

Practice Advisory: Parsing the FAQs on DHS Enforcement Priorities

On June 17, 2015, U.S. Immigration and Customs Enforcement (ICE) released [Frequently Asked Questions](#)¹ (FAQs) regarding the November 20, 2014 Department of Homeland Security (DHS) memorandum, [Policies for the Apprehension, Detention and Removal of Undocumented Immigrants](#)² (“Enforcement Memo”).

First, this Advisory will discuss the following issues that were addressed in the FAQs:

1. Definition of the significant misdemeanor of driving under the influence (DUI).
2. When might a DUI not be an enforcement priority?
3. Definition of the significant misdemeanor of a domestic violence offense.
4. Possible exceptions for identity theft.
5. Effect of expungements.
6. Effect of juvenile adjudications.
7. What orders constitute a final order of removal on or after January 1, 2014 (Priority 3).
8. Guidance on who poses a danger to national security (Priority 1a).
9. What constitutes significant abuse of the visa and visa waiver programs.
10. How DHS will decide whether removal serves an important federal interest.

Second, the Advisory will discuss the following practice issues:

11. Will CBP and USCIS adhere to these FAQs?
12. Will USCIS use standards announced in the FAQs to adjudicate DACA applications?
13. Remember, we can win on a definition but lose as a matter of discretion.
14. How can individuals elevate their cases to DHS headquarters’ attention if they fall outside the enforcement priorities or have strong arguments for exercise of one of the exceptions enumerated in the enforcement priorities or ICE FAQs?

1. What constitutes a driving under the influence (DUI) significant misdemeanor?

The Enforcement Memo provides that individuals convicted of a DUI fall into Priority 2. The FAQs provide more detail about what constitutes a DUI and what factors DHS may consider in determining whether an individual merits a positive exercise of discretion. The FAQs state that DHS must consider the elements of the statute of conviction to determine whether a conviction (requiring proof beyond a

¹ See Frequently Asked Questions Relating to Executive Action on Immigration, updated June 17, 2015, at www.ice.gov/ImmigrationAction/FAQs.

² See Jeh Johnson, DHS Memorandum, “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum,” Nov. 20, 2014, available at www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (“Enforcement Memo”).

reasonable doubt) is a DUI significant misdemeanor. The statute of conviction must:

- 1) constitute a **misdemeanor** as defined by federal law;
- 2) require the **operation of a motor vehicle**; and
- 3) require, as an element of the offense, either a **finding of impairment** or a **blood alcohol content (BAC)** of 0.08 or higher.

First, the offense must be a misdemeanor. For DUI purposes, the FAQs define a misdemeanor according to federal law, which is an offense for which the term of imprisonment authorized is more than 5 days but not more than 1 year.³ Counsel must examine the sentence range of the statute of conviction to see if it meets this definition. For example, in Wisconsin, a first Operating While Intoxicated offense under Wis. Stat. § 346.63(1)(a) does not carry any potential jail sentence⁴ and thus would not constitute a misdemeanor as defined in the FAQ. Similarly, in Texas, an underage DUI under Alcoholic Beverage Code §106.041(a) is a Class C misdemeanor without any potential jail sentence. A New York traffic infraction, however, may qualify as a misdemeanor because it carries a potential jail sentence of fifteen days, although, per DHS policy guidance, New York infractions are not considered misdemeanors for purposes of eligibility for Temporary Protected Status.⁵ Another possible area of confusion involves state misdemeanors that carry a potential sentence of more than one year. For example, Massachusetts penalizes an Operating Under the Influence offense with a misdemeanor that carries a potential jail sentence of two and one-half years.⁶ Advocates are seeking clarification on this.

Second, the offense must require the “operation of a motor vehicle.” Because DHS limits DUIs to motor vehicles while some states apply DUI penalties to the operation of any conveyance (such as a fishing boat), practitioners are encouraged to compare their states’ definitions with the federal standard,⁷ and to distinguish their clients’ offenses from this part of the definition, as applicable. For example, boating under the influence under Fla. Stat. §327.35 requires operating a vessel, not a motor vehicle, and so should not meet the memo’s definition. Another question involves the definition of “operating” a motor vehicle. Some DUI statutes reach conduct that does not involve driving a car; for instance, they prohibit conduct such as merely sitting in a parked car with the key in the ignition, while inebriated.⁸ Counsel

³ 18 U.S.C. § 3559 (West 2012). Apart from DUIs, in the enforcement context a felony is defined according to how the state characterizes it, and DHS has not clarified how they define misdemeanors.

⁴ Wis. Stat. §346.65(2)(am)1. See also OWI Sentencing Guidelines available at: <https://www.wicourts.gov/publications/fees/docs/d7owi.pdf>.

⁵ NY VTL 1193.1(a). Even though we have received reports that DHS does not adhere to the [January 17, 2010 USCIS Memorandum](#), which clarifies that New York infractions and DHS has issued policy guidance that violations are not misdemeanors for Temporary Protected Status adjudications, practitioners may wish to cite the USCIS policy on this matter in the prosecutorial discretion context.

⁶ MGL c. 90 s. 24.

⁷ Under 40 C.F.R. 85.1703, a motor vehicle is generally a vehicle that is self-propelled and capable of transporting a person or persons or any material or any permanently or temporarily affixed apparatus.

⁸ See, e.g., former Ariz. Rev. Stat. § 28-1383 (formerly § 28-697) and see discussion in *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117, 1118-1119 (9th Cir. 2003) (holding that having “physical control” of a car under ARS 28-697, which includes “sitting in one’s own car in one’s own driveway with the key in the ignition and a bottle of beer in one’s hand,” is substantially different from drunk driving and is not a crime involving moral turpitude even if committed while one’s license is suspended from a prior DUI). See also Virginia Code 18.2-266 and *Sarafin v. Commonwealth*, 764 S.E.2d 71 (Va. 2014) (sleeping man in parked car on own property with radio playing violates that section). The better view is that “operation” requires actually driving a vehicle while inebriated so as to cause a risk of collision. See, e.g., *People v. Wood*, 538 N.W.2d 351 (Mich. 1995). (“[O]perating’ should be defined in terms of the danger the OUIL [operating under the influence of liquor] statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of intoxicating liquor with other persons or property. Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such a risk.”). Applying that

may argue that this does not constitute driving or “operating” a vehicle and should not be held a DUI under the definition.

Third, the offense must require a finding of impairment or a BAC of at least .08. It is unclear how expansively DHS will interpret the phrase “finding of impairment” as applied to different state statutes. A statute like California “wet reckless”⁹ does not require a finding of alcohol effect or impairment, or any BAC level, and therefore does not appear to fit the FAQs definition. Several DACA applicants have been approved despite having this conviction. Washington negligent driving presents a more complex case. That statute prohibits operating a motor vehicle “in a manner that is both negligent and endangers or is likely to endanger any person or property, and exhibits the effects of having consumed liquor...” Advocates may argue that this does not meet the DUI definition because, while the person must “exhibit the effects” of having consumed liquor, there is no finding that the person actually was impaired by the alcohol, or that the drinking caused the negligence. At this point we do not know if DHS will accept this argument. DHS may find that statutes that contain the element of (or even the word) impairment come within the definition, for example “impaired driving” statutes such as those in Colorado, Maryland, Michigan, New York, Oklahoma, and the District of Columbia.¹⁰

Federal law sets the BAC limit for operating a vehicle under the influence of alcohol at 0.08.¹¹ All states have DUI statutes prohibiting driving when the driver’s BAC is at or above 0.08. Moreover, all states also have underage DUI statutes that criminalize driving after the consumption of a de minimis quantity of alcohol.¹² These underage DUI statutes arguably should not fall within the Enforcement Memo’s DUI definition, provided the statute does not require a finding of impairment.¹³

2. *What factors may DHS consider to determine whether individuals convicted of DUI significant misdemeanors are not enforcement priorities?*

The FAQs incorporate additional and more specific factors beyond those listed in the Enforcement Memo to assess whether a person who has been convicted of “driving under the influence” within the meaning of the Enforcement Memo should qualify as a priority. This applies to prosecutorial discretion, but it is not yet clear how it may apply to DAPA or DACA eligibility.

The FAQs provide that officials should consider the following factors:

- the level of intoxication;
- whether the individual was operating a commercial vehicle;

definition, the Michigan Court of Appeals held that a person was “operating” his vehicle when he abandoned it in the middle of a freeway.

⁹ Ca. Veh. Code 23103.5 (West 2015).

¹⁰ Col. Rev. Stat. § 42-4-1301(1) (g) (driving while ability impaired, a lesser included offense under Colorado’s DUI statute, *Thompson v. People*, 510 P.2d 311, 313 (Co. 1973)); MD Code, Transportation § 21-902(b)(1) (criminalizes driving while impaired by alcohol, which requires simple impairment “to some extent,” whereas Maryland DUI requires “substantial” impairment, *Turner v. State*, 956 A.2d 820, 828 (Md. Ct. Spec. App. 2008)); Mich. Comp. Laws § 257.625(3) (known as “driving while visibly impaired,” a lesser included offense under Michigan’s DUI statute, *People v. Prehn*, 396 NW 2d 472 (Mich. Ct. of App. 1986)); NY VTL § 1192(1) (criminalizes driving while ability impaired, a lesser included offense under New York’s DWI statute, *People v. Smith*, 18 NY 3d 544 (NY 2012)); Okla. Stat. § 47-761(A) (driving while ability impaired held a lesser included offense to driving under the influence, *Bernhardt v. State*, 719 P.2d 832, 834 (Okla. Crim. App. 1986)).

¹¹ Congress restricts certain transportation funding to those states that enact and enforce a 0.08 BAC limit. 23 U.S.C. § 163 (West 2015).

¹² See, e.g., Ala. Code § 32-5A-191 (BAC limit of 0.02 for underage drivers); Cal. Veh. Code § 23136(a) (BAC limit of 0.01 for underage drivers).

¹³ An example of this type of offense may be in Washington state, which penalizes OUI offenses in a certain range. See RCW § 46.61.503.

- any additional convictions for alcohol or drug-related DUI offenses;
- circumstances surrounding the arrest, including the presence of children in the vehicle, or harm to persons or property;
- mitigating factors for the offense (e.g. the conviction being for a lesser-included DUI offense under state law); and
- other factors showing that the person is or is not a threat to public safety.

3. *What constitutes a domestic violence (DV) significant misdemeanor?*

This FAQ links the domestic violence significant misdemeanor to the statutory definition of a deportable “crime of domestic violence” at INA § 237(a)(2)(E)(i), 8 USC 1227(a)(2)(E)(i). This more specific and technical definition may help applicants to know whether their conviction will be a bar to DAPA (or DACA, if the definition is carried over) or an enforcement priority as a DV offense. Its interpretation may mitigate against the longstanding problem faced by immigrants who were told that they were convicted of domestic violence significant misdemeanor offenses when in fact they pled to a different offense, after having been initially charged with domestic violence.

There are two components to a domestic violence offense: the violent conduct, and the victim with a domestic relationship. The FAQ discusses both components. Regarding violence, the FAQ provides that the “definition of domestic violence applies to convictions that are crimes of violence (as defined in section 16 of title 18)” The definition at 18 USC 16 is technical, has been interpreted in many court cases, and does not include certain types of offenses. For example, assault, battery, or other statutes that penalize de minimis touching (sometimes called an “offensive” or “rude” touching) should not constitute a domestic violence crime because they do not rise to the level of violence required by 18 USC § 16. Thus, even some “spousal battery” offenses are not deportable crimes of domestic violence, if the minimum conduct required for guilt involves de minimis violence.¹⁴ Also, convictions for vandalism, disorderly conduct or “no contact” protection orders generally should not count as DV significant misdemeanors.

The next question in this analysis is whether the conviction will be judged under the regular “categorical approach,” which looks only at the minimum conduct required for guilt under the statute, or under the approach that up to now has been used in DACA, where the officer has looked at all kinds of information about the person’s conduct in the incident. By tying the definition of DV offense to the DV deportation ground and 18 USC 16, the FAQ implies, but does not state that the categorical approach will be used. Advocates should consult resources examining whether a conviction qualifies as a crime of violence under 18 USC §16 and under INA § 237(a)(2)(E)(i). In particular see NIPNLG’s “[Crimes of Violence](#),” “[United States v Castleman](#),” and “[Johnson v United States](#)” Advisories. When in doubt in this complex and highly litigated area, consult an expert.

Regarding the domestic relationship, the FAQ notes that the domestic violence deportation ground reaches convictions both “under generally applicable criminal statutes prohibiting assault and battery or under statutes specifically addressing domestic violence. Many states do not have specific domestic violence laws, but INA section 237(a)(2)(E)(i) applies if there was a domestic relationship between the perpetrator and victim.” Thus, even if the person is not convicted under a specific domestic violence-type statute, as long as the offense meets the definition of crime of violence, and there is sufficient proof that the victim had the required domestic relationship, it is a domestic violence offense. It is not clear what proof of the relationship is acceptable. For the deportation ground, in some jurisdictions such

¹⁴ See *Matter of Sanudo* 23 I&N Dec. 968 (BIA 2006), *Johnson v. United States*, 130 S.Ct. 1265 (2010).

as the Ninth Circuit Court of Appeals, the relationship must be established in the record of conviction,¹⁵ but in other jurisdictions any credible evidence of the relationship is used.

4. How will ICE approach offenses related to identity theft where immigration status is not an explicit element of the offense?

The Enforcement Memo provides exceptions for Priority 1(d), Priority 2(a), and Priority 2(b) where immigration status is an explicit element of the offense. The FAQ provides that DHS may presume that individuals convicted under laws that are immigration neutral (not requiring immigration status as an element of the offense), such as convictions related to employment (e.g. identity theft, impersonation, fraud, tampering with government record), may fall within Priority 1(d), Priority 2(a), or Priority 2(b), as applicable. However, an immigration officer should be “sensitive to the overall circumstances” of the arrest and conviction, including the following factors:

- whether DHS was the agency that presented the case for prosecution;
- whether there is a victim in the case;
- the nature of any loss or harm experienced by the victim as a result of the crime;
- the sentence imposed as a result of the conviction (including whether the conviction was subsequently reclassified as a misdemeanor);
- whether there is any indication that the conviction has been collaterally challenged based on allegations of civil rights violations; and
- the nature and extent of the individual’s criminal history.

Many noncitizens have been convicted for identity-theft related crimes because they used documents that did not belong to them for purposes of obtaining or keeping employment, even when the earnings from this employment are used to pay for school and related expenses or support a family member. Identity theft in Arizona exemplifies the kind of offense where DHS should apply this exception. Sheriff Joe Arpaio facilitated prosecutions of undocumented workers for identity theft. The workers filed complaints and, eventually, a lawsuit. In *Puente Arizona v. Arpaio*, the Court found that “the primary purpose and effect of [those laws] is to impose criminal penalties on [undocumented immigrants] who seek or engage in unauthorized employment,” and temporarily enjoined county and state officials from further enforcement of the laws until a final decision can be reached.¹⁶

5. Will DHS apply the categorical approach in the prosecutorial discretion context?

The FAQs and other materials from DHS do not say that the categorical approach will apply. However, we suggest making these arguments in your prosecutorial discretion requests, especially if someone is in removal proceedings or in detention.

6. Will expunged convictions make an individual a priority for removal?

The Enforcement Memo from November 20, 2014 does not address how DHS will treat expunged convictions. Under the ICE FAQs, an individual with a conviction that would otherwise classify him or her as an enforcement priority may potentially escape that classification through expungement. ICE will assess expunged convictions “on a case-by case” basis to determine whether an individual is an enforcement priority. Accordingly, if possible, advocates should consider obtaining expungements for

¹⁵ See, e.g., *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004).

¹⁶ No. CV-14-01356-PHX-DGC, 2015 WL 58671, *18-19, 27 (D. Ariz. Jan. 5, 2015).

convictions that could otherwise make the individual an enforcement priority. Consult lawyers experienced in post-conviction relief, and obtain certified copies of court dispositions before expunging any records. Expungement will not automatically prevent an individual from being an enforcement priority, but will weigh favorably when ICE determines whether to exercise discretion. See [Post Conviction Relief to Advance Eligibility for Administrative Relief \(webinar\)](#) and [Post Conviction Relief Resources by State \(chart\)](#). This policy seems similar to the DACA context, where the DACA FAQs specifically state that expunged convictions will not be automatic bars to eligibility, although they will be considered in USCIS' exercise of discretion. The difference is that an individual with an otherwise disqualifying conviction for DACA (such as a felony, significant misdemeanor, or third misdemeanor) that is expunged still qualifies for DACA, although USCIS could deny his or her DACA request on discretion. The ICE FAQs reflect a weaker policy: DHS applies a case-by case approach to determine whether the expunged conviction makes an individual an enforcement priority (i.e. an expunged conviction falling within the enforcement priorities may, on its own, make an individual a priority for removal).

The FAQs do not provide an expungement definition. Different states employ different types of rehabilitative relief, i.e. mechanisms that eliminate or lessen the effect of a conviction based on the person's good conduct (e.g., completing probation) or other reasons. An expungement is one type of rehabilitative relief, but there are several other types that may or may not be called expungement, but that functionally serve the same purpose. For example, Texas offers deferred adjudication, which results in dismissal of charges, no conviction, and sealing of records;¹⁷ and California offers certificates of rehabilitation, sets-aside certain convictions, offers deferred sentencing, and sealing in certain situations.¹⁸ The Attorney General and the BIA historically treat any state action that purports to "erase the record of guilt" of a conviction as an "expungement."¹⁹ Counsel should argue that all state rehabilitative relief should be treated as an "expungement," regardless of the state's legal name for the relief.

7. Will juvenile adjudications make an individual a priority for removal?

Juvenile delinquency refers to the process of addressing alleged violations of law by individuals under a certain age—18 or 16 (state laws vary). A juvenile delinquency adjudication is not a conviction for immigration purposes.²⁰

Under the ICE FAQs, DHS will not consider a juvenile adjudication a conviction, and a juvenile adjudication, on its own, will not be sufficient for ICE to consider an individual an enforcement priority. However, if a juvenile is tried and convicted as an adult, that conviction will be treated as a conviction for purposes of the enforcement priorities. Many states provide robust protections for state records related to juvenile adjudications. Accordingly, individuals should carefully assess whether to turn over their juvenile adjudication records to DHS, especially if state law protects those records.

¹⁷ Tex. Gov't Code § 411.081(d); Tex. Code Crim. Proc. art. 42.12.

¹⁸ See Cal. Bus. & Prof. § 480(b); Cal. Penal §§ 17(b), 1203.4, 1203.4a, 1203.41; Cal. Penal § 1203.45(a); Cal. Penal § 851.8(d).

¹⁹ See *In re Roldan*, 22 I. & N. Dec. 512, 520 (Mar. 3, 1999); *Matter of Marroquin*, 23 I&N Dec. 705, 711 (A.G. 2005) ("Although *Roldan* appears to involve a deferred adjudication, the BIA found 'it necessary to reconsider [...] the effect to be given to any state action, whether it is called setting aside, annulling, vacating, cancellation, expungement, dismissal, discharge, etc., of the conviction, proceedings, sentence, charge, or plea, that purports to erase the record of guilt of an offense pursuant to a state rehabilitative statute.'") .

²⁰ *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).

8. *Will DHS deem individuals with removal orders dated on or after January 1, 2014 – other than final orders issued by immigration judges – as falling within Priority 3?*

Under the Enforcement Memo, individuals who have been issued a final order of removal on or after January 1, 2014 fall within Priority 3. The Enforcement Memo adopts the definition of the term “final order of removal” that appears at 8 C.F.R. § 1241.1.²¹ The new FAQs, however, do not neatly track this definition.

The new FAQs provide that DHS will evaluate the following cases on a “case-by-case basis to determine whether their removal would serve an important federal interest[:]”

- *Certain reinstatements* – The noncitizen reentered the United States before January 1, 2014, but his or her prior removal order was reinstated on or after January 1, 2014;
- *Certain voluntary departure overstays* – The noncitizen was granted voluntary departure by an immigration judge or the Board of Immigration Appeals before January 1, 2014 and his or her voluntary departure period expired on or after that date without the noncitizen having departed;
- *Certain appellants* – The noncitizen was ordered removed by an immigration judge before January 1, 2014, but his or her timely appeal was dismissed on or after that date.

9. *What does it mean for someone’s removal to “serve an important federal interest”?*

According to the Enforcement Memo, even if someone does not fall into a priority, they may be removed if an ICE Field Office Director decides that their removal would “serve an important federal interest.” This term is not specifically defined in the Enforcement Memo and may have intentionally been left “open-ended”²² to permit officials to exercise individualized discretion and make case-by-case determinations of an individual’s circumstances. However, the FAQs clarify that whether an individual’s removal serves an important federal interest is a discretionary determination that the Office of Chief Counsel (OCC) and ERO Field Office Director (FOD) should make on a case-by-case basis. It should be based on the individual’s conduct and the impact of that conduct on the integrity of the immigration system. The FAQs also clarify that “the normal expenditure of federal resources to prosecute or adjudicate an individual’s immigration case, alone” is not enough. In other words, the fact that ICE has already spent time and energy pursuing someone’s removal should not prevent a favorable exercise of

²¹ Enforcement Memo, at 4 n.2. 8 C.F.R. § 1241.1 provides:

An order of removal made by the immigration judge at the conclusion of proceedings under section 240 of the Act shall become final:

- (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.

²² Office of Legal Counsel Memorandum Opinion for the Secretary of Homeland Security and the Counsel to the President, Nov. 19, 2014, at 11, available at <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf>.

prosecutorial discretion from OCC or the FOD. However, the precise meaning of this term remains unclear.²³

That being said, practitioners should assume ICE will likely extend the “federal interest” analysis to convictions that trigger mandatory detention under INA §236(c). Unfortunately, this implicates convictions that do not fall within the enforcement priorities, such as controlled substance convictions. In an April 2015 memorandum, the Office of the Principal Legal Advisor provides that ICE will not agree to administrative closure for cases involving mandatory detention.²⁴ Practitioners should highlight the applicant’s eligibility for relief or discretion under existing deferred action programs.

In making a PD request, point to the client’s positive equities, argue that his or her record of immigration violations does not threaten the integrity of the immigration system, and, using the 2000 PD memo and US Attorney’s Manual cited above, explain why no federal interest would be served by taking a particular enforcement action against your client.

10. How will DHS determine whether an individual has “significantly abused the visa or visa waiver programs”?

According to the new FAQs, DHS will consider the totality of the circumstances in determining whether a noncitizen has significantly abused the visa or visa waiver programs and thus falls within Priority 2(d). Importantly, the FAQs make clear that individuals who have merely overstayed their visas or the visa waiver program will not be considered to fall within Priority 2(d). The length of time an individual has overstayed should generally be irrelevant.

The FAQs provide that “significant abuse” should be interpreted to include “intentional violations of the immigration laws that distinguish the [noncitizen] as a priority because of the noteworthy and substantial nature of the violations or their frequency.” The commission of immigration fraud is described as a “significant matter that should be considered under the totality of the circumstances.”

11. How will DHS determine whether individuals “otherwise pose a danger to national security”?

The FAQs clarify that INA sections 212(a)(3) and 237(a)(4) will provide guidance to ICE in determining whether an individual poses a danger to national security. These sections of the INA are the security and related grounds of inadmissibility and deportability. They include acts of espionage, terrorism, and human rights violators (which are described below). While not binding on ICE because these grounds of inadmissibility and deportability serve only as guidance under the priorities memo, the DHS Secretary has issued several exemptions to INA section 212(a)(3) which can be found [here](#). Reviewing these exemptions may be useful in evaluating the likelihood that an individual will be found to fall under this enforcement priority.

²³ The term “important federal interest” has also appeared in other guidance. According to a 2000 prosecutorial discretion [memo](#)²³ from legacy INS that remains in effect, the importance of a given case should be weighed in relation to other cases and priorities. If the interest served is not “substantial,” it may not warrant pursuing. This memo explains further that enforcement action may be outweighed by other priorities such as U.S. foreign policy. It also references the following factors enumerated in the [United States Attorneys’ Manual](#): federal law enforcement priorities; nature and seriousness of the offense; deterrent effect of prosecution; and the individual’s culpability in connection with the offense, criminal history, willingness to cooperate in the investigation of others; and probable sentence.

²⁴ Riah Ramlogan, Acting Principal Legal Advisor, “Guidance Regarding Cases Pending Before EOIR Impacted by Secretary Johnson’s Memorandum entitled Policies for the Apprehension, Detention and Removal of Undocumented Immigrants,” Apr. 6, 2015 at: http://www.ice.gov/sites/default/files/documents/FOIA/2015/guidance_eoir_johnson_memo.pdf (“OPLA Memo”).

12. How will DHS treat individuals who have been involved in human rights abuses?

While the Enforcement Memo does not mention “human rights violators,” the FAQs clarify that individuals who have participated in serious violations of human rights are considered to be Priority 1 as threats to national security. In determining whether someone has committed a serious human rights violation, ICE will look to INA §208(b)(2)(A)(i)—the “persecutor bar” to asylum— and to the grounds of inadmissibility under INA §212(a)(2)(G), §212(a)(3)(E), and §212(a)(3)(G). Human rights violators would include those “described as having engaged in, committed, ordered, incited, assisted or otherwise participated in severe violations of religious freedom, Nazi persecution, genocide, torture, extrajudicial killings, or use or recruitment of child soldiers” along with “those described as having ordered, incited, assisted, or otherwise participated in persecution.” When screening clients, pay careful attention to those who may have been denied asylum on security-related grounds.

PRACTICE QUESTIONS

13. Will the other immigration components of DHS – U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS) – adhere to the new ICE FAQs when interpreting the Enforcement Memo?

DHS has not stated publicly that the other immigration components of DHS – CBP and USCIS – will adhere to the new ICE FAQs when applying the policy articulated in the Enforcement Memo. However, we note that the Enforcement Memo binds ICE, CBP and USCIS. Counsel may wish to monitor the relevant agency websites for indications that the FAQs apply to those agencies.

14. In adjudicating DACA cases, will USCIS use the new ICE FAQ definitions of terms that cross-apply in the DACA context (like “driving under the influence”)?

DHS has not stated publicly that USCIS will adhere to the ICE FAQs when adjudicating DACA cases. However, because of the similarity of certain terms (e.g. significant misdemeanors) and guidance regarding recurring issues in the DACA context (e.g. identity theft convictions), it is likely that this guidance will apply throughout DHS, including in the adjudication of DACA requests. If a DACA requestor’s eligibility is contingent on the ICE FAQs, it may be prudent to delay filing his or her request until USCIS releases guidance clarifying this issue.

Keep in mind that for requestors who are denied DACA, USCIS’ decision to refer someone to ICE for enforcement action is still governed by the November 7, 2011 USCIS Policy Memorandum, Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens, not the Enforcement Memo. A person could be an enforcement priority and be denied DACA, but not be referred to ICE, because they don’t fit the criteria in that NTA memo. However, ICE has their own mechanisms for identifying and tracking people, so individuals who are enforcement priorities still face the heightened possibility of ICE enforcement actions.

15. Remember, we can win on a definition but lose on discretion.

The FAQs made some very helpful clarifications on key topics such as the definition of a DUI or domestic violence offense, and the possible effectiveness of expungements in enforcement priorities. Advocates should use the FAQs aggressively. Still, these are not absolutely protections, since DHS has tremendous discretion to deny requests for DACA and DAPA or to place a noncitizen in removal proceedings. An undocumented person who has not yet come to DHS’ attention risks being placed in removal

proceedings if the application is denied. Even if the person's criminal history does not trigger an absolute bar or constitute an enforcement priority, anyone with a bad-sounding criminal record should be carefully screened before applying for DACA.

USCIS' decision to refer a denied DACA applicant to ICE for enforcement action is governed by the November 7, 2011 USCIS Policy Memorandum, [Revised Guidance for the Referral of Cases and Issuance of Notices to Appear \(NTAs\) in Cases Involving Inadmissible and Removable Aliens](#) (the "NTA Memo"). For more on notices to appear, see [Notices to Appear: Legal Challenges and Strategies](#). However, even if the person does not come within the NTA memo criteria, an officer still might refer a denied DACA applicant to removal proceedings if the person comes within the enforcement priority criteria. And, the definition of who is an enforcement priority is highly discretionary.

Example: Arnold has two DUI's that have been expunged. He also was convicted twice of spousal battery. He did not get 90 days of jail time for any offense. None of these are a bar to DACA, because the expungements eliminate the DUI's, and his state spousal battery law technically does not meet the definition of a "crime of domestic violence" under INA 237(a)(2)(E)(i). Still, Arnold is denied DACA as a matter of discretion, and as a threat to public safety. Moreover, Arnold might be referred to removal proceedings. He does not come within the NTA guidelines, because they do not include these offenses. But he will come within the enforcement criteria if on a "case by case basis" the agent decides not to accept his expungements – or if the officer decides on the totality of the circumstances that he is dangerous.

16. How can individuals elevate their cases to DHS headquarters' attention if they fall outside the enforcement priorities or have strong arguments for exercise of one of the exceptions enumerated in the enforcement priorities or ICE FAQs?

ICE established a process for individuals seeking prosecutorial discretion under the Enforcement Memo. This process, with different mechanisms for detained individuals, individuals before EOIR, and individuals scheduled for removal, is located here: <https://www.ice.gov/ImmigrationAction>.

Individuals should first contact the local ICE field office. If the field office is unresponsive, individuals should submit requests for elevation to: eroprosecutorialdiscretioninquiries@ice.dhs.gov. If none of the above processes prove fruitful, individuals should consider submitting their cases to NGOs for additional assistance. For cases related to significant visa abuse, individuals who fall outside the priorities, expungements, and juvenile adjudications, submit a case to the ILRC at <http://www.ilrc.org/ced/Enforcement>. For cases related to detention, DUIs, gangs, and domestic violence, submit a case to NIPNLG at: paromita@nipnlg.org.