



AMERICAN  
IMMIGRATION  
LAWYERS  
ASSOCIATION

May 9, 2023

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Asylum Division  
Refugee, Asylum and International Operations Directorate  
U.S. Citizenship & Immigration Services

Associate Director Ted. H. Kim  
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Chief Avidah Moussavian  
Office of Policy and Strategy  
U.S. Citizenship & Immigration Services

Via Email: [Public.Engagement@uscis.dhs.gov](mailto:Public.Engagement@uscis.dhs.gov)

**Re: Second request for USCIS guidance on the impact the dismissal or termination of removal proceedings has on cases before USCIS**

Dear Mr. Lafferty, Mr. Kim, and Ms. Moussavian:

We write on behalf of the American Immigration Lawyers Association's (AILA) National Asylum & Refugee Committee to renew the request we made in [our letter](#) to you on May 18, 2022—fully one year ago—urging USCIS to issue guidance to address the questions raised for asylum seekers who will have to refile applications with USCIS, often after waiting many years for adjudication in immigration.

In April of 2023, Kerry Doyle, the Principal Legal Advisor (OPLA) for Immigration and Customs Enforcement (ICE) issued a memo strongly encouraging ICE OPLA attorneys to exercise prosecutorial discretion (PD) in their cases. In practice this PD has primarily taken the form of OPLA joining a motion to terminate with respondent's counsel or moving unilaterally to dismiss proceedings in immigration court. In the abstract, it is a positive development for noncitizens to not be in removal proceedings, and for asylum seekers to be able to pursue their cases affirmatively in the first instance, in a non-adversarial setting before a USCIS asylum officer. However, this practice has created myriad questions for practitioners and how dismissal or termination of removal proceedings affects the rights of their clients.

AILA is a membership organization that is over 17,000 immigration lawyers strong. Throughout the last year, we have witnessed confusion, frustration, and likely incorrect legal advice as counsel struggles to advise clients on the pros and cons of accepting dismissal of immigration

court proceedings when there has been no guidance whatsoever from USCIS on how it will handle refiled asylum cases.

Both AILA as an organization, and AILA members in other capacities have raised many of these issues with USCIS over the course of the past year and have repeatedly been told that written guidance is coming soon, and until that written guidance is released, the agency cannot provide answers to any of these questions. While these questions remain unanswered, even more cases are being dismissed from immigration court as the immigration court itself has introduced its own initiatives to remove cases from the court calendar.

We first reiterate the questions we posed a year ago, to which we continue to anxiously await a response. These questions were and continue to be:

- 1) When removal proceedings are dismissed against a noncitizen, is there a mechanism for the I-589 to be transferred to the local Asylum Office? Or must the noncitizen file a “new application” affirmatively? Alternatively, will the Asylum Office consider a referred asylum case that is remanded back from the Immigration Judge, as opposed to the Immigration Judge granting dismissal? *Still unanswered.*
- 2) If the noncitizen must file a new application with USCIS, where should they file the application (i.e. Service Center, Vetting Center, or somewhere else)? *We note that of the questions we have asked, this is the only one to which USCIS has provided an answer that, yes, these cases must be filed with the Vetting Center. While we appreciate the clarity of that answer, which is posted on the USCIS website, this requirement has created its own problems as there was a significant “frontlog” in issuing receipts by the Vetting Center throughout most of the past year, and asylum seekers whose removal proceedings were dismissed were not permitted to file their I-589 applications online.*
- 3) If the noncitizen must file a new application, will the application be subject to Last In, First Out (LIFO) for interview scheduling? If yes, has the Asylum Office considered how that influx of cases will affect the existing backlog of asylum cases and the possibility that some recently dismissed defensive cases will once again be referred to the court? *Still unanswered.*
- 4) If the noncitizen has to file a new asylum application, will they have to start over in waiting 180 days to become eligible for an employment authorization document (EAD)? Assuming they already have an EAD through the previously filed asylum application in court, can they continue to use that EAD? *Still unanswered.*
- 5) Will the Asylum Office consider the date the I-589 was filed with the court or initially with the Asylum Office prior to referral to removal proceedings for one-year filing deadline purposes? If the court filing was outside the one-year period, but the applicant was eligible for an exception, how will that be treated in the subsequent later affirmative adjudication? If the initial court filing was within one-year, but a subsequent new affirmative filing is not, will having their case dismissed by the court generally constitute an extraordinary circumstances exception? Will the Asylum Office issue guidance on

how to determine how long, after dismissal, would constitute a reasonable period of time for refiling? If an applicant filed a Mendez Rojas notice with the immigration court, but not with USCIS (because the case was before the court during the relevant time period), will USCIS consider the application timely filed? *Still unanswered.*

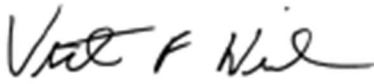
- 6) Although OPLA has said that it generally will not move to unilaterally dismiss cases where the asylum application has been referred to court after an asylum interview, we have heard that OPLA will join in motions to dismiss in this circumstance if the respondent wants dismissal. How will the Asylum Office handle newly filed or remanded asylum applications if the Asylum Office has already adjudicated the claim? *Still unanswered.*
- 7) If OPLA and respondent's counsel agree to dismiss a BIA appeal, thereby vacating the IJ's removal order and adverse decision on asylum, will the Asylum Office accept jurisdiction since there is no longer a case before EOIR? If the IJ decision has been vacated, does USCIS agree that the prohibition on asylum seekers' applying after having filed previous applications would not apply? In such circumstances, would the Asylum Office review the EOIR record, as it would in a claim of changed circumstances? *Still unanswered.*

In addition to these questions, our members have also raised the following:

- 8) If an I-589 was filed in immigration court while a derivative was a minor, and during the pendency of the application, the minor turns 21, will the child still be considered a derivative if the asylum seeker has to file a new application with USCIS? Or will the child's age be "locked in" as of the date of the initial filing? If this child (not in removal proceedings) decides to file an affirmative asylum application, should the I-589 be filed with the Asylum Vetting Center?
- 9) If the refiled cases are scheduled according to LIFO, would the new I-589 put the asylum seeker near the front of the line (since it is recently refiled) or in the middle of the backlog based on the initial filing date?
- 10) If an asylum seeker's I-589 was pending in immigration court for fewer than 180 days, and then the asylum seeker must refile the I-589 affirmatively does the asylum seeker get credit for the number of days on the clock from court, or must they begin counting again at day 0. For those asylum seekers who received an initial c8 EAD based on a defensive I-589 filing, when that EAD expires, and the asylum seeker has (presumably) filed a new I-589 with USCIS, would their EAD filing be considered a renewal (because it is not their first asylum-pending EAD) or an initial (since it would be the first EAD filed that is associated with that particular EAD)?
- 11) If OPLA and respondent's counsel agree to narrow issues at a status conference, or enter into a stipulation, for example, that the applicant timely filed or that their proposed particular social group is cognizable, will USCIS afford deference to those agreements with OPLA when the I-589 is filed affirmatively?

We thank you for your prompt responses to these questions and believe that the more information we can give our membership, the better they will be able to represent their clients. Should you have any questions or require more information, please do not hesitate to contact us or AILA Policy & Practice Counsel Amy Grenier ([agrenier@aila.org](mailto:agrenier@aila.org)).

Sincerely,



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