

April 15, 2015

The Honorable Jeh Johnson
Secretary, U.S. Department of Homeland Security

Re: Implementation of the November 20, 2014 prosecutorial discretion policy

Dear Secretary Johnson:

We write on behalf of immigrant, faith, and labor groups, as well as legal experts from across the country, to express concerns regarding the implementation of the prosecutorial discretion policy articulated in your November 20, 2014 memorandum, "Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants" (Priorities Memo). We urge you to ensure that these new guidelines are implemented consistently and in a manner that ensures immigration enforcement is fair and just.

We are dismayed by recent statements by officials that contradict or undermine the goals of the Priorities Memo. Moreover, we have received numerous reports indicating that Immigration and Customs Enforcement (ICE) and Customs and Border Patrol (CBP) offices are failing to comply with the Priorities Memo. Long-time resident business-owners, homeowners, workers, community leaders, and dedicated family members are being taken from their families, detained, and sometimes even removed from the country without a meaningful review of their prosecutorial discretion requests, or without even an opportunity to request discretion. Recent enforcement actions, such as Operation Cross Check, stoke fears within immigrant communities about a return to overly aggressive enforcement that runs counter to the humane approach to which this Administration has publicly committed.

To avoid repeating mistakes of the past, we strongly urge you to institute more robust and effective training methods, accountability mechanisms, and oversight procedures for all relevant Department of Homeland Security (DHS) components and, in particular, ICE.

DHS policy on prosecutorial discretion and enforcement priorities

On November 20, 2014, President Obama announced significant changes to our nation's immigration enforcement system including the release of the Priorities Memo. The changes responded to the widely acknowledged failure of the existing enforcement regime, and were intended to ensure that DHS "conduct[s] enforcement more humanely within the confines of the law."¹ It is well-established practice for law enforcement agencies to set enforcement priorities and exercise prosecutorial discretion. Such prioritization ensures the smart use of finite enforcement resources. If consistently and properly carried out, such policies promise to promote efficiency and fairness, thereby better protecting the public while improving faith in the integrity of the immigration system more generally.

¹ Press Release, The White House, Readout of the President's Meeting with Congressional Hispanic Caucus Leadership (March 13, 2014), available at <https://www.whitehouse.gov/the-press-office/2014/03/13/readout-presidents-meeting-congressional-hispanic-caucus-leadership>.

The Priorities Memo accomplishes these goals by focusing finite immigration enforcement resources on those who pose “a threat[] to national security, public safety, and border security” while deprioritizing those who do not.² The Priorities Memo establishes three categories of immigration enforcement priorities depending on the type of immigration or criminal law violations an individual has committed. The fact that an individual may have committed an offense or immigration violation at some time in the past does not automatically make that person ineligible to receive a favorable exercise of prosecutorial discretion. Instead, under the policy, immigration enforcement personnel must evaluate whether each and every individual qualifies for prosecutorial discretion at every relevant stage of enforcement proceedings.

The Priorities Memo specifies that DHS will pursue removal against an individual who engaged in conduct identified as a priority, *unless* mitigating factors or conditions apply, in which case the person is no longer an enforcement priority at all.³ These “unless” clauses are included within every priority category. In that way, the Priorities Memo establishes a framework under which all individuals—including those who may appear to meet one or more priority factors but have strong equities and therefore do not constitute enforcement priorities—may receive a favorable exercise of prosecutorial discretion. The Priorities Memo describes some of the factors DHS personnel should consider:

extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative.⁴

Importantly, persons whose conduct does not fall within *any* of the priority categories are not required to demonstrate mitigating factors at all. Rather, they are not to be removed unless an ICE Field Office Director determines that removal of a specific individual would “serve an important federal interest.”⁵

Concerns about implementation of the prosecutorial discretion policy

Developments since the Priorities Memo was issued appear to validate our concerns. ICE Director Saldaña misstated the goals of the Priorities Memo in her recent testimony before the House Oversight and Government Reform Committee. Specifically, she testified that *all*

² Memorandum from Jeh C. Johnson, Secretary of Homeland Security on Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants to Thomas S. Winkowski, Acting Director of U.S. Immigration and Customs Enforcement, et al. (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [hereinafter “Priorities Memo”].

³ For example, in the Priority 1 category, the memorandum states:

removal of these aliens must be prioritized *unless*...in the judgment of an ICE Field Office Director, CBP Sector Chief or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the [noncitizen] is not a threat to national security, border security, or public safety and *should not therefore be an enforcement priority*.

Id. at 3 (emphasis added).

⁴ *Id.* at 6.

⁵ *Id.* at 5.

“criminal aliens” should be deported.⁶ That position contradicts the Priorities Memo, which requires that DHS review each and every case for prosecutorial discretion before pursuing removal.

The Administration deserves praise for clarifying that the Priorities Memo was unaffected by the preliminary injunction in *State of Texas, et al v. United States, et al.*, No. 1-14-CV-254 (S.D.Tex.).⁷ However, there appears to be confusion within DHS ranks about how the policy should be implemented. Already, we have received numerous reports indicating that several ICE offices are failing to comply with the Priorities Memo. The failure to provide clear reasons for prosecutorial discretion denials combined with short review periods suggest that some field offices are not reviewing submitted evidence. We have also received reports that some ICE offices have recently detained individuals who had previously been released from custody despite the fact that their circumstances had not changed. Even people who do not fall under any priority whatsoever have been removed.

If left uncorrected, the poor implementation of prosecutorial discretion threatens to unravel the policy announced on November 20th. We ask you to ensure that implementation of the policy is consistent with the Priorities Memo throughout DHS immigration enforcement agencies.

Lessons from the 2011 prosecutorial discretion initiative

Our organizations closely monitored the implementation of the 2011 prosecutorial discretion policy issued by then ICE Director John Morton and were deeply disappointed. Some ICE offices implemented the policy effectively, while other jurisdictions required considerable pressure from local advocates to make any operational changes at all.⁸ The 2011 memorandum was perceived as a failed attempt to set rational priorities and keep families together. Indeed, as late as February 2015, prosecutorial discretion had led to the closure of only 6.7 percent of all cases closed by the immigration courts, with wide variation from one court to another.⁹ Based on prior experience, we believe without adequate training and accountability, and streamlined review processes, implementation of the updated prosecutorial discretion policy will once again be inconsistently and unfairly applied.

⁶ Transcript of March 19, 2015 hearing before House Oversight and Government Reform Committee, Homeland Security Department Policies and Procedures for Non-Citizens.

Representative Hurd: "So do you think all criminal aliens should be deported?"

Director Saldana: "Yes. If we encounter them, get our hands on them, sure."

⁷ Press Release, Secretary of Homeland Security, Statement by Secretary Jeh C. Johnson Concerning the District Court's Ruling Concerning DAPA and DACA (Feb. 17, 2015), available at <http://www.dhs.gov/news/2015/02/17/statement-secretary-jeh-c-johnson-concerning-district-courts-ruling-concerning-dapa>; Press Release, Immigration and Customs Enforcement, DACA Statement (undated), available at <http://www.ice.gov/daca-statement>.

⁸ Julia Preston, *Deportations Under New U.S. Policy Are Inconsistent*, N.Y. TIMES, Nov. 12, 2011, available at http://www.nytimes.com/2011/11/13/us/politics/president-obamas-policy-on-deportation-is-unevenly-applied.html?_r=0.

⁹ See TRAC, Syracuse University, *Immigration Court Cases Closed Based on Prosecutorial Discretion*, Feb. 28, 2015, available at <http://trac.syr.edu/immigration/prosdiscretion/>.

Prosecutorial discretion is being applied inconsistently or, in some cases, not at all

As the cases below illustrate, the implementation of the Priorities Memo during the past several months has led to the very injustices you structured this policy to avoid. We have received very few reports of ICE officers exercising discretion in favor of individuals who have negative priority factors under the Priorities Memo but satisfy the relevant “unless” clause and therefore do not constitute enforcement priorities. In addition to the well-known case of Pastor Max Villatoro,¹⁰ we view the following cases as indicative of a troubling trend of DHS officers failing to consider the totality of the circumstances before taking enforcement action:

Individuals with no negative priority factors at all have faced enforcement action:

➤ **Henry David Alvarado Mendoza. Detained in October 2014 and removed in February 2015.**

Henry David Alvarado Mendoza lived in Houston, TX continuously from 2005 until October 2014. He had a voluntary return in early 2005 to Honduras but came back into the country soon after. In October 2014, Mr. Alvarado was being driven to work by his wife when the car was pulled over, Border Patrol arrived, and he was taken into custody. Mr. Alvarado is married to a legal permanent resident and they have one U.S. citizen child together as well as one U.S. citizen step-child from his wife’s past marriage. He also has two other U.S. citizen children from a different marriage. He is the sole custodial parent for the two children from his first marriage as their mother is no longer in the picture. He does not have a criminal history and is not an enforcement priority.

When he was apprehended in October, DHS reinstated the previous removal order from 2005. A reinstated removal order does not, even if entered after January 2014, fall under any of the priorities set forth in the Priorities Memo.

Throughout this process his attorney made several attempts to get an answer as to why Mr. Alvarado continued to be detained when he did not meet any of the enforcement priorities. Mr. Alvarado’s attorney filed three separate written requests for release over a three-month span. The final written request was sent to the San Antonio field office on February 16, 2015. Ten days later, Mr. Alvarado’s attorney received a response stating that her client was removed to Honduras on February 25, 2015.¹¹

¹⁰ Elise Foley, *Iowa Pastor Max Villatoro Deported After Community Rallies To Keep Him in U.S.*, HUFFINGTON POST, March 20, 2014, available at http://www.huffingtonpost.com/2015/03/20/max-villatoro-deported-n_6911610.html.

¹¹ For more information about Mr. Alvarado’s deportation, see Lomi Kriel, *Immigration Order Muddle Leads to Wrongful Detention*, HOUSTON CHRONICLE, March 9, 2015, available at <http://www.pressreader.com/usa/houston-chronicle/20150309/281479274884013/TextView>.

➤ **Huerta Molina, married and father of three children. Detained by ICE since July 2014.**

Since July 2014, ICE has been detaining Huerta Molina at the Essex County Detention Center in New Jersey. Mr. Molina has lived in the United States continuously since 2005. He is married and has four children, three of which are U.S. citizens and one that is DACA eligible. Mr. Molina was the primary care taker for the children while his wife worked. When Mr. Molina was detained, his wife became the sole caretaker. Mr. Molina has a pending U visa application (from a violent crime that involved an arson attack against his family) that was verified as *prima facie* approvable by USCIS. Mr. Molina has one prior misdemeanor conviction from 2000 for an assault. This assault is not a “significant misdemeanor” and as a result would not trigger the enforcement priorities. Mr. Molina also has a pending reasonable fear determination from an immigration judge which has been pending since October 2014. Mr. Molina is not currently removable because of this pending reasonable fear determination, which will not likely be decided until October 2015.

The following case examples reveal that ICE officers are failing to exercise discretion in favor of individuals who fall within the lowest enforcement priority, and who have factors that qualify them under the “unless” clause.

➤ **Mr. L, father and provider of three children, with no criminal history. Detained by ICE.**

Mr. L, is a father and provider of 3 children, ages 16, 14, and 8. The two youngest are U.S. citizens. Mr. L was issued a final order of removal in the summer of 2014. However, Mr. L has no criminal history apart from two convictions for driving on a revoked license. Upon reporting for an order of supervision, Mr. L was taken into ICE custody and transferred to an ICE detention center in a neighboring state. He is married and has a solid employment history. He attends church and enjoys the support of his community. Mr. L has been continuously present in the United States since his only entry in 1999. Notwithstanding these equities, ICE denied Mr. L’s request to stay his removal and continues to detain him.

➤ **Jose (pseudonym), father of U.S. citizen daughter. ICE declined prosecutorial discretion.**

Jose has been in the U.S. since 2007. He entered the country on a visa, and has a young United States citizen daughter. He was charged as a visa overstay and granted voluntary departure on October 31, 2014. Prior to the end of his voluntary departure period, he filed for a stay as he believed he could apply for potential relief under the November 20th memo. However, the decision on his request for a stay was not made until after his voluntary departure period ended. When Jose went to ICE to learn the results of his stay request, he was detained. ERO believed Jose was a priority because he had a removal order entered after January 1, 2014. ERO confirmed that Jose was not otherwise considered a priority as he does not have any criminal convictions. His attorney asked

OCC to join in a motion to reopen Jose's case but OCC declined, stating that Jose is a Priority 3 due to the recent removal order. OCC did not exercise any prosecutorial discretion in this case. The motion to reopen was ultimately granted by the Immigration Judge and Jose was released on an order of recognizance.

We have heard reports that ICE officers have taken a strict approach to certain crimes, especially DUIs. However, as noted above, proper implementation of the memo requires ICE officers to consider the totality of the circumstances in all cases. The cases that follow suggest that ICE officers are failing to consider equities by individuals with criminal convictions.

➤ **Mr. Pablo Fabian Cardenas, father of 2 young children. Deported after Operation Cross Check.**

Mr. Cardenas lived in Philadelphia since 2000 with his wife and 2 children, ages nine and one. Mr. Cardenas was arrested during Operation Cross Check because of a 2009 DUI conviction and an order of deportation. He complied with all conditions and had not had any other interaction with the law since 2009. Mr. Cardenas was immediately transferred to Jena, Louisiana.

Mr. Cardenas was a local business owner of an auto repair shop with his US citizen brother. His auto repair business made him the sole financial provider for his family. Mr. Cardenas received a removal order in 2014. On March 19, he applied for a stay of removal. Within hours, the officer informed the attorney the stay was denied. He was deported on March 20, 2015. Mr. Cardenas met a priority factor under the prosecutorial discretion memo, but had submitted evidence of equities demonstrating he was not an enforcement priority.

➤ **Mr. Sanchez-Ponce, a father and DACA eligible-man in detention**

Mr. Sanchez is a twenty-four year-old father of a seven-year-old US citizen daughter, Ileana. A construction worker from Tennessee, he has lived with his family in Tennessee since he was 10 years old. His brother was granted DACA two years ago. In 2013, he was convicted for simple possession of marijuana and one count of paraphernalia possession. ICE detained him in October 2014 and transferred him to a facility in Jena, Louisiana. ICE refuses to release him or administratively close pending removal proceedings. Under the policy, Mr. Sanchez is not a priority and is eligible for DACA.

➤ **Elvis Omar Cano-Morales. A father and husband whose sole offense was an immigration-status crime.**

Elvis was deported recently because of a re-entry conviction that occurred four years ago. Elvis came to the United States from Honduras in 2007 and settled in Kentucky where he met his future wife. In 2011, Elvis' father became ill and he returned to Honduras to take care of him. After his father's death, Elvis was apprehended returning to the United States. He was prosecuted and then deported. Elvis later returned to the

United States and to reunite with his wife. They soon became the parents of a U.S. citizen daughter.

Elvis was detained by ICE at a bus station in Louisiana, while traveling for work to provide for his family. He tried to submit a request for a stay of removal but, because he lacked the filing fee, ICE rejected it. Instead of offering Elvis an opportunity to gather the necessary funds, ICE deported him.

Elvis's wife—who is currently pregnant with their second child—has already lost their home as a consequence of his deportation.

ICE continues to detain vulnerable populations.

➤ **Nicoll Hernández-Polanco, a transgender woman who passed her credible fear interview, remains in detention in an all-male facility**

Nicoll is a Guatemalan transgender woman currently being detained at an all-male ICE facility in Florence, Arizona. In October 2014, Nicoll presented herself to CBP officers to seek asylum due to persecution she suffered on account of her gender identity.

In detention, Nicoll experiences sexual harassment and abuse at the hands of Florence staff for being a transgender woman. In her first month in detention, Nicoll was patted down 6-8 times a day by male guards, who Nicoll reported would grope her breasts and buttocks, make offensive sexual comments and gestures, and sometimes pull her hair. Verbal abuse is rampant and witnesses have heard a female guard refer repeatedly to Nicoll as “it.”

In addition to harassment by guards, Nicoll is particularly vulnerable to abuse from male detainees. Nicoll is required to shower, use the restroom, and sleep in the presence of men. As a result, in early December, Nicoll was sexually assaulted by another detained person.

Nicoll proved to an immigration officer that she has a credible fear of persecution if she were forced to return to Guatemala. Notwithstanding that, ICE continues to detain her while her physical and mental health deteriorates.

Recommendations

- To ensure the effective implementation of the Priorities Memo, DHS should train all immigration enforcement personnel to consider not only whether an individual has engaged in conduct enumerated in Priority 1, 2 or 3 but also whether other countervailing factors are present that warrant a favorable exercise of prosecutorial discretion. This training should furnish personnel with clear guidance and examples highlighting when the exercise of discretion is appropriate for individuals who appear to fall within one of the enumerated enforcement priorities but should not be considered an enforcement priority under an “unless” clause.

- Training and accountability should emphasize that vulnerable populations who suffer greater hardship in detention than others should not be detained unnecessarily. The Priorities Memo states that DHS should not detain immigrants “who are known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate that they are the primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest.” We believe LGBTQ populations are likewise a vulnerable population whose detention is not in the public interest and that they should therefore be given special solicitude.
- DHS and the relevant component agencies should institute measures to hold accountable officers and attorneys who fail to adhere to the Priorities Memo. DHS should likewise institute effective oversight mechanisms to identify instances of noncompliance with the Priorities Memo.
- DHS should require responses to prosecutorial discretion requests to be made in writing with a detailed explanation of the basis of the denial.
- DHS should clarify that references in the memo to persons who “qualify for asylum or other form of relief” are meant to include those who demonstrate *prima facie* eligibility. To require a higher standard of proof, such as a grant of asylum by an immigration judge, would render the language and the exercise of prosecutorial discretion meaningless since an individual is—by definition—no longer subject to enforcement once he or she wins asylum or other relief.
- To ensure the effective implementation of the Priorities Memo, DHS should build upon existing efforts to engage with legal service providers and community-based organizations on the local level across the country.

Thank you very much for your consideration of these recommendations. If you have any questions or would like further information, please contact Patrick Taurel, Legal Fellow, American Immigration Council, at ptaurel@immcouncil.org or (202) 507-7526 or Greg Chen, Director of Advocacy, American Immigration Lawyers Association, gchen@aila.org.

Sincerely,

The Advocates for Human Rights
 African Services Committee
 Alabama Coalition for Immigrant Justice, ACIJ
 Alliance for a Just Society, AJS
 Alliance for Citizenship
 Alliance San Diego
 American Civil Liberties Union
 American Immigration Council
 American Immigration Lawyers Association

Americans for Immigrant Justice
Arkansas United Community Coalition, AUCC
ASI, Inc. - Asociacion de Servicios para el Inmigrante
Asian Americans Advancing Justice
Asian Americans Advancing Justice - Asian Law Caucus
Asian Americans Advancing Justice, Los Angeles
ASISTA Immigration Assistance
California Rural Legal Assistance Foundation, Inc.
CASA
Casa Latina Seattle, WA
Catholic Legal Immigration Network
Causa Oregon
Center for Community Change, CCC
The Center for Popular Democracy
Church Council of Greater Seattle
Cleveland Jobs with Justice
Coalition for Humane Immigrant Rights Los Angeles, CHIRLA
Colorado Immigrant Rights Coalition, CIRC
Comunidades Unidas, CU, Utah
Consejo de Federaciones Mexicanas, COFEM
Deverall Immigration Law, LLC
EL CENTRO de Igualdad y Derechos, New Mexico
Entre Hermanos
Fair Immigration Reform Movement, FIRM
Farmworker Justice
Florida Immigrant Coalition, FLIC
Franciscan Action Network
The Freedom Network USA
Helen Tarokic Law PLLC
HIAS Pennsylvania
Human Agenda
Idaho Community Action Network, ICAN
Illinois Coalition for Immigrant and Refugee Rights, ICIRR
Immigrant Defense Project
Immigrant Justice Corps
Immigrant Legal Center of Boulder County, Colorado
Immigrant Legal Resource Center
Iowa Citizens for Community Improvement, Iowa CCI
Junta for Progressive Action, JUNTA, Connecticut
Kids in Need of Defense (KIND)
Laborers local 270

Latin American Coalition, LAC, North Carolina
Law Office of Lawrence M. Cobb
Legal Aid Society – Employment Law Center
Lowcountry Immigration Coalition Hilton Head/Bluffton, SC
Lutheran Immigration and Refugee Service
Maine People’s Alliance
Make The Road New York
MALDEF
Massachusetts Immigrant and Refugees Advocacy Coalition, MIRA
Michigan United
National Council of La Raza (NCLR)
The National Employment Law Project
National Immigrant Justice Center
National Immigration Law Center
National Justice for Our Neighbors
National Korean American Service and Education Consortium
National Latin@ Network: Casa de Esperanza
National Partnership for New Americans, NPNA
National People’s Action, NPA
Nebraska Appleseed
New Hampshire Alliance for Immigrant Rights-MIRA
New Mexico Immigrant Law Center
New York Immigration Coalition
North Carolina Justice Center
Oakland Law Collaborative
OCA - Asian Pacific American Advocates
One America, Washington
Organization
Our Lady of Guadalupe Parish
Pennsylvania Immigration and Citizenship Coalition, PICC
Pineros y Campesinos Unidos del Noreste, PCUN, Oregon
Progressive Leadership Alliance of Nevada, PLAN
Promise Arizona, PAZ
Refugee and Immigrant Center for Education and Legal Services
Rights for All People, RAP, Colorado
San Diego Immigrant Rights Consortium
Schooler Law Firm
SEIU 775
SEIU Local 49 – Oregon
SEIU-UHW
SEIU United Service Workers West
Service Employees International Union

Services, Immigrant Rights, and Education Network (SIREN)
Skagit Immigrant Rights Council, Mount Vernon WA
Somos un Pueblo Unido, New Mexico
Southeast Asian Resource Action Center (SEARAC)
Southern Poverty Law Center
Southern Region, Workers United, SEIU
Stein Legal LLC
Sunflower Community Action, Kansas
Tacoma Community House
Tennessee Immigrant and Refugee Rights Coalition, TIRRC
TK Immigration Law
United Farm Workers Foundation (UFWF)
United Farm Workers of America (UFW)
United We Dream
Voces de la Frontera, Wisconsin
Washington Defender Association's Immigration Project
Washington-CAN!
We Belong Together
Workers Defense Project, WDP, Texas

cc: Alejandro Mayorkas, Deputy Secretary, U.S. Department of Homeland Security
Sarah Saldaña, Director, U.S. Immigration and Customs Enforcement
León Rodríguez, Director, U.S. Citizenship and Immigration Services
R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection