

Advisory on Immigration Enforcement Summary of New Priorities and Program Changes Announced by President Obama

Introduction

On November 20, 2014, the Obama Administration announced new policies regarding immigration enforcement. Simultaneously, the administration announced other modifications and immigration benefits, including a program for deferred action for parents of U.S. citizens and lawful permanent residents. More comprehensive analyses of the enforcement priorities as well as non-enforcement related announcements are available at www.adminrelief.org.

The enforcement announcements fall into three primary categories:

- Shifts in enforcement “priorities,” including detention resources;
- Changes to the Secure Communities program and detainers; and
- Updated objectives for Southern Border enforcement.¹

Enforcement “Priorities”

The new enforcement priorities memo, entitled “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants”² covers the categories of people who will be at greatest risk of deportation, and applies to ICE, CBP and USCIS.³ It also provides guidance on prosecutorial discretion and immigration detention. Finally, it supersedes and rescinds several previous memos on enforcement priorities and operations. The changes took effect on January 5, 2015. On June 17, 2015, ICE released Frequently Asked Questions (FAQs) regarding the implementation of the enforcement priorities.⁴

There are three civil enforcement priority levels, although as before, the new memo states that anyone who is legally deportable under immigration law may still be deported.

- **Priority One** focuses on people who are “threats to national security, border security, and public safety.” This includes: persons suspected of having involvement with gangs, spies, or terrorists; persons convicted of a felony (defined under state law) or an “aggravated felony;” and persons apprehended at the borders while attempting to enter unlawfully.⁵
- **Priority Two** focuses on people who are “misdemeanants and new immigration violators.” This includes: persons convicted of three or more misdemeanors, not including minor traffic offenses and state convictions where immigration status is an element; visa “abusers;” persons without status who have not been continuously present in the U.S. since January 1, 2014; and persons with convictions for a significant misdemeanor. A “significant misdemeanor” is defined as an offense of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, driving under the influence, or any misdemeanor for which the person was sentenced to serve 90 days or more in jail, not counting suspended sentences.
- **Priority Three** focuses on people who have “other immigration violations.” This priority only names “those who have been issued a final order of removal on or after January 1, 2014.”

Note that eligibility for Deferred Action for Parents (DAPA) depends on **NOT** being listed in any one of these enforcement priority categories above. Eligibility for Deferred Action for Childhood Arrivals (DACA) does not depend upon these enforcement priority categories, but upon the original DACA criteria. It is likely, however, that the June 17, 2015 FAQs may affect eligibility for DACA, pending future guidance from DHS. For more information on DACA, please see www.adminrelief.org and www.ilrc.org/daca.

Immigration Detention

The enforcement policy memo directs that DHS *should* use detention resources to detain:

- Individuals who fall in the priority categories described above; and
- Individuals subject to mandatory detention under current immigration law.

DHS *should not* detain any of the following, absent “extraordinary circumstances” or unless they are subject to mandatory detention as required by law: those who are known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest. DHS officers or special agents must obtain approval from the ICE Field Office Director before detaining any of these individuals.

Secure Communities and Immigration Detainers

Although the administration says they have ended Secure Communities, it has actually just been renamed to “Priority Enforcement Program (PEP).” The fingerprints sent to the FBI of anyone arrested will continue to be checked against ICE databases at the point of arrest.

The new policy is primarily about reforms to immigration detainers. Detainers will now generally be requests for notification of release date, not hold requests for extra detention. The memo is ambiguous, but it appears to intend that ICE shall primarily only make notification requests to local law enforcement, but may request a hold for transfer to ICE under “special circumstances.” “Special circumstances” is not defined. However, the memo also provides that if such a hold is requested, ICE will have to specify that there is probable cause for that detention. How ICE would specify this to the satisfaction of the constitution is unknown. Moreover, reports from the field indicate that ICE plans to continue to issue detainers in jurisdictions that will honor those requests.

The memo also states, again with some ambiguity, that these notification requests or hold requests should be issued according to the enforcement priorities, focusing specifically on: persons suspected of being involved with terrorists, gangs, or spies, persons convicted of felonies or “aggravated felonies,” and persons with convictions for significant misdemeanors or three or more non-significant misdemeanors. As a result, because these enforcement priorities are mostly for people convicted of certain crimes, ICE should not issue detainers on individuals who only been charged, or have pending criminal cases, unless they have a prior conviction that meets the priorities. How strictly ICE will follow this requirement will require close monitoring.

Border Enforcement

This announcement builds on the “Southern Border and Approaches Campaign Plan” that DHS launched in May, 2014. In contrast to the border strategies of some recent years, which focused on facilitating trade and ensuring functioning ports, this plan emphasizes immigration enforcement and surveillance.

Southern Border operations will be divided into three Joint Task Forces: East, West, and “investigations.”

The overarching goals of the Southern Border and Approaches Campaign are:

- Enforce immigration laws and interdict individuals crossing borders without permission;
- Targeting transnational criminal organizations; and
- Decreasing terrorist threats.

The plan also identifies ten objectives, which focus on deterrence, increased surveillance, heightened inspections, targeting organized crime, and infrastructure improvements.

¹ No new policies or priorities were announced regarding the Northern Borders.

² The memo addresses “Undocumented Immigrants” in the title, and it is unclear whether it also applies to immigrants with valid visas or lawful permanent residence.

³ Memorandum from Jeh Johnson, Secretary, U.S. Department of Homeland Security, on Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants to Thomas S. Winkowski et. al (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf. This memo from DHS Secretary Jeh Johnson applies to ICE, CBP, and USCIS.

⁴ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY, Frequently Asked Questions Relating to Executive Action on Immigration (June 17, 2015), <https://www.ice.gov/immigrationAction/faqs>.

⁵ This level 1 priority for those apprehended at the border applies to those apprehended after the effective date of the memo, January 5, 2015.