Hon. Alejandro N. Mayorkas
Secretary of Homeland Security
U.S. Department of Homeland Security
2707 Martin Luther King Jr. Avenue, SE
Washington, DC 20528

July 31, 2021

Dear Secretary Mayorkas,

Upon entering office, President Biden promised bold, swift action in the immigration arena to undo the years of harm caused by the Trump administration. AILA was pleased to see that part of this effort included rapid issuance of new guidance on enforcement priorities in January and February by the Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE), followed by guidance specific to the ICE Office of Principal Legal Advisor (OPLA) in May.[1]

The new priorities are a significant improvement over the Trump administration's indiscriminate enforcement methods, yet AILA is concerned about the inconsistent implementation of these priorities across jurisdictions that many of our members have reported. Furthermore, the enforcement guidance relies on discredited methods for identifying public safety threats that will result in unreliable and harmful targeting of noncitizens who should not be priorities for enforcement. While we recognize the substantial steps already taken, more is needed to fulfill the administration's pledge to ensure enforcement is done in a just, humane, and fair manner.

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Based on decades of experience with numerous administrations and their approaches to prioritizing enforcement, as well as months of closely following the implementation of the current enforcement priorities, we offer the following recommendations on how to improve the priorities and ensure consistent implementation. This letter focuses on implementation of the January and February memos, unless otherwise specified. As it was only issued two months ago, AILA plans to continue monitoring implementation of the May OPLA memo and provide further recommendations and feedback in the coming months.

DHS and ICE Should Implement Accountability Measures to Ensure Priorities Are Followed

AILA appreciates DHS's and ICE's willingness to engage stakeholders and to address challenges identified in the field. Since February, we have seen the agency resolve several obstacles to full implementation of the memos. For example, initial reports revealed that some ICE offices thought that the new priorities only applied to new cases. However, now it appears that offices widely understand that the new priorities apply to both new and existing cases. AILA members have also reported a promising willingness by ICE ERO and OPLA offices to grant discretion in limited circumstances. For example, following the memos, members initially reported an increase in releases from detention and agreements by ICE not to execute removal orders in non-priority cases.

[1] David Pekoske, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (January 20, 2021) (hereinafter "January memo"); Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (February 18, 2021) (hereinafter "February memo"); John D. Trasviña, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021) (hereinafter "May OPLA memo").

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Overall, however, AILA member reports indicate that ICE offices are inconsistently implementing the enforcement priorities with some offices seemingly refusing to follow the guidance. For example, many jurisdictions continue to view any criminal conviction—no matter how minor—as a public safety threat. AILA members have reported denials of prosecutorial discretion in cases due to convictions for reckless driving, driving without a license, driving under the influence, assault, and trespass. ICE offices have declined to exercise discretion in cases that have compelling mitigating factors, including people who have lived for decades in their communities or who have years-old convictions, U.S. citizen spouses and children, or mental health concerns. In many reported cases, ICE offices are giving no consideration to mitigating factors or rehabilitation if the person has a conviction for an aggravated felony.

DHS and ICE need to give more clear direction to officers in the field and to implement more accountability measures at the local and national level to ensure that ICE officers in every jurisdiction are implementing the priorities in a meaningful, effective, and consistent manner. We recommend the following as a start:

ICE Should Provide Individuals and Their Attorneys with Justifications for Enforcement in Cases That Are Not Presumed Priorities

The February memo states that civil immigration enforcement or removal actions that do not meet the criteria for presumed priority cases require preapproval from the Field Office Director (FOD) or Special Agent in Charge (SAC). It goes on to say that, in requesting this preapproval, the ICE officer must raise a written justification through the chain of command. This section of the memo allows ICE officers to take enforcement actions in non-presumed priority cases, but only when a supervisor has approved the enforcement action in writing.

In order to ensure that this section of the memo is used in the way that it was intended, DHS should require ICE to provide individuals and their attorneys with the justification and FOD/SAC preapproval in writing upon request. Doing so would require minimal additional time and effort from ICE officers, because the memorandum already requires justifications to be in writing. Officers would merely have to attach the justification and preapproval to the notice denying prosecutorial discretion.

At the same time, providing the preapproval for enforcement to individuals and their attorneys would be a valuable accountability mechanism for ensuring that the memorandum is being used appropriately. It would incentivize ICE officers to use the preapprovals only in appropriate individual cases, and not as a blanket denial of discretion for whole categories of cases. It would encourage accountability at the local level and, in many cases, avoid headquarters' review because individuals and their attorneys would be able to verify that the justification used to deny discretion is consistent with DHS and ICE policy. If the denial of discretion is not consistent with the priorities or if the denial misstates the facts of the case, attorneys would be able to address the denial's flaws directly with the officer. It would also ensure that the portion of the memo requiring written justifications in individual cases is being implemented.

Require Written Explanations for Denials: Similarly, in presumed priority cases, DHS should require ICE officers to provide written, fact-specific explanations for denials of discretion. AILA members have reported some summary denials of discretion that come within minutes of the request, even when significant and compelling equities are present. These denials say that the "facts and circumstances" in the case were reviewed, and that discretion is denied, but do not actually cite any of the individual facts or circumstances in the case.

Requiring written explanations for denials that include case-specific information would incentivize ICE officers to do a close read of the equities in a case, and thoroughly consider the positive factors laid out in the February memorandum. It would also allow the individual and

their attorney to understand the reasoning for the officer's denial, decreasing the likelihood they will attempt to escalate the case to other ICE officers, supervisors, and headquarters staff. And again, if the denial of discretion is not consistent with the priorities or if the denial misstates the facts of the case, attorneys would be able to address that directly with the officer. In the long term, the time spent writing a brief explanation could save significant time and resources overall. Lastly, providing written explanations would help pro se individuals understand the process and give them the opportunity to correct any deficiencies.

Make All Guidance Public: In order to ensure accountability and save time and resources, DHS and ICE should make public all local and national guidance related to the enforcement priorities and have it available in detention center law libraries. Doing so will allow individuals and their attorneys to understand why and how decisions are made, giving them the opportunity to provide the most relevant information up front and making it more likely that they will accept decisions by ICE officers. When guidance is not public, individuals and their attorneys are left to try and predict what information might be most helpful to ICE officers and, when denied discretion, to wonder whether an officer made a decision that does not align with guidance. If guidance is made public, it will be clear to both parties when decisions are and are not in line with the guidance, cutting down on confusion and attempts to escalate the case through other channels.

DHS Should Grant Discretion That Allows People to Work Legally

The ability of individuals who are offered prosecutorial discretion to obtain work authorization is a key ingredient for ensuring successful implementation of the enforcement priorities. With the Attorney General's decision in *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021), which overruled *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) and made administrative closure widely available again, ICE OPLA offices nationwide should be encouraged now to administratively close cases when requested by the individual and their attorney. Administratively closing cases would allow individuals with an eligible application to continue renewing their work authorization. Without the option to administratively close their case, individuals in proceedings may not want to agree to dismissal or termination if they would no longer be eligible to renew their work authorization, for example in terminated non-LPR cancellation or asylum cases withdrawn with prejudice.

The ability to apply for work authorization is a necessity for almost all individuals in removal proceedings who are considering whether to request prosecutorial discretion. State regulations often require valid employment authorization in order to obtain a driver's license, which is necessary not only to drive legally in the United States, but also serves as a form of identification for other basic daily necessities such as showing proof of residency for school registration, obtaining library cards, renting a car, and accessing community resources. Without the ability to obtain a driver's license, individuals risk violating state law and potential arrest when driving to work, taking children to doctor's appointments, or buying groceries.

We recommend additional training for ICE officers to ensure full and consistent implementation of *Matter of Cruz-Valdez.* Before July 16, administrative closure was available in three circuits – the Third Circuit, Fourth Circuit, and Seventh Circuit[2]—but AILA members reported that in these jurisdictions, some ICE officers were taking the position that termination or dismissal is the preferred form of discretion and thus were not agreeing to join a motion to administratively close.

Given how vital work authorization is to daily life in the United States and the hurdles mentioned above to obtaining work authorization when discretion is exercised, ICE should consider coordinating with USCIS to grant work authorization when ICE grants discretion in the form of termination, specifically

[2] Sanchez v. Attorney General, Arcos Sanchez v. Att'y Gen. United States of Am., 997 F.3d. 113 (3d Cir. 2021); Meza Morales v. Barr, 963 F.3d 629 (7th Cir. 2020); Zuniga Romero v. Barr, 927 F.3d 282 (4th Cir. 2019).

using the deferred action category.[3] To grant work authorization to individuals in proceedings, USCIS generally requires a pending application for relief that allows applicants to apply for work authorization while it is being adjudicated, such as an asylum application or an application for cancellation of removal. Any application for relief remains pending when cases are administratively closed. However, when cases are terminated or dismissed, relief applications that were previously filed are no longer considered to be pending for the purposes of work authorization.

Ensuring work authorization for individuals granted discretion will encourage more people to seek prosecutorial discretion earlier in the process, helping to alleviate the court backlog, and will protect people from the harsh consequences of living in the United States without a driver's license. Without work authorization, individuals granted discretion are more likely to be exploited by unscrupulous employers or be subject to human trafficking, because they are excluded from the legitimate labor market. U.S. employers would also lose valued, longstanding workers if they are forced to fire people who no longer have work authorization simply because they are not an enforcement priority.

The Interim Enforcement Priorities Are Overbroad and Should Be Narrowed

"Public Safety Threats"

While the new priorities are a significant improvement over the Trump administration's indiscriminate enforcement methods, they rely upon discredited and overly broad approaches to determining who does not warrant discretion. For example, the February memo presumes anyone who has been convicted of an aggravated felony as defined in INA § 101(a)(43) is a threat to public safety. However, "aggravated felony" is an overly broad category of cases designated by Congress that includes relatively minor and nonviolent convictions. Originally defined to only include crimes like murder and federal drug trafficking, it has been expanded to include a litany of offenses.[4] Convictions for misdemeanor theft of under 20 dollars' worth of goods, writing a bad check, simple battery, and filing a false tax return have all been deemed aggravated felonies.[5]

Similarly, the February memo ties public safety designations to gang allegations, despite widespread and consistent criticism of gang databases for being overbroad, racially biased, and lacking procedural safeguards.[6] In their revised guidance on enforcement priorities, DHS and ICE should eliminate their reliance on these overly broad and unreliable categories. In any assessment, there should be a clear emphasis in the memorandum on reviewing and considering mitigating factors, rather than a presumption that someone who meets these overbroad criteria is a threat to public safety.

The flaws in these categories reflect what is still a deeply problematic approach that continues to exclude large numbers of individuals from the favorable exercise of prosecutorial discretion without adequate evaluation of each person's circumstances. AILA urges the agency to shift away from the use of categorical exclusions and, instead, adopt a policy that requires thorough review in every case, including full consideration of equities, to determine whether discretion is warranted.

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[3] 8 CFC §274a.12(c)(14).
[4] American Immigration Council, *Aggravated Felonies: An Overview* (March, 2021); National Immigration Project and Immigrant Defense Project, *End Extreme Punishment for "Aggravated Felonies"* (May 21, 2013).
[5] *Id.*
[6] University of California Irvine School of Law, *Mislabeled: Allegations of Gang Membership and Their Immigration Consequences* (April 2016); *Letter to DHS Secretary Mayorkas From Criminal Justice and Immigration Advocates on Interim Enforcement Priorities* (April 1, 2021); Rebecca Hufstader, *Immigration Reliance on Gang Databases: Unchecked Discretion and Undesirable Consequences*, 90 N.Y.U. Law Rev. 671 (2015); Katherine Conway, Fundamentally Unfair: Databases, Deportation, and the Crimmigrant Gang Member, 67 Am. Univ. Law Rev. 269 (2017); Thomas Nolan, The Trouble with So-Called "Gang Databases": No Refuge in the "Sanctuary" (June 27, 2018).

Recent Arrivals

According to the February memo, noncitizens who are apprehended at the border or a port of entry while attempting to unlawfully enter the United States after November 1, 2020, are also presumed to be a priority for enforcement. This categorization puts at risk, and potentially targets, the large number of "recent arrivals" who are fleeing persecution and strife in their home countries. The administration should not target people for enforcement for seeking safety at or between ports of entry. Instead, it should commit to fully upholding its obligation under domestic and international law to protect those fleeing persecution.

In order to effectively uphold the right of individuals to seek safety in the United States, we must ensure that all individuals have a full and fair day in court. In contrast, DHS has already rolled out accelerated dockets without the guarantee of legal representation to families who crossed the southern border and whom DHS has placed in alternatives to detention.[7] These dockets seek to speed cases through court using arbitrary timelines. AILA urges DHS to stop fast-tracking cases at the expense of due process.

In addition to re-evaluating the use of "recent arrivals" as a priority for enforcement, the Biden administration should make significant reforms to ensure a humane approach to migration flows. DHS should rescind Title 42 and reopen ports of entry so people can present themselves for inspection and, for people seeking asylum, present their claims, instead of being forced to attempt an unlawful entry between ports of entry. It should also refrain from detaining recent border arrivals who claim fear of return; asylum seekers who are recent border arrivals are frequently held in detention while awaiting their "credible fear" interviews and determinations. Detention of recent arrivals is not only unnecessary to achieve border security, but also inappropriate when dealing with people experiencing certain vulnerabilities. Using case management programs administered by trusted nonprofit organizations and legal representation and orientation at the border, this administration can show that it is possible to make smart enforcement decisions that adhere to the values of due process and human rights.

ICE Offices are Setting Their Own Priorities Under a Catchall Provision

As previously noted, in addition to setting forth three presumed categories of enforcement priorities—national security, border security, and public safety—the February memo also states that "[any] civil immigration enforcement or removal actions that do not meet the above criteria for presumed priority cases will require preapproval" from ICE supervisors. AILA members report that offices are using this portion of the memorandum to essentially set their own local enforcement priorities that are significantly more expansive than the three priorities outlined by the memo. For example, we have had local ICE offices give AILA members lists of convictions and/or other interactions with law enforcement that they consider to be priorities. If a case presents that conviction, the local ICE office will not consider exercising discretion in the case.

DHS should remove or significantly alter this language. While the language appears to be aimed at making sure ICE officers only take enforcement actions in individual, nonpriority cases when a supervisor has approved the action in writing, offices are instead misusing the language to justify enforcement actions against whole categories of cases. In fact, practitioners and stakeholders have called this part of the memo the "fourth priority category" because offices have used it as a blank check to write jurisdiction-by-jurisdiction priority categories.

ICE Should Dramatically Reduce the Use of Detention

The restriction of liberty in the form of physical detention or electronic monitoring is one of the most severe and costly forms of enforcement. DHS enforcement priorities should reflect this reality and include language that heavily weighs in favor of releasing individuals from custody. Troublingly, while releases

[7] Jean King, *PM 21-23: Dedicated Docket* (May 28, 2021).

from detention have increased since President Biden's inauguration, overall detention numbers have increased.[8] This unacceptable trend should be reversed—the administration must send a clear message that detention should be dramatically reduced.

Unfortunately, AILA members report that some ICE offices automatically categorize a person as a public safety risk if there is any interaction with the criminal justice system, no matter how minor. In several case examples, even pending charges triggered continued detention without regard to mitigating factors. For example, an AILA member's client was detained and denied release because of a pending DUI for which they had been released on a criminal bond. The client provided documentation that they had been assessed by a behavioral health professional who deemed the incident out of character and offered ongoing support upon release from ICE custody. They also provided documentation of their residence in the United States for over a decade, presence of U.S. citizen family and children, stable work history, and a serious medical condition.

The February memo and the corresponding ICE Case Review (ICR) process also require revisions to achieve meaningful access for individuals to seek release from custody. There is no mechanism for the more than 80 percent of detained individuals without counsel to effectively escalate their release request.[9] Currently, individuals are instructed to email their ICR request after receiving a denial at the local level, however, people in detention generally do not have access to email thus making this option unusable.

If ICE intends for detained pro se people to use the ICE ERO Detention hotline to escalate their release requests, immediate changes to the hotline are necessary to make it function in that manner. For example, the initial prompts should be expanded beyond English and Spanish— AILA members report requests for help from detained Haitian Creole speakers who would not be able to understand the English or Spanish language prompts. Wait times to speak to a live operator should be reduced and time limits on the use of phones need to be increased. If someone can only make a 10-minute call, and the wait time to speak to an operator is 15 minutes, the hotline is not functional. Operators should also be trained on how to document and process requests for discretion from unrepresented, detained individuals.

Thank you for your attention to these very critical matters, and for the steps you have already taken to work towards improved prosecutorial discretion policies. Should you have any questions or require additional information, please contact Kate Voigt, AILA's Senior Associate Director of Government Relations (kvoigt@aila.org, 202-507-7626).

Sincerely,

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CC: Esther Olavarria, Domestic Policy Council, White House
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[8] American Immigration Council, *Tracking the Biden Agenda on Immigration Enforcement* (May 20, 2021).
[9] Ingrid Eagly and Steven Shafer, Access to Counsel in Immigration Courts (September 2016).