



AMERICAN  
IMMIGRATION  
LAWYERS  
ASSOCIATION

May 18, 2022

Acting Director Ted. H. Kim  
U.S. Citizenship & Immigration Services  
Refugee, Asylum and International Operations Directorate  
Washington, DC 20529

Chief Amanda Baran  
U.S. Citizenship & Immigration Services  
Office of Policy and Strategy  
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Via Email: [ted.h.kim@uscis.dhs.gov](mailto:ted.h.kim@uscis.dhs.gov) & [Amanda.Baran@uscis.dhs.gov](mailto:Amanda.Baran@uscis.dhs.gov)

Dear Acting Director Kim and Chief Baran:

We write on behalf of the American Immigration Lawyers Association's (AILA) National Asylum & Refugee Committee to request guidance from your offices on how you will process affirmative asylum applications where the noncitizen had their immigration court removal case terminated. This is an issue of top concern for many of our members and raised to us on multiple occasions as members of the national committee. As we are sure you are aware, on April 4, 2022, Kerry Doyle, the Principal Legal Advisor (PLA) for Immigration and Customs Enforcement (ICE) issued a memo strongly encouraging ICE OPLA attorneys to exercise prosecutorial discretion in their cases.<sup>1</sup> In subsequent stakeholder calls and in [public guidance](#), PLA Doyle has made clear that OPLA's preferred form of prosecutorial discretion is dismissal of cases before the immigration court. The experience of our members bears this out, with OPLA filing motions to dismiss, often unilaterally, and often when respondents have already been waiting years for adjudication of their asylum application.

As a result of this new policy, we are writing to ensure that the USCIS Asylum Division has designed and will implement a plan to address the issues that will be raised as a result of these dismissals. We believe a large number of individuals who were initially required to file defensively for asylum protection will want to seek affirmative relief before the Asylum Office. We hope you can answer the following related questions and make your responses publicly available to avoid confusion among individual Asylum Offices and practitioners and allow them

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<sup>1</sup> [Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion](#) (Doyle Memorandum), April 4, 2022.

to give applicants as much information as possible as they decide whether or not to pursue their asylum claim.

### **New Filing and Jurisdiction**

- 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 (IJ), as opposed to the Immigration Judge granting dismissal?
- 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)?
- 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?

### **Employment Authorization**

- 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?

### **One-Year Filing Date**

- 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 latter 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?

### **Referred Cases**

- 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?

### **BIA Appeals**

- 7) If OPLA and respondent's counsel agree to dismiss a pending Board of Immigration (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?

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 Director of Government Relations Sharvari Dalal-Dheini (SDalal-Dheini@aila.org) or Policy Counsel Jennifer Ibañez Whitlock (jwhitlock@aila.com).

Sincerely,



Victoria Neilson, Esq. & Kathryn R. Weber, Esq.  
AILA Asylum & Refugee Committee Co-Chairs

cc: Ms. Carrie Selby, Acting Associate Director, External Affairs Directorate  
Mr. Carlos Munoz-Acevedo, Chief Public Engagement Division  
Ms. Ashley Caudill-Mirillo, Acting Chief Asylum Division