



Practice Alert:
ICE Interim Guidance on Civil Immigration Enforcement and Removal Priorities

This alert provides a brief summary of the 2/18/21 memo from ICE Acting Director Tae Johnson titled Interim Guidance: Civil Immigration Enforcement and Removal Priorities (“Johnson Memo”). The AILA EOIR/ICE Joint Liaison Committee released an earlier practice alert, which provided a summary of President Biden’s 1/21/21 Executive Order on the Revision of Civil Immigration Enforcement Policies and Priorities and Acting DHS Secretary David Pekoske’s 1/20/21 memo Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities (“Pekoske Memo”).

The Johnson Memo is effective immediately and purports to be in support of the interim civil enforcement and removal priorities from the Pekoske Memo. It will remain in effect until DHS Secretary Mayorkas issues new enforcement guidelines, which the memo states will happen within 90 days.

The Johnson memo covers enforcement actions, custody decisions, the execution of final orders of removal, financial expenditures, and strategic planning. To the extent the new guidelines conflict with the Pekoske Memo, the Johnson Memo explicitly states that it controls. The Johnson memo notes that it does not implement or take into account the proposed 100-day moratorium on removals at Section C of the Pekoske Memo, which is currently enjoined.

The memo instructs that its interim priorities “shall be applied” to all civil enforcement and removal decisions including, but not limited to:

- Whether to issue a detainer, or whether to assume custody of a noncitizen subject to a previously issued detainer;
- Whether to issue, reissue, serve, file, or cancel a Notice to Appear;
- Whether to focus resources only on administrative violations or conduct;
- Whether to stop, question, or arrest a noncitizen for an administrative violation of civil immigration law;
- Whether to detain or release from custody subject to conditions;
- Whether to grant deferred action or parole; and
- When and under what circumstances to execute final orders of removal.

In addition to resource constraints, the guidance acknowledges that ICE has “the responsibility to ensure that eligible noncitizens are able to pursue relief from removal under the immigration laws.”

Priorities

The Johnson Memo lists three categories of cases that are considered to be presumed priorities.

- **Category 1: National Security.** A noncitizen is *presumed* to be a national security enforcement and removal priority if:
 - Engaged in or suspected of engaging in terrorism-related activities;
 - Engaged in or suspected of engaging in espionage-related activities; or
 - Otherwise necessary to protect national security. General criminal activity *does not* amount to a national security threat and should be analyzed under the Public Safety Category.

- **Category 2: Border Security.** A noncitizen is *presumed* to be a border security enforcement and removal priority if:
 - Apprehended at the border or a port of entry while attempting to enter the country unlawfully on or after November 1, 2020; or
 - Not physically present in United States before November 1, 2020. Note that this priority category will include future overstays who enter on or after November 1, 2020.

- **Category 3: Public Safety.** A noncitizen is *presumed* to be a public safety enforcement and removal priority if they pose a threat to public safety *and*:
 - Have been convicted of aggravated felony as defined in INA § 101(a)(43); or
 - Have been convicted of an offense with active gang participation as an element *or* are 16 years old or older and “intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization”

Practitioners should note the following regarding the Public Safety Category:

- Analysis of whether someone is a priority should *always* be a two-step process. The person must have been convicted of an aggravated felony or trigger the gang participation prong, *and separately*, must be judged to pose a threat to public safety. In evaluating whether the person poses a threat to public safety, the memo instructs officers to consider:
 - The extensiveness, seriousness, and recency of the criminal activity; and
 - Mitigating factors, including, but not limited to:
 - Personal and family circumstances;
 - Health and medical factors;
 - Ties to the Community;
 - Evidence of rehabilitation; and
 - Whether the individual has potential immigration relief available.

- The Pekoske Memo had instructed that only those with aggravated felonies who were incarcerated on or after January 20, 2021, would fit into the Public Safety Category. This guidance removes that temporal limitation and allows an aggravated felony conviction at any time to trigger priority treatment, if the person also poses a threat to public safety.

- The guidance instructs officers to base conclusions about intentional participation in an organized criminal gang or transnational criminal organization on reliable evidence and consultation with the Field Office Director (FOD) or Special Agent in Charge (SAC) in reaching this conclusion.

The memo instructs that the execution of removal orders must be supported by a compelling reason and have approval from the Field Office Director for cases involving noncitizens:

- Who are elderly or are known to be suffering from serious physical or mental illness;
- Who have pending petitions for review on direct appeal from an order of removal;
- Who have filed only one motion to reopen removal proceedings; or
- Who have pending applications for immigration relief and are *prima facie* eligible for such relief.

If a case meets the criteria for a presumed priority case, ICE officers do not need any further pre-approval for enforcement actions.

For cases not meeting the criteria for a presumed priority case, pre-approval from the Field Office Director or Special Agent in Charge is required. Requests for pre-approval for non-priority cases take into consideration:

- The nature and recency of the noncitizen's convictions;
- The type and length of sentences imposed; and
- Whether the enforcement action is otherwise an appropriate use of ICE's limited resources, and other relevant factors.

The justification for taking an enforcement action in a non-priority case must be in writing. Also, pre-approval to carry out an enforcement action against a particular noncitizen does not authorize collateral arrests, except in exigent circumstances, generally limited to situations where a noncitizen poses an imminent threat to life or imminent substantial threat to property. Where an action is taken in such circumstances, the officer must request approval following the action within 24 hours.

ICE Case Review Process

The guidance noted that ICE would create and maintain a system for evaluating individual requests for prosecutorial discretion. On March 5, 2021, ICE announced its ICE Case Review (ICR) process for individuals who believe their case does not align with ICE's enforcement, detention, and removal priorities.

ICE's Case Review website, www.ice.gov/ICEcasereview, offers additional information on how cases should be elevated. In general, individuals requesting a detention case review should contact their local ERO field office for initial consideration. Upon request, cases will be further reviewed by a Senior Reviewing Official, who, where appropriate, will communicate the ultimate resolution with the requestor. The cases of individuals detained in ICE custody or pending imminent removal will be prioritized.

After contacting your local ERO field office, individuals may also initiate the ICE Case Review (ICR) process by emailing the ERO Senior Reviewing Official to request a case review at ICEcasereview@ice.dhs.gov. ICE asks that requests include the individual's A-number, other identifying information, a telephone number, a valid email, and a Form G-28 or ICE Form I-60-001, Privacy Waiver Authorizing Disclosure to a Third Party (when applicable).

**Special thanks for Aaron Hall, Vice Chair of the EOIR/ICE Joint Liaison Committee and the EOIR/ICE Joint Liaison Committee.*