

# PROSECUTORIAL DISCRETION IMPLEMENTATION: SYNTHESIS OF CHAPTER REPORTS

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AILA is compiling reports on DHS's implementation of prosecutorial discretion nationwide from local liaison meetings, individual conversations with government officials, and chapter observations. Below is a synthesis of many of these chapter reports. AILA plans to revise this document periodically as we receive new or updated information. If you have any additions or corrections, please contact Kate Voigt at [kvoigt@aila.org](mailto:kvoigt@aila.org).

Additionally, AILA is maintaining a resource page at [www.aila.org/pd](http://www.aila.org/pd) with links to official agency memos and announcements, guidance for practitioners, information on the Pilot Programs in Denver and Baltimore, advocacy tools, and more. The page will be updated on a regular basis.

## **What Cases Are Being Reviewed?**

There are two programs through which cases have been or are being reviewed for possible grants of prosecutorial discretion: 1) a nationwide review of selected cases under every Office of Chief Counsel (OCC), and 2) a pilot program involving a more comprehensive review of all non-detained cases in Baltimore and Denver. While these are supposed to be two separate programs, DHS appears to be carrying them out in a similar manner.

In the nationwide review program ("nationwide review"), the Office of Principal Legal Advisor (OPLA) has directed each OCC in the country to immediately begin review of the following three categories of case: 1) cases in which the Notices to Appear (NTA) have not been filed with EOIR; 2) all cases on the master docket; and 3) all non-detained cases with merits hearings scheduled up to seven months from November 17, 2011.

In the pilot program ("pilot program"), DHS conducted a more comprehensive review of cases in Denver, Colorado and Baltimore, Maryland. The pilot program officially concluded on January 13, 2012. In both locations, all non-detained pending cases were reviewed. The only cases not reviewed were cases on the detained docket, cases that had been appealed to the Board of Immigration Appeals, and cases where a final order of removal had already been issued. [According to the Baltimore Sun](#), ICE attorneys in Baltimore reviewed 3,759 cases and recommended 366 cases for an exercise of prosecutorial discretion, while ICE attorneys in Denver reviewed 7,923 cases and recommended 1,301 cases for an exercise of prosecutorial discretion.

Between December 4, 2011 and January 13, 2012, while the cases were being reviewed for the pilot program, both the **Denver and Baltimore** immigration courts froze the non-detained docket. In **Baltimore**, motions to advance were entertained and the asylum clock was "properly administered." In **Denver**, the immigration courts moved the hearing dates to 2014, though the Denver OCC said that the 2014 hearing dates were only placeholder dates, and that it expects the Pilot Program will open up new spaces on the docket for the postponed cases to be plugged into.

Although attorneys could file motions to advance, these motions are generally disfavored unless the one-year filing deadline for asylum is implicated. In general, the asylum clock, if currently running, will continue to run.

### **What Criteria Is Used to Evaluate the Cases?**

#### ***Criteria for Nationwide Review***

When evaluating cases under the nationwide review, ICE attorneys are directed to follow the more focused criteria from the [November 17, 2011 Guidance](#) (AILA Doc. No. 11111762), although the factors discussed in the [June 17, 2011 Memorandum](#) (AILA Doc. No. 11061734) are also relevant. See [November 17, 2011 Memorandum](#) (AILA Doc. No. 11111761).

#### ***Criteria for Pilot Program***

In both Baltimore and Denver, the OCCs said that they would conduct the reviews using the more focused criteria published in the November 17, 2011 guidance. They also indicated that they would not use any quotas or bright-line standards to assess cases. Additionally, the Denver OCC said that it would consider same-sex relationships, including partnerships and marriages, in evaluating community ties.

#### ***Prosecutorial Discretion Training***

According to the [November 17, 2011 Next Steps in Implementing Prosecutorial Discretion](#) (AILA Doc. No. 11111749) document, ICE has launched a comprehensive program to train ICE officers and attorneys on how to use the June 17, 2011 memo to evaluate cases. However, there are no trainings planned for state and local law enforcement agencies, nor is CBP being trained at this time. It is unlikely that AILA representatives will be allowed to observe these trainings.

### **What Procedure Is Used to Evaluate the Cases and How Do Attorneys Request Prosecutorial Discretion?**

According to the November 17, 2011 memorandum, each OCC is required to draft and implement a standard operating procedure (SOP) for the review of cases, including setting up an e-mail address for attorneys to send supplemental documents to augment their clients' files.

In a December 22 meeting with the AILA ICE Liaison Committee, ICE said that an offer of prosecutorial discretion would most likely be extended only once during removal proceedings, although there may be circumstances when a case is pending at an appellate level and a change in circumstances warrants prosecutorial discretion. A number of chapters have reported that offers of prosecutorial discretion are being presented as “one-bite-at-the-apple” deals – if clients reject prosecutorial discretion when it is initially offered, they will not be granted prosecutorial discretion in the future. This is reportedly the policy in Seattle, Baltimore, Houston, Denver, Memphis, Ohio, Miami, and Detroit.

#### ***Nationwide Review Program***

In **Atlanta**, a member reports that attorneys are generally being approached by OPLA/OCC at or right before the master calendar hearing or merits hearing to offer administrative closure in

certain cases, and respondents are expected to make an immediate decision whether to accept or decline the offer. OPLA is reviewing around 1,500 cases, which are assigned to various staff. OPLA has not designated a process for receiving correspondence per the November 17, 2011 memorandum. A member has also reported that OPLA is planning to grant administrative closure in juvenile cases, unless the case should be kept in proceedings for relief. Detained cases are not being reviewed.

In **Boston**, the OCC is reviewing their current cases to determine which cases may be appropriate for prosecutorial discretion. If the OCC believes a case may be appropriate, the trial attorney will reach out to the attorney of record to determine if the applicant is interested. If the applicant is interested in prosecutorial discretion, OCC will only then conduct a further review of the file including security checks. Attorneys can also request prosecutorial discretion affirmatively; they do not need to wait for the OCC's inquiry before submitting a request if the attorney believes the case is worthy of prosecutorial discretion. If ICE offers prosecutorial discretion, the OCC is agreeing to seek administrative closure. There is no corresponding EAD that is granted because there is no basis for it. Requests for relief outside of proceedings would be directed to USCIS if the applicant is eligible.

In **Dallas**, the OCC stated in a meeting that three Assistant Chief Counsels are conducting reviews, and have started to contact attorneys whose clients have been identified for prosecutorial discretion. The OCC is giving particular attention to cases that fall within the low priority list in the November 17, 2011 guidance, but attorneys can request administrative closure under the June 17, 2011 memorandum criteria if they think a case merits prosecutorial discretion.

In **Detroit**, the OCC reports that they are actively reviewing cases included in the nationwide review. ICE will strictly adhere to the guidelines in the November 17, 2011 memorandum, and cases with any criminal record, including one simple DUI for example, likely will not be granted. OCC provided a new e-mail address for attorneys to submit requests. Pro se respondents will be offered administrative closure at the time of their master calendar hearing.

In **Hawaii**, one member reported that there appears to be very little happening with prosecutorial discretion because the courts are not too backlogged (a second immigration judge was added within the last year), and DHS has reported that while cases may be "low priority," they are declining prosecutorial discretion because they have the resources to move forward on most cases in proceedings.

In **Houston**, members report that the OCC has set up an e-mail address to submit additional information to the OCC. Detained cases are not being reviewed.

In **Kansas City**, a member reported that attorneys must identify cases they believe are good cases for prosecutorial discretion and submit evidence via regular mail to the OCC's office requesting prosecutorial discretion. Although the OCC is apparently reviewing cases for prosecutorial discretion, it will not reach out to attorneys about a case until it receives a packet from the attorney. The OCC also said that pro se cases would only be dealt with at the master hearing; no one would contact the pro se respondent prior to the hearing. Finally, when specifically asked if the OCC would agree to a motion to reopen in cases where an attorney

realized that a pro se applicant who had been granted voluntary departure might be eligible for prosecutorial discretion, the OCC said that it would not reopen cases for prosecutorial discretion.

In **Los Angeles**, AILA members met with the OCC and the office is actively reviewing 12,000 cases under the November 17, 2011 memorandum. The OCC is encouraging counsel to submit requests for prosecutorial discretion.

In **Memphis**, members report that they have been approached at or right before hearings to be offered prosecutorial discretion. They also report that ICE trial attorneys are reviewing cases set for merits hearings and calling attorneys to “green light” case review for consideration of prosecutorial discretion.

In **Miami**, the OCC indicated that, in addition to the cases that it identifies for prosecutorial discretion, individuals can request prosecutorial discretion. The OCC would like to receive a package that includes a memo, documents, index, and tabs and requests can be submitted at a master calendar hearing, handed in at the court clerk’s window, or e-mailed in through a designated e-mail address. The OCC will only consider people who entered over three years ago. The OCC also indicated that it is especially looking to exercise prosecutorial discretion in cases where the client is a child who came to the U.S. at a young age and attended school in the U.S., is elderly, has served in the military, or is a victim of a crime. The OCC will not consider prosecutorial discretion in cases where a client has two misdemeanors, a felony, a DUI, or any violent criminal conviction. All ICE trial attorneys will take part in exercising prosecutorial discretion. Once a request is submitted, ICE needs around 10 days to do record checks, and, if a case is selected for prosecutorial discretion, it will call attorneys to come to the clerk’s window to sign a joint motion. Barring extenuating circumstances, attorneys should sign the motion within three days. The OCC will then file the motion. If a case is not selected for prosecutorial discretion, the OCC will send a letter to the attorney.

In **Minnesota**, the OCC indicated that it is reviewing approximately 160 cases for possible prosecutorial discretion and that the office would be reaching out to attorneys whose cases are impacted in the next few weeks.

In **Ohio**, the OCC said that each ICE attorney in the Cleveland office is involved in the case review, though a working group is also being set up, and that attorneys are focusing on the criteria in the November 17, 2011 guidance. It is reviewing cases specified in the November 17, 2011 memorandum until January 13, 2012, when a revised policy for continuing prosecutorial discretion will be announced. Attorneys can submit requests and additional documentation through a new prosecutorial discretion e-mail box. E-mail is preferred over regular mail, and the e-mail should include a brief explanation regarding which low priority category or categories attorneys believe their client falls under. It also said that DHS will only exercise prosecutorial discretion in the most sympathetic/humanitarian cases, and that borderline cases will likely proceed to hearing. Detained cases are still the top priority for DHS. DHS will be calling attorneys if more information is needed, or to offer administrative closure.

In **San Francisco**, the OCC is actively reviewing requests for prosecutorial discretion. It also wants to hear about any difficulties attorneys are having with their prosecutorial discretion requests.

In **Seattle**, AILA members had a meeting with the OCC which noted that it had an attorney coming in to review cases. It is providing a new e-mail address for attorneys to submit requests. It also said that it wanted an admission from the client before granting prosecutorial discretion in cases with a motion to suppress. The office is not reviewing detained cases.

### ***Pilot Program***

Each OCC in the pilot program was instructed to draft and implement an SOP for the review of cases. However, SOPs in Baltimore and Denver were not made public.

According to chapter reports from both **Denver and Baltimore**, the OCC in each jurisdiction expected to review each positive decision to exercise prosecutorial discretion. The OCC did not plan to review decisions not to exercise prosecutorial discretion, though it indicated it would spot-check cases. Additionally, ICE attorneys will not communicate why they declined to exercise prosecutorial discretion to attorneys or individuals, though they planned to keep track of these reasons for internal use.

In **Denver**, individuals can submit additional evidence for ICE to consider when they reviewed cases via a specially created address: ([OPLAPD-DEN-OCC@ice.dhs.gov](mailto:OPLAPD-DEN-OCC@ice.dhs.gov)). This email address is still being used to submit information for all prosecutorial discretion-related cases. The Denver OCC instructed attorneys to include a bullet-pointed list addressing each of the 19 factors enumerated in the November 17, 2011 guidance, if possible. The AILA Colorado Chapter drafted a practice advisory titled [Implementation of the Prosecutorial Discretion Review Pilot Program in Denver, Colorado](#) (AILA Doc. No. 11120769), which has more detailed information about the Denver pilot program.

The Colorado Chapter also reported that AILA attorneys started receiving notifications of offers of prosecutorial discretion on December 14, 2011. The government created a joint motion for attorneys to sign, and asked attorneys to respond to offers of prosecutorial discretion within a couple of weeks. Initially, the number of pro se applicants receiving prosecutorial discretion in Denver was extremely low, however it increased towards the end of the pilot program.

Similarly, attorneys, representatives, and pro se individuals in **Baltimore** can submit additional materials in support of prosecutorial discretion to an e-mail address set up by the Baltimore OCC ([OPLA-PD-BAL-OCC@ice.dhs.gov](mailto:OPLA-PD-BAL-OCC@ice.dhs.gov)). This email address is still being used to submit information for all prosecutorial discretion-related cases. The materials submitted had to be relevant to the criteria listed in both the June 17, 2011 memorandum and the November 17, 2011 guidance. The e-mail address returned an automatic reply, which served as a receipt of the additional materials. The AILA Washington, DC Chapter drafted a practice advisory titled [ICE Baltimore Pilot Program: What You Need to Know in Order to Advise Clients](#) (AILA Doc. No. 1112077), which has more detailed information about the Baltimore pilot program. The Washington, DC chapter also received a template joint motion for administrative closure from

the OCC for attorneys to sign and return. A copy of the joint motion is available in the DC Chapter's Prosecutorial Discretion Practice Advisory.

### **What Happens Under the Pilot Programs if the OCC Recommends a Case for Prosecutorial Discretion?**

In **Denver**, if the respondent is represented by counsel, HSI and ERO complete the necessary security checks and OCC notifies the agency that initiated removal proceedings (USCIS, CBP, or ICE/ERO) for consent. After they complete security checks and obtain consent, a notification will be sent to the respondent's counsel that the case has been deemed appropriate for administrative closure. If the respondent wants to accept administrative closure, the attorney will be asked prepare the Joint Motion to Administratively Close Proceedings template provided to the Colorado Chapter. If an attorney is confident that the client does not want the case administratively closed or terminated before being contacted by the government with an offer of prosecutorial discretion, Denver OCC is requesting that the attorney e-mail the office to let it know so it does not put unnecessary resources into reviewing cases. Once a joint motion for administrative closure is filed with the court, the asylum clock will be stopped. Additionally, if a respondent does not accept administrative closure when it is offered, it will be considered a negative factor in future requests for prosecutorial discretion. The OCC is working with EOIR to identify pro se cases flagged for prosecutorial discretion, and have them put on a special master calendar docket as a way to notify pro se respondents.

In **Baltimore**, if the OCC makes a determination that a case can be administratively closed, it will contact the respondent's attorney via e-mail to ask whether their client agrees. If the client does want to accept prosecutorial discretion, a Joint Motion to Administratively Close Proceedings will be signed by both parties and filed with the immigration court. The immigration court will then administratively close the case. In cases where the respondent is pro se, the OCC will send the respondent a letter, and then will address the letter in a master calendar hearing with the pro se respondent.

### **How Is Prosecutorial Discretion Being Exercised?**

Generally, ICE is exercising prosecutorial discretion through the administrative closure of cases in both the nationwide review and pilot programs.

In **Baltimore**, administrative closure is the "default" when ICE is exercising prosecutorial discretion. However, DHS also noted that ICE is encouraged to take the opportunity to consider termination if it makes sense, such as cases where relief may be available.

In **Dallas**, prosecutorial discretion is likely to be exercised through either not filing an NTA with the court, or if the case is already pending, through administrative closure.

In **Denver**, the primary avenue for prosecutorial discretion through the pilot review is administrative closure. The Denver OCC has informed AILA's Colorado Chapter that virtually

all of the cases deemed appropriate for prosecutorial discretion have been recommended for administrative closure. Generally, termination will be reserved for cases wishing to pursue adjustment of status through USCIS.

In **Detroit**, the OCC is urging attorneys to approach ICE counsel with a request to terminate proceedings for adjustment of status cases pending on the court's docket. It stated that cases with an approved I-130 - and an otherwise "clean" case with no criminal issues - would be recommended for termination.

In **Ohio**, the OCC said that administrative closure was the primary means for exercising prosecutorial discretion. DHS will consider termination or motions to reopen in cases where a person comes eligible for a benefit, such as an adjustment of status case with an approved I-130. DHS will not consider deferred action unless there is a final order of removal. If there is a final order of removal, deferred action requests should be submitted to the ICE/ERO Field Office Director in Detroit and not DHC OCC.

In **Seattle**, the OCC indicated that it would be exercising prosecutorial discretion through administrative closure, though attorneys can request other types of relief.

### **Will Individuals Granted Prosecutorial Discretion be Able to Apply for Employment Authorization?**

In a December 22 meeting with the AILA ICE Liaison Committee, ICE said that it is not considering EADs in conjunction with the exercise of prosecutorial discretion for cases where the person has no independent basis for an EAD. ICE said that it understood that any underlying application remains pending, but that the issuance of an EAD is under USCIS's purview.

#### ***EADs under the Nationwide Review***

In **Atlanta**, a member reports that two OCC attorneys have said they can only offer administrative closure right now, and that they are not discussing work authorization.

In **Detroit**, the OCC said that it was not sure how EADs will be resolved by USCIS, but that the OCC does not have discretion to issue an EAD under the guidelines.

In **Ohio**, the OCC reports that there has been very little guidance on EADs.

In **San Antonio**, the OCC indicated that prosecutorial discretion will only include administrative closure, and that individuals granted administrative closure will be unable to obtain an EAD unless that person independently qualifies for deferred action or work authorization on another basis. One chapter member noted that clients were previously granted deferred action somewhat regularly, and are now actually in a worse position than they would have been before the new guidance.

In **Seattle**, a member reports that EADs are under consideration, but there is no final decision on whether clients will be eligible to apply for EADs.

### ***EADs under the Pilot Program***

In both **Baltimore and Denver**, it appears that individuals whose cases have been administratively closed will only be able to apply for an EAD if there is an independent basis for work authorization, for example a pending adjustment application or a pending asylum application. Administrative closure itself will not create a basis for an EAD.

### **Will Individuals Granted Prosecutorial Discretion Have Their Bond Cancelled? What About ISAP Requirements?**

Some individuals have posted bond in removal proceedings or have been required to participate in an Alternatives to Detention (ATD) program. In a December 22, 2011 call with the AILA ICE Liaison Committee, ICE indicated that issues regarding the return of bond money and ATD participation were under consideration by ERO and they expected to release further guidance at some point.

### ***Bond/ATD under the Nationwide Review***

In **North Carolina**, a member reported that a local ERO bond officer said that when the court orders administrative closure, generally the money for the bond is not returned at that time. An administrative closure (for bond purposes) is a hold on the individual's case and therefore can be reopened at any time. The bond remains in place until the court comes to a final decision on the individual's case at which time the bond will be processed accordingly.

### ***Bond/ATD under the Pilot Program***

In **Denver**, the OCC indicated ERO will cancel the bond after it receives an order from the IJ administratively closing the case, unless it receives or uncovers some "derogatory information" that would presumably have caused the OCC to deny prosecutorial discretion in the first place. The OCC will work to remove individuals granted prosecutorial discretion from ATD programs, but they should continue to adhere to the requirements until they are formally removed from the program. The office also specified that this was its local policy, and it is only in place until it receives further instruction from headquarters.