



U.S. Immigration
and Customs
Enforcement

OCT 6 2005

MEMORANDUM FOR: Chief Counsels

FROM: William J. Howard *WJH*
Principal Legal Advisor

SUBJECT: Exercising Prosecutorial Discretion To Dismiss Adjustment
Cases

PURPOSE:

To set forth the criteria and procedures by which an Immigration and Customs Enforcement (ICE) Office of the Chief Counsel (OCC) may join in or file a motion to dismiss proceedings without prejudice when the ICE OCC determines adjustment applications currently pending before EOIR would be appropriate for approval by Citizenship and Immigration Services (CIS).

The basis for this policy is to reallocate limited ICE resources to priority cases by dismissing appropriate cases where it appears in the discretion of the ICE OCC that relief in the form of adjustment of status appears clearly approvable.

CRITERIA:

Motions to Dismiss Proceedings Without Prejudice pursuant to this memorandum should be predicated on the following threshold criteria.

- EOIR must have jurisdiction to adjudicate the application for adjustment.
- The respondent must demonstrate *prima facie* eligibility for adjustment of status based on a properly filed application for adjustment under the Immigration and Nationality Act (including but not limited to sections 209, 245, 249, or section 1 of the Act of November 2, 1966). Where the application for adjustment is predicated on a visa petition, the case may be dismissed where the visa petition is approved and immediately available or the record establishes a long-term relative relationship where approval of an immediately available petition is likely.

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- Adjustment applications must support a discretionary determination by the ICE OCC that the applications appear clearly approvable.
- There is no asylum application pending adjudication before the Immigration Judge.
- ICE OCC should not generally join in a Motion to Dismiss Without Prejudice or so move sua sponte in removal proceedings involving threats to national security, human rights violators, criminal convictions or conduct necessitating a 212(h) waiver (e.g. Operation Community Shield, Operation ICE Storm, Operation Cornerstone or Operation Predator), immigration fraud necessitating a 212(i) waiver (e.g. Operation Jakarta), or detained aliens. With the approval of the Chief Counsel, dismissal may be permitted in the above cases based upon unique or special circumstances including but not limited to the extent and/or seriousness of criminal conduct, recency and/or significance of immigration fraud, or national security interests. While this is not an exhaustive list, the policy outlined herein should ordinarily be followed absent a competing enforcement interest.

PROCEDURE:

A Motion to Dismiss Without Prejudice must be predicated on the respondent demonstrating prima facie eligibility through an application for adjustment before EOIR. When applicable, the respondent or his/her representative must contact the ICE OCC representing DHS before the Immigration Court to request ICE OCC consent to dismiss proceedings. ICE OCC may require that such request be made in writing, be supported by a true and complete copy of the adjustment application pending before EOIR, and be supported by any other evidentiary material including, but not limited to, a copy of the current DOS Visa Bulletin showing current priority date and respondent's FBI Identification Record accessible at <http://www.fbi.gov/hq/cjisd/fprequest.htm>. (FAQ's accessible at <http://www.fbi.gov/hq/cjisd/faqs.html>.)

The ICE OCC may join in a Motion to Dismiss without Prejudice or move sua sponte for dismissal without prejudice if the ICE OCC determines that the respondent's application for adjustment is likely to be granted.

Where appropriate, ICE OCC may request revisions to a proposed motion be made as a precondition for giving its consent. ICE OCC should strive to reply in a timely manner to requests for dismissal of proceedings for adjustment before CIS.

ICE OCC should specifically request that a decision of the Immigration Judge dismissing proceedings will expressly state that dismissal of the matter shall be without prejudice to the Department of Homeland Security (DHS) so that the record will be clear that the re-commencement of removal proceedings will not be barred by the doctrines of res judicata or collateral estoppel. If the Immigration Judge dismisses removal proceedings without prejudice, the OCC should route the administrative file(s) through DRO to CIS for

adjudication of adjustment applications and update the General Counsel Electronic Management System (GEMS) including entering "DFA" (Dismissed for Adjustment) within the events note portion of the events tab in GEMS cases manager until "Dismissed for Adjustment" is incorporated as a dropdown order option within the events tab. While the applicant bears the burden of satisfying CIS filing and eligibility requirements, should the immigration court grant a joint request to forward the original adjustment application to the ICE OCC at the time of dismissal of proceedings, the original adjustment application should be placed in the administrative file prior to routing the administrative file to CIS.

Use

This memorandum is intended solely for the guidance of DHS personnel in the performance of their duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or equity by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner. Discretionary decisions of the ICE OCC regarding the exercise of prosecutorial discretion under this memorandum are final and not subject to legal review or recourse.