

## Prosecutorial Discretion by U.S. Immigration and Customs Enforcement (ICE) in Cases Involving Immigrant Workers

### What is prosecutorial discretion?

“Prosecutorial discretion” is a law enforcement agency’s authority to decide whether and to what degree to enforce the law in any given case. For example, police officers exercise prosecutorial discretion when deciding to issue a speeding ticket or only giving a warning to a motorist. In the immigration context, the Department of Homeland Security (DHS) can decide to prioritize certain immigration violations, and focus its resources on only the most pressing cases.

In memos released by Immigrations and Customs Enforcement (ICE) Director John Morton, the government has stated that it will focus its immigration enforcement resources in cases involving:

- National security;
- Public safety;
- Border security, and the
- Integrity of the immigration system.<sup>1</sup>

ICE memos also outlined guidelines for exercising prosecutorial discretion in cases where individuals involved are in efforts to protect their **civil and labor rights and liberties** and in cases involving victims and witnesses of crimes.<sup>2</sup> Most recently, in November 2011, DHS officials announced that it would engage in pilot projects in Denver, CO, and Baltimore, MD, to test local implementation of prosecutorial discretion.<sup>3</sup>

### What does prosecutorial discretion look like in the immigration context?

Prosecutorial discretion may be a way for immigrants with pending cases and with no other forms of immigration relief to avoid removal. ICE can exercise prosecutorial discretion in a number of ways. For example, ICE can:

- Decide not to issue or to rescind a Notice to Appear (“NTA”);
- Release an individual from detention

---

<sup>1</sup> Memorandum from John Morton, Director, ICE, “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens,” (June 17, 2011) (available at: <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>), hereinafter “Exercising Prosecutorial Discretion,” at 2-3.

<sup>2</sup> Memorandum from John Morton, Director, ICE, “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs,” (June 17, 2011) (available at: <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>), hereinafter “Certain Victims, Witnesses, and Plaintiffs.”

<sup>3</sup> Department of Homeland Security, “Next Steps in the Implementation of the Prosecutorial Discretion Memorandum and the August 18th Announcement on Immigration Enforcement Priorities,” (Nov. 17, 2011) (available at: <http://www.ice.gov/doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf>).

- Grant deferred action, parole, or stay a final order of removal;
- Issue or cancel a detainer;
- Focus enforcement resources on particular administrative violations or conduct;
- Settle or dismiss a removal proceeding;
- Grant of administrative relief, including parole.<sup>4</sup>

### Why does prosecutorial discretion matter to immigrant workers?

Immigrant workers who seek to exercise their workplace rights or engage in protected labor organizing may often face retaliation by their employers. Employers may seek to use a worker's immigration status to gain the upper hand in a labor dispute, and contact immigration or other local law enforcement agencies. Immigrant workers with pending civil rights claims or who are victims of workplace abuse and crimes may also catch the eye of immigration authorities through the operation of the Secure Communities program or other enforcement programs. In cases where such individuals lack claims to immigration relief, a request for favorable exercise of prosecutorial discretion may help them remain in the country, at least temporarily.

### Which ICE officers may exercise prosecutorial discretion?

A broad range of ICE officers have the authority to exercise prosecutorial discretion. They include:

- Officers, agents, and supervisors within Enforcement and Removal Operations (ERO) and Homeland Security Investigations (HSI) who have authority to engage in civil immigration enforcement;
- Attorneys and their respective supervisors within the Office of the Principal Legal Advisor (OPLA) who have authority to represent ICE in proceedings before the Executive Office for Immigration Review (EOIR);
- The Director, Deputy Director, and senior staff at ICE;
- ICE attorneys may also exercise prosecutorial discretion in removal proceedings before the Executive Office of Immigration Review, on referral to the Attorney General, or during an appeal to the federal courts.<sup>5</sup>

### What factors does ICE consider when deciding to exercise prosecutorial discretion?

ICE has identified numerous factors to consider when deciding to grant prosecutorial discretion. Most importantly for immigrant workers, ICE considers as a factor an individual's cooperation with federal, state, or local law enforcement authorities, including investigations by the Department of Labor (DOL) or National Labor Relations Board (NLRB).<sup>6</sup> ICE has stated that ***it is generally against ICE policy to remove individuals in the midst of a "legitimate effort to protect their civil rights or civil liberties."*** Similarly, ICE has specified that it is against department policy to initiate removal proceedings against immediate victims or witnesses to a crime, including victims of domestic violence.<sup>7</sup>

Additional factors include: the individual's length of presence in the United States, pursuit of education in the United States, service in the military, lack of criminal history, immigration history, ties and contribution to the community, and U.S. citizen family members.<sup>8</sup>

---

<sup>4</sup> "Exercising Prosecutorial Discretion," at 2-3.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 4.

<sup>7</sup> "Certain Victims, Witnesses, and Plaintiffs," at 1-2.

<sup>8</sup> "Exercising Prosecutorial Discretion," at 4-5.

However, ICE will consider negative factors, including risk to national security, a lengthy criminal record, gang membership, or an egregious record of immigration violations, including illegal re-entry and immigration fraud.<sup>9</sup> ICE's November 17, 2011 Guidance to ICE Attorneys also states that cases involving a felony conviction, or misdemeanor violations involving violence, sexual abuse, driving under the influence, and drug distribution fall under ICE's enforcement priorities and should be pursued in an "accelerated manner."<sup>10</sup>

### **In what potential scenarios could immigrant workers be eligible for prosecutorial discretion?**

Immigrant workers who have encountered ICE enforcement or removal proceedings may be eligible for a favorable exercise of prosecutorial discretion on the following bases:

- *Cooperation in DOL or NLRB Investigations.* ICE has specified that it is against its policy to remove individuals engaged in efforts to protect their civil rights or civil liberties. Special consideration should also be given to those who have cooperated or are currently cooperating with investigations by agencies such as the DOL or NLRB.
- *Involvement in Protected Workplace Activities or Civil Rights Complaints.* ICE has stated that its officers should exercise discretion when making detention and enforcement decisions in the cases of individuals pursuing legitimate civil rights complaints.<sup>11</sup> In addition, ICE has noted that "**particular attention should be paid to . . . individuals engaging in a protected activity related to civil or other rights (for example, union organizing or complaining to authorities about employment discrimination or housing conditions) who may be in a non-frivolous dispute with an employer, landlord, or contractor.**"<sup>12</sup>
- *Advocates should consider the language of DHS's Operating Instruction 287.3a, which requires ICE agents to determine whether information concerning the employment of undocumented individuals is provided to interfere with the rights of employees to "form, join or assist labor organizations or to exercise their rights not to do so; to be paid minimum wages and overtime; to have safe work places; to receive compensation for work related injuries; to be free from discrimination based on race, gender, age, national origin, religion, handicap; or to retaliate against employees for seeking to vindicate these rights."*<sup>13</sup> This language provides specific examples of protected activities related to workplace disputes, and advocates should argue that cases described under Operating Instruction 287.3a qualify for a favorable exercise of prosecutorial discretion.
- *Victim of Workplace Crimes and Abuse.* ICE has specified that particular attention should be paid to "victims of domestic violence, human trafficking, or other serious crimes."<sup>14</sup> This language, which tracks the language of 8 C.F.R. § 214.14, clearly contemplates applicants and individuals eligible for the U visa, including immigrant workers who may have been victims of crimes commonly taking place in

---

<sup>9</sup> *Id.* at 4.

<sup>10</sup> Immigrations and Customs Enforcement, "Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review," Nov. 17, 2011, (available at: [http://www.ice.gov/doclib/foia/dro\\_policy\\_memos/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf](http://www.ice.gov/doclib/foia/dro_policy_memos/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf)), hereinafter "Guidance to ICE Attorneys."

<sup>11</sup> Certain Victims, Witnesses, and Plaintiffs, at 2.

<sup>12</sup> *Id.*

<sup>13</sup> Operating Instruction 287.3a, "Questioning Persons during Labor Disputes," available at: <http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-53690/0-0-0-61072/0-0-0-61097.html>.

<sup>14</sup> Certain Victims, Witnesses, and Plaintiffs, at 2.

employment settings. Qualifying criminal activity under the U visa statute includes witness tampering, obstruction of justice, blackmail, perjury, involuntary servitude, forced labor, labor trafficking, false imprisonment, extortion, assault, and sexual assault by their employer. Workers who have cooperated with law enforcement in investigation of the crime, and have suffered substantial mental or physical abuse, may be eligible for a U visa. 8 C.F.R. § 214.14.

### **If ICE favorably grants prosecutorial discretion in a removal proceeding, does this mean I have lawful immigration status?**

No. The grant of prosecutorial discretion does not confer any lawful immigration status, and DHS may offer different types of prosecutorial discretion. For example, administrative closure of a case means that a case is temporarily removed from the immigration court's calendar. The individual still remains in removal proceedings, and the case can be rescheduled to proceed at a later date. Termination of proceedings means that a removal case has been closed, and the individual is no longer in immigration proceedings. However, ICE may issue a new Notice to Appear at any time, and again place the individual in immigration proceedings.

### **If ICE favorably grants prosecutorial discretion in a removal proceeding, does this mean I automatically get work authorization?**

NO. Although early announcements about the prosecutorial discretion policy suggested that individuals whose cases were administratively closed would be eligible for employment authorization documents,<sup>15</sup> DHS has not issued any guidance on how individuals granted prosecutorial discretion can obtain work authorization. DHS officials have stated in recent public stakeholder meetings that individuals who have had their cases administratively closed would not be granted employment authorization unless they had an independent basis for work authorization eligibility. Advocates should and are currently pressing the Obama administration to clarify its position and to grant work authorization as promised earlier.

### **Additional resources:**

- Alexa Alonzo, Legal Action Center, American Immigration Council, DHS Review of Low Priority Cases for Prosecutorial Discretion, (Dec. 12, 2011), [http://www.immigrationpolicy.org/sites/default/files/DHS\\_Review\\_of\\_Low\\_Priority\\_Cases\\_9-1-11.pdf](http://www.immigrationpolicy.org/sites/default/files/DHS_Review_of_Low_Priority_Cases_9-1-11.pdf).
- Mary Kenney, Legal Action Center, American Immigration Council, Prosecutorial Discretion: How to Advocate for Your Client (June 24, 2011), <http://www.legalactioncenter.org/sites/default/files/ProsecutorialDiscretion-11-30-10.pdf>.

Where can I get help? For more information on prosecutorial discretion as it relates to immigrant workers, please contact:

**Eunice Cho**, *Skadden Fellow/Staff Attorney* | [echo@nelp.org](mailto:echo@nelp.org) | 510-663-5707

**Rebecca Smith**, *Immigrant Worker Justice Project Coordinator* | [rsmith@nelp.org](mailto:rsmith@nelp.org) | 206-324-4000

**Tsedeye Gebreselassie**, *Staff Attorney* | [tsedeye@nelp.org](mailto:tsedeye@nelp.org) | 212-285-3025 ext. 314

---

<sup>15</sup> Letter from DHS Secretary Janet Napolitano, to Senator Dick Durbin, August 18, 2011.