



Practice Alert:
Advocating for Clients in Removal Proceedings
Using the OPLA Prosecutorial Discretion Memo¹
June 21, 2021

I. Introduction

On May 27, 2021,² ICE Principal Legal Advisor John Trasviña issued a long awaited department-wide memorandum (“Trasviña memo”)³ providing interim guidance to OPLA⁴ attorneys about how and when to exercise prosecutorial discretion (“PD”) under DHS’ interim enforcement priorities.⁵ Subsequently, on June 11, 2021, Acting EOIR Director Jean King issued a memorandum (“King memo”) to all Immigration Court and Board of Immigration Appeals (BIA) personnel discussing EOIR policies related to DHS’ interim enforcement priorities.⁶ This practice alert builds upon our [previous practice advisory](#), “Advocating for Clients under the Biden Administration’s Interim Enforcement Priorities,”⁷ and provides key information, takeaways, and practice tips for advocating with OPLA.

¹ Publication of the National Immigration Project of the National Lawyers Guild (NIPNLG) and Immigrant Legal Resource Center (ILRC), 2021. This practice advisory is released under a Creative Commons Attribution 4.0 International License (CC BY 4.0). The advisory is intended for authorized legal counsel and is not a substitute for independent legal advice provided by legal counsel familiar with a client’s case. Counsel should independently confirm whether the law has changed since the date of this publication. The authors of this practice advisory are Cristina Velez, NIPNLG, and Anita Gupta, ILRC.

² Though the memo is dated May 27, 2021, it was publicly released on June 4, 2021.

³ See John D. Trasviña, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities*, May 27, 2021, available at https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf.

⁴ The Office of the Principal Legal Advisor (OPLA) was formerly known as the Office of Chief Counsel (OCC).

⁵ The Trasviña memo operationalizes the interim enforcement priorities set forth in the January 20, 2021 memorandum from Acting DHS Secretary David Pekoske, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (“Pekoske memo”), and follows the February 18, 2021 memorandum issued by Acting ICE Director Tae Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (“Johnson Memo”). The Trasviña memo applies only to OPLA, while the priorities set forth in the Pekoske memo apply to all DHS components, including USCIS and CBP. Note that on the same day as the Trasviña memo, May 27, 2021, Acting DHS General Counsel Joseph B. Maher issued a memo titled *Implementing Interim Civil Immigration Enforcement Policies and Priorities* (“Maher memo”) that is referenced throughout the Trasviña memo. The Maher memo has yet to be publicly released.

⁶ Jean King, *Provides EOIR policies regarding the effect of Department of Homeland Security enforcement priorities and initiatives*, June 11, 2021, available at <https://www.justice.gov/eoir/book/file/1403401/download>.

⁷ IDP-ILRC-NIPNLG, *Practice Advisory for Immigration Advocates: The Biden Administration’s Interim Enforcement Priorities*, (March 23, 2021), <https://www.ilrc.org/advocating-clients-under-biden-administration%E2%80%99s-interim-enforcement-priorities>.

The guidance in the Trasviña memo covers various decisions made by OPLA attorneys, including whether to file or cancel a Notice to Appear (NTA); initiate or join motions for continuances, dismissals, motions to remand or reopen, and motions for relief; agree to bond and/or release; and pursue appeal. The memo describes the purpose of PD as being to “preserve limited government resources, achieve just and fair outcomes in individual cases, and to advance [DHS]’ mission of enforcement of immigration laws in a smart and sensible way that promotes public confidence.” It encourages the use of PD “at all stages of the enforcement process and **at the earliest moment practicable.**” This guidance will likely remain in effect until DHS Secretary Alejandro Mayorkas issues new DHS enforcement guidelines.

Note that the OPLA interim guidance and King memo do not constitute changes in immigration law. OPLA continues to have the discretion to pursue the detention and removal of individuals who do not fall within the priorities outlined. While advocates should not assume that clients will benefit from the interim enforcement priorities and an exercise of PD, the memo presents new opportunities for advocacy for immigrants facing removal proceedings.

II. Overview of ICE Interim Enforcement Priorities

The Trasviña memo builds on the ICE enforcement priorities announced in the Johnson memo and further operationalizes those articulated in the Pecoske memo and [Executive Order 13993](#) issued by President Joseph Biden on January 20, 2021. The King memo establishes practices and expectations regarding the use of PD in removal proceedings by encouraging IJs and the BIA to affirmatively confer with practitioners and OPLA counsel at the initiation of EOIR proceedings or appeals before the BIA.

The Trasviña memo’s guidance for OPLA attorneys relies on the same three categories of enforcement priorities articulated in the Johnson memo, which are discussed in further detail in our previous [practice advisory](#):

1. “**National Security**”: Individuals who have engaged in or are suspected of terrorism or espionage, or whose apprehension, arrest and/or custody is otherwise necessary to protect the national security of the United States.⁸
2. “**Border Security**”: Individuals apprehended at the border or ports of entry on or after November 1, 2020 while attempting to enter unlawfully, or who were not physically present in the United States before November 1, 2020.

⁸ The Trasviña memo instructs that the terms of “terrorism” and “espionage” should be applied consistently with such definitions in immigration laws, and reiterates that general criminal activity is explicitly excluded from consideration in a national security threat determination.

3. “**Public Safety**”: Individuals determined to pose a threat to public safety **AND** who have
 - a. been convicted of an "aggravated felony,"⁹ or
 - b. participated in a criminal street gang or have a gang related conviction.¹⁰

In determining whether a noncitizen “poses a threat to public safety,” considerations include the extensiveness, seriousness, and recency of the criminal activity as well as mitigating factors, such as personal and family circumstances, health and medical factors, ties to the community, evidence of rehabilitation, and whether potential immigration relief is available.

OPLA attorneys may still take enforcement action against “non-priorities” in consultation with their Chief Counsel, who may determine that the action is an appropriate use of resources.

III. Exercising Prosecutorial Discretion

OPLA attorneys will respond to requests for PD from both represented respondents and *pro se* respondents. The Trasviña memo also instructs OPLA attorneys to affirmatively evaluate each case for PD, even if the respondent does not request it.

Although discretion may be exercised at any stage of the process, OPLA attorneys are encouraged to exercise PD at the earliest point possible. Even if OPLA does not agree that a particular case merits PD at one stage, reconsideration may be warranted if additional information comes to light or circumstances change, so practitioners should continuously evaluate the appropriateness of PD throughout the case.

A. Factors for Consideration

The Trasviña memo articulates a non-exhaustive list of mitigating and aggravating factors for OPLA attorneys to consider in the totality of the circumstances when making PD decisions. These include:

⁹ Aggravated felony is defined by INA § 101(a)(43).

¹⁰ Noncitizens fall under this category if (1) they have been convicted of an offense for which an element was active participation in a criminal street gang as defined in 18 U.S.C. § 521(a); or (2) they are 16 years of age or older and have “intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization.” In making this determination, the Johnson memo requires ICE agents to base their conclusion on “reliable evidence” and consult a Field Office Director (FOD) or Special Agent in Charge (SAC). The Trasviña memo contains no further guidance as to how gang affiliations should be established. Practitioners should be prepared to contest gang allegations in removal proceedings.

<p><i>Mitigating Factors</i></p> <ul style="list-style-type: none"> ● Length of time in the United States ● U.S. Military service ● Family and community ties in the United States ● How and why the person entered the United States ● Current immigration status (with “greater consideration” for Lawful Permanent Residents) ● Work history in the United States ● Education in the United States ● Being a witness, victim, or plaintiff in a civil or criminal case ● Eligibility for some kind of immigration relief ● Contributions to the community ● “Humanitarian” factors, including: <ul style="list-style-type: none"> ○ Poor health ○ Age ○ Pregnancy ○ Being a child ○ Being a caregiver for a seriously ill relative in the United States 	<p><i>Aggravating Factors</i></p> <ul style="list-style-type: none"> ● Criminal convictions <ul style="list-style-type: none"> ○ BUT OPLA should also consider: <ul style="list-style-type: none"> ■ Extensiveness, seriousness, and recency of such criminal history ■ Rehabilitation and extenuating circumstances involving the offense ■ Length of sentence imposed and served ■ Age of person when offense was committed ■ Length of time since the offense/conviction occurred ■ Subsequent criminal activity that indicates a “threat to public safety” ● Participation in persecution or other human rights violations ● Previous immigration “violations,” such as: <ul style="list-style-type: none"> ○ Failure to comply with terms of release on bond ○ Prior illegal entries ○ Prior deportations ● Fraud or material misrepresentation
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B. When to Exercise PD: Stages of a Removal Case

OPLA attorneys are authorized to exercise PD at various stages in a removal case, including to determine whether to file or cancel a Notice to Appear (NTA), whether to initiate or join motions for administrative closure, continuances, dismissals, motions to remand or reopen, and grants of relief, positions on bond, and decisions about whether to pursue appeal. Note that each Chief Counsel is instructed to issue further guidance for their attorneys with more specifics on exercising PD in many stages of a case, in a manner consistent with the Trasviña memo. Additionally, the King memo instructs Immigration Judges (IJs) to affirmatively inquire “whether the case remains a removal priority for ICE and whether ICE intends to exercise some form of prosecutorial discretion....” and to take into account the respondent’s position on the

matter before taking further action. For additional information and advocacy strategies for requesting PD before OPLA, please see our previous practice advisory.

1. NTAs

OPLA attorneys should independently assess whether the initiation of removal proceedings is appropriate regardless of which DHS component (ICE, CBP, or USCIS) issues the NTA.¹¹ When the NTA has been issued but not yet filed, OPLA should consider whether cancellation is appropriate, and if so, work with the ICE Enforcement and Removal Office (ERO) to cancel the NTA and inform the noncitizen of the cancellation. Thus, if proceedings have not yet commenced, practitioners should be prepared to advocate with OPLA to cancel the NTA as an exercise of PD. For NTA referrals from USCIS where the noncitizen wishes to be placed in proceedings to pursue relief (such as non-LPR cancellation of removal), OPLA is advised to litigate the case to completion unless the respondent requests PD *prior to* a merits hearing.

2. Administrative Closure and Continuances

OPLA attorneys are encouraged to consent to administrative closure of proceedings in circuits where it is permissible¹² and/or continuances where warranted. In all circuits, including those that follow *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018), continuances sought for non-priority respondents while the department-wide comprehensive review takes place are deemed to be categorically for “good cause.” Moreover, in the absence of “serious aggravating factors,” non-priority cases should generally warrant non-opposition to a respondent’s request for continuance. OPLA attorneys may also agree to continuances in cases that fall within the enforcement priorities. If an OPLA attorney wishes to oppose a continuance for a non-priority respondent, they must confer with their supervisors first.

3. Dismissal of Proceedings

The Trasviña memo suggests that additional guidance is forthcoming regarding dismissal of proceedings. Note that dismissal of proceedings is akin to termination, though they carry

¹¹ OPLA’s discretion remains constrained by statutory requirements for NTA issuance. See *Trasviña memo n. 12*, “8 C.F.R. §§ 208.14(c)(1) (requiring referral for removal proceedings of a removable noncitizen whose affirmative asylum application is not granted by USCIS); 216.4(d)(2) (requiring NTA issuance to noncitizen whose joint petition to remove conditional basis of LPR status is denied by USCIS); 216.5(f) (same; USCIS denial of application for waiver of the joint petition requirement).”

¹² Note that administrative closure is available in circuits that have rejected *Castro Tum*, such as the Third, Fourth, and Seventh circuits. See *Arcos Sanchez v. Att’y Gen. U.S.A.*, 997 F.3d 113 (3d Cir. 2021); *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020); *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019). It is also available in the Sixth Circuit to respondents to apply for provisional unlawful presence waivers. *Garcia-DeLeon v. Garland*, ___ F.3d ___, 2021 WL 2310055 (6th Cir., June 4, 2021). The King memo also encourages adjudicators to use administrative closure where possible. Regardless of location, administrative closure remains available to respondents with pending T and V visa applications, by regulation. 8 § C.F.R. 1214.2(a); 1214.3.

slightly different meanings in the INA.¹³ Under the memo, the following categories of cases merit dismissal without prejudice:

Military Service Members and Their Immediate Relatives: respondents who are (or whose immediate family members are) current or former members (honorably discharged) of the Armed Forces, particularly if they may qualify for U.S. citizenship under INA § 328 or 329.

Individuals Likely to be Granted Relief: respondents who have a “viable avenue” for temporary or permanent relief outside of removal proceedings, e.g. individuals who are *prima facie* eligible for Temporary Protected Status (TPS), Special Immigrant Juvenile Status (SIJS), and/or are beneficiaries of an approved I-130 petition and are “immediately or in the near future”¹⁴ *prima facie* eligible for adjustment of status or an immigrant visa via consular processing (with an I-601A unlawful presence waiver, if needed).¹⁵ Note that OPLA’s willingness to dismiss proceedings for respondents pursuing I-601A waivers marks a stark change to its prior position of only considering administrative closure.

Practitioners may also advocate for PD to dismiss proceedings in cases with pending relief before USCIS, including cases currently on status dockets. In addition, the memo notes that DHS regulations explicitly contemplate joint motions to terminate proceedings for respondents who are U-visa eligible.¹⁶ U visa petitioners may also benefit from additional factors favoring PD, as discussed below.

Compelling Humanitarian Factors: These include cases where the respondent 1) has a serious health condition; 2) is elderly, pregnant, or a minor; 3) is the primary caregiver to, or has an immediate family or household member who is, known to be suffering from serious physical or mental illness; 4) is a victim of domestic violence, human trafficking, or other serious crime¹⁷; 5) came to the United States as a young child and has since lived in the United States continuously; or 6) is party to significant collateral civil litigation (e.g., family court proceedings, non-frivolous civil rights or labor claims).

¹³ See 8 C.F.R. § 239.2(b) (DHS may move to dismiss proceedings where its continuation is no longer in the best interest of the government); 8 C.F.R. § 1239.2(f) (providing for termination where the respondent is *prima facie* eligible for naturalization.)

¹⁴ “Near future” is not defined in the memo.

¹⁵ Practitioners should not limit requests for PD to the aforementioned circumstances, which simply serve as examples of where dismissal may be appropriate.

¹⁶ See 8 C.F.R. § 214.14(1)(c)(i). Moreover, on June 14, 2021, DHS Secretary Mayorkas announced a change to the USCIS policy manual allowing noncitizens with pending U visa petitions to request a “[bona fide determination](#)” that would provide them deferred action and eligibility for employment authorization prior to adjudication of their petitions. Practitioners may wish to monitor OPLA for any parallel use of this mechanism to guide PD.

¹⁷ See generally ICE Directive No. 10076.1, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011).

Cases involving these factors may be dismissed even where relief is speculative or unavailable, and practitioners should generally advocate for a broad reading of them. However, it is important to first consider whether such clients are eligible for relief exclusively available in removal proceedings, such as withholding of removal or cancellation of removal, and the strength of those cases. The client's priorities and desires should always dictate the path forward. For example, if the client is eligible for employment authorization based on a pending application before EOIR, practitioners must discuss this consideration with them in weighing whether to pursue dismissal or administrative closure.

Significant Law Enforcement or Other Governmental Interest: noncitizens who are cooperating witnesses, confidential informants, or are otherwise significantly assisting state or federal law enforcement, including the enforcement of labor and civil rights law. The Trasviña memo does not define what assistance would be considered “significant.” OPLA attorneys are encouraged to take guidance from the relevant investigating agencies¹⁸ and any relevant state (and local) counterparts.¹⁹

Long-Term Lawful Permanent Residents (LPRs): LPRs who have lived in the United States for many years, especially if they acquired LPR status at a young age and have close family and community ties in the United States.²⁰ Note that many LPRs are placed in removal proceedings due to criminal history, so if your client has an aggravated felony or gang-related conviction, you can still argue that they are not an enforcement priority because they are not a threat to public safety.

Remember that the King memo requires IJs to ask and take into account the respondent's position on OPLA's intended exercise of PD before ruling on the matter. This is presumably to ensure that OPLA does not exercise PD to resolve a case in a manner which is inconsistent with the respondent's wishes, such as where the respondent presents several compelling factors but has a strong application for non-LPR cancellation of removal and does not wish for proceedings to be dismissed.

4. Pursuing Appeal

OPLA attorneys are authorized to decline, discontinue or waive appeals against noncitizens who are not enforcement priorities and/or where there is little likelihood of success

¹⁸ E.g. Office of Inspector General, Office for Civil Rights and Civil Liberties, Department of Justice Immigrant and Employee Rights Section, Department of Labor, the National Labor Relations Board, Equal Employment Opportunity Commission and other federal agencies, in addition to ERO, Homeland Security Investigations. Note that state and local counterpart agencies may provide broader protections than those available under federal law.

¹⁹ Remember that certain law enforcement agencies can grant other forms of PD, such as stays of removal, deferred action, S visas, as well as T and U visa certifications. Practitioners representing clients engaged in Federal Tort Claims Act litigation may consult the [recent practice advisory](#) by NIPNLG and the Asylum Seeker Advocacy Project (ASAP) for additional information about immigration remedies that may be sought during the course of litigation.

²⁰ Practitioners should present all other compelling humanitarian factors and positive equities in favor of discretion where applicable, and not rely exclusively on long term residence and familial and community ties.

on appeal, unless significant aggravating factors exist, or there is a “need to seek clarity on an important legal issue.”²¹ Nevertheless, OPLA may reserve appeal to ensure a fully reasoned decision from the IJ prior to declining to pursue an appeal. OPLA should also focus resources, such as time drafting and perfecting appeals, on presumed priority cases. Under the King memo, BIA members should “review and adjudicate motions from DHS regarding prosecutorial discretion” and “may solicit supplemental briefing from the parties regarding whether the case remains a removal priority for ICE or whether the parties intend to seek or exercise some form of prosecutorial discretion.” Finally, OPLA should limit their briefing schedule extension requests, and should not request extensions in detained matters without prior supervisory approval, although they may agree to briefing extension requests filed by non-detained noncitizens who fall outside of the enforcement priorities.²²

5. Joining Motions for Relief and Motions to Reopen

OPLA attorneys are authorized to join motions for relief where they determine that the noncitizen merits relief as a matter of discretion or qualifies for protection from removal under law, particularly in asylum, LPR and non-LPR cancellation, voluntary departure, adjustment of status, and registry applications. With regard to withholding of removal and relief under the Convention Against Torture, OPLA attorneys may join these motions if persuaded that the noncitizen is able to meet the higher burdens required by these forms of non-discretionary relief. OPLA is also encouraged to not oppose, or join, motions to reopen for these forms of relief.

The Trasviña memo notes that guidance relating to motions to reopen is forthcoming. In the meantime, OPLA attorneys may exercise discretion to join such motions on a case-by-case basis, where the respondent falls outside of the enforcement priorities and where dismissal would be considered. Where a request to join a motion to reopen is filed based on new availability of relief, it is possible that OPLA may require a copy of the completed application and evidence of *prima facie* eligibility.

6. Stipulations

OPLA attorneys are authorized to exercise their discretion by narrowing disputed issues through stipulation.²³ The Trasviña memo does not, however, address the impact of *Matter of A-C-A-A-*, where the former Attorney General noted that “[w]hen reviewing a grant of asylum, the Board should not accept the parties’ stipulations to, or failures to address, any of the particular elements of asylum.”²⁴ It is vital that practitioners continue to submit supporting evidence for every element of the relief sought, and invite OPLA attorneys to stipulate to the

²¹ OPLA attorneys should make appeal decisions consistent with direction from their respective Chief Counsel.

²² The Trasviña memo does not address whether OPLA may agree to extension requests filed by detained respondents.

²³ Note that some types of stipulations are easier to obtain than others. For example, in a Non-LPR Cancellation case, it may be commonplace to obtain a stipulation to the 10-years continuous presence element. It is far rarer to obtain a stipulation to the exceptional and extremely unusual hardship element.

²⁴ *Matter of A-C-A-A-*, 28 I. & N. Dec. 84, 84 (A.G. 2020).

content and credibility of any such supporting affidavits or other testimonial evidence that it does not wish to challenge.

7. Bond Proceedings

The Trasviña memo instructs OPLA attorneys to follow binding federal and administrative case law regarding the standards for custody redeterminations.²⁵ Further, OPLA attorneys are generally instructed to defer to custody determinations made by ICE-ERO officers pursuant to 8 C.F.R. § 236.1(c)(8), while also applying the interim enforcement priorities and implementing guidance. If a noncitizen produces “new information” that “credibly” mitigates flight risk or danger concerns, OPLA may agree to a bond amount or other conditions of release, or waive an appeal of an IJ’s bond order, but are advised to consult with ERO to ensure that any non-monetary conditions of release are “practicable.”

When representing noncitizens in bond proceedings, practitioners should present all available evidence mitigating dangerousness or flight risk, even if such evidence was already submitted to ICE. If bond is granted, practitioners should advocate with OPLA to waive appeal.

IV. Conclusion

The operational guidance to OPLA attorneys described in the Trasviña memo presents an important advocacy tool for immigration practitioners to request PD for clients in removal proceedings. OPLA field offices have been instructed to open and maintain email inboxes dedicated to receiving PD requests and inquiries, and to spread the word about the existence of the mailboxes with their local immigration bars, including non-profit organizations assisting noncitizens before EOIR. As we await further guidance from DHS Secretary Mayorkas, as well as local guidance from OPLA field offices, advocates have an opportunity to push for stronger, more inclusive policy with DHS. We will continue to monitor policy developments in the federal immigration enforcement context, and we encourage practitioners to share their experiences and strategies from their advocacy.

Practitioners may contact Cristina Velez at cristina@nipnlg.org and Anita Gupta at agupta@ilrc.org to share information about how OPLA is implementing this memorandum.

²⁵ The memo references three BIA cases that significantly narrowed the eligibility of noncitizens for release from detention: *Matter of R-A-V-P-*, 27 I. & N. Dec. 803 (BIA 2020) (determining that an asylum applicant presented a flight risk); *Matter of Siniauskis*, 27 I. & N. Dec. 207 (BIA 2018) (concluding that a respondent with multiple DUIs was both a flight risk and danger to the public), and *Matter of Kotliar*, 24 I. & N. Dec. 124 (BIA 2007) (discussing general parameters of INA section 236(c) mandatory detention). Practitioners should expect OPLA to make arguments opposing release on bond based on these and other relevant cases.