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## **Practice Advisory for Immigration Advocates: The Biden Administration's Interim Enforcement Priorities**

### **I. Introduction**

On January 20, 2021, former Acting DHS Secretary David Pekoske issued a department-wide memorandum, [\*Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities\*](#) (“Pekoske memo”), with wide-ranging implications on immigration enforcement policy. On February 18, 2021, Acting ICE Director Tae Johnson issued interim guidance specific to removal priorities for ICE in support of the Pekoske memo, [\*Interim Guidance: Civil Immigration Enforcement and Removal Priorities\*](#) (“Johnson Memo”).

The guidance in each memo covers broad categories of decisions made by DHS officers, including whether to take enforcement action against an individual; whether to issue, serve, or file a Notice to Appear (NTA); or whether to grant deferred action or parole. This guidance will remain in effect until DHS Secretary Alejandro Mayorkas issues new DHS enforcement guidelines, expected in less than 90 days.

Advocates should keep in mind that the interim guidance does not constitute a change in immigration law. ICE continues to have the discretion to remove individuals who do not fall within the priorities outlined. It is imperative that practitioners remain cautious when evaluating a client's immigration history and the immigration consequences of criminal convictions and other factors. While advocates should not assume that clients will benefit from the interim enforcement priorities, and ICE's framework continues to criminalize and exclude from relief many categories of immigrants, the memoranda present new opportunities for advocacy with immigration agencies.

This practice advisory aims to provide immigration practitioners with an overview of the key policy changes and interim priorities arising from these memos and strategies to use these priorities to advocate for clients.

### **II. Key Changes in DHS Enforcement Policy: the Pekoske Memo**

The January 20, 2021 Pekoske memo is the first DHS-issued guidance under the Biden administration. It directs four categories of actions that DHS should undertake:

- (1) Comprehensive Review of Enforcement Policies: The Pekoske memo directs all DHS components to conduct a comprehensive review of enforcement policies and priorities by April 30, 2021. This includes review of policies related to prosecutorial discretion, detention policy, prioritizing agency resources, and collaboration with state and local law enforcement.
- (2) Rescission of Prior Memos: The memo rescinds six Trump-era DHS memos, listed in the appendix of the Pekoske memo, that addressed enforcement priorities, expedited removal, border policies, and state and local cooperation. The memo also specifies that USCIS should revert to pre-existing guidance on case referral and issuance of Notices to Appear (NTAs) set forth in the Obama-era November 7, 2011, [Policy Memorandum 602-0050 \(“2011 NTA Memo”\)](#). Guidance in other enforcement areas will likely be replaced by DHS following the internal review mandated by the memo.
- (3) Enforcement Priorities: The memo establishes interim enforcement priorities, focusing on three categories: national security, border security, and public safety. These priorities went into effect on February 1, 2021. Additionally, the memo requires that all enforcement and detention decisions be consistent with “applicable COVID-19 protocols.” While the memo states that these enforcement priorities apply to all DHS components, the subsequent Johnson Memo establishes significantly different interim enforcement priorities for ICE. See Section III below for more details on the Johnson memo.
- (4) “Pause” on Removals: The memo sought to impose a 100-day moratorium (“pause”) on all deportations, with some exceptions. However, on January 26, 2021, Judge Drew Tipton of the U.S. District Court for the Southern District of Texas issued a temporary restraining order (TRO), followed by a preliminary injunction on February 23, 2021, enjoining the Biden administration from executing the moratorium. Therefore, this moratorium is not currently in effect.

### **III. Key Changes in ICE Enforcement Policy: the Johnson Memo**

The February 18, 2021 Johnson Memo establishes ICE interim priorities and provides more details about how officers might determine who falls within these enforcement priorities. It also establishes procedures and certain pre-approval requirements for enforcement and removal actions. It is important to note that the enforcement priorities in the Johnson memo apply only to ICE, while the priorities set forth in the Pekoske memo apply to all DHS components, including USCIS and CBP. Practitioners should be aware of these distinctions as they assess the opportunities for advocacy among the various agencies taking action in a client’s case.

## **A. ICE Interim Enforcement Priorities**

The Johnson memo states that, with some exceptions, noncitizens who fall under the three categories listed below are presumed to be an ICE enforcement priority. ICE officers generally require no pre-approval for enforcement actions against presumed priorities, whereas ICE must in most cases seek approval for individuals who do not fall within ICE's priorities. Because the memo was issued to operationalize the enforcement priorities laid out in the Pekoske Memo, it uses the same three priority categories. However, the Johnson memo significantly expands who can be classified as a public safety threat.<sup>1</sup> The Johnson memo's three presumed priority categories are:

### ***Priority Category 1: National Security***

Noncitizens are presumed to be a national security priority if: (1) they have engaged in or are suspected of engaging in terrorism or terrorism-related activities; (2) they have engaged in or are suspected of engaging in espionage or espionage-related activities; or (3) their "apprehension, arrest, or custody is otherwise necessary to protect the national security of the United States."

The evaluating criteria for whether noncitizens pose a national security threat under the third prong is whether the person poses a threat to United States sovereignty, territorial integrity, national interests, or institutions. General criminal activity is explicitly excluded from consideration in a national security threat determination.

The memo also clarifies that the references to terrorism and espionage must be applied consistently with how they are understood in the Immigration and Nationality Act (INA). Persons who may be inadmissible under certain security related inadmissibility grounds pursuant to 8 U.S.C. § 1182(a)(3) could be at risk of falling within this category.<sup>2</sup>

### ***Priority Category 2: Border Security***

Noncitizens are presumed a border security priority if (1) they are apprehended at the border or a port of entry while attempting to enter the country unlawfully on or after November 1, 2020; or (2) they were not physically present in the United States before November 1, 2020. This means that any person who is removable under the INA and was not physically present in the United

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<sup>1</sup> ICE has expanded the "public safety priority" definition by: (1) declining to exclude the category of those who were released from criminal custody on or after January 20, 2021, who are not considered priorities in the Pekoske memo, and (2) adding a new category of persons who have participated in 'criminal gang' activities.

<sup>2</sup> This includes those who may be inadmissible under 8 U.S.C. § 1182 (a)(3)(A)(i) (inadmissibility related to engaging in espionage or sabotage), 8 U.S.C. § 1182 (a)(3)(A)(iii) (inadmissibility related to engaging in activity for the purpose of overthrowing the government of the United States), and 8 U.S.C. § 1182 (a)(3)(B) (terrorism-related inadmissibility grounds).

States before November 1, 2020 is presumed a priority. This would include noncitizens who entered unlawfully on or after November 1, 2020 as well as those who entered the United States with authorization after November 1, 2020 and overstayed the duration of their visa or period of admission.

### ***Priority Category 3: Public Safety***

The Johnson memo lays out a two-prong process for determining who can be classified a public safety priority. ICE must (1) determine that they “pose a threat to public safety” **and** (2) determine that they have been convicted of an aggravated felony or have participated in certain “criminal gang” activities described below. Both prongs must be satisfied.

*Threat to Public Safety.* In determining whether a noncitizen “poses a threat to public safety,” the Johnson Memo instructs ICE agents to consider the extensiveness, seriousness, and recency of the criminal activity as well as mitigating factors. These factors include personal and family circumstances, health and medical factors, ties to the community, evidence of rehabilitation, and whether potential immigration relief is available.

***Practice Tip:*** Remember that it is still possible to argue that a client is not a threat to public safety, even if the agency believes that the client has a conviction for an aggravated felony or has participated in certain “criminal gang” activities. For more information on arguing that a client is not a public safety threat, see Section V below.

*Noncitizens Who Have Been Convicted of an Aggravated Felony.* The Johnson Memo requires ICE agents to have a “good-faith belief” that a person has been convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43), the definition of “aggravated felonies” in the INA. The memo clarifies that officers may rely on a final administration determination, available conviction records, or the advice of agency legal counsel to determine that an individual has been convicted of an aggravated felony. Remember that the analysis of whether a conviction is an aggravated felony is complex, as crimes that fall under that label need not be aggravated nor a felony.<sup>3</sup>

*Noncitizens Who Have Participated in Certain “Criminal Gang” Activities.* 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 memo requires ICE agents to base their

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<sup>3</sup> For more information see [ILRC, Practice Advisory: Aggravated Felonies \(April 2017\)](#).

conclusion on “reliable evidence” and also consult a Field Office Director (FOD) or Special Agent in Charge (SAC).

## **B. Enforcement Procedures and Pre-approval Requirements**

*Priorities.* All noncitizens who fall under the three categories listed above are presumed to be an enforcement priority. This means that ICE officers generally are not required to obtain pre-approval for enforcement actions against presumed priorities. However, the memo requires a “compelling reason” and approval from the FOD for ICE agents to execute a removal order against noncitizens who:

- are elderly or are known to be suffering from serious physical or mental illness;
- have pending petitions for review on direct appeal from an order of removal;
- have filed only one motion to reopen removal proceedings, and such a motion either remains pending or is on direct appeal via a petition for review; or
- have pending applications for immigration relief and are prima facie eligible for such relief.

*Non-Priorities.* In order to remove or carry out enforcement actions against noncitizens who are not priorities, ICE agents must obtain pre-approval from a FOD or SAC and provide a written justification for the action.<sup>4</sup> In such cases, the guidance requires ICE agents and their leadership to consider:

- the nature and recency of the noncitizen’s convictions,
- the type and length of sentences imposed,
- whether the enforcement action is otherwise an appropriate use of ICE’s limited resources and other relevant factors.

*Note on Collateral Arrests.* Under the new guidance, ICE cannot take enforcement action against any other individual encountered during an operation who was not their target, unless they fall within the enforcement priorities.

## **IV. When and How Do These Priorities Apply?**

The Pekoske memo states that the interim enforcement priorities shall apply to decisions regarding the initiation of removal proceedings, as well as “a broad range of other discretionary enforcement decisions,” such as “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

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<sup>4</sup> Pre-approval is not required where “exigent circumstances and the demands of public safety will make it impracticable to obtain pre-approval.” These circumstances “generally will be limited to situations where a noncitizen poses an imminent threat to life or an imminent substantial threat to property.”

deferred action or parole,” and shall be implemented in accordance with COVID-19 protocols. The subsequent Johnson memo further elaborates that the priorities apply to “all civil immigration enforcement and removal decisions”<sup>5</sup> made by ICE, including, but not limited to “deciding whether to issue a **detainer**, or whether to assume custody of a noncitizen subject to a previously issued detainer; issue, reissue, serve, file, or cancel a **Notice to Appear**; focus resources only on **administrative violations or conduct**; stop, question, or **arrest** a noncitizen for an administrative violation of the civil immigration laws; **detain or release from custody** subject to conditions; grant **deferred action or parole**; and deciding when and under what circumstances to **execute final orders of removal**.” What follows are several of the scenarios in which advocates may cite the enforcement priorities.

### *Detainers*

The Johnson memo states that the enforcement priorities shall apply to decisions regarding “whether to issue a detainer, or whether to assume custody of a noncitizen subject to a previously issued detainer.” Detainers are requests from ICE to law enforcement agencies to hold an alleged noncitizen for up to an additional 48 hours beyond the date/time of their release from criminal custody so that ICE may take immediate custody. Practitioners with clients in criminal custody should urge ICE to apply the priorities when deciding whether to issue or rescind detainers. For clients with existing detainers, practitioners may contact the ICE Enforcement and Removal Operations (ERO) field office with jurisdiction over their client, argue that their client is not an enforcement priority, and request that the detainer be rescinded. A sample detainer rescission request is included in the appendix. Because detainers often affect a person’s criminal defense strategy,<sup>6</sup> it is best to contact ICE soon after a detainer has been issued and prior to the client’s release from criminal custody.<sup>7</sup> Note that although ICE may require a completed Form G-28 from the practitioner, it allows representation to be limited to specific matters.

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<sup>5</sup> In the weeks after the Pekoske and Johnson memos were issued, practitioners in several parts of the country reported that ICE field offices were asserting that the Johnson Memo only applies prospectively to those who are encountered, arrested, detained or scheduled for removal after the issuance of the memo. Nothing in the plain language of the memo supports this position, and we understand that there may subsequently have been guidance issued to the field offices on this point. We will update the advisory as we receive more information. Practitioners and advocates may contact Khaled Alrabe at [khaled@nipnl.org](mailto:khaled@nipnl.org) and Lena Graber at [lgraber@ilrc.org](mailto:lgraber@ilrc.org) to report on how the priorities are being applied by their local ICE field offices.

<sup>6</sup> Practitioners who are not representing in criminal proceedings should coordinate with the client’s criminal defense attorney.

<sup>7</sup> ICE cannot compel law enforcement agencies to comply with detainer requests. However, some states and localities have laws either prohibiting or mandating their compliance. The ICE enforcement priorities do not affect law enforcement agencies’ obligations under applicable local and state laws, and apply only to ICE’s discretionary decisions. Therefore, advocates should direct their requests to ICE, though support from a local elected official (such as the sheriff or Congressional representative) can be helpful in pressuring ICE to take certain actions.

## ***Custody/Detention***

Practitioners may also advocate for ICE to follow the enforcement priorities in making custody decisions. When ICE arrests a person, they make an initial custody determination, which can occur at an ICE processing office, field office, or a detention center. To the extent possible, practitioners should advocate for their client's release as soon as they are taken into ICE custody, especially if the person has not yet been transferred to a detention center.

***Practice Tip:*** The Pekoske memo also states that COVID-19 protocols apply to all DHS components and the Johnson memo does not state otherwise. Practitioners should include arguments under the [Fraihat litigation](#) regarding COVID-19 risk factors, as well as the enforcement priorities, to advocate for release.

When a client is being processed at the local ICE processing office or field office, a practitioner may advocate with ICE to release the client on an order of recognizance (or a low bond). Note that it can be difficult to locate a client in the ICE online detainee locator or find the right contact information for ICE while the client is still being processed. It can be helpful to contact practitioners in your area who have experience with ICE, including the local AILA-ICE liaison, as they often have practice tips and contact information for ICE that are not publicly available. If your client was picked up by ICE from a local jail, they will likely be processed at the nearest ICE office.

After a person is processed and transferred to a detention center, they will be assigned an ICE "deportation officer." Practitioners should point to the enforcement priorities to advocate for their client's release with the assigned deportation officer. ICE has the discretion to make custody determinations at any time, and to issue a new custody determination after one has already been made. Additional strategies for advocating for release with ICE are covered in the following section, and a sample request for release is included in the Appendix.

## ***Initiating Removal Proceedings***

Removal proceedings before an immigration judge commence when DHS issues and files a Notice to Appear (NTA), a charging document that lays out the grounds of removability and the factual allegations supporting removability against a noncitizen. Both the Pekoske and the Johnson memos state that the interim priorities apply to the decision "to issue, reissue, serve, file, or cancel a Notice to Appear." Thus, when noncitizens are initially taken into ICE custody or are otherwise at risk of being placed in removal proceedings, practitioners should advocate with ICE ERO not to issue an NTA. Where proceedings have not yet commenced, DHS can unilaterally cancel the NTA under 8 C.F.R. § 239.2(a). If the NTA has been drafted but not yet served on

their client, practitioners still have the opportunity to request that ICE not serve the NTA, as service is necessary to commence removal proceedings. If an NTA was already served but not yet filed with the immigration court, practitioners may contact the Office of the Principal Legal Advisor (OPLA), formerly known as the Office of Chief Counsel,<sup>8</sup> to request that they not file the NTA with the court. Given the current delays and backlogs in the immigration courts, this may be an effective strategy, especially if the client is already pursuing affirmative relief before USCIS.

As for persons filing applications before USCIS, the Pekoske memo rescinds the [expansive instructions](#) for issuance of NTAs to persons seeking affirmative immigration benefits under the prior administration, and requires USCIS to revert to the preexisting policy contained in its November 7, 2011 [Policy Memorandum 602-0050 \(“2011 NTA Memo”\)](#). Thus, practitioners should be aware of the specific circumstances<sup>9</sup> in which USCIS will refer a case for issuance of an NTA, and review the 2011 NTA memo prior to filing certain applications.

### ***Joint Motions and Agreements with the Office of Chief Counsel (OCC)***

The Pekoske memo states that the interim enforcement priorities apply to decisions to “settle, dismiss, appeal or join in a motion on a case.” This includes a broad range of OCC activity, including decisions whether to appeal a court decision, and whether to join or not oppose motions for continuance, placement of the case on the status docket, and motions to terminate proceedings (including on appeal), as well as motions to remand and motions to reopen, even outside of the statutory time and numerical bars that would otherwise bar them from consideration. *See* 8 C.F.R. § 1003.23(4)(iv).<sup>10</sup>

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<sup>8</sup> We will continue to refer to OPLA as the Office of Chief Counsel (OCC) throughout this advisory, as the office is more widely known and referred to as OCC.

<sup>9</sup> Specifically, the 2011 NTA memo provides for the issuance of an NTA where a statement of findings of substantial fraud is part of the record, even if the petition or application is denied for a reason other than fraud. The memo also provides guidance for the issuance of NTAs to naturalization applicants who are removable, and in the following: Egregious Public Safety Cases, Non-Egregious Public Safety Criminal Cases, and National Security Entry Exit Registration System (NSEERS) Violator Cases. Finally, the 2011 NTA memo includes a list of circumstances under which USCIS is required to issue an NTA by statute and regulation.

<sup>10</sup> Several Attorney General decisions from the prior administration have severely curtailed the procedural rights of noncitizens in immigration proceedings, and until these decisions are overturned, the types of joint motions available to respondents are more limited than they were four years ago. *See e.g. Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) (suspending administrative closure); *Matter of L-A-B-R-*, 27 I&N Dec. 405, 413 (A.G. 2018) (limiting the scope of motions for a continuance). Additionally, a recently-issued regulation, entitled “Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure” (colloquially known as the “death to due process” rule) severely limits appeals, reopening proceedings, administrative closure, and due process in general. However, this rule is being challenged in federal court and is currently enjoined. Practitioners should stay abreast of any developments regarding applicable case law and litigation challenging the “death to due process” regulation.



Where applicable, practitioners should point to the enforcement priorities to advocate with OCC to join in a particular motion. Where clients do not fall under the interim priorities, but there are arguments that justify reopening, practitioners should also file a request with OCC seeking an agreement to reopen the proceedings. For strategies for filing a joint motion request to OCC, see Section V below.

Though administrative closure may not be available currently, practitioners with clients in removal proceedings who do not fall within the interim priorities may request that OCC join in a motion to dismiss or terminate proceedings and explain why the client's situation warrants the exercise of favorable discretion.<sup>11</sup> 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.) Although *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018) limited the circumstances in which an immigration judge may dismiss or terminate proceedings, immigration judges may still do so upon a joint motion from the parties. Though it is unknown whether OCC will be regularly receptive to requests to dismiss or terminate proceedings, practitioners may still have some success, especially in particularly compelling cases. The appendix includes a sample request to OCC to join in a motion to terminate proceedings.

Note that while arguments regarding the enforcement priorities are appropriate for requests to OCC, the enforcement priorities are only binding on ICE, and not the immigration courts. Therefore, the interim enforcement priorities should not be relied on in motions to the court, or to supplant the statutory or regulatory basis for the motion.

### ***Parole and Deferred Action***

The Pecoske and Johnson memos also state that the interim enforcement priorities shall be applied to parole and deferred action determinations. Parole allows a noncitizen to remain in the United States for a temporary period when they are otherwise inadmissible or ineligible to remain. Often, CBP may grant parole at a port of entry, or ICE may grant parole and release a detained person.

Deferred action is a discretionary determination to defer removal action against a noncitizen, and may be granted by USCIS or ICE. A person need not have a final removal order to receive deferred action. Formal notices of deferred action may be issued that allow a noncitizen to apply

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<sup>11</sup> Under the Obama administration, OCC sometimes agreed to administratively close a case and remove it from an active court docket. This practice was especially valuable in cases involving weak claims or where clients were not eligible for relief from removal. In those cases, OCC would evaluate whether the individual was an enforcement priority and consider equity arguments put forth by practitioners before agreeing to administrative closure, effectively allowing the individual to remain in the United States while retaining the option to recalendar the case in the future and place it back on an active docket.

for work authorization under code (c)(14), but deferred action may also be granted without a formal notice. In filing requests for deferred action, practitioners should point to the enforcement priorities, as well as other positive equities, hardship and compelling circumstances, and humanitarian considerations. Practitioners filing a stay of removal request with ICE may also want to ask for deferred action.

Note that the enforcement priorities under the Johnson memo apply only to ICE, while the Pecoske memo's priorities apply to USCIS and CBP. The Pecoske memo's enforcement priorities are narrower than the Johnson memo, so it is possible that a person could be a priority under the Johnson memo, but not the Pecoske memo. Make sure to apply the correct enforcement priorities depending on the agency which has jurisdiction over your request.

### ***Stays of Removal***

Lastly, the Johnson memo states that the interim enforcement priorities apply to decisions regarding “when and under what circumstances to execute final orders of removal,” which can apply to decisions regarding whether to grant stays of removal. Because the federal lawsuit in Texas temporarily blocked the 100-day pause on deportations from going into effect, practitioners should continue to request stays of removal for clients in immigration custody or under the supervision of ICE who are subject to final orders of removal, and zealously argue that they are not enforcement priorities.

***Practice Tip:*** As noted earlier, under the Johnson memo, ICE agents are directed to take special care with people who are elderly, mentally ill, or have certain pending motions, appeals, or applications. Executing removal orders for these noncitizens requires special approval from the Field Office Director, and there must be a “compelling reason” for the removal, even if the person has been deemed an enforcement priority.

For clients with final orders of removal but who are not detained or under the supervision of ICE, practitioners should consider the risks in filing a stay of removal request, which could bring the individual to ICE's attention.

## **V. Advocacy Strategies Under the Interim Priorities**

ICE's power to choose who to deport and what enforcement actions to take (or not take) is known as prosecutorial discretion. Although it has long existed, guidance related to prosecutorial discretion was updated and expanded during the Obama administration, and these interim enforcement priorities potentially signal a return to the practices then in place. The following section lays out the nuts and bolts of seeking prosecutorial discretion (at various stages of a case,

detailed above). It also provides strategies for escalating a request following an initial denial, and for engaging in a public campaign if DHS continues to deny the request. Throughout, it is important to keep in mind that the Johnson memo is only interim guidance until DHS Secretary Mayorkas provides additional guidance.

### **A. Requests for Prosecutorial Discretion (“PD”)**

#### ***When to make a PD Request***

If your client is subject to any of the enforcement actions mentioned above, or your client is in removal proceedings, and you believe that your client is not an enforcement priority under the new DHS and ICE guidance or merits prosecutorial discretion for another compelling reason, you should make a formal, written request for prosecutorial discretion as soon as possible, regardless of the stage of the case. Additionally, alert ICE to your intention to do so. The Johnson Memo states that ICE will create and maintain a system for receiving and evaluating prosecutorial discretion requests, though it does not give any further detail. Practitioners should keep an eye out for forthcoming guidance.

If your client is **not in removal proceedings**, you will need to discuss with them the **risks** inherent in bringing themselves to ICE’s attention. This risk will also depend in part on whether your client has any prior orders of removal, contacts with CBP, and/or applications pending with another agency. Any of these factors increases your client’s risk of detection and risk of being placed in removal proceedings.

#### ***Anatomy of a PD Request***

Sample PD requests can be found in the Appendix of this guide. Briefly, a written PD request should include:

- A detailed cover letter referencing the guidance and explaining why your client:
  - Does not fall into one of the priority categories, and
  - Merits a favorable exercise of discretion.
  - If your client has an aggravated felony or gang related conviction, or other gang related history, you should include arguments that your client is not a threat to public safety using the factors discussed in the Johnson memo, including the extensiveness, seriousness, and recency of the criminal activity, and mitigating factors, such as personal and family circumstances, health and medical factors, ties to the community, evidence of rehabilitation, and whether the individual has potential immigration relief available.
- Exhibits providing evidence to support your argument. Evidence could include:
  - Evidence documenting absence of a disqualifying conviction;

- For clients with non-disqualifying convictions, evidence of rehabilitation, such as completed probation, classes, treatment programs, Alcoholics Anonymous or Narcotics Anonymous attendance, mental health treatment, and social support (social support could take the form of declarations or letters from family members);
- Evidence documenting physical presence in the U.S. before November 1, 2020;
- Birth certificates or certificates of naturalization for any USC children, spouses, or parents;
- Letters of support, especially from USC relatives, community members, church leaders, employers, etc.;
  - Letters should be signed (not electronically) and either notarized or accompanied by a copy of the person’s photo ID;
- Letter of support from a Congressional representative (see below for more)
- Evidence of employment and payment of taxes (tax returns, pay stubs). It is important to never include evidence with a fake social security number or incorrectly-filed tax returns;
- Other evidence of community involvement, such as church or club membership and volunteer work;
- In addition to, or in lieu of record evidence, a declaration from your client detailing rehabilitation (if applicable), participation in community, and employment.

Your evidence should be paginated and organized with letter tabs, and your PD request should also include a Table of Contents, with clear descriptors of each item of evidence and reference to the tab and page numbers where the item can be found. Note also that your cover letter should feature your client’s A number clearly in the subject line and the first line of the body of the letter. You might also consider putting it in a header or footer alongside the page numbers.

***Where to send your PD request***

To whom you send your PD request will depend on the goal being sought for the client and the stage of the case. If your client is in removal proceedings, and you know which Trial Attorney (TA) from OCC is assigned to their case, you can contact that person directly and send them the PD request. Alternatively, many OCC offices have an email address or e-portal for written submissions, and you can send the PD request there. Finally, if neither of those options is available, there is usually a “duty attorney” email address with a different TA assigned to monitor it daily; you can email that address to send the PD request and ask which TA is assigned to your client’s case. It is also a good practice to canvas practitioners in the jurisdiction where you will file and ask if there is a designated email for proposed joint motions to reopen or similar PD requests, or if they have other suggestions for how to present your request. Note that OPLA

has not yet released specific guidance for OCC attorneys on how to apply the new enforcement priorities.

If your client is in ICE custody, you can send your PD request to their assigned deportation officer. If you do not know who your client's deportation officer is, or if you do not know how to contact that person, try contacting the ICE field office's general number to inquire. If your client is detained at a detention facility, you can also call the detention facility's front desk and ask to be transferred to ICE. Sometimes those numbers are available on ICE's website. You can also send your request to the Assistant Field Office Director (AFOD) and explain that you wish your request to be forwarded to the appropriate person. Again, canvassing local practitioners, including your local AILA-ICE or AILA-EOIR liaisons, will often yield valuable information about whom to contact.

It is generally a good idea to send your PD request in multiple formats, depending on what contact information you have available, including via email (in consolidated PDF format), via fax, and a hard copy via mail.

### ***Escalating a Request***

If the initial reviewing ICE officer or OCC attorney denies a request, the practitioner should escalate the request to a supervisor, which can often be successful in reversing the initial decision. For example, if your request is denied by an ICE ERO deportation officer, you may escalate the request to that officer's supervisor (if any), then the AFOD, FOD, and potentially even ICE headquarters.

In addition, ICE ERO has set up an ICE case review process and email for escalating requests that were not resolved at the field office level.<sup>12</sup> Note that practitioners must first submit their request to the field office before using the case review process, and cases involving individuals detained in ICE custody or pending imminent removal will be prioritized. Practitioners should include Form G-28, the client's A-number, other identifying information, a telephone number, and a valid email in their requests. Many attorneys have reported receiving quick responses and mixed success from the case review mailbox.

ICE has also set up a "detention reporting and information" hotline at 1-888-351-4024, which it describes as "a toll-free service that provides a direct channel for agency stakeholders to communicate with ERO to answer questions and resolve concerns."<sup>13</sup> The hotline is monitored

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<sup>12</sup> See Contact ICE About an Immigration/Detention Case, <https://www.ice.gov/ICEcasereview> (last visited Mar. 10, 2020).

<sup>13</sup> *Id.*

by live operators and is open for use by all community members, not just legal practitioners. According to ICE, interpretation is available.

For requests to OCC, you may need to elevate the request to Deputy Chief Counsel and Chief Counsel for that office. It is a good practice, however, to make your request initially to the TA assigned to the case, if ongoing, or the duty attorney or designated email for your request.

## **B. Public Campaigns & Congressional and Community Advocacy**

One of the most powerful tools that practitioners and advocates can use to help their clients obtain a favorable decision is to promote the case publicly by getting community members, organizations, congressional representatives, and/or media involved. Prior to the Trump administration, practitioners and advocates used this strategy to receive a favorable grant of prosecutorial discretion from DHS. In certain cases, taking a case public can make DHS aware that the community is invested in your client's case, thus increasing the pressure on ICE to make a favorable discretionary determination. The decision whether to go public with a case is highly individualized and depends on the specifics of each situation.

Before making a decision to move forward, practitioners should discuss public engagement strategies with their clients, and obtain their informed consent before proceeding. Clients and their families are often the most compelling advocates for prosecutorial discretion, but they may also experience a high degree of scrutiny from both ICE and the press when going public. This is particularly true of family members who are undocumented or fall within enforcement priorities.

Moreover, going public might be a better option in situations where ICE has already targeted the client. For example, it might not be as effective to engage in a public campaign if a client is currently in jail and an ICE detainer has not yet been filed with the jail, as doing so may trigger an enforcement action. On the other hand, if practitioners know that ICE is seeking to arrest or detain the client or has already detained the client, then going public is a strategy worth considering.

Should a client wish to pursue a public campaign for prosecutorial discretion, it can take many forms. Practitioners should encourage their client and their client's family to connect with local community and immigrant justice organizers who can support and advise them on campaign strategies, and practitioners should be prepared to work closely with community advocates. Family members, organizations, and communities can help write letters and provide testimonials to describe a client's positive equities and strong community ties when reaching out to DHS for prosecutorial discretion. Practitioners can also present signatures from online petitions as additional evidence of community support, can mobilize calls to the local ICE field office and ICE headquarters to bring attention to the case, and can hold community rallies and vigils outside

of ICE offices, where family members, local organizations, congressional representatives, and other community members can provide testimonies, and the media is invited to promote and highlight the cases to a larger audience. Engaging congressional representatives or other elected officials may also bolster the client's case through additional letters of support or ICE inquiries. Whatever the strategy, public campaigns have proven most successful when legal advocates collaborate closely with community organizers.

## **VI. Conclusion**

The interim enforcement priorities described in the Pekoske and Johnson memos present an important advocacy tool for immigration practitioners to utilize in requesting prosecutorial discretion for noncitizen clients. As we await further guidance from DHS Secretary Mayorkas, advocates still 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 successes<sup>14</sup> from their advocacy.

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<sup>14</sup> Practitioners may contact Khaled Alrabe at [khaled@nipnl.org](mailto:khaled@nipnl.org) and Lena Graber at [lgraber@ilrc.org](mailto:lgraber@ilrc.org) to share information about how ICE has responded in individual cases.

## APPENDIX

### SAMPLE PROSECUTORIAL DISCRETION REQUEST TO OCC



February 16, 2021

Assigned Assistant Chief Counsel  
Office of the Principal Legal Advisor – Phoenix  
U.S. Immigration and Customs Enforcement  
Department of Homeland Security  
6431 S. Country Club Road  
Tucson, AZ 85706

**RE: Request to Dismiss Removal Proceedings Without Prejudice  
John Doe, XXXX-XXX-XXX  
Individual Hearing Date:**

**Delivered via email to: [tuc.duty.attorney@ice.dhs.gov](mailto:tuc.duty.attorney@ice.dhs.gov)**

Dear Assistant Chief Counsel:

I represent Mr. Doe in the above-referenced matter. His Individual Hearing is scheduled for \_\_\_\_\_. The purpose of this letter is to request that the Department move to dismiss my client’s removal proceedings without prejudice. Our request is consistent with, and supported by, Acting Secretary Pecoske’s Memorandum dated January 20, 2021 (“the Pecoske memo”) and Acting Director Johnson’s Memorandum dated February 18, 2021 (“the Johnson memo”), which drastically reordered ICE enforcement priorities. Attachment A, Pecoske Memo, “Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities,” Jan. 20, 2021; Attachment B, Johnson Memorandum, “Interim Guidance: Civil Immigration Enforcement and Removal Priorities,” Feb. 18, 2021.

Acting ICE Director Johnson explained that, while DHS conducts an appropriate review of its enforcement operations and prior priorities that were in effect prior to January 20, 2021, ICE’s interim priorities shall be:

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.

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2. **Border Security:** Individuals apprehended at the border or ports of entry while attempting to unlawfully enter the United States on or after November 1, 2020, or who were not physically present in the United States before November 1, 2020.
3. **Public Safety:** Individuals who are determined to pose a threat to public safety **AND** have been convicted of an “aggravated felony,” as defined in INA § 101(a)(43), or individuals who have been convicted of an offense for which an element is “active participation in a criminal street gang as defined by 18 U.S.C. § 521(a),” or individuals who are “not younger than 16 years of age and intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity” of that gang or organization. Note that in addition to the aggravated felony and gang-related determinations, the individual must be also determined to pose a threat to public safety.

These enforcement priorities apply to “all civil enforcement and removal decisions,” including “whether to...cancel a Notice to Appear.” *See* Attachment B, Johnson Memo. The Pekoske memo also states that the enforcement priorities apply to “whether to settle, dismiss, appeal, or join in a motion on a case.” *See* Attachment A, Pekoske Memo.

This three-factor analytical framework (national security, border security, public safety) is, of course, familiar. It was first established by former DHS Secretary Jeh Johnson’s memorandum in 2014. Former Acting Principal Legal Advisor, Riah Ramlogan, provided more specific guidance to OPLA attorneys several months later (“the Ramlogan memo”). *See* Attachment D, Ramlogan Memorandum, “Guidance Regarding Cases Pending Before EOIR Impacted by Secretary Johnson’s Memorandum entitled *Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants*,” April 6, 2015.

While we await additional guidance from the current Acting Principal Legal Advisor, the Ramlogan guidance is instructive. In the context of removal proceedings, the Ramlogan memo clearly directed OPLA attorneys “to prioritize assets accordingly” and “to review their cases, at the earliest opportunity, for the potential exercise of prosecutorial discretion, in light of these enforcement priorities.” Attachment D, Ramlogan Memo, p. 2. The memo also stated that “***OPLA should generally seek administrative closure or dismissal of cases that are not priorities.***” *Id.* (Emphasis added.)

Mr. Doe has no criminal or gang history; his presence in the United States predates November 1, 2020; and he is not a national security threat. Applying the interim criteria that are now in effect, he is unequivocally not an enforcement priority. *See* Attachment D, Respondent’s Brief in Support of Application for Cancellation of Removal. In 2015, OCC agreed to, and the IJ granted, administrative closure of Mr. Doe’s removal proceedings specifically because he was not an enforcement priority and, therefore, was eligible for a grant of prosecutorial discretion.

The Department’s position now, after issuance of the Pekoske and Johnson memoranda, should be no different than it was under the 2014 Jeh Johnson memo and accompanying guidance from the Principal Legal Advisor. ***Mr. Doe is not an enforcement priority and the ICE should***

*exercise prosecutorial discretion in his case.* Because administrative closure is, unfortunately, no longer available as an option to exercise prosecutorial discretion, OCC should move to dismiss Mr. Doe's removal proceedings without prejudice.

Thank you for taking the time to consider this information. If you would like to discuss any of these matters in greater depth, you may contact me directly at \_\_\_\_\_.

Sincerely,

Matthew H. Green

MHG/krq

*Encl.*

## SAMPLE REQUEST FOR RELEASE FROM DETENTION



*Fighting for equal justice for all immigrants  
at risk of detention and deportation*

[www.caircoalition.org](http://www.caircoalition.org)

1612 K Street, NW Suite 204  
Washington, DC 20006

T 202 / 331.3320  
F 202 / 331.3341

Deportation Officer \_\_\_\_\_  
Stewart Detention Center  
146 CCA Road, P.O. Box 248  
Lumpkin, GA 31815

January 25, 2021

*Via Electronic Mail*

**Re: Request for Release of [Full Name], #A[XXX-XXX-XXX], due to Status as Non-Priority for Detention**

Deportation Officer \_\_\_\_\_:

I represent Mr. [Last Name], currently detained at Stewart Detention Center, in his custody matters and immigration proceedings and submit this request for release on his behalf. Mr. [Last Name] does not fall under any of the three priorities for deportation as set forth by the January 20, 2021 Department of Homeland Security Memorandum on Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities (“the January 20, 2021 DHS Memo”): national security, border security, or public safety. Further, the equities weighing in favor of his release—including Mr. [Last Name]’s family ties and support in the U.S., pending case before the Fourth Circuit Court of Appeals in which the Court granted a stay of removal, and almost X-year detention in ICE custody—are incredibly strong. Due to the nature of Mr. [Last Name]’ case and the totality of his circumstances, we respectfully request that he be released from detention during the pendency of his removal proceedings.

### **I. Background**

Mr. [Last Name] is a [Age]-year-old native and citizen of [Country]. *See* Ex. A, Notice to Appear (“NTA”). He entered the United States on [Date], at the age of [Age], as a Lawful Permanent Resident (LPR). *Id.* He has lived in the United States for almost X years—the majority of his life. *Id.* All of Mr. [Last Name]’ nuclear family members, including his LPR parents and U.S. citizen brother and sisters reside in [State]. Ex. B, Mr. [Last Name] Declaration ¶ 2, Ex. C, Mr. [Last Name]’s family’s immigration and citizenship documentation.

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Mr. [Last Name] was the victim of severe sexual, physical, and verbal abuse from a young age. Ex. B ¶¶ 3-4. He turned to drugs and alcohol as a teenager in an attempt to self-medicate for this trauma, which started his multi-year long struggle with substance abuse. *Id.* ¶ 5 3. Mr. [Last Name]'s addiction to drugs and alcohol led to him committing and being convicted of several criminal offenses. *Id.* On [Date], Mr. [Last Name] pled guilty to [Criminal Offense]. Ex. D, Criminal Judgment. On [Date], he pled guilty to [Criminal Offenses] and was sentenced to a total of [Sentence] imprisonment. *Id.* Determining that Mr. [Last Name] would benefit from rehabilitation programming rather than additional incarceration, the criminal judge sentenced Mr. [Last Name] to a residential transitional program for non-violent offenders. *Id.*

During his time in prison, Mr. [Last Name] participated in comprehensive drug addiction programming, courses on life and anger management and employability skills, and a GED course. Ex. E, Evidence of Rehabilitation. After completing his prison sentence, Mr. [Last Name] was taken into ICE custody on [Date] at Farmville Detention Center in Virginia. On [Date], DHS issued Mr. [Last Name] an NTA charging him with removability as an “alien who at any time after admission is convicted of two or more crimes involving moral turpitude [(CIMTs)], not arising out of a single scheme of criminal misconduct.” 8 U.S.C. § 1227(a)(2)(A)(ii). DHS later clarified that it was charging removability based on Mr. [Last Name]' [Criminal convictions] constituting CIMTs. Ex. A.

Through counsel, Mr. [Last Name] filed a Motion to Terminate Removal Proceedings in Arlington Immigration Court. On [Date], the Immigration Judge (IJ) denied Mr. [Last Name]'s Motion to Terminate. On [Date], the Board upheld the IJ's determination that Mr. [Last Name] was removable. Mr. [Last Name] timely petitioned the Fourth Circuit Court of Appeals for review of the Board's decision. On [Date], based in part on Mr. [Last Name] showing a likelihood of success on the merits of his case, the Fourth Circuit granted Mr. [Last Name] a stay of removal pending its decision. Ex. F, Fourth Circuit Stay of Removal. His case remains pending before the Court.

Mr. [Last Name] was transferred to Stewart Detention Center on [Date]. While at Farmville and now at Stewart, Mr. [Last Name] has exhibited exceptional behavior, working on the cleaning staff at Stewart, and helping numerous detained immigrants in addition to facility staff using his bilingual abilities. Ex. B ¶¶ 11, 13, 14. He has been sober for X years, since [Date]. Ex. E.

## **II. Mr. [Last Name] Is Not a Priority for Detention Under the January 20, 2021 DHS Memo on Enforcement Priorities.**

As set forth in the January 20, 2021 DHS Memo, the three priorities “shall 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 detain or release.*” January 20, 2021 DHS Memo at 2 (emphasis added). “In addition, all enforcement and detention decisions shall be guided by DHS's ability to conduct operations and maintain custody consistent with applicable COVID-19 protocols.” *Id.* at 2-3.

Mr. [Last Name] is not an enforcement priority under any of the three priority categories:

1. **Priority 1 National Security** (threats to national security and suspected terrorism or espionage): His convictions for [List of criminal offenses] do not raise any national security, terrorism, or espionage concerns.<sup>15</sup>
2. **Priority 2 Border Security** (individuals not physically present in the U.S. before November 1, 2020 or apprehended attempting to illegally enter on or after that date): As a former Lawful Permanent Resident who has legally resided in the U.S. since [Year], Mr. [Last Name] does not fall under this category.
3. **Priority 3 Public Safety** (incarcerated individuals released on or after January 21, 2021, who have been convicted of an aggravated felony and deemed a threat to public safety at the time of conviction): Mr. [Last Name] has not been convicted of an aggravated felony and was released from state prison on [Year].

Mr. [Last Name] takes full responsibility for his criminal actions, which stem from his mental health and substance abuse issues. He has been sober for X years, has participated in rehabilitative programming while incarcerated, and is dedicated to staying sober and out of trouble if released. Once released, Mr. [Last Name] is still subject to the terms of his probation, which include attending the residential rehabilitation program, abstaining from alcohol and drugs, and seeking or maintaining full-time employment or coursework. Ex. D. He has access to extensive substance abuse recovery, educational programs, and mental health resources near his family's residence in [State] and is committed to participating in these programs. Ex. G, [Last Name] Post-Release Plan.

### III. Mr. [Last Name]' Equities Also Favor Release.

Mr. [Last Name]' additional equities also call for his release. He has been in ICE custody for X years, since [date]. Mr. [Last Name] and his family members, all of whom are U.S. citizens or LPRs, have lived in the United States for the past X years. He barely remembers [Country] and out of his siblings, he is the only one who is not a U.S. citizen. *See* Ex. B at 3; Ex. C at 5 ¶ 2.

Should he be released, Mr. [Last Name]' family members would pay for his bus ticket from Georgia to [State], pick him up from the bus station, and welcome him into their home at [Address]. There, Mr. [Last Name] would reside with his parents, [Names], younger brother [Name], and younger sister [Name]. His other sister [Name] lives minutes away at [Address], with her U.S. citizen husband and children. Ex. C at 5, 7 ¶¶ 2, 18.

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<sup>15</sup> Despite his being detained under 8 U.S.C. § 1226(c), ICE has the discretionary authority to release Mr. [Last Name]. *See, e.g., Fraihat v. ICE*, 445 F. Supp. 3d 709, 726 (C.D. Cal. 2020) (“Even individuals required to be detained by statute can be and were released pursuant to ICE guidelines and policies, and statutory and regulatory provisions.”) (citing 8 U.S.C. §§ 1182(d)(5), 1225(b), 1226, 1231; 8 C.F.R. §§ 1.1(g), 212.5, 235.3, 236.2(b)). The January 20, 2021 DHS Memo also “rescinded and superseded” prior DHS policy disallowing the exercise of discretion to release immigrants subject to mandatory detention. January 20, 2021 DHS Memo at 2, Appendix.

Mr. [Last Name]' parents and brother [Name] have access to vehicles and are able and willing to transport Mr. [Last Name] to any scheduled appointments or rehabilitation programs. Mr. [Last Name] could also commute using public buses. Should Mr. [Last Name] recover his LPR status and ability to legally work through his pending appeal, his father has a landscaping business, which Mr. [Last Name] previously helped with, and has offered to employ Mr. [Last Name] upon his release. Ex. D at 12-13. Mr. [Last Name] could also obtain employment on his own or through his family's network of friends.

Finally, the status of Mr. [Last Name]' removal proceedings weighs in favor of his release. He is represented by undersigned counsel in his removal proceedings at the Fourth Circuit Court of Appeals and the Court has granted him a stay of removal pending a decision on his case, based on his showing that he has a substantial likelihood of prevailing on the merits. Ex. F.

On Mr. [Last Name]' behalf, I respectfully request his release from ICE detention. In support of this request, please find the following documents:

- Ex. A [Date] Notice to Appear & [Date] Additional Charges of Inadmissibility/Deportability
- Ex. B [Full Name] Declaration
- Ex. C Mr. [Last Name]' Family's Immigration and Citizenship Documentation
- Ex. D Criminal Judgment for [Criminal Convictions]
- Ex. E Evidence of Rehabilitation
- Ex. F Fourth Circuit Stay of Removal
- Ex. G Post-release Plan

Please feel free to contact me with questions or to further discuss. Thank you very much for your time and attention to this matter.

Sincerely,

Capital Area Immigrants' Rights Coalition  
1612 K St. NW, Ste. 204  
Washington, DC 20006  
(202) 908-6902

*March 2021*

## SAMPLE PROSECUTORIAL DISCRETION REQUEST

March 15, 2021

[ICE Field Office Addresses]

### **Re: Request for Prosecutorial Discretion for [Redacted], A# [Redacted]**

We request that you release Mr. [Redacted] pursuant to Acting Director Johnson's February 18, 2021 [\*Interim Guidance: Civil Immigration Enforcement and Removal Priorities\*](#) (the "Johnson memo"). The Johnson memo authorizes the release from custody of noncitizens who have significant equities including deep family and community ties, medical needs, and available immigration relief, and have shown rehabilitation, even where they have been convicted of crimes. Moreover, officials are encouraged to give particular attention to noncitizens such as Mr. [Redacted] with pending petitions for review on direct appeal of their orders of removal. Finally, the department-wide memorandum issued by Acting DHS Secretary David Pekoske on January 20, 2021, [\*Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities\*](#) (the "Pekoske memo"), from which the Johnson memo draws its guidance, states that "all enforcement and detention decisions shall be guided by DHS's ability to conduct operations and maintain custody consistent with applicable COVID-19 protocols."

Though Mr. [Redacted] has an aggravated felony conviction, he is not categorically barred from discretionary release. The Johnson memo specifically instructs ICE officials to consider mitigating factors, including the recency of the conviction, to determine whether he is an enforcement priority. Mr. [Redacted] does not pose a threat to public safety and warrants release for the reasons set forth below.

#### **I. Family and Community Ties**

Mr. [Redacted] has numerous family ties to the United States, and his mother and siblings would welcome him back into the community with open arms and provide for his well being upon release. His business partner, [Redacted], describes him as [Quote from friend/community support letters attesting to good character].

Mr. [Redacted]'s family, as well, stands ready to ensure a smooth transition to freedom. His mother, [Redacted], who is a United States Citizen, and other members of his family and community in [Redacted], have attested to his strong character. [Quote from family support letters attesting to good character].

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[Redacted], a [Redacted] based immigrant advocacy organization, attests to Mr. [Redacted]'s value to the community and has agreed to provide support to him and his family upon his release.<sup>16</sup> [Redacted] has agreed to provide him accompaniment at local ICE field office check-ins and access to community support networks. Finally, the community at large wants Mr. [Redacted]'s freedom as over 5,000 people so far have signed a petition requesting that this field office release him.<sup>17</sup>

## **II. Rehabilitation**

Mr. [Redacted] has drug and firearms convictions stemming from incidents that occurred in 2006, when he was only 21 years old. In the 15 years since, Mr. [Redacted] has matured immensely. He has successfully rehabilitated himself and obtained training that would permit him to positively reengage with society upon his release. He has shown care and support to others, including friends and family outside of detention. The Johnson memo specifically authorizes ICE to release persons such as Mr. [Redacted], who were convicted of "aggravated felonies," but have established sufficient mitigating factors to warrant release. Mr. [Redacted] has exhibited these factors from the time of his initial incarceration until now.

Even during the course of his criminal trial on federal charges, Mr. [Redacted] demonstrated remorse and rehabilitation such that the Assistant United States Attorney (AUSA) urged the court to reduce his sentence. The AUSA wrote in his case sentencing memorandum to the court that Mr. [Redacted] "has both expressed profound remorse for his criminal conduct that is the subject of the instant prosecution and also devoted considerable efforts to his own rehabilitation."<sup>18</sup> In granting a reduction of Mr. [Redacted]'s sentence, the Federal District Court Judge remarked that "it is clear that since his incarceration he has invested considerable effort in turning his life around and by all measures that I am aware of he has been successful in doing so. His manifold efforts to improve himself while incarcerated and his communications make it clear that he has fully accepted responsibility for his actions, which militates strongly in favor of leniency."<sup>19</sup>

Moreover, during the course of his incarceration, Mr. [Redacted] persevered through traumatic experiences that impacted his mental health.<sup>20</sup> At one point, Mr. [Redacted] was [provide details of experiences relating to trauma].<sup>21</sup> Instead of shutting down and isolating himself from opportunities to better himself while in prison, Mr. [Redacted] took advantage of what was

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<sup>16</sup> See Exhibit B, Organizational Support Letters

<sup>17</sup> See Exhibit C, [Name of Campaign] Petitions

<sup>18</sup> See Exhibit D, Sentencing Memorandum

<sup>19</sup> See Exhibit E, Re-sentencing Transcript

<sup>20</sup> See Exhibit F, Psychological Evaluation by [Redacted]

<sup>21</sup> *Id.*



offered. Over the past 15 years, 4 of which have been spent in ICE custody, Mr. [Redacted] has managed to maintain and even strengthen his relationships with family and friends. He has continued to dedicate himself to rehabilitation, receiving certifications in paralegal studies, typing, Microsoft Office, parenting, and entrepreneurship while in prison.<sup>22</sup> Numerous letters from friends, family, and teachers attest to Mr. [Redacted]'s remorse over his past and maturation while detained.<sup>23</sup> Over the past decade and a half since the initial sentencing on his crimes, Mr. [Redacted] has consistently demonstrated his remorse and rehabilitation.

Mr. [Redacted] is now 36 years old, and he has used the time of his incarceration to transform from a young man who made mistakes into an adult who has learned from them. To evaluate Mr. [Redacted]'s request for release based only on actions that occurred when he was barely out of his teens - and for which he even then accepted responsibility and demonstrated remorse - without consideration of the significant evidence of his rehabilitation, would be inconsistent with the spirit and language of the Johnson memo. Mr. [Redacted] has shown that he has changed and will positively impact his community if he is released.

### **III. Available Immigration Relief**

On May 9, 2020, the [Redacted] Circuit Court of Appeals granted Mr. [Redacted] a stay of removal in connection with his pending petition for review.<sup>24</sup> As likelihood of success on the merits is a key factor in the case that is currently pending at the [Redacted] Circuit Court of Appeals, Mr. [Redacted]'s stay reflects that he remains eligible for immigration relief, as contemplated in the Johnson memo. As noted earlier, the Johnson memo urges particular attention be given to those, like Mr. [Redacted], whose direct appeals of their removal orders remain pending. Thus, the stay granted Mr. [Redacted] should be considered a mitigating factor in favor of his release from ICE custody.

### **IV. Medical Needs**

Mr. [Redacted] suffers from hypertension, asthma, depression, and post traumatic stress disorder.<sup>25</sup> These conditions on their own weigh in favor of release from detention. However, Mr. [Redacted] also contracted COVID-19 while detained at Etowah County Detention Center and suffers from long term effects from the disease, such as shortness of breath,<sup>26</sup> a condition that [has recently been characterized](#) as an enduring symptom of COVID infection. A recent

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<sup>22</sup> See Exhibit G, Certifications from Mr. [Redacted]'s Prison Term

<sup>23</sup> See Ex. A

<sup>24</sup> See Exhibit H, Docket of Mr. [Redacted]'s [Redacted] Circuit Petition for Review

<sup>25</sup> See Ex. F, Exhibit I, 12/4/20 Notice of Custody Determination

<sup>26</sup> See Exhibit J, Letter from [Redacted]

echocardiogram also revealed that Mr. [Redacted] is suffering from concentric left ventricular hypertrophy.<sup>27</sup> He is currently awaiting the results of specialized cardiology exams.

Mr. [Redacted] has twice requested release pursuant to the protocols established by [\*Fraihat v. ICE\*](#), but has been denied. Most recently, on February 4, 2021, ICE acknowledged the existence of medical conditions otherwise warranting release, but denied his request on the grounds that he is a threat to public safety without further explanation, and contrary to evidence of his remorse and rehabilitation. The Pekoske and Johnson memos instruct ICE officials to consider his release in light of the various mitigation factors cited within, despite his conviction of an aggravated felony, and consistent with COVID-19 protocols. Thus, Mr. [Redacted]'s medical conditions remain in favor of his release from custody.

## **V. Conclusion**

In sum, the enclosed attestations and records demonstrate that Mr. [Redacted] does not pose a threat to public safety and is not an enforcement priority, and establish all of the mitigating factors contemplated by the Pekoske and Johnson memos, including close family and community ties, likely immigration relief, and medical conditions endangering his life and health if he continues to remain in detention. Mr. [Redacted] has a caring and supportive community awaiting his return, that will help him to reenter society and abide by his obligations to ICE upon his release. For the foregoing reasons, Mr. [Redacted] should be released.

Sincerely,

[Counsel for Respondent]

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<sup>27</sup> See Exhibit K, Echocardiogram Result

## SAMPLE DETAINER RESCISSION REQUEST

[Date]

Criminal Alien Program, Dallas County Jail  
U.S. Immigration and Customs Enforcement  
Department of Homeland Security

Re: Detainer Rescission Request for NAME XXXXXX

Dear Officer:

Pursuant to the January 20, 2021 Memorandum from David Pekoske, Acting Secretary of Homeland Security (hereafter "Pekoske Memo") and the February 18, 2021 Memorandum from ICE Acting Director Tae Johnson (hereafter "Johnson Memo"), we request the detainer be lifted for Mr. NAME XXXXXX, who is currently detained with the Dallas County Sherriff's Office.

On January 20, 2021, President Biden issued an Executive Order on civil immigration enforcement policies and priorities, which established new policies for the administration with regard to federal immigration enforcement, and rescinded Executive Order 13768. The Memo established interim immigration enforcement priorities for ICE and all DHS components. Although the portion of the Memo that related to the 100-day moratorium on deportations is currently under injunction in the District Court, the interim priorities are not in any way enjoined by the District Court's order. In turn, on February 18, 2021, ICE Acting Director Tae Johnson issued an agency-wide memo regarding how ICE will interpret and implement the Pekoske memo.

Under the Johnson Memo, the federal government's civil immigration enforcement priorities are focused only on certain categories of people. These categories are defined as follows:

1. 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.
2. Individuals arrested at the border or ports of entry on or after November 1, 2020, or who were not physically present in the United States before November 1, 2020.
3. Individuals pose a threat to public safety AND
  1. who have been convicted of an "aggravated felony," as that term is defined in section 101(a) (43) of the Immigration and Nationality Act; or
  2. who have participated in a criminal street gang or have a gang related conviction.

The custody of Mr. XXX does not adhere to the ICE enforcement priorities outlined in the Johnson Memo. Mr. XXX is a person who is not "engaged in or suspected of terrorism or espionage," nor do his charges relate to national security. He did not attempt "to unlawfully enter

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the United States on or after November 1, 2020” and was present in the U.S. before that date. Finally, he does not have any aggravated felony or gang convictions, and he has never participated in gang related activity. It should be noted the only charge Mr. XXX could face, Driving with License Invalid, does not fall within the INA definition of an “aggravated felony,” and he has no other criminal history.

The Pekoske and Johnson Memoranda state clearly that these enforcement priorities apply to all discretionary enforcement actions when identifying and detaining noncitizens. This includes any enforcement in a jail setting, such as the issuance of ICE detainers and transfers of individuals into ICE’s custody.

Moreover, Mr. XXX is married to a U.S. citizen, entered on a visa and his family has already contracted an immigration attorney to represent him. He is not a flight risk nor is he a danger to the community.

Mr. XXX is not a threat to national security, he entered the U.S. well before November 1, 2020, and he is not a threat to public safety; thus, we request the Mr. XXXX’s detainer be lifted immediately, as he is no longer a priority for removal under the Pekoske and Johnson Memoranda.

Thank you for your attention to this matter. You may reach me at [email address] or [phone number] if you have any questions.

Sincerely,

Jordan Pollock  
Assistant Public Defender/Immigration Specialist  
Dallas County Public Defender’s Office