

## Recommendations for DOJ and EOIR Leadership

### To Systematically Remove Non-Priority Cases from the Immigration Court Backlog

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The extraordinary and unprecedented backlog of cases in the nation's immigration courts is making it impossible for the courts to deliver fair and consistent results and is undermining the integrity of the entire removal system. During the Obama administration, the backlog of cases pending before the immigration courts grew substantially from nearly 200,000 cases to over 500,000 cases.<sup>1</sup> Under President Trump, that backlog has ballooned to over 1.26 million cases.<sup>2</sup> As a result, cases now take on average over 800 days to complete.<sup>3</sup> In many jurisdictions, the wait time for a hearing exceeds four years.<sup>4</sup> The bottleneck for the entire removal system caused by the court backlog, if not addressed quickly, presents a serious obstacle to the Biden administration's goal of ensuring the fair and efficient processing of all removal cases.<sup>5</sup>

The Biden administration should act immediately to substantially reduce the immigration court backlog. This memo proposes a systematic and efficient method for how the leadership of the Department of Justice (DOJ) and the Executive Office for Immigration Review (EOIR) can identify and remove significant categories of non-priority cases from consideration on the court's docket. By systematically removing such non-priority cases from the courts active docket, the Biden administration will be far more effective in implementing its new enforcement priorities and in ensuring just results in removal cases.<sup>6</sup>

### Top DOJ Leadership Is Needed to Implement Immigration Enforcement Priorities

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<sup>1</sup> In the decade prior to President Obama assuming office, the number of pending immigration court cases remained relatively consistent, hovering between 100,000 and 200,000 cases. TRAC Immigration, *Backlog of Pending Cases in Immigration Courts*, (data through October 2020), [https://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog.php](https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php).

<sup>2</sup> *Id.*

<sup>3</sup> TRAC Immigration, *Immigration Court Processing Time by Outcome*, (data through October 2020) (FY 2020 national average days to completion was 829), [https://trac.syr.edu/phptools/immigration/court\\_backlog/](https://trac.syr.edu/phptools/immigration/court_backlog/).

<sup>4</sup> TRAC Immigration, *Crushing Immigration Judge Caseloads* (Oct. 25, 2019), <https://trac.syr.edu/immigration/reports/579/>.

<sup>5</sup> Greg Chen and Peter Markowitz, *The Hill*, "Unclogging the Nation's Immigration Court System, February 1, 2021, [Unclogging the nation's immigration court system | TheHill](https://www.thehill.com/policy/immigration/2021/02/01/unclogging-immigration-court-system/).

<sup>6</sup> Specific recommendations were described in the recommendations compiled by the Center for Community Change with input from many organizations which has been submitted to the transition team: "Year One Recommendations to the Executive Branch: Interior Enforcement, Affirmative Relief, and Temporary Protected Status," December 14, 2020 [hereinafter Community Change Memorandum]. The Community Change Memorandum provides a proposed set of criteria that should be used to identify cases for removal from the immigration court docket and urges the incoming administration to "cease all prosecutorial work" on non-detained cases during a moratorium period while the resources of the DHS Chief Counsel offices are redirected identify "all existing cases" that fit the recommended criteria. This memorandum is intended to supplement and facilitate that recommendation by identifying which of the proposed criteria could be systematically implemented by EOIR at a headquarters level without the need for individual file reviews. By quickly and systematically removing large categories of cases through headquarters action, DHS Chief Counsel offices could focus their file review on the remaining cases.

The first and most important step is for the Attorney General and top DOJ leadership to convey its commitment to implementing the new administration’s enforcement priorities and re-establishing the robust exercise of prosecutorial discretion. To achieve these ends, within the first days of entering office, the administration should appoint a high-level official with reporting authority to the DAG to oversee immigration policy and install new EOIR leadership that shares the administration’s vision for a fair and effective enforcement system.

Though immigration judges do not technically engage in the exercise of prosecutorial discretion, it is necessary and appropriate for DOJ and EOIR management to facilitate DHS’s exercise of prosecutorial discretion by removing non-priority cases from consideration or rescheduling them to a later date. Moreover, DOJ and EOIR have independent authority to remove large numbers of non-priority cases from consideration to improve the efficiency of the immigration courts.

### **DOJ Directive on Docket Management and Prioritization**

Early in the new term, the Attorney General or DAG should issue a directive instructing EOIR to utilize all available mechanisms to immediately and systematically set aside non-priority cases on the court’s docket. In the alternative, the directive could be issued by the EOIR director, but it would carry more force among EOIR personnel, especially immigration judges, if it comes from the Attorney General and top DOJ leadership. The directive would identify the categories of cases that EOIR management could systematically identify and remove from the court’s active docket without the need for individual case reviews by immigration judges. Given the failure of the Trump administration’s current case management system to process cases efficiently, the Biden administration would certainly be justified in implementing a new system that reprioritizes case on the docket.

By framing it as a management initiative, the removal of non-priority cases from the court docket can be implemented using case management tools at the disposal of DOJ and EOIR management. In particular, the EOIR director has clear authority to shift the timing of cases and defer adjudication of cases pursuant to 8 C.F.R. § 1003.0(b)(1)(ii). Specifically, the director has the “power, in his discretion, to set priorities or time frames for the resolution of cases [and] to direct that the adjudication of certain cases be deferred...” This management authority can also be exercised by the Chairman of the BIA, the Chief Immigration Judge, and other judge managers.<sup>7</sup>

Importantly, the shifting of non-priority cases off the docket can be accomplished without the use of administrative closure, termination, or continuances—powers which have been severely constrained by AG opinions and, with respect to administrative closure and continuances, by recent regulation.<sup>8</sup> Immigration judges will not need to be involved in this process. Instead, DOJ

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<sup>7</sup> See 8 C.F.R. §§ 1003.1(a)(2)(i)(C), 1003.9(b)(3) (identifying the similar subordinate authority of the Chairman of the BIA and the Chief Immigration Judge).

<sup>8</sup> See 85 FR 52491, EOIR final rule (amending the regulations regarding administrative closure) (effective date: January 15, 2021), [available on the AILA website](#); 85 FR 75925, EOIR notice of proposed rulemaking (defining the term “good cause” in the context of continuances, adjournments, and postponements) (comment deadline: 12/28/20), [available on the AILA website](#). Indeed, the power of EOIR officials to defer adjudication of case under the regulations cited above has been recently reaffirmed by the Attorney General, even as he severely constrained other critical case management tools. *Matter of Castro-Tum*, 27 I. & N. Dec. 271, 286 (2018).

and EOIR management should instruct court administrators to execute the deferral of the non-priority cases. While the deferral of non-priority cases should happen immediately, the administration should also work to restore, as quickly as possible, the administrative closure power and other authorities undermined by the Trump administration.

The directive should instruct EOIR to defer adjudication of cases identified as non-priorities pursuant to 8 C.F.R. § 1003.00(b)(1)(ii), 8 C.F.R. § 1003.1(a)(2)(i)(C), 8 C.F.R. § 1003.9(b)(3). Functionally, deferred cases can be completely taken off calendar (though they would still technically be active). Alternatively, they could be rescheduled (“parked”) to a distant date until intervening events arise or DOJ/EOIR leadership provides directions. The effect is similar to administrative closure but the cases would remain on calendar.

In order to ensure adherence to the substantive criteria employed and to avoid prejudice to individuals, EOIR should notify both DHS and the respondent of their intention to defer adjudication and the criteria relied upon for that determination. Prior to deferral, DHS should be afforded the opportunity to move to dismiss the case under 8 C.F.R. § 239.2(c) as “no longer in the best interest of the government.”<sup>9</sup> Immigration judges should be directed to grant such motions, absent opposition from the respondent. If DHS decides not to so move, it should also be afforded an opportunity to object to deferral if the case does not in fact satisfy the criteria relied upon. The respondents should likewise be afforded an opportunity to object if deferral would prejudice them. EOIR headquarters should establish a centralized mechanism to review and act upon such objections.

With regard to some cases that are eligible for relief before USCIS (see category 2 below), USCIS will lack jurisdiction over the affirmative application until and unless the removal proceedings are dismissed or closed.<sup>10</sup> Accordingly, to the extent DHS does not move to dismiss such cases and they are instead deferred, the cases should be coded in an easily identifiable manner such that they can be administratively closed once that authority is restored.

### **Criteria That Should Be Used to Systematically Identify Cases**

To remove the non-priority cases from the docket, EOIR management will need a simple and effective way to identify specific criteria at the headquarters level. It would be easiest if the identifying information appears in the EOIR database. Among the various criteria AILA and other advocates<sup>11</sup> have recommended for non-priority cases, the ones that appear most amenable to identification through EOIR data management systems are:

- 1) old cases pending for years;

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<sup>9</sup> See 8 C.F.R. § 239.2(c) (permitting DHS to move to dismiss any case where the notice to appear was “improvidently issued” or where “continuation is no longer in the best interest of the government” (incorporating grounds enumerated in 8 C.F.R. § 239.2(a))); 8 C.F.R. § 1239.2 (same). See also *Matter of S-O-G- & F-D-B-*, I&N Dec. 462, 464 (A.G. 2018) (reaffirming DHS authority to move to dismiss on such bases); more information available at [AILA- AG Issues Decisions Relating to Immigration Judge Termination and Dismissal Authority](#)

<sup>10</sup> See 8 C.F.R. § 245.2(a)(1) (explaining that USCIS lacks jurisdiction over adjustment applications when a person has pending removal proceedings); 8 C.F.R. § 1245.2(a)(1)(i) (explaining that the immigration judge has “exclusive jurisdiction” over adjustment applications for people in removal proceedings).

<sup>11</sup> See Community Change Memorandum *supra* note 5.

- 2) cases eligible for relief that can be adjudicated by USCIS;
- 3) cases previously closed under the Obama administration; and
- 4) cases in which the grounds for removability are based on drug use offenses.

### **1) Deferral or dismissal of old cases**

Old cases can be identified in the EOIR database by the date of the filing of the NTA. Based upon an analysis of the publicly available EOIR Case Data system,<sup>12</sup> there are 215,787 open cases before EOIR that have been pending for over five years.<sup>13</sup> This represents 17 percent of the current case backlog. While EOIR priorities have changed numerous times over recent years, cases that have been pending longest are, by definition, those the agency has not prioritized. Moreover, there are strong equitable arguments that weigh in favor of treating old cases as non-priority matters.

### **2) Deferral or dismissal of cases that can be adjudicated by USCIS**

There are large categories of individuals who are in removal proceedings before EOIR who have viable pathways to lawful status that could be adjudicated by USCIS through affirmative applications, such as applications for asylum, Special Immigrant Juvenile Status, U visas, and adjustment through family-based visa petitions. It makes little sense to clog the immigration courts with these cases that may be eligible for relief specifically authorized by Congress. These cases should be removed from the immigration court calendar to facilitate their adjudication by USCIS. If these individuals' applications are unsuccessful, DHS could consider anew whether it is warranted to commit additional enforcement resources to reinstate removal proceedings.<sup>14</sup>

There are readily available mechanisms to identify these cases through existing EOIR data. EOIR's data systems track applications for relief filed before EOIR and have codes that indicate collateral applications pending before USCIS. These data markers reveal that there are at least 462,000 pending cases (or 37 percent of the current backlog) that could be adjudicated by USCIS.<sup>15</sup> This number is a conservative estimate as it is likely that many individuals with applications pending before USCIS may not be reflected in the EOIR data.

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<sup>12</sup> EOIR Case Data, publicly available at <https://www.justice.gov/eoir/foia-library-0>.

<sup>13</sup> This number was calculated as follows: We identified pending cases in the EOIR Case Data, current through October 1, 2020, by finding all Removal, Exclusion, Deportation, Asylum Only, and Withholding Only cases that did not have a completion code or that had the non-final completion code for change of venue. This yielded 1,265,695 "pending cases." Among such pending cases there were 215,787 cases where the NTA filed date was on, or prior to, October 1, 2015. A three-year rule would expand this category significantly, impacting 458,382, or 36% of, current cases.

<sup>14</sup> On June 28, 2018, USCIS dramatically changed its policy and greatly expanded the situations in which USCIS will issue NTAs. AILA and other organizations have recommended that the 2018 policy be rescinded and the previous policy established by memorandum of November 7, 2011 under the Obama administration be restored. See [AILA Policy Brief](#), "New USCIS Notice to Appear Guidance," July 17, 2018.

<sup>15</sup> Some applications for relief can be adjudicated by EOIR and USCIS. Accordingly, we arrived at the 465,000 figure by first identifying all cases in the EOIR Case Data with application types that could be adjudicated by EOIR, including: NACARA adjustment; removal of conditions on LPR's status; section 245 adjustment of status; registry; Haitian Refugee Immigration Fairness Act; asylum or asylum/withholding (though only the asylum portion of such joint applications could be adjudicated by EOIR). For these final asylum categories, we excluded cases where the asylum application was originated affirmatively because USCIS would already have adjudicated such cases and thus

### 3) Deferral or dismissal of cases closed under the Obama administration and reopened by the Trump administration

During the Obama administration, immigration courts administratively closed over 200,000 cases, generally because they fell outside of enforcement priorities or because the individual was eligible for relief from USCIS.<sup>16</sup> The Trump administration reopened almost 75,000 of those cases.<sup>17</sup> Such cases could be easily identified through the EOIR Case Data using the same methodology employed in the cited TRAC report.

### 4) Deferral or dismissal of cases involving drug use offenses

In many removal cases, the sole grounds of removability are drug use offenses. Due to the overwhelming evidence that systemic racial discrimination has resulted in the targeting of people of color and immigrants for drug use offenses, these offenses should not be treated as priorities for immigration enforcement. The Biden-Sanders Unity Task Force recommendations noted, “our fight to end systemic racism in our country extends to our immigration system.”<sup>18</sup> One important step the new Administration should take to achieve a more equitable system would be to deprioritize removals where the sole removal charge was for deportability or inadmissibility related to controlled substance offenses. Such cases can be identified in the EOIR Case Data where the sole removability charge is related to a drug use offense.<sup>19</sup>

The EOIR Case Data will be a powerful but imperfect tool to identify cases in the four categories described above. To prevent over-inclusion where the case does not meet the criteria for deferral, this memo sets forth a procedure for providing notice to the parties and the opportunity to object. On the other hand, this systematic method will not be able to identify all the non-priority cases. To address the problem of under-inclusion, immigration judges should be instructed to identify and defer non-priority cases or bring such cases to the attention of EOIR management.

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it would not make sense to return such cases to USCIS. This analysis yielded 439,545 unique cases that had at least one of the designated applications.

In addition, there are certain pathways to status that only USCIS has jurisdiction to adjudicate (such as I-360 applications related to Special Immigrant Juvenile Status and U-visas). Such applications do not appear to be reliably captured in the EOIR data but certain adjournment codes (codes 7a & 7b) indicate the presence of such applications. There are 36,175 pending cases in which the most recent adjournment indicates the presence of a USCIS application. Combining the two categories yields 462,252 unique cases that have an affirmative pathway to status through USCIS. One large category of such cases that is likely not captured in the EOIR data reliably are people with approved I-130 Family Relative Petitions without a current priority date. EOIR practice used to be to regularly adjourn such cases for long periods to allow an immigrant visa to become available. This practice should be restored through the deferral mechanism.

<sup>16</sup> TRAC Immigration, *The Life and Death of Administrative Closure*, Appendix Table 1 (Sept. 10, 2020), <https://trac.syr.edu/immigration/reports/623/>.

<sup>17</sup> *Id.*

<sup>18</sup> *Biden-Sanders Unity Task Force Recommendations*, Joe Biden for President: Official Campaign Website, <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf>.

<sup>19</sup> NTA charges are recorded in the EOIR Case Data. It can be presumed that any person facing removal solely based on 8 U.S.C. § 1227(a)(2)(B) (relating to controlled substance offenses) or 8 U.S.C. § 1182(a)(2)(A)(i)(II) (same) is a drug use offense because drug trafficking offenses are charged under separate provisions. Compare 8 U.S.C. §§ 1101(a)(43)(B), 1182(a)(2)(C), 1227(a)(2)(A)(iii).

### **Additional Inquiry into the EOIR Database**

To verify what data is available and to refine and improve upon the methodology suggested above for systematically identifying such cases, the Biden team will need access to the EOIR database and consult trusted EOIR personnel to determine exactly what information is in the database. It may help expedite this process for the transition team to request access to the non-public EOIR database or to ask for more information about what information is available in the database. In addition, in the last four years, the current EOIR leadership may have modified the CASE system (using “change requests”). The transition team may want to request information about these changes which may provide clues as to how EOIR data has been modified and what critical missing data may be recoverable. An expert on the publicly available EOIR Case Data was consulted for this memo and is available for consultation.

### **DOJ and EOIR’s Role in Implementing the Moratorium on Deportations**

Until the Biden administration sets new enforcement priorities and completes its review and reduction of the existing court docket, DOJ and EOIR should halt immigration court proceedings for nearly all pending cases.<sup>20</sup> With a majority of immigration judges having been appointed during the Trump administration (over 300 appointees) and case denial rates now reaching the highest levels in history,<sup>21</sup> it is essential that the new administration suspend proceedings to ensure no one is ordered removed without a fair hearing. There are other indications that the current leadership in EOIR is accelerating court removals. For example, pursuant to a new procedural memorandum, many jurisdictions are dispensing with master calendar hearings in certain cases.<sup>22</sup> Assistant chief immigration judges are issuing scheduling orders requiring people to file their applications for relief under short deadlines or risk losing the opportunity to apply for relief and being ordered removed without any hearing.<sup>23</sup> A suspension of immigration court proceedings will protect against such rushes to judgement and give the new administration time to shift the non-priority cases off the docket in the manner proposed in this memo.

### **Halting Appellate Cases Before the BIA or Appellate Immigration Judges**

At the appellate level, many people will be severely disadvantaged and harmed if pending appeals are not addressed during the moratorium. Under the revised case management system put in place during the Trump administration, the BIA is required to screen cases for summary dismissal *before* getting the paper record from the immigration court or obtaining the recorded transcript.<sup>24</sup> In particular, pro se asylum-seekers are being harmed by these summary dismissals.

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<sup>20</sup> Exceptions should include detained cases, where both the respondent and the government have a strong interest in expeditious resolution and cases where a respondent could be prejudice by delay.

<sup>21</sup> See Gregory Chen, “The Urgent Need to Restore Independence to America’s Politicized Immigration Courts,” Just Security, November 12, 2020, available at [The Urgent Need to Restore Independence to America’s Politicized Immigration Courts - Just Security](https://www.justsecurity.org/2020/11/12/the-urgent-need-to-restore-independence-to-americas-politicized-immigration-courts/)

<sup>22</sup> James McHenry, EOIR Director, procedural memorandum 21-05, “Enhanced Case Flow Processing in Removal Proceedings,” effective date December 1, 2020, available at <https://www.aila.org/infonet/eoir-issues-guidance-on-enhanced-case-flow>.

<sup>23</sup> See AILA Practice Alert: New Scheduling Orders in Removal Proceedings, updated December 2, 2020, available at <https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/practice-alert-new-scheduling-orders-in-removal>.

<sup>24</sup> See 85 FR 81588. EOIR final rule on appellate procedures and decisional finality (effective date: January 15, 2021), available at [AILA - EOIR Final Rule on Appellate Procedures and Administrative Closure](https://www.federalregister.gov/documents/2020/12/23/2020-12-23-eoir-final-rule-on-appellate-procedures-and-administrative-closure). The rule codifies

The Biden administration should explore the options for holding in abeyance, on a temporary basis, appeals that are subject to summary dismissals.

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the memorandum by James McHenry, EOIR Director, “Case Processing at the Board of Immigration Appeals,” October 1, 2019, available at [AILA - EOIR Releases a Policy Memo on Case Processing at the BIA](#).