

Preventing the Removal of Individuals Who Are Not Enforcement Priorities or Who Are Eligible for Expanded DACA and DAPA

PRACTICE ADVISORY¹

On February 16, 2015, a federal judge in the Southern District of Texas issued a [preliminary injunction](#) in *State of Texas, et al v. United States, et al.*, No. 1-14-CV-254 (S.D.Tex.), temporarily blocking the implementation of the expanded Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Legal Permanent Residents (DAPA) initiatives. In light of the preliminary injunction, DHS and DOJ personnel are temporarily prohibited from considering an individual's eligibility for expanded DACA or DAPA.

The preliminary injunction, however, does not prohibit DHS or its components from implementing the enforcement priorities set forth in the November 20, 2014 memorandum from DHS Secretary Jeh Johnson entitled, [Policies for the Apprehension, Detention and Removal of Undocumented Immigrants](#) (“Enforcement Memo”). On June 17, 2015, [ICE released Frequently Asked Questions](#) clarifying its interpretation of the enforcement priorities (“ICE FAQs”). Individuals who do not fall within the enforcement priorities—this includes all or substantially all potential expanded DACA and DAPA requestors as well as many other individuals—should continue to pursue prosecutorial discretion. Even individuals who appear to fall within one of the enumerated enforcement priorities may ultimately be found not to be a priority and receive prosecutorial discretion based on the exceptions specified in the Enforcement Memo. Under a plain reading of the Enforcement Memo, if the relevant DHS official finds that your client meets the applicable standard to be excepted from the priority category that seemingly applies to him or her, **your client is not an enforcement priority.**

While the preliminary injunction is in effect, counsel may continue to follow the procedures for making prosecutorial discretion requests set forth in this practice advisory and on the [ICE Immigration Action web page](#). However, in light of the injunction, counsel should generally focus prosecutorial discretion requests on why the client is not an enforcement priority and what positive equities the client has that warrant a favorable exercise of prosecutorial discretion, and not whether the client is eligible for expanded DACA or DAPA. Should you decide to reference the expanded DACA and DAPA programs in requests for prosecutorial discretion or administrative closure, such references should include an acknowledgment that those programs are now enjoined but that your client intends to pursue deferred action when the opportunity arises.

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On November 20, 2014, President Obama [announced](#) a series of reforms modifying immigration policy (“Executive Action”). After the announcement, DHS Secretary Johnson issued agency-wide memoranda expanding deferred action and revising immigration enforcement priorities. This advisory offers strategies to prevent the removal of individuals who do not fall within the enforcement priorities—including all or substantially all those who qualify for the expanded Deferred Action for Childhood Arrivals initiative (“Expanded DACA”) or the newly-created deferred action initiative for certain parents of U.S. citizens and lawful permanent residents, Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”), as well as many other individuals.

Two DHS memoranda in particular may impact individuals in immigration custody and/or removal proceedings.

- (1) *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (“Enforcement Memo”): This memo provides additional information about DHS’s arrest, detention, and removal policy and creates new categories of enforcement priorities which may impact the availability of DAPA when the injunction is lifted.² This memo indicates that the criteria identified in the memo apply to individuals in removal proceedings.³ DHS has specifically stated that while the injunction is in effect, the Enforcement Memo remains in “full force and effect.”⁴ In addition to memoranda, ICE, CBP, and USCIS have issued FAQs and additional guidance on their websites. On June 17, 2015, ICE released FAQs⁵ regarding the enforcement priorities.⁶
- (2) *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are the Parents of U.S. Citizens or Permanent Residents* (“Deferred Action Memo”): This memo instructs Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) to immediately begin identifying individuals in their custody, as well as newly encountered individuals, who may be eligible for DAPA or Expanded DACA. In addition, ICE is directed to review pending removal cases, seek administrative closure or termination of cases of those who meet the eligibility criteria, and refer these cases to USCIS for case-by-case determinations. Both these processes are currently suspended based on the preliminary injunction. Nonetheless, the requirements for DAPA and Expanded DACA are analyzed

² The *Enforcement Memo* rescinds the following prosecutorial discretion memoranda: John Morton, [Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens](#), March 2, 2011; John Morton, [Exercising Prosecutorial Discretion Consistent with the Civil Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens](#), June 17, 2011; Peter Vincent, [Case-by-Case Review of Incoming and Certain Pending Cases](#), November 17, 2011; John Morton, [Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems](#), December 21, 2012; John Morton, [National Fugitive Operations Program: Priorities, Goals, and Expectations](#), December 8, 2009.

³ *Enforcement Memo*, at 2 (“In the immigration context, prosecutorial discretion should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case”).

⁴ Press Release, Department of Homeland Security, Statement by Secretary Jeh C. Johnson Concerning the District Court’s Ruling Concerning DAPA and DACA (Feb. 17, 2015), available at <http://www.dhs.gov/news/2015/02/17/statement-secretary-jeh-c-johnson-concerning-district-courts-ruling-concerning-dapa>.

⁵ 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> [hereinafter “ICE FAQs.”].

⁶ For more information, see the CIRI Practice Advisory, “FAQs Regarding the Enforcement Priorities,” at adminrelief.org.

below to assist lawyers in determining their clients' eligibility for these benefits once the injunction is lifted and advising them on the application process.

Several discrepancies exist between the Enforcement Memo and the Deferred Action Memo. Some of them will be discussed below, but continue to check our websites for future advisories that provide additional clarity.

On April 6, 2015, ICE's Office of the Principal Legal Advisor (OPLA) and DOJ released the following memoranda regarding cases pending before the Executive Office for Immigration Review (EOIR).

- (1) [Guidance Regarding Cases Pending Before EOIR Impacted by Secretary Johnson's Memorandum entitled *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*](#): This memo directs ICE attorneys to continue to review cases for potential exercise of prosecutorial discretion (PD) as early in the case as possible; to review PD requests prior to hearings; and to seek administrative closure or dismissal of cases not falling within the enforcement priorities. The memo provides that the Office of Chief Counsel (OCC) should not seek administrative closure for detained individuals (note that this does not preclude OCC from agreeing to join in a motion to administratively close). According to the memo, OCC will only agree to release someone from mandatory detention after EOIR grants a motion to dismiss proceedings.
- (2) [Operating Policies and Procedures Memorandum 15-01: *Hearing Procedures for Cases Covered by New DHS Priorities and Initiatives*](#): In this memo, Chief Immigration Judge Brian O'Leary instructs immigration judges to ask ICE attorneys on the record whether the case before them remains a removal priority or whether ICE is seeking termination or administrative closure.

Who will qualify for the Expanded Deferred Action for Childhood Arrivals ("Expanded DACA") when the injunction is lifted?

The Deferred Action Memo supplements and amends the June 15, 2012 memo that created the DACA program, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children. The Deferred Action Memo eliminates the "age cap," so a person must no longer have been "under the age of 31 on June 15, 2012" to qualify. It also advances the start date for the continuous residence period from June 15, 2007 to January 1, 2010. In addition, the memo extends the DACA and accompanying work authorization period to three, instead of two, years.⁷ However, DHS reverted to issuing DACA grants for two-year periods, as established when it created the program in 2012.⁸ To qualify for Expanded DACA, individuals must demonstrate that they:

- Came to the United States before reaching their 16th birthday;
- Have continuously resided in the United States since January 1, 2010 up to the present time;
- Were physically present in the United States on June 15, 2012, and at the time of requesting consideration of deferred action;
- Had no lawful status on June 15, 2012;

⁷ For more information on the eligibility criteria for the original DACA program, which is not impacted by the preliminary injunction, see American Immigration Council and National Immigration Project of the National Lawyers Guild Practice Advisory, [Deferred Action for Childhood Arrivals](#).

⁸ Note that USCIS erroneously issued 3-year employment authorization documents to approximately 2,600 individuals AFTER the Texas ruling. It has notified these DACA recipients to return their EAD in exchange for a two-year EAD.

- Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a General Educational Development certificate, or are honorably discharged veterans of the Coast Guard or Armed Forces of the United States; and
- Have not been convicted of a felony, a significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.⁹

Who will qualify for Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) when the injunction is lifted?

To qualify for DAPA, individuals must demonstrate that they:

- Have, as of November 20, 2014, a son or daughter of any age who is a U.S. citizen or lawful permanent resident;
- Have continuously resided in the United States since before January 1, 2010;
- Were physically present in the United States on November 20, 2014 and at the time they requested consideration of deferred action with USCIS;
- Have no lawful status on November 20, 2014;
- Are not enforcement priorities as defined in the Enforcement Memo. The Enforcement Memo creates three new priority enforcement categories. Certain criminal convictions or extra-conviction conduct as well as certain immigration law violations trigger these enforcement priority categories;¹⁰ and
- Present no other factors that, in the exercise of discretion, make a grant of deferred action inappropriate.

USCIS has indicated that detailed explanations, instructions, regulations, and forms will become available in the coming months—although presumably not until after the injunction is lifted. Individuals may request e-mail updates from USCIS. USCIS also posts updates on its website, Facebook, and Twitter.

When the injunction is lifted, will an individual with a final order of removal be eligible for Expanded DACA or DAPA?

The Deferred Action Memo provides that individuals with final removal orders¹¹ may qualify for Expanded DACA or DAPA. However, with respect to individuals with recent final removal orders—i.e.,

⁹ For more information about eligibility criteria under DACA and DAPA, please visit the [Administrative Relief Resource Center](#).

¹⁰ As discussed on pages 6-7 of this practice advisory, each of the three categories of enforcement priorities contains “exception” language that permits DHS not to pursue enforcement with regard to a particular individual who otherwise is a priority. The *Enforcement Memo* lays out the factors that can be considered in determining whether DHS should apply the exception. For a close reading of the *Enforcement Memo*, see American Immigration Council and American Immigration Lawyers Association Practice Advisory, [Prosecutorial Discretion Requests Under the Johnson Enforcement Priorities Memorandum](#) and American Immigration Council Practice Advisory, [Prosecutorial Discretion: How to Advocate for Your Client](#). For a preliminary analysis of the criminal and public safety bars to DAPA, which are co-extensive with the criminal and public safety grounds covered in the *Enforcement Memo*, see Immigrant Legal Resource Center and NIPNLG Practice Advisory, [Practice Advisory for Criminal Defenders: New “Deferred Action for Parental Accountability” \(DAPA\) Immigration Program Announced by President Obama](#). Note that this Practice Advisory only addresses the criminal and public safety bars to DAPA, not bars related to violations of immigration law.

¹¹ The *Enforcement Memo* cross-references the 8 CFR § 1241.1 definition of the term “final order.” That regulation provides that “[a]n order of removal made by the immigration judge at the conclusion of proceedings under section 240 of the Act shall become final:

those with final removal orders entered on or after January 1, 2014—it remains to be seen whether DHS will grant deferred action under the DAPA program. That is because the Deferred Action Memo provides that a person is ineligible for DAPA if he or she is an enforcement priority, and the Enforcement Memo identifies as an enforcement priority “those who have been issued a final order of removal on or after January 1, 2014.” Once the injunction is lifted, we hope that DHS will provide clarification regarding this apparent tension between the Deferred Action Memo and the Enforcement Memo. During the transition period into new enforcement priorities, the ICE FAQs¹² provide guidance regarding how DHS will approach the cases of individuals who:

- 1) were removed and unlawfully reentered the country before January 1, 2014, but whose prior removal orders were reinstated on or after January 1, 2014;
- 2) were granted voluntary departure by an immigration judge or the Board of Immigration Appeals before January 1, 2014, and whose voluntary departure period expired on or after that date without them having departed (thereby converting their voluntary departure into a removal order); or
- 3) were ordered removed by an immigration judge before January 1, 2014, but whose timely appeals were denied on or after that date.

The ICE FAQs provide that DHS will evaluate the cases of individuals who fall within this category on a case-by-case basis to determine whether their removal would serve an important federal interest. However, counsel with clients who would not be enforcement priorities but for a recent final removal order may still wish to appeal removal orders issued by immigration judges, seek remand of cases now before a court of appeals, move to reopen removal orders rendered final in 2014, and take other steps that may prevent clients from having a final order of removal dated on or after January 1, 2014.

My client is in removal proceedings and meets the criteria for Expanded DACA or DAPA. What steps can I take to facilitate administrative closure or termination of proceedings while the injunction is still in place?

As ICE recommends on its website, you may submit a written request for prosecutorial discretion to the ICE Office of the Principal Legal Advisor (OPLA) at the mailbox of the OPLA field office that is handling the case. In the request, include your client’s full name, alien registration number, and the case status, and describe in detail the reasons why your client does not fall within the DHS enforcement priorities.¹³ We also recommend that you submit any available corroborating evidence. The ICE Executive Action website provides that OPLA should consider such requests promptly and respond.

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- (a) Upon dismissal of an appeal by the Board of Immigration Appeals;
 - (b) Upon waiver of appeal by the respondent;
 - (c) Upon expiration of the time allotted for an appeal if the respondent does not file an appeal within that time;
 - (d) If certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal;
 - (e) If an immigration judge orders an alien removed in the alien’s absence, immediately upon entry of such order; or
 - (f) If an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, upon overstay of the voluntary departure period, or upon the failure to post a required voluntary departure bond within 5 business days. If the respondent has filed a timely appeal with the Board, the order shall become final upon an order of removal by the Board or the Attorney General, or upon overstay of the voluntary departure period granted or reinstated by the Board or the Attorney General.”

¹² 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>.

¹³ See American Immigration Council Practice Advisory, *Prosecutorial Discretion: How to Advocate for your Client* (March 17, 2015) for information about how an attorney can advocate for a favorable exercise of prosecutorial discretion.

If the ICE trial attorney refuses to grant prosecutorial discretion and will not join a motion to administratively close or terminate your client's case, consider filing a motion with the immigration court requesting termination or administrative closure, citing *Matter of Avetisyan*.¹⁴ If the immigration judge denies your motion, you still may file a motion to continue removal proceedings while the respondent escalates his or her prosecutorial discretion request through the appropriate channels. The Enforcement Memo is the primary prosecutorial discretion memorandum, but other memoranda, such as ICE Director John Morton's June 17, 2011 *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* may apply and strengthen prosecutorial discretion requests. Practitioners also should consider other types of prosecutorial discretion requests, if applicable, such as asking ICE not to issue or to cancel a Notice to Appear that has been issued but not filed with the Immigration Court.¹⁵

My non-detained client has a removal order, is scheduled for removal and is not an enforcement priority under the Enforcement Memo or meets the criteria for Expanded DACA or DAPA. What should I do?

Promptly contact the Enforcement and Removal Operations (ERO) officer responsible for your case. You may also call the ICE ERO Detention Reporting and Information Line, toll-free, at 1-888-351-4024. ICE further recommends contacting the [local OPLA office](#) or calling the USCIS National Customer Service Center toll-free at 1-800-375-5283. At this point, however, it is unclear what steps USCIS may be able to take in this situation. Practitioners may also send an email to eroprosecutorialdiscretioninquiries@ice.dhs.gov to further elevate their cases. Additionally, individuals may also submit their case to outside advocates, such as the Immigrant Legal Resource Center at <http://www.ilrc.org/CED/Enforcement> for further assistance.

Explain and, if necessary, provide documentation to prove to the relevant official that your client merits a favorable exercise of prosecutorial discretion.

My client is facing imminent removal. What should I do?

In addition to contacting the ERO Detention Reporting and Information Line and emailing OPLA to request prosecutorial discretion, it is advisable to file a request for a judicial or administrative stay of removal.¹⁶ Some practitioners have reported that elected officials and community organizers have been helpful in supporting requests to stay the execution of a removal order.

My client is in immigration custody, but is eligible for DAPA or Expanded DACA or is not an enforcement priority under the Enforcement Memo. What steps can I take to get my client out of detention?

You should immediately notify ICE that your client is not an enforcement priority and, if applicable, explain that your client meets the criteria for one of these programs (while acknowledging that these programs are now enjoined). The ICE Executive Action website instructs detainees to identify

¹⁴ 25 I&N Dec. 688 (BIA 2012) (providing that immigration judges and the BIA may administratively close removal proceedings, even if a party opposes the closure, after weighing certain relevant factors).

¹⁵ For more information, see American Immigration Council Practice Advisory, [Notices to Appear](#) (June 30, 2014).

¹⁶ Pursuant to 8 C.F.R. § 241.6, ICE may issue an administrative stay of removal. In addition, a court of appeals may issue a stay of removal if there is pending petition for review of the removal order. An individual may request a judicial stay by filing a motion concurrently with a petition for review or after a petition for review has been filed. See American Immigration Council, NIPNLG and New York University School of Law Immigrant Rights Clinic Practice Advisory, [Seeking a Judicial Stay of Removal in the Court of Appeals](#) (January 21, 2014).

themselves to ICE officers according to the detainee-staff communication procedures in the detention facility's orientation handbook, which should have been provided at the time of booking. Legal representatives may call the ICE ERO Detention Reporting and Information Line at 1-888-351-4024 to request prosecutorial discretion.

The *Enforcement Memo* provides additional criteria that DHS can take into account when considering a request for release from detention.¹⁷ For example, unless a person falls under one of the enforcement priorities or is subject to mandatory detention, he or she should only be detained under extraordinary circumstances. Officers and special agents will have to obtain approval from the ICE Field Office Director to detain someone who is known to be suffering from serious physical or mental illness; who is disabled, elderly, pregnant, or nursing; who demonstrates that he or she is the primary caretaker of children or an infirm person, or whose detention is otherwise not in the public interest. Some practitioners have reported ICE resists releasing people subject to mandatory detention even when they do not fall under the enforcement priorities memo.

My client is not eligible for Expanded DACA or DAPA and is not an enforcement priority. What should I do if he or she is in removal proceedings or scheduled to be deported?

The *Enforcement Memo* took effect on January 5, 2015.¹⁸ The ICE Executive Action website repeatedly indicates that individuals who believe they are eligible for prosecutorial discretion should contact ICE. Under the Enforcement Memo, resources should be devoted, "to the greatest degree possible," to those identified as enforcement priorities. If a person does not fit within one of the enforcement priority categories, ICE may pursue his or her removal only if, in the judgment of an ICE Field Office Director, removing the person would "serve an important federal interest."¹⁹ According to the ICE FAQs an "important federal interest" is a discretionary decision for the ICE office of Chief Counsel and the Field Office Director to determine, based on the "the conduct of the individual and its impact on the integrity of the immigration system." Federal interest may be related to the resources needed to prosecute and adjudicate a deportation case, but cannot be determined by resource expenditure alone.²⁰

My client appears to fall within one of the enumerated enforcement priorities, but should not be considered a priority based on the exceptions specified in the Enforcement Memo. What should I do?

Even individuals who appear to fall within one of the enumerated enforcement priorities may ultimately be found not to be a priority and receive prosecutorial discretion based on the exceptions specified in the memorandum. Under a plain reading of the Enforcement Memo, if the relevant DHS official finds that your client meets the applicable standard to be excepted from the priority category that seemingly applies to him or her, *your client is not an enforcement priority*.²¹ Though members have reported little

¹⁷ *Enforcement Memo*, at 5.

¹⁸ *Id.* at 6.

¹⁹ *Id.* at 5.

²⁰ ICE FAQs.

²¹ The *Enforcement Memo* provides that the "removal of [individuals in Priority 1] must be prioritized *unless*...in the judgment of an ICE Field Office Director, CBP Sector Chief or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and *should not therefore be an enforcement priority*." *Enforcement Memo* at 3 (emphasis added). "Unless" clauses appear in the flush language following *all* of the enumerated priority categories. *Id.* at 3-4. This language is set forth anew in subsection D of the *Enforcement Memo*. *Id.* at 5.

success persuading DHS that their clients merit an exception, counsel should continue to raise these arguments with the relevant officials.

In deciding whether a person who appears to fall within one of the enumerated priorities should ultimately be found not to be a priority, DHS personnel are instructed to consider the following non-exhaustive list of factors:²²

- extenuating circumstances involving the offense of conviction;
- extended length of time since the offense of conviction;
- length of time in the United States;
- military service;
- family or community ties in the United States;
- status as a victim, witness or plaintiff in civil or criminal proceedings;
- compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative;
- age at the time the offense was committed;
- sentence and/or fine imposed;
- whether the conviction has been expunged; and
- evidence of rehabilitation.

Below is a table setting forth the relevant DHS official and the applicable standard you must meet to have your client removed from the ambit of the Enforcement Memo.

Table 1: Exceptions to the Enforcement Priorities

	Priority 1	Priority 2	Priority 3
Who is the DHS decision maker?	ICE Field Office Dir. CBP Sector Chief CBP Dir. of Field Ops	ICE Field Office Dir. CBP Sector Chief CBP Dir. of Field Ops USCIS District Dir. USCIS Service Center Dir.	An immigration officer
What is the standard?	Compelling and exceptional factors that clearly indicate person is not a threat to national security, border security, or public safety.	Factors indicating person is not a threat to national security, border security, or public safety.	Not a threat to integrity of the immigration system or factors suggesting person should not be a priority.

²² Enforcement Memo at 6; ICE FAQs.

Can I ask ICE to reconsider decisions made in responses to requests for prosecutorial discretion, including requests to be released from detention?

ICE's Executive Action website states that "there is no formal reconsideration process." However, an attorney may contact the supervisor of the DHS employee who made a particular decision to request a further explanation. The website also instructs that you may contact OPLA to request review of the decision in a client's case. AILA members may wish to consult the AILA Practice Pointer entitled, [Escalating Requests for Prosecutorial Discretion](#), for more information on the escalation process.

Where can I find more information about prosecutorial discretion in the immigration context?

For general advice on advocating for a favorable exercise of prosecutorial discretion by DHS officers, see American Immigration Council Practice Advisory, *Prosecutorial Discretion: How to Advocate for Your Client*.

Where can I find more information about these programs?

Advocates can find information about these new programs and other aspects of executive action at:

- American Immigration Council, [A Guide to the Immigration Accountability Executive Action](#)
- USCIS Webpage, [Executive Actions on Immigration](#)
- ICE Webpage, [Immigration Action](#)
- CBP Webpage, [Immigration Action](#)
- DHS Webpage, [Fixing Our Broken Immigration System Through Executive Action – Key Facts](#)