



U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

February 3, 2012

BIA 12-02

MEMORANDUM

TO: Board Legal Staff

FROM: David L. Neal
Acting Chairman

SUBJECT: DHS Exercise of Prosecutorial Discretion

In August of 2011, the Department of Homeland Security (DHS) announced an initiative to ensure that its resources were focused on the Administration's highest immigration enforcement priorities. This effort is commonly referred to as DHS' prosecutorial discretion initiative (or "PD"). This memorandum pertains to how the Board will respond to cases in which PD is exercised.

I. Background

Beginning in November 2011, attorneys for the Immigration and Customs Enforcement (ICE) began to review cases pending before the Immigration Courts and cases where charging documents had not yet been filed in the Immigration Court. *See* EOIR Statement Regarding Prosecutorial Discretion, Nov. 17, 2011, www.justice.gov/eoir.

DHS recently expanded the initiative to include cases pending before the Board. As of last week, DHS personnel have begun reviewing appeals to identify cases that may warrant the exercise of prosecutorial discretion.

While this is a DHS initiative, we need to monitor how this initiative will impact the Board, if at all, and be able to report on how the initiative has progressed. We must therefore be careful to record in which cases prosecutorial discretion has been exercised. This memorandum pertains to processing cases that involve an affirmative and express exercise of prosecutorial discretion by DHS attorneys.

II. Identifying cases

Active cases. DHS has advised us that, when it elects to exercise prosecutorial discretion in a case pending before us, we will receive a motion that both (a) affirmatively states that prosecutorial discretion is being exercised and (b) reflects that the respondent joins the motion. The motion will ask the Board to (i) administratively close proceedings, (ii) allow DHS to withdraw the appeal, or (iii) terminate proceedings.

Closed cases. We may receive joint motions to reopen cases in which there has been an administrative final order. Should that happen, the motion to reopen (for the purpose of administratively closing or terminating the case) will reflect that the motion is based upon the exercise of prosecutorial discretion.

Remanded cases. We may receive federal court remands with instructions to the Board either to administratively close or to terminate proceedings, based upon DHS' express desire to exercise prosecutorial discretion.

All cases. DHS informs us that any exercise of prosecutorial discretion will be expressly made. We are *never* to assume that prosecutorial discretion has been exercised but must always look for an articulation of the decision before characterizing a case as being resolved through prosecutorial discretion.

III. Decision format

In anticipation of receiving such motions, we have prepared form orders. Where prosecutorial discretion has been expressly exercised, please use the appropriate attached form order.

If you are assigned a case that requests termination of proceedings (whether with or without prejudice) based upon DHS' exercise of prosecutorial discretion, please advise and consult your supervisor for format guidance.

If you are assigned a case that has been remanded from the federal courts ordering the Board to take a particular course of action as a result of DHS' enforcement initiatives or prosecutorial discretion processes, please advise and consult your supervisor for format guidance.

III. Decision Codes

Our circulation sheet has been revised to record which of our decisions are based upon DHS' exercise of prosecutorial discretion. Specifically, Group V of the Decision Codes, as listed below, applies to cases in which the motion before the Board expressly reflects the exercise of prosecutorial discretion.

APD = Proceedings administratively closed based on DHS exercise of prosecutorial discretion

TPD = Proceedings terminated based on DHS exercise of prosecutorial discretion

WPD = Withdrawal of DHS appeal based on DHS exercise of prosecutorial discretion

If you are assigned a case that involves DHS' exercise of prosecutorial discretion and are unsure how to proceed, please advise and consult your supervisor.

Additionally, if you or your supervisor have questions, please consult Senior Legal Advisor Amy Minton, who serves as our primary point of contact on DHS prosecutorial discretion case issues.

Attachments

Falls Church, Virginia 22041

File: A -

Date:

In re:

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT:

ON BEHALF OF DHS:

An appeal from the Immigration Judge's decision in this case is currently pending before the Board of Immigration Appeals ("Board"). The parties have now filed a joint motion to administratively close these proceedings based upon the Department of Homeland Security's exercise of prosecutorial discretion. The motion will be granted, and the proceedings administratively closed.

If either party to this case wishes to reinstate the proceedings, a written request to reinstate the proceedings may be made to the Board. The Board will take no further action in the case unless a request is received from one of the parties. The request must be submitted directly to the Clerk's Office, without fee, but with certification of service on the opposing party.

Accordingly, the following order will be entered.

ORDER: The proceedings before the Board of Immigration Appeals in this case are administratively closed.

FOR THE BOARD

Falls Church, Virginia 22041

File: A -

Date:

In re:

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

ON BEHALF OF DHS:

The Department of Homeland Security (“DHS”) and the respondent have filed a joint motion to reopen and administratively close these proceedings based upon DHS’ exercise of prosecutorial discretion. The motion to reopen proceeding will be granted, and the proceedings will be administratively closed.

If either party to this case wishes to reinstate the proceedings, a written request to reinstate the proceedings may be made to the Board of Immigration Appeals (“Board”). The Board will take no further action in the case unless a request is received from one of the parties. The request must be submitted directly to the Clerk’s Office, without fee, but with certification of service on the opposing party.

Accordingly, the following orders will be entered.

ORDER: The joint motion to reopen is granted.

FURTHER ORDER: The proceedings before the Board of Immigration Appeals in this case are administratively closed.

FOR THE BOARD

Falls Church, Virginia 22041

File: A -

Date:

In re:

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

ON BEHALF OF DHS:

ORDER:

The Board of Immigration Appeals (“Board”) has been advised that the Department of Homeland Security, in the exercise of prosecutorial discretion, has withdrawn its appeal. *See* 8 C.F.R. § 1003.4. Since there is nothing now pending before the Board, the record is returned to the Immigration Court without further action.

FOR THE BOARD