforcement priorities and framework for the exercise of prosecutorial discretion.[1] Those memoranda establish the DHS general enforcement and removal priorities as three categories of cases of noncitizens who present risks to (1) national security, (2) border security, and (3) public safety.[2]

[1] *See, e.g.*, Memorandum from John D. Tasviña, Principal Legal Advisor, ICE, Office of the Principal Legal Advisor (OPLA), to All OPLA Att'ys, *Interim Guidance to OPLA Att'ys Regarding Civil Immigr. Enf't and Removal Policies and Priorities* (May 27, 2021), *available at* https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf; Memorandum from Tae D. Johnson, Acting Dir., ICE, to All ICE Emps., *Interim Guidance: Civil Immigr. Enf't and Removal Priorities* (Feb. 18, 2021), *available at* https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf.

[2] These DHS memoranda and DHS priorities do not change EOIR's current adjudication priorities, which remain in effect. *See, e.g.*, PM 21-23, *Dedicated Docket* (May 28, 2021); Exec. Office for Immigr. Rev. Mem., *Case Priorities and Immigration Court Performance Measures* (Jan. 2018).

Through individualized review of pending cases, DHS, U.S. Immigration and Customs Enforcement (ICE), attorneys will be determining which cases are enforcement priorities and which are not. Overall, these memoranda explain that DHS will exercise discretion based on individual circumstances and pursue these priorities at all stages of the enforcement process. This includes a wide range of enforcement decisions involving proceedings before EOIR, such as deciding whether to issue, reissue, serve, file, or cancel Notices to Appear; to oppose or join respondents' motions to continue or to reopen; to request that proceedings be terminated or dismissed; to pursue an appeal before the Board of Immigration Appeals (BIA); and to agree or stipulate to bond amounts or other conditions of release. Accordingly, these memoranda are likely to affect many cases currently pending on the immigration courts' and BIA's dockets.

II. Role of the EOIR Adjudicator

The role of the immigration court and the BIA, like all other tribunals, is to resolve disputes. *Cf.* 8 C.F.R. §§ 1003.1(d) ("The Board shall resolve *the questions before it* in a manner that is timely, impartial, and consistent with the Act and regulations."), 1003.10(b) ("In all cases, immigration judges shall seek to resolve *the questions before them* in a timely and impartial manner consistent with the Act and regulations.") (emphasis added). At the present time, there are over 1.3 million combined cases pending before the immigration courts[3] and the BIA.[4] In light of the DHS memoranda, it is imperative that EOIR's adjudicators use adjudication resources to resolve questions before them in cases that remain in dispute.

A. Immigration Court

Immigration judges should be prepared to inquire, on the record, of the parties appearing before them at scheduled hearings as to whether the case remains a removal priority for ICE and whether ICE intends to exercise some form of prosecutorial discretion, for example by requesting that the case be terminated or dismissed, by stipulating to eligibility for relief, or, where permitted by case law, by agreeing to the administrative closure of the case.[5] The judge should ask the respondent or his or her representative for the respondent's position on these matters, and take that position into account, before taking any action.

In addition, immigration judges are encouraged to use all docketing tools available to them to ensure the fair and timely resolution of cases before them.

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[3] Exec. Office for Immigr. Rev., *Adjudication Statistics: Pending Cases, New Cases, and Total Completions*, Apr. 19, 2021, *available at* https://www.justice.gov/eoir/page/file/1242166/download.

[4] Exec. Office for Immigr. Rev., *Adjudication Statistics: Case Appeals Filed, Completed, and Pending*, Apr. 19, 2021, *available at* https://www.justice.gov/eoir/page/file/1248501/download.

[5] Administrative closure is currently permitted in the Third, Fourth, and Seventh Circuits. *See Arcos Sanchez v. Att'y Gen. U.S.A.*, 997 F.3d 113 (3d Cir. 2021); *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020); *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019). Administrative closure is currently permitted in the Sixth Circuit, but only to allow respondents to apply with U.S. Citizenship and Immigration Services for provisional unlawful presence waivers. *See Garcia-DeLeon v. Garland*, __ F.3d __, 2021 WL 2310055 (6th Cir., June 4, 2021). Administrative closure is not currently permitted in the other circuits. *See Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

B. Board of Immigration Appeals

Appellate immigration judges should be prepared to review and adjudicate motions from DHS regarding prosecutorial discretion. In addition, appellate immigration judges may solicit supplemental briefing from the parties regarding whether the case remains a removal priority for ICE or whether the parties intend to seek or exercise some form of prosecutorial discretion. *See* 8 C.F.R. § 1003.1(e)(9) ("[T]he Board may rule, in the exercise of its discretion . . . , on any issue, argument, or claim not raised by the parties, and the Board may solicit supplemental briefing from the parties on the issues to be considered before rendering a decision.").

III. Conclusion

EOIR expects the parameters of the new DHS memoranda to focus DHS resources on cases that meet the DHS-determined priorities. All EOIR adjudicators are encouraged to use docketing practices that ensure respondents receive fair and timely adjudications, and act consistently with the role of the immigration courts and the BIA in resolving disputes. That includes disposing of cases as appropriate, based on the specific circumstances of the individual matter, with consideration of ICE's determinations that 1) a case does not fit within the Secretary's enforcement priorities, and 2) accordingly, pursuit is no longer in the best interest of the Government. If you have any questions, please contact your Assistant Chief Immigration Judge or the Chief Appellate Immigration Judge.

Nothing in this PM is intended to replace independent research, the application of case law and regulations to individual cases, or the decisional independence of immigration judges and appellate immigration judges as defined in 8 C.F.R. §§ 1003.1(d)(1)(ii), 1003.10.