

AMERICAN BAR ASSOCIATION
COMMISSION ON IMMIGRATION
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges the Department of Homeland Security
2 (DHS) to implement the following policies and procedures within the immigration removal
3 adjudication system:
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- 5 (a) Increase use of prosecutorial discretion by both DHS officers and attorneys to reduce the
6 number of Notices to Appear (“NTA”) served on noncitizens who are prima facie
7 eligible for relief from removal, and to reduce the number of issues litigated;
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- 9 (b) Give DHS attorneys greater control over the initiation of removal proceedings, and in
10 DHS local offices with sufficient attorney resources, establish a pilot program requiring
11 approval of a DHS lawyer prior to issuance of all discretionary Notices to Appear by
12 DHS officers;
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- 14 (c) To the extent possible, assign one DHS trial attorney to each removal proceeding;
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- 16 (d) Cease issuing Notices to Appear to noncitizens who are prima facie eligible to adjust to
17 lawful permanent resident status;
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- 19 (e) Upgrade DHS's data systems to permit better tracking of detainees within the detention
20 system, and improve protocols for transfers of detainees between detention facilities to
21 ensure notification of family members and counsel; and
22
- 23 (f) Create a position within DHS to oversee and coordinate all aspects of DHS immigration
24 policies and procedures, including asylum matters.
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26 FURTHER RESOLVED, That the American Bar Association urges Congress to amend the
27 Immigration and Nationality Act (“INA”) regarding the removal of noncitizens convicted of
28 certain crimes that would:
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- 30 (a) Amend the definition of “aggravated felony” to require that any such conviction must be
31 of a felony and that a term of imprisonment of more than one year must be imposed
32 (excluding any suspended sentence);
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- 34 (b) Eliminate the retroactive application of the aggravated felony provisions;
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- 36 (c) Restore an immigration judge’s authority to consider a discretionary application for
37 cancellation of removal for certain lawful permanent residents convicted of an
38 aggravated felony, based on humanitarian and other grounds. Extend the same
39 eligibility based on humanitarian grounds to deserving lawful permanent residents
40 barred from cancellation by the offense “clock-stop” provision; and
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- 42 (d) Amend the deportation ground that requires removal based upon conviction of a single
43 crime involving moral turpitude to provide that the conviction must be of a crime for
44 which a sentence of more than one year was imposed.

REPORT

The Department of Homeland Security (“DHS”) is a cabinet-level agency that provides U.S. immigration benefit services and enforcement functions through the following three sub-components:

- **U.S. Citizenship and Immigration Services (“USCIS”)**, which provides benefit services and adjudicates noncitizens’ applications for adjustment of status, naturalization, and asylum;
- **Customs and Border Protection (“CBP”)**, which is responsible for enforcing immigration laws at the nation’s borders and ports of entry and for inspecting individuals seeking admission into the United States at any port of entry; and
- **Immigration and Customs Enforcement (“ICE”)**, which enforces immigration laws in the interior of the United States, prosecutes removal cases before the immigration courts, manages the immigration detention system, and effects the removal of noncitizens.

The first step in a typical removal proceeding is when a DHS officer from any of these three components serves a Notice to Appear (“NTA”) upon a noncitizen and files the NTA with an immigration court. USCIS, CBP, and ICE play other important roles in the removal of noncitizens:

- CBP and ICE officers, with only limited administrative or judicial review, may order the removal of a noncitizen convicted of an “aggravated felony” and the expedited removal of certain other noncitizens;
- USCIS asylum officers adjudicate affirmative asylum applications of noncitizens and have authority to grant asylum to such applicants;
- CBP and ICE officers may grant voluntary departure relief to noncitizens who are subject to removal;
- ICE attorneys prosecute removal proceedings in immigration courts; and
- ICE officers (and sometimes CBP officers) make decisions regarding the detention of noncitizens and are responsible for the removal of noncitizens subject to a removal order.

In short, DHS personnel (including officers in the field) regularly make important and difficult decisions regarding the removal of noncitizens, and these decisions have material effects on these individuals and their families, as well as the immigration enforcement and adjudication system at large.

The number of noncitizens removed from the United States has increased from 69,680 in fiscal year 1996 to 358,886 in fiscal year 2008 – a more than 400% increase.¹ The number of removal, deportation and exclusion proceedings initiated by DHS grew by 25.2 % from 231,502 in fiscal

¹ U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2008 YEARBOOK OF IMMIGRATION STATISTICS 95 T.36 (Aug. 2009).

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year 1996 to 289,803 in fiscal year 2008.² This enormous expansion of immigration enforcement activity and resources has not been matched by a commensurate increase in resources for the adjudication of immigration cases. As a result, the adjudication system has been overwhelmed by the increasing caseload. The immigration courts are especially overburdened, leaving immigration judges with little time to spend on individual cases, many of which require complex determinations of fact and law. While this imbalance between judges and cases is in part a function of insufficient funding and staffing for the immigration courts, some DHS policies and practices contribute to the burden. In order to alleviate this burden, we recommend actions not only to increase the resources available but also actions, consistent with existing enforcement priorities, to decrease the number of people being put into the system.

Increase the Use Of Prosecutorial Discretion To Reduce Unnecessary Removal Proceedings And Litigation

DHS officers in ICE, CBP, and USCIS have considerable discretion with respect to removal proceedings against noncitizens in a variety of circumstances. In particular, they have discretion not to initiate proceedings at all; to concede eligibility for relief from removal after receipt of an application; to stop litigating a case after key facts develop to make removal unlikely (such as the serious illness of the respondent or a family member); to offer deferred action or a stay of removal early in the process; and not to file an appeal in certain types of cases (such as CAT relief).

The decision to serve an NTA on a noncitizen is an exercise of prosecutorial discretion.³ DHS policy is that “[a]s a general matter, [officers] may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial.”⁴ In addition, DHS attorneys are able to exercise great discretion with regard to the issues, and even the cases, that will be litigated. Given limited judicial resources at all levels (immigration judges, BIA, courts of appeals), unnecessary removal proceedings or unnecessary litigation of legal and factual issues is particularly costly to the system.

² U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF PLANNING AND STATISTICS, FY2000 STATISTICAL YEAR BOOK D1 (Apr. 2004); U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF PLANNING, ANALYSIS, AND TECHNOLOGY, FY2008 STATISTICAL YEAR BOOK C3 (Mar. 2009).

³ U.S. Department of Justice, Executive Office for Immigration Review, Fact Sheet “Type of Immigration Court Proceedings and Removal Hearing Process” (July 28, 2004). The decision to initiate removal proceedings is not subject to judicial review by any court. *See* INA § 242(g), 8 U.S.C. § 1252(g); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999). Prosecutorial discretion is the authority of a law enforcement agency to decide whether to enforce, or not to enforce, the law against an individual.

⁴ Doris Meissner, Commissioner of the Immigration and Naturalization Service, Memorandum to Regional Directors, District Directors, Chief Patrol Agents and Regional and District Counsel, Exercising Prosecutorial Discretion 5 (November 17, 2000).

ICE Officers

ICE officers' decisions are guided by operation manuals, guidance from supervisors, and training. A 2007 GAO report concluded that ICE lacked comprehensive guidance for the exercise of officer discretion, particularly in determining whether to detain noncitizens with humanitarian circumstances or those who are not primary targets of ICE investigations.⁵ In addition, ICE did not have an effective mechanism to ensure that officers are informed of legal developments that may affect decision making.⁶

In the context of increasing worksite enforcement, ICE officers have reported that their decisions to initiate removal actions are influenced by considerations of detention space and other resource availability factors.⁷ Without clear institutional guidance, there is a persistent danger that ICE officers will exercise their discretion inconsistently, resulting in unfairness to individual noncitizens, overburdening of the detention and adjudication system, and/or inappropriate release of removable noncitizens.

Training, guidance, support, and encouragement are all required elements to ensure that DHS officers properly exercise prosecutorial discretion. We recommend the following to facilitate the use of discretion by ICE officers:

(1) Communicating to all DHS personnel the view of the DHS Secretary and other senior officials that the appropriate exercise of prosecutorial discretion is not only authorized by law but encouraged;

(2) Updating existing policies and procedures to make clear that DHS officers and other personnel are expected to exercise prosecutorial discretion to refrain from serving NTAs on persons believed to be prima facie eligible for relief from removal and developing clearer guidelines (with specific examples of situations in which exercises of prosecutorial discretion are expected) to assist DHS officers and other personnel in appropriate exercises of prosecutorial discretion;

(3) Mandating periodic training on these policies, guidelines, and procedures for DHS officers and other personnel, including senior officials;

(4) Making DHS attorneys available to consult with and address specific questions from DHS officers and other DHS personnel regarding prosecutorial discretion;

(5) Creating mechanisms and procedures by which those who believe a DHS officer failed to exercise prosecutorial discretion properly may report the actions to a superior and distributing information about such mechanisms and procedures to those with whom DHS officers and personnel are in contact; and

(6) Developing metrics to evaluate each DHS officer's compliance with the policies, guidelines, and procedures and rewarding superior compliance appropriately.

⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: ICE COULD IMPROVE CONTROLS TO HELP GUIDE NONCITIZEN REMOVAL DECISION MAKING 20-22 (2007).

⁶ *Id.* at 17.

⁷ *Id.* at 12.

ICE and USCIS Attorneys

On October 24, 2005, DHS Principal Legal Advisor William J. Howard issued a memorandum directing all Office of the Principal Legal Advisor (OPLA) attorneys to apply principles of prosecutorial discretion in order to ensure that the Office's limited resources were used as judiciously as possible.⁸ Although acknowledging that OPLA attorneys lacked authority to cancel NTAs, the memorandum instructed OPLA attorneys to:

attempt to discourage issuance of NTAs where there are other options available such as administrative removal, crewman **removal**, expedited removal or reinstatement, clear eligibility for an immigration benefit that can be obtained outside of immigration court, or where the desired result is other than a removal order.⁹

For cases in which an NTA has been issued but not yet filed with the immigration court, the memorandum directs OPLA attorneys to attempt to resolve the matter without filing the NTA. For cases where an NTA *has* been filed, the memorandum suggests that OPLA attorneys consider dismissing the proceedings without prejudice,¹⁰ and also identifies ways in which OPLA attorneys might resolve a case, including not opposing relief, waiving appeal, making agreements to narrow the issues or stipulating to the admissibility of evidence.¹¹ For cases in which a court hearing has been held, the memorandum directs OPLA attorneys to exercise their prosecutorial discretion with regard to post-hearing actions, guided by the interests of judicial economy and fairness.¹² Finally, the memorandum states that even after a final order of removal, OPLA attorneys retain the discretion to determine if the proper course of action requires reopening the proceeding in order to terminate the NTA.¹³

Despite such internal policies urging the exercise of prosecutorial discretion where appropriate, there is at least a widely held perception that ICE and USCIS attorneys do not sufficiently and appropriately exercise prosecutorial discretion and that there is significant room for improvement in this area that would benefit the entire adjudication system.

If DHS officers and attorneys increase their use of prosecutorial discretion to weed out unnecessary cases or issues, the burden on the removal adjudication system could be lessened significantly. We recommend that the following steps be taken to ensure the proper exercise of discretion by ICE and USCIS attorneys:

⁸ Memorandum from William J. Howard, Principal Legal Advisor, U.S. Department of Homeland Security, to All OPLA Chief Counsel (Oct. 24, 2005), *available at* [http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/Oct24th%202005\(1\).pdf](http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/Oct24th%202005(1).pdf).at 3.

⁹ *Id.*

¹⁰ *Id.* (citing 8 C.F.R. §§ 239.2(c)).

¹¹ *Id.*

¹² *Id.* For example, the memorandum urged OPLA attorneys to consider whether to appeal, what issues to appeal, and how to respond to a noncitizen's appeal.

¹³ *Id.*

(1) Each agency should adopt guidelines encouraging the use of prosecutorial discretion in appropriate instances, while precluding such prosecutorial discretion in other circumstances. These guidelines should account for important concerns, such as fairness and efficiency. They should clarify that the mission of DHS attorneys is to promote justice rather than to defeat noncitizens' claims in every case.

(2) In the ongoing training provided to their attorneys, ICE and USCIS should emphasize the importance of exercising prosecutorial discretion when doing so would be in the interest of justice or efficiency.

(3) The central legal offices of ICE and USCIS should continually monitor the extent to which the regional legal offices exercise prosecutorial discretion and ensure that they are consistently promoting efficiency while staying within appropriate boundaries.

Give DHS Attorneys Greater Control Over the Initiation of Removal Proceedings

Notices to Appear are issued in a variety of agency contexts by CBP, USCIS, and ICE and are subject to substantial discretion. Apart from NTAs required by regulation, there appears to be no consistent policy guidance outlining factors to be considered in exercising discretion in the issuance of NTAs. Consequently, discretion is exercised with disparate results.

We recommend that, in DHS local offices with sufficient attorney resources, the approval of a DHS lawyer be required for the issuance of all discretionary NTAs, and that the DHS lawyer's approval be granted on a case-by-case basis. This should help produce more consistent outcomes and would help to ensure that decisions about the issuance of NTAs would take into account developments in the applicable law. To the extent this approach may contribute to delays in decision-making, exceptions could be provided in time-sensitive circumstances, such as cases where detainees need to issue for noncitizens incarcerated for aggravated felonies.

In some cases, issuance of an NTA is prescribed by regulation.¹⁴ Where USCIS suspects that an application is fraudulent, the applicant's case is referred to ICE.¹⁵ If ICE declines the case, USCIS will investigate and, if it finds fraud, will issue an NTA.¹⁶ In all other cases, USCIS managers have discretion in deciding whether to issue an NTA. Standard procedures provide that "if an applicant is removable and there are no means of relief available (e.g., voluntary departure, reinstatement, or eligibility for another status), then an NTA should normally be prepared."¹⁷ Legal counsel is available to review all NTAs, but such review is not required.¹⁸ Deviations

¹⁴ See Michael L. Aytes, Associate Director for Domestic Operations, U.S. Citizenship and Immigration Services, Policy Memorandum No. 110: Disposition of Cases Involving Removable Noncitizens (July 11, 2006). The memorandum outlines protocols to be followed pursuant to a Memorandum of Understanding between USCIS and ICE at 6; 8 C.F.R. § 216.3(a) (2008) (petitions to remove conditions on residence); 8 C.F.R. § 216.6(a)(5) (2008) (petitions by entrepreneurs to remove conditions); 8 C.F.R. § 207.9 (2008) (applications for family unity benefits); and 8 C.F.R. § 207.9 (2008) (termination of refugee status).

¹⁵ See Aytes, *supra* note 14, at 6.

¹⁶ *Id.*

¹⁷ *Id.* at 7.

¹⁸ *Id.*

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from these procedures must be approved by the Director of Service Center Operations or by the Director of Field Operations.¹⁹

We recognize, however, that ICE attorneys in larger local offices are currently overwhelmed by their caseloads in immigration proceedings and, therefore, are not in a position to take on the additional burden of screening NTAs. Such screening, therefore, should be undertaken on a pilot basis in smaller offices that have sufficient resources. The results there should be monitored carefully and evaluated to determine the need for and feasibility of extending the system to other offices and the additional resources needed for such extension.

To The Extent Possible, Assign Cases to Individual DHS Trial Attorneys

One barrier to the effective exercise of prosecutorial discretion and the efficient handling of cases by DHS trial attorneys is the current practice of assigning attorneys on a hearing-by-hearing basis in removal proceedings at the immigration courts. The result is that several attorneys may have to become familiar with the same case, with no single attorney having overall responsibility for the case.

We recommend that, to the extent possible, DHS assign one DHS trial attorney to each removal proceeding. This would permit that attorney to become familiar with the facts and circumstances of the removal cases assigned to him or her, give the attorney a sense of ownership over those cases, and provide a single contact person to facilitate negotiations and stipulations with opposing counsel. This practice would facilitate the exercise of prosecutorial discretion in a manner consistent with DHS policies.

Cease Issuing NTAs To Noncitizens Who Are Prima Facie Eligible To Adjust To Lawful Permanent Resident Status

On July 11, 2006, Michael L. Aytes, Associate Director for Domestic Operations of USCIS, issued a memorandum informing USCIS offices that on and after October 1, 2006, upon the completion of the denial of an application or petition, an NTA should “normally” be prepared as part of the denial if the applicant is removable and there are no means of relief available.²⁰ The memorandum notes that “[d]eciding whether a person is removable and whether an NTA should be issued is an integral part of the adjudication of an application or petition.”²¹ This represents a shift in prior USCIS policy established in September 2003 under which the issuance of NTAs by USCIS Service Centers was focused on: cases in which a noncitizen’s violation of the INA or other law constituted a threat to public safety or national security; instances where fraud schemes

¹⁹ *Id.*

²⁰ Michael L. Aytes, Associate Director for Domestic Operations, U.S. Citizenship and Immigration Services, Policy Memorandum No. 110: Disposition of Cases involving Removable Noncitizens 7 (July 11, 2006).

²¹ *Id.* at 1.

had been detected; and certain applications for temporary protected status where the basis for the denial or withdrawal constituted a ground of deportability or excludability.²²

While this policy shift did not eliminate the exercise of prosecutorial discretion,²³ practitioners have reported instances in which USCIS has served NTAs on noncitizens who are out of status but eligible to adjust to LPR status pursuant to INA Section 245. For example, in January and February of 2009, the USCIS Texas Service Center reportedly issued NTAs to out-of-status noncitizen beneficiaries following the approval of employment-based immigrant visa petitions (Form I-140) filed for their benefit.²⁴ The new policy also can reach noncitizens eligible to adjust to LPR status pursuant to INA Section 245(i) who have not yet filed to adjust their status or who were unable to adjust their status because of backlogs associated with the relevant employment-based immigrant visa preference category.

In March 2009, USCIS said it was not changing its 2001 policy not to use the filing of an immigrant petition, application for labor certification, or application to adjust status as the sole ground to initiate removal proceedings against an eligible out-of-status applicant.²⁵ USCIS noted, however, that its Service Centers have discretion to issue NTAs when a beneficiary is not maintaining status and would not rescind NTAs served on these beneficiaries of approved employment-based immigration visa (Form I-140) petitions.²⁶

Permitting DHS to issue NTAs under such circumstances is an inefficient use of adjudicatory resources and unfair to such noncitizens. Accordingly, we recommend that DHS implement a policy of not issuing NTAs to noncitizens who may be out-of-status but are prima facie eligible to adjust to LPR status.

²² Michael L. Aytes, Associate Director for Domestic Operations, U.S. Citizenship and Immigration Services, Memorandum to Regional Directors and Service Center Directors, Service Center Issuance of Notice to Appear 1 (Sept. 12, 2003).

²³ For example, USCIS has noted that it maintained and had the authority to exercise prosecutorial discretion and that “[t]here will be a number of cases where USCIS will decide not to issue an NTA upon a finding that to do so would be against the public interest or contrary to humanitarian concerns.” USCIS Response to Recommendation #22 (Apr. 27, 2006) http://www.dhs.gov/xlibrary/assets/CISombudsman_RR_22_Notice_to_Appear_USCIS_Response-04-27-06.pdf. In addition, USCIS has said there may be situations in which it would be logistically inappropriate to issue an NTA, such as where an application to adjust to LPR status was denied because it was filed prior to the effective date of the preference category priority. *Id.*

²⁴ AILA InfoNet, Doc. No. 09031266 (posted Mar. 12, 2009).

²⁵ AILA Infonet Doc. No. 09032460 (posted March 24, 2009). *See also* Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, U.S. Citizenship and Immigration Services, Memorandum to Regional Directors, Guidance on Initiation of Removal Proceedings and Section 245(i) of the Immigration and Nationality Act 2 (Apr. 27, 2001) (noting that the exercise of prosecutorial discretion embodied in the 2001 policy would “ensure that individuals eligible for the benefits of section 245(i) of the INA, and relatives or employers eligible to file petitions or labor certifications on their behalf, will not be deterred from initiating the process to legalize their status through fear that their filing will be used to identify and remove them.”).

²⁶ *See* AILA Infonet Doc. No. 09032460 (posted March 24, 2009).

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Tracking of Detainees

The INA provides DHS with broad authority to detain noncitizens while awaiting a determination of whether they should be removed from the United States and requires that certain categories of noncitizens, including those subject to expedited removal, be detained by DHS. The number of noncitizens detained over the course of a year increased from approximately 209,000 in fiscal year 2001²⁷ to 378,582 in fiscal year 2008.²⁸ It is estimated that by the end of fiscal year 2009, DHS will have detained approximately 380,000 noncitizens.²⁹

ICE has discretion to choose the place of a noncitizen's detention and to transfer detainees within the immigration detention system at any point. ICE's complete discretion with respect to the initial placement of detainees and subsequent transfers makes it difficult for counsel, family, and friends to determine with certainty where a detainee is located. It also appears that ICE itself has only limited ability to locate detainees once they have been placed in detention.³⁰ DHS, however, has committed to expedite efforts to provide an online detainee-locator system for lawyers, relatives and others.³¹

This recommendation urges that DHS's data systems be upgraded to allow better tracking of detainees within the detention system, so they can be located from any DHS location. In addition, a protocol for transfer of detainees between detention facilities should be established, to ensure notification of family members and counsel.

Create Position To Coordinate Immigration Positions and Policies Among the Various Components of DHS

DHS's enforcement and application of immigration law have often been inconsistent and confusing. This is unfair to those affected, limits the ability of DHS to take a leadership role on immigration policies, and decreases confidence and trust in the immigration adjudication system. The structure of the immigration functions in DHS makes coordination and consistency in this area challenging. The immigration service and enforcement functions are divided among three co-equal components in DHS, each of which is headed by a Presidential appointee reporting directly to the Secretary of DHS through the Deputy Secretary. The DHS Assistant Secretary for Policy and the General Counsel of DHS play important roles in immigration matters. Each of

²⁷ U.S. IMMIGRATION AND NATURALIZATION SERVICE, 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE at 235 (Feb. 2003).

²⁸ U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2008, at 3 (July 2009).

²⁹ See Dora Schriro, Director, Office of Detention Policy and Planning, U.S. Immigration and Customs Enforcement, Department of Homeland Security, Immigration Detention Overview and Recommendations at 6 (October 6, 2009).

³⁰ See *id.* at 17-18.

³¹ Spencer S. Hsu, *Immigration Officials Weigh Less-Restrictive Detentions*, WASHINGTON POST, October 5, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/06/AR2009100601639.html>.

USCIS, CBP, and ICE has its own policy office reporting directly to the head of such component, while each has its own general counsel, who reports directly to the General Counsel of DHS.

Important cross-cutting issues should be addressed in a coordinated and consistent manner. The only persons in DHS with the authority to resolve these disputes are the Secretary and the Deputy Secretary, who are managing an enormous agency with multiple components, of which USCIS, CBP, and ICE are only a part. Moreover, as the Migration Policy Institute observed, this lack of a “robust department-level mechanism” will be a particularly acute problem if immigration reform legislation is enacted.³²

We recommend, therefore, that DHS create a position to oversee and coordinate all aspects of DHS immigration policies and procedures. This position should have sufficient resources and authority: (1) to ensure coordination among USCIS, CBP, and ICE; (2) to develop and advance its own agenda and goals with respect to immigration policies; and (3) to play a more significant role in developing immigration policies and informing public opinion on these issues.

Amend Definition of “Aggravated Felony”

The INA provides that a noncitizen is removable if he or she has been convicted of an aggravated felony. The provision was first enacted in 1988 and defined “aggravated felony” to mean murder, any drug trafficking crime as defined in 18 U.S.C. § 924(c)(2), or any illicit trafficking in any firearms or destructive devices, in each case committed in the United States. Since 1988, the definition of “aggravated” has been expanded so significantly that DHS has initiated removal proceedings on the basis of convictions for misdemeanors and other minor offenses, such as shoplifting, that are not consistent with any common understanding of the term “aggravated felony.” These have included even misdemeanor convictions in which no sentence was ordered or served.

In many cases, courts called upon to construe the aggravated felony provisions are led by the broad statutory language to seemingly nonsensical results. For example, in *United States v. Pacheco*,³³ a long-term permanent resident who had entered the United States legally as a six-year-old child was convicted, *before* the definition of aggravated felony was significantly expanded in 1996, of three misdemeanor offenses in Rhode Island state court, resulting in three different suspended one-year sentences. State misdemeanor offenses are not felonies, much less “aggravated felonies.” The Second Circuit expressed “‘misgivings’ that Congress, in its zeal to deter deportable noncitizens from re-entering this country, has ‘improvidently, if not inadvertently, broken the historic line of division between felonies and misdemeanors,’” but still held that these misdemeanor convictions were “aggravated felonies” as defined under the INA.

³² See MIGRATION POLICY INSTITUTE, *DHS AND IMMIGRATION: TAKING STOCK AND CORRECTING COURSE* 93 (Feb. 2009).

³³ 225 F.3d 148 (2d Cir. 2000).

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In other cases, the Courts of Appeals have affirmed the expansive reach of the term “aggravated felony,” while expressing reservations about the irrational results.³⁴

There is evidence that removal proceedings brought on aggravated felony grounds have increased greatly since 1988. The number of such removal orders more than doubled from 10,303 in 1992 to 26,074 in 2005. From mid-1997 to May 2006, removal proceedings on the basis of aggravated felony convictions were initiated against 156,713 noncitizens in immigration courts.³⁵ Moreover, the expansion of the definition of aggravated felony, coupled with aggressive enforcement, has contributed to a sharp increase in appeals of removal orders based on aggravated felony convictions and thus has added to the burdens of the Board of Immigration Appeals and federal Courts of Appeal.

Because Congress considers aggravated felonies to be “the most serious criminal offenses” covered by U.S. immigration laws, noncitizens convicted thereof are subject to very serious consequences, beyond what would result if they were “merely” deportable. These consequences include mandatory detention during removal proceedings, a lifetime bar to reentry into the United States, and ineligibility for relief from removal, including cancellation of removal, voluntary departure, asylum, and relief for victims of domestic violence under the Violence Against Women’s Act. Thus, a noncitizen who is determined to have been convicted of an aggravated felony will face extended detention and near-certain removal with no consideration of equities, lawful status, or hardship to U.S. citizen family members — even where the immigration judge has found that the noncitizen has a well-founded fear of persecution based on race, religion, nationality, membership in a social group, or political opinion.

The absence of discretionary relief or consideration of equities and the fact that such a large number of offenses now may qualify as aggravated felonies have resulted in the automatic removal of thousands of permanent residents and other noncitizens with extensive ties to the United States, with the attendant family and societal disruption. According to the Transaction Records Access Clearinghouse at Syracuse University (“TRAC”), the individuals charged from 2002 through 2006 as removable on the basis of aggravated felony convictions had resided in the United States for an *average of 15 years*. The longest stay in the country before being charged was 54 years. These and other data suggest that most of those placed in removal proceedings on the basis of aggravated felony convictions have strong connections with the United States and have spouses and children who are often either U.S. citizens or permanent residents. When a noncitizen is removed on the basis of an aggravated felony conviction and has a family, the

³⁴ For example, in *United States v. Graham*, 169 F.3d 787, 787 (3d Cir. 1999), the Third Circuit, describing the aggravated felony provisions as “carelessly-drafted,” nonetheless affirmed an aggravated felony designation for a defendant convicted of the misdemeanor crime of petty larceny. Similarly, in 2001, the Eleventh Circuit upheld an aggravated felony designation based on a conviction for a misdemeanor shoplifting crime, but noted the law was “breaking the time-honored line between felonies and misdemeanors.” *United States v. Christopher*, 239 F.3d 1191 (11th Cir. 2001).

³⁵ Transactional Records Access Clearinghouse (TRAC), New data on the processing of aggravated felons, <http://trac.syr.edu/immigration/reports/175/> (last visited April 5, 2009).

spouse and children frequently remain in the United States and the family is permanently divided.

Further, the aggravated felony provisions have been applied to noncitizens *retroactively* to include persons who were convicted or pleaded nolo contendere prior to 1988 for misdemeanors and other minor infractions without any reason to believe that deportation was a potential consequence, since such crimes were not a basis for removal at the time of conviction. This retroactive application burdens the removal adjudication system, is unfair, and also results in the removal of noncitizens with longstanding ties to the United States and the disruption of their families.

Finally, the fact that 55% of noncitizens removed in 2006 on the basis of aggravated felony convictions were processed through administrative removal procedures with no review by an immigration court or judicial body makes the need for revision of the aggravated felony provisions particularly acute.³⁶

The ABA has existing policy recommending that an “aggravated felony” should be a felony.³⁷ An aggravated felony should be a serious offense for which a felony sentence is imposed. Instead, several categories of offenses currently are aggravated felonies based upon a sentence imposed of one year, even if the sentence is entirely suspended and no jail term is ordered. Other categories of offenses are classed as aggravated felonies without requirement that any sentence at all was imposed. As discussed above, in both cases misdemeanor convictions routinely are classed as “aggravated felonies.”

While an appropriate standard would appear to be that any aggravated felony offense must be one in which a mid-level felony sentence is imposed, we think a minimal and incremental change in the current statute still would have a significant effect. Therefore, we recommend that Congress add to the current definition of aggravated felony a threshold requirement that any such conviction must be of a felony, for which a sentence of more than one year was imposed (in the words of the statute, an “offense for which the term of imprisonment” is more than one year³⁸). Any suspended sentence would be excluded under this provision. This threshold sentence requirement will ensure that only noncitizens who are convicted of a felony, for which a minimum felony sentence is imposed, bear the extreme immigration consequences attached to an aggravated felony conviction.

The addition of this bright-line threshold requirement would accomplish several goals. It would be a step toward improving the credibility of the immigration adjudication system and ensuring fairness. It would restore some consistency between the term Congress used in the statute and the offenses included in the term. And, it would reduce the strain on the adjudication system that is brought by prosecuting a large number of misdemeanants as aggravated felons, as well as the

³⁶ Transactional Records Access Clearinghouse (TRAC), New data on the processing of aggravated felons, <http://trac.syr.edu/immigration/reports/175/> (last visited April 5, 2009).

³⁷ American Bar Association Recommendation 300 (06M300), adopted by the House of Delegates in 2006.

³⁸ See, e.g., INA § 101(a)(43)(F), 8 USC § 1101(a)(43)(F).

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flood of litigation brought by sympathetic petitioners to the federal Courts of Appeals on this issue.

Restore Eligibility for Discretionary Relief to Certain Long-Time Permanent Residents Who Are Barred by an Aggravated Felony Conviction or the Offense “Clock-Stop” Rule

We recommend that Congress restore an immigration judge’s ability to consider discretionary relief for certain long-time permanent residents convicted of an aggravated felony. Currently conviction of an aggravated felony is an absolute bar to eligibility for cancellation of removal for permanent residents who have resided in the United States for at least seven years. We recommend that Congress include a provision for an immigration judge to waive this bar on a case-by-case basis for humanitarian reasons, public benefit including assuring family unity, or another sufficiently compelling reason. This is especially important if Congress does not implement our recommendation to amend the definition of aggravated felony to include only more serious offenses.

We recommend that this relief also be extended to long-time permanent residents currently barred from applying for cancellation by the offense “clock-stop” provision. Under that provision, a permanent resident who became inadmissible or deportable based on committing an offense (not rising to an aggravated felony) within the first seven years of residence in the United States is absolutely barred from applying for cancellation of removal. This applies regardless of whether the permanent resident has a clean record for years following the commission of the offenses. For example, a permanent resident who committed two shoplifting offenses in 1999, a few years after starting residence in the United States, is deportable and absolutely barred from applying for the cancellation of removal waiver, despite the fact that she has led a productive and blameless life in the ensuing ten years.

We recommend that the offense “clock-stop” provision be eliminated,³⁹ or amended to include a waiver for humanitarian reasons, public benefit including assuring family unity, or another sufficiently compelling reason, to permit the long-time permanent resident to apply for discretionary relief. This will reduce the litigation that is a strain on the administrative and judicial adjudications system, restore discretion to immigration judges, and reduce the disruptive effects that removal of rehabilitated and productive long-time permanent residents would have on their families and society.

³⁹ The offense “clock-stop” provision was added to the statute in conference. The provision conflicts with the basic goals of the cancellation of removal statute. The most important issue in granting cancellation of removal is the extent to which the applicant has shown rehabilitation in the time since the conviction. The effect of the offense “clock-stop” provision is to bar from relief those applicants whose conviction was farther in the past (i.e., during, rather than after, their first seven years in the United States). These are the very applicants who have had more time to establish a record of rehabilitation and other positive equities.

Amend Law Regarding “Crimes Involving Moral Turpitude”

“Crime involving moral turpitude” is a vaguely defined term that has been held to encompass a wide range of crimes, including minor offenses such as shoplifting and turnstile-jumping to avoid paying a subway fare. For decades leading up to 1996, a permanent resident could be found deportable based upon a single conviction of a crime involving moral turpitude only if a sentence of at least one year was imposed for the conviction. The 1996 IIRIRA drastically expanded this deportation ground by requiring only that the offense have a *potential* one-year sentence. Under this rule, a lawful permanent resident with no other criminal record may be found deportable based upon a single misdemeanor conviction where no sentence was imposed, if the offense is found to “involve moral turpitude.”⁴⁰

When a lawful permanent resident is charged with being deportable based upon a single misdemeanor offense, such as misdemeanor shoplifting where no sentence was imposed or served, the resident either will or will not be eligible to apply for a waiver or some relief from removal. In some cases permanent residents are eligible to apply for a waiver of the minor offense. If the offense is the only negative equity such waivers are likely be granted, but only after a full hearing in immigration court, resulting in a strain on the scarce resources of the overcrowded immigration adjudications system.

In many cases, however, the permanent resident is barred from applying for any discretionary relief for technical reasons such as the timing of the conviction, whether close family members are permanent residents versus citizens, and other factors. In that case the permanent resident will be removed to the home country, with the accompanying emotional and financial hardship to the family, and attendant societal disruption. The former permanent resident now may be barred from returning to family in the United States for several years, or permanently. Long-time permanent residents with close family in the United States who are placed in this intolerable situation have engaged in extensive litigation as a means of defense.

We recommend that Congress amend this section of the deportation ground to require that a single conviction of a crime involving moral turpitude is a basis for deportability only if a sentence of more than a year is imposed. This will ensure that a single misdemeanor conviction is not the sole basis for removal of a permanent resident.

Respectfully Submitted,

Karen Grisez, Chair
Commission on Immigration
February 2010

⁴⁰ See I.N.A. § 237(a)(2)(A)(i)(II), 8 U.S.C. § 1227(a)(2)(A)(i)(II).

GENERAL INFORMATION FORM

Submitting Entity: Commission on Immigration

Submitted By: Karen T. Grisez, Chair, Commission on Immigration

1. Summary of Recommendation(s).

The Recommendation supports efforts to alleviate the burden of cases in the removal adjudication system by implementing changes to improve the efficiency and effectiveness of Department of Homeland Security (“DHS”) policies and procedures. The Recommendation includes: (1) increasing the use of prosecutorial discretion by both DHS officers and attorneys to reduce the number of Notices to Appear served on noncitizens who are prima facie eligible for relief from removal, and to reduce the number of issues litigated; (2) giving DHS attorneys greater control over the initiation of removal proceedings; including establishing a pilot program in offices with sufficient attorney resources to require approval by a DHS lawyer prior to the issuance of any discretionary Notices to Appear by a DHS officer; (3) assigning one DHS trial attorney to each removal proceeding, to increase efficiency and facilitate the exercise of appropriate discretion; (4) ceasing issuing Notices to Appear to noncitizens who are prima facie eligible to adjust to legal permanent resident status; (5) upgrading DHS's data systems to permit better tracking of individuals in the immigration detention system, and improve the protocols for transfers of detainees between detention facilities to ensure notification of family members and counsel; and (6) creating a position within DHS to oversee and coordinate all aspects of DHS immigration policies and procedures, including asylum matters.

2. Approval by Submitting Entity.

On November 17, 2009, the Commission approved this recommendation.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The need for due process, uniformity, predictability, professionalism, efficiency and fairness in immigration adjudications is a core concern of the ABA. Promoting these goals through system-wide improvement to our overburdened immigration adjudication system will only serve to advance the rule of law (Goal IV) by providing for a fair legal process. The ABA has previously addressed similar issues in a series of reports addressing immigration procedures, immigration detention and fairness in the administrative immigration process:

In 1983, the House of Delegates adopted a policy to recommend that the United States reform its immigration laws and practices in accord with the following principles, that those federal

agencies charged with administering the immigration and refugee laws and the pertinent laws governing fair labor standards and practices be provided sufficient resources and organization to enforce and administer the laws effectively and fairly. (2/83)

In 2004, the ABA released *American Justice Through Immigrants' Eyes*, a report by the Commission on Immigration which focused in part on negative due process implications of the 1996 legislative reforms that expanded the criminal removal grounds.

In 2006, the House of Delegates adopted a policy supporting the establishment of a system to screen and to refer indigent persons with potential relief from removal - as identified in the expanded "legal orientation program" - to pro bono attorneys, Legal Services Corporation subgrantees, charitable legal immigration programs, and government-funded counsel; (06M107A)

In 2006, the House of Delegates adopted a policy supporting an immigration enforcement plan that: (1) respects domestic and international legal norms; (2) includes mechanisms to evaluate the effectiveness of enforcement strategies; (3) allows verification of employment eligibility in a simple, secure and effective way; and (4) is cost-effective and adequately resourced. (06M107B)

In 2006, the House of Delegates adopted a policy urging an administrative agency structure that will provide all non-citizens with due process of law in the processing of their immigration applications and petitions, and in the conduct of their hearings or appeals, by all officials with responsibility for implementing U.S. immigration laws. Such due process in removal proceedings should include proceedings like those governed by the Administrative Procedure Act, in person and on the record, with notice and opportunity to be heard, and a decision that includes findings of facts and conclusions of law; availability of full, fair, and meaningful review in the federal courts where deportation or removal from the United States is at stake; and the restoration of discretion to immigration judges when deciding on the availability of certain forms of relief from removal. (06M107C)

In 2006, the House adopted a policy on the administration of U.S. immigration laws, calling for "a system for administering our immigration laws that is transparent, user-friendly, accessible, fair, and efficient, and that has sufficient resources to carry out its functions in a timely manner." (06M107D)

In 2006, the House of Delegates adopted a policy opposing the detention of non-citizens in removal proceedings except in extraordinary circumstances. Such circumstances may include a specific determination that the individual (1) presents a threat to national security, (2) presents a threat to public safety, (3) presents a threat to another person or persons, or (4) presents a substantial flight risk. The decision to detain a non-citizen should be made only in a hearing that is subject to judicial review. (06M107E)

In 2006, the House of Delegates adopted a policy on deportation or removal of noncitizens based upon conviction of a crime, calling for "immigration authorities to avoid interpretations of the immigration laws that extend the reach of the 'aggravated felony' mandatory deportation ground" and supporting other policies that would restore discretion where a person would otherwise be subject to removal. (06M300)

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In 2008, the House of Delegates adopted a policy urging that the Detention Standards be revised to include the following provisions...Involuntary transfer of immigration detainees to remote facilities shall be prohibited if such transfer would impede an existing attorney-client relationship, or impede case preparation and defense or financing of such preparation and defense due to remoteness from legal counsel, family members, health care providers, other community support and material witnesses and/or evidence, or if appropriate counsel is not available near the proposed transfer site. Irrespective of whether the individual has already obtained counsel, detained noncitizens shall not be transferred to remote locations where legal assistance generally is not available for immigration matters. (08M111B)

These policies recognize the crucial importance of uniformity, fairness, and due process for immigrants facing removal and other negative immigration consequences. However, they do not fully address the need for systematic reform of the immigration removal adjudication system to promote fairness, efficiency and professionalism in the adjudication of all removal cases.

5. What urgency exists which requires action at this meeting of the House?

There is a strong likelihood that the Congress will address the need for comprehensive immigration reform in the next few months, most likely between the time of the Midyear Meeting and the Annual Meeting.

6. Status of Legislation. (If applicable.)

Several bills have been introduced addressing various aspects of immigration system; however, as of this time, none have received legislative action.

7. Cost to the Association. (Both direct and indirect costs.)

None. Existing Commission and Governmental Affairs staff will undertake the Association's advocacy on behalf of these recommendations, as is the case with other Association policies.

8. Disclosure of Interest. (If applicable.)

There are no known conflicts of interest with this resolution.

9. Referrals.

This recommendation is being circulated to Association entities and Affiliated Organizations including:

Section of Administrative Law and Regulatory Practice
Criminal Justice Section
Commission on Domestic Violence
Section of Family Law
Government and Public Sector Lawyers Division
Section of Individual Rights and Responsibilities

Section of International Law
Judicial Division
Legal Services Division/Center for Pro Bono
Legal Services Division/Standing Committee on Pro Bono and Public
Council on Racial and Ethnic Justice
Commission on Law and Aging
Commission on Law and National Security
Section of Litigation
Standing Committee on Legal Aid and Indigent Defendants (SCLAID)
Young Lawyers Division
American Immigration Lawyers Association (AILA)
National Legal Aid and Defender Association (NLADA)

10. Contact Person. (Prior to the meeting.)

Karen T. Grisez
Special Counsel, Public Service Counsel Litigation
Fried, Frank, Harris, Shriver & Jacobson LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Karen.Grisez@friedfrank.com
202-639-7043 (phone)
202-639-7003 (fax)
202-639-6666 (cell)

Megan H. Mack
Director
American Bar Association
Commission on Immigration
740 Fifteenth St., NW
Washington, DC 20005-1022
202-662-1006 (phone)
202-638-3844 (fax)

11. Contact Person. (Who will present the report to the House.)

Karen T. Grisez
Special Counsel, Public Service Counsel Litigation
Fried, Frank, Harris, Shriver & Jacobson LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Karen.Grisez@friedfrank.com
202-639-7043 (phone)
202-639-7003 (fax)
202-639-6666 (cell)

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EXECUTIVE SUMMARY

1. Summary of the Recommendation

The Recommendation supports efforts to alleviate the burden of cases in the removal adjudication system by implementing changes to improve the efficiency and effectiveness of Department of Homeland Security (“DHS”) policies and procedures. The Recommendation includes: (1) increasing the use of prosecutorial discretion by both DHS officers and attorneys to reduce the number of Notices to Appear served on noncitizens who are prima facie eligible for relief from removal, and to reduce the number of issues litigated; (2) giving DHS attorneys greater control over the initiation of removal proceedings; including establishing a pilot program in offices with sufficient attorney resources to require approval by a DHS lawyer prior to the issuance of any discretionary Notices to Appear by a DHS officer; (3) assigning one DHS trial attorney to each removal proceeding, to increase efficiency and facilitate the exercise of appropriate discretion; (4) ceasing issuing Notices to Appear to noncitizens who are prima facie eligible to adjust to legal permanent resident status; (5) upgrading DHS's data systems to permit better tracking of individuals in the immigration detention system, and improve the protocols for transfers of detainees between detention facilities to ensure notification of family members and counsel; and (6) creating a position within DHS to oversee and coordinate all aspects of DHS immigration policies and procedures, including asylum matters.

2. Summary of the Issue that the Resolution Addresses

DHS personnel (including officers in the field) regularly make important decisions regarding the removal of noncitizens. DHS officers have considerable discretion with respect to removal of noncitizens in a variety of circumstances, but there is significant room for improvement in this area that would benefit the entire adjudication system. The current practice of assigning attorneys on a hearing-by-hearing basis in removal proceedings at the immigration courts is a barrier to the effective exercise of prosecutorial discretion and the efficient handling of cases by DHS trial attorneys. Also, ICE has only limited ability to locate detainees once they have been placed in detention.

3. Please Explain How the Proposed Policy Position will Address the Issue

DHS’s enforcement and application of immigration laws have often been inconsistent and confusing. This is unfair to those affected, limits the ability of DHS to take a leadership role on immigration policies, and decreases confidence and trust in the immigration adjudication system. Important cross-cutting issues should be addressed in a coordinated and consistent manner. This Recommendation also urges that DHS personnel use discretion appropriately, assign attorneys to an entire proceeding where possible, and that DHS’s data systems be upgraded to allow better tracking of detainees within the detention system.

4. Summary of Minority Views

None to date.