

DHS Enforcement Priorities: Policies and Memoranda Information for State Court Judges¹

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These DHS enforcement policies protect T and U visa holders as well as VAWA self-petitioners; however, they also apply in any family case where a foreign born person comes before the court.² The purpose of this bench card is to inform courts about DHS protections available to all immigrants so that the court can assess cases with an understanding of real policies and see official memoranda describing the intended protections available.

Immigration Enforcement Priorities

DHS has decided to prioritize its immigration enforcement resources on the following categories of immigrants:³

- Priority #1- Aliens who pose a danger to national security or a risk to public safety.
- Priority #2- Misdemeanants⁴ and immigrants who have recently illegally entered the United States.
- Priority #3- Aliens who have been issued a final order of removal on or after January 1, 2014.
- Detention- “Absent extraordinary circumstances or the requirements of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, or who are disabled, elderly, pregnant, or nursing, or demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest.”⁵

In 2012, 96% of all DHS removals fell within these categories (convicted criminals 55%, repeat immigration violators 21%, border removals 17%, and immigration fugitives 3%).⁶

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² For further details about forms of immigration relief, see Immigration Relief Bench Card (September 2013).

³ Jeh Johnson, Sec., Dep’t of Homeland Sec., to ICE, CBP, USCIS, Ass. Sec. for Policy, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, 5 (Nov. 20, 2014), available at <http://niwaplibrary.wcl.american.edu/pubs/dhspoliciesforapprehensiondetentionandremoval112014/>

⁴ *Id.* at 3 (stating that “(a) aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses of state or local offenses for which an essential element was the alien’s immigration status, provided the offenses arise out of three separate incidents; (b) aliens convicted of a ‘significant misdemeanor,’ which for these purposes is an offense of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or driving under the influence, or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence).

⁵ *Id.* at 5, emphasis added (underlined in original). See also Memorandum from Bo Cooper, Gen. Counsel, Immigration & Naturalization Serv., to Comm’r, Immigration & Naturalization Serv., *INS Exercise of Prosecutorial Discretion* 3 (Jul. 11, 2000), available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Bo-Cooper-memo%20pros%20discretion7.11.2000.pdf/view?searchterm=Bo%20Cooper> (stating that “[b]ecause . . . the INS does not have the resources fully and completely to enforce the immigration laws against every violator, it exercises prosecutorial discretion thousands of times every day. INS enforcement priorities, including the removal of criminal aliens and the deterrence of alien smuggling, are examples of discretionary enforcement decisions on the broad, general level that focus INS enforcement resources in the areas of greatest need.”).

⁶ *FY 2012 Removals by Priorities*, IMMIGRATION AND CUSTOMS ENFORCEMENT, available at <http://www.ice.gov/removal-statistics/>.

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Issues Concerning Children and Humanitarian Factors

Nursing Mothers⁷

- Nursing mothers should be released, unless they are considered to be threats to national security, public safety or their detention is statutorily mandated.
- Discretion should be employed to avoid making arrests of nursing mothers for civil immigration law violations.
- The decision to detain nursing mothers must be reported up through and cleared by the chain of command.
- If a nursing mother is detained, it is encouraged that the unity of the mother and child is maintained through the use of residential centers or state social service agencies.
- ICE directed its agents and officers to exercise prosecutorial discretion to consider the conditional release of nursing mothers pending the results of their immigration removal hearings.”⁸
- Screening for caregiver issues is done in English and Spanish and both orally and in writing to ensure that any alien with caregiver issues is not detained for any extensive period of time.”⁹

Humanitarian Reasons for Release from Detention¹⁰

- Guidelines called for a comprehensive plan to identify pregnant women, nursing mothers, primary caretakers of children, disabled or seriously ill relatives, and parents who are needed to support their spouses in caring for sick or special needs children or relatives as early as possible when a worksite enforcement operation will be conducted that involved over 150 persons whom DHS is detaining for civil immigration law violations.¹¹
 - In 2009, this threshold was changed from 150 to 25 persons.¹²

Parents with Detained Children: Visitation Rights¹³

- DHS expanded the use of the INS Detention Standard that was issued on September 20, 2000¹⁴ to state that “parents have a fundamental right to care for

⁷ Julie L. Meyers, Assistant Sec’y, Immigration Customs Enforcement, Memorandum to All Field Office Dirs. and All Special Agents in Charge, *Prosecutorial and Custody Discretion* (Nov. 7, 2007), available at <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Myers-Memo-Custody-Discretion-11-7-07.pdf>.

⁸ Letter from Susan M. Cullen, Dir., Office of Policy, Immigration Customs Enforcement, to Leslye E. Orloff, Dir., Immigrant Women Program, Legal Momentum (Feb. 7, 2008), available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Nursng-Mothers-and-Primary-Caretaker-Letter-to-L-Mo.pdf/view>.

⁹ *Id.*

¹⁰ See DEP’T OF HOMELAND SEC., GUIDELINES FOR IDENTIFYING HUMANITARIAN CONCERNS AMONG ADMINISTRATIVE ARRESTEES WHEN CONDUCTING WORKSITE ENFORCEMENT OPERATIONS (Nov. 16, 2007), available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/ice-hum-guidelines.pdf/view>; see also Press Release, Dep’t of Homeland Sec., Kennedy, Delahunt Announce New Guidelines for Immigration Raids (Nov. 16, 2007), available at <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Humanitarian-release-provisions-2007.pdf/view>.

¹¹ See GUIDELINES FOR IDENTIFYING HUMANITARIAN CONCERNS, *supra* note 7, at 1.

¹² U.S. DEP’T OF HOMELAND SEC., WORKSITE ENFORCEMENT STRATEGY FACT SHEET (Apr. 30, 2009), available at http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/c_Enforcement_DHSNewStrategy_04.30.09_FIN.pdf.

¹³ Phyllis A. Coven, Acting Assistant Director, Immigration Customs Enforcement, Letter to Michelle Brane, Dir., Detention and Asylum Program, Women’s Refugee Comm’n, Oct. 6, 2012, available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/ICE%20%20family%20court%20access-ocr.pdf>.

their children and participate in the discussions that affect the interest of their child.”

Individuals Who Came to the United States as Children¹⁵

- The Deferred Action for Child Arrivals (DACA) program provides protection from deportation and access to work authorization for immigrant children and youth who:
 - came to the United States under the age of sixteen;
 - have continuously resided in the United States for at least five years;
 - is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
 - has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
 - is not above the age of thirty.”

Protections for Immigrants with Documentation or the Potential for Legal Status

U Visa Holders: Removal Proceedings or Final Orders of Deportation or Removal¹⁶

- “When deciding to stay the request, the Field Office Director should also consider favorably any humanitarian factors related to the alien or the alien’s close relatives who rely on the alien for support.”¹⁷
- Listed adverse factors that make a stay inappropriate to grant: “(1) national security concerns; (2) evidence that the alien is a human rights violator; (3) evidence that the alien has engaged in significant immigration fraud; (4) evidence that the alien has a significant criminal history; and (5) any significant public safety concerns.”¹⁸

Aliens with Pending or Approved Applications or Petitions: Guidance Regarding the Handling of Removal Proceedings¹⁹

¹⁴ See MICHAEL D. CRONIN, ACTING EXEC. ASSOC. COMM’R, OFFICE OF PROGRAMS, & MICHAEL A. PEARSON, EXEC. ASSOC. COMM’R, OFFICE OF FIELD OPERATIONS, IMMIGRATION AND NATIONALITY SERV., INS DETENTION STANDARD: NON-MEDICAL EMERGENCY ESCORTED TRIPS (Sep. 20, 2000), available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/family-law-for-immigrants/parental-rights-of-detained-immigrants/NonMedical-Escorted-Trips-DHS.pdf/view>.

¹⁵ Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship and Immigration Servs., & John Morton, Dir., U.S. Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 1* (June 15, 2012), available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf/view>.

¹⁶ Memorandum from Peter S. Vincent, Principal Legal Advisor, Immigration Customs Enforcement, to OPLA Attorneys, *Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal*, September 25, 2009, available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Vincent-Memo-Guidance-Regarding-U-Nonimmigrant-Status.pdf/view> (providing field guidance to ensure compliance with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) regarding aliens with pending U visa petitions who are either (1) subject to a final administrative order of deportation or removal and request a stay of removal or (2) in removal proceedings”).

¹⁷ *Id.* at 2.

¹⁸ *Id.*

¹⁹ Memorandum from John Morton, Assistant Sec’y, Immigration Customs Enforcement, to Peter S. Vincent, Principal Legal Advisor, & James Chaparro, Exec. Assoc. Dir., Enforcement and Removal Operations, Immigration Customs Enforcement, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions*, August 20, 2010, available at:

- After United States Citizenship and Immigration Service verifies through expedited arbitration that an immigrant has a pending or approved applications for benefits, cases are to be dismissed without prejudice unless there are adverse factors including: “criminal convictions, evidence of fraud or other criminal misconduct, and national security and public safety considerations.”²⁰

Victims and Witnesses of Domestic Violence or Human Trafficking: Protections Afforded²¹

- VAWA Confidentiality and Victim Safety Provisions provide three types of protection to immigrant victims of violence, including battered immigrants and immigrant victims of sexual assault, trafficking and other U visa listed crimes.²² Specifically, VAWA:
 1. Protects the confidentiality of information provided to the Department of Homeland Security, the Department of Justice or the Department of State;
 2. Stops immigration enforcement agencies from using information provided by an abuser, trafficker or U visa crime perpetrator, a relative, or a member of their family against the victim in an immigration case; and
 3. Prohibits enforcement actions at any of the following locations: domestic violence shelter; victim services program; family justice center; supervised visitation center; or courthouse if the victim is appearing in connection with a protection order case, a child custody case or other civil or criminal case related to domestic violence, sexual assault, trafficking, or stalking.”²³
- “Absent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime.”²⁴
- Crime victims and witnesses should receive “release from detention and deferral or a stay of removal.”²⁵

Low Priority Removal Status

- This policy memo set out a list of immigrants who are do not fall within DHS enforcement priorities, who may have violated civil immigration

<http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/aliens-pending-applications.pdf/view>. See also, U.S. Immigration Customs Enforcement Policy Memorandum, *Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings; Revisions to the Adjudicator’s Field Manual*, February 4, 2011, available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/coordination-adjud-removal-proceedings.pdf/view>

²⁰ *Guidance Regarding the Handling of Removal Proceedings*, supra note 19, at 2.

²¹ See U.S. DEP’T OF HOMELAND SEC., DHS BROADCAST MESSAGE ON NEW 384 CLASS OF ADMISSION CODE (Dec. 21, 2010), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message-to-DHS-384-COA-Final-12.21.10.pdf/view>.

²² See Leslye E. Orloff, *VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections*, September 25, 2012, available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-20-21-2012-new-orleans-la/vawa-confidentiality/vawa-confidentiality-chapters/Ch3-SA-Man-Confidentiality-MANUAL-ES.pdf/view>

²³ *Id.* at 3.

²⁴ See Memorandum from John Morton, Dir., Immigration Customs Enforcement to All Field Office Dirs., Special Agents in Charge, and Chief Counsel, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* 1 (Jun. 17, 2011), available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/november-12-15-2012-atlanta-ga/family-law-track/custody/departement-of-homeland-security-dhs-memos/Morton-CertainVictimsWitnessesandPlaintiffs-Memo-06-17-2011.pdf/view>.

²⁵ *Id.* at 2.

laws, whose removal is a low priority and against whom DHS will not expend enforcement resources.²⁶

- Immigrants factors that result in an immigrant being considered a “low priority” and not likely to be removed are:²⁷
 1. the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
 2. the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
 3. the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
 4. whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
 5. the person's ties and contributions to the community, including family relationships;
 6. the person's ties to the home country and condition~ in the country;
 7. the person's age, with particular consideration given to minors and the elderly;
 8. whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
 9. whether the person is the primary caretaker of a person with a with a mental or physical disability, minor, or seriously ill relative;
 10. whether the person or the person's spouse is pregnant or nursing;
 11. whether the person or the person's spouse suffers from severe mental or physical illness;
 12. whether the person's nationality renders removal unlikely;
 13. Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
 14. whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
 15. whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.

²⁷ See *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, *supra* note 4.

²⁷ *Id.* at 4, 5.