



POLICY ALERT

Q&A on ICE Directive: *Using a Victim-Centered Approach with Noncitizen Crime Victims* (Current as of August 23, 2021)

On August 10, 2021, [ICE issued a new agency directive](#) superseding guidance from [2019 regarding stay of removal requests and removal proceedings involving U visa petitioners](#) (hereinafter “Directive”). The Directive outlines new policies and procedures regarding exercising prosecutorial discretion for victims of crime, including those eligible for victim-based immigration relief (including VAWA self-petitions, U and T visas, and SIJS) as well as victims and witnesses who are assisting in investigations or prosecutions. It also outlines definitions of terms, the responsibilities of different components of ICE with regard to the implementation of these new policies, training requirements, and obligations regarding record keeping.

This alert will provide an overview of the new directive and identify areas in which additional clarification or further advocacy may be required.

I. Overview of New Policy & Procedures

This Directive outlines that ICE should adopt a victim-centered approach with noncitizen victims in order to mitigate the chilling effect that immigration enforcement actions have on the willingness of victims to come forward to seek assistance.

Victim-centered Approach: ICE defines victim-centered approach as placing “equal value on the identification and stabilization of victims and on the deterrence, investigation, and prosecution of perpetrators. It should be applied to policy making and civil immigration enforcement actions to the greatest extent possible, to the extent consistent with law. The goal of a victim-centered investigation and prosecution is to focus the investigation and prosecution around the victim while minimizing any undue stress, harm, and trauma to the victim.”¹

ICE builds on its [2011 prosecutorial discretion guidance](#) regarding victims and witnesses of crime and states that “absent exceptional circumstances, ICE **will** refrain from taking civil immigration enforcement action² against known beneficiaries of victim-based immigration benefits and those known to have a pending application for such benefits.”³

Exceptional circumstances, in the context of this Directive, “generally exist only in the following circumstances: a) The noncitizen poses national security concerns; or b) The noncitizen poses an articulable risk of death, violence, or physical harm to any person”⁴

¹ ICE Directive 11005.3 “Using a Victim-Centered Approach with Noncitizen Crime Victims”, Section 3.9 p. 4

² *Id.* Section 3.2.

³ *Id.* at Section 2.1(emphasis added).

⁴ Defined in the Directive in Section 3.4.

A. Survivors with Pending Applications for Relief

For individuals with pending VAWA, U, T, or SIJS applications, absent exceptional circumstances, ICE will defer civil enforcement actions until USCIS makes a final determination on the pending benefit or petition, including adjustment of status or in the case of VAWA, U or T visa application, until USCIS makes a negative bona fide or prima facie determination.⁵

This section raises concerns as VAWA self petitioners and those applying for T or U visa relief may overcome these negative initial determinations and eventually have favorable outcomes in their case. For example, a VAWA self-petitioner could potentially overcome a negative prima facie determination through the submission of additional evidence, or someone who does not receive a bona fide determination (“BFD”) in a U matter may eventually be placed on the waitlist or granted a U visa after a deeper evaluation of their case.

B. Survivors without Pending Applications for Relief

For those who do not have pending applications for relief, ICE “must” look for indicia or evidence that a noncitizen is a victim of a crime, such as being the beneficiary of a protection order or having a HHS Interim Assistance and Eligibility Letter.⁶ The fact that someone is a victim of a crime, and where applicable may be eligible for victim-based immigration benefits, is a discretionary factor that “must” be considered in deciding whether to exercise prosecutorial discretion including detention determinations.⁷

In addition, the Directive mentions that absent exceptional circumstances, during the pendency of any known criminal investigation or prosecution, ICE will not take civil enforcement action against an individual against victims and witnesses without approval from Headquarters and may, where appropriate, issue deferred action or stay of removal.⁸ If there’s information that shows an individual may be a crime witness or victim, ICE should take efforts to identify that as soon as possible when a victim's status is unknown or unclear.⁹

Analysis: The Directive contains mandatory language that ICE must look for indicia or evidence that a noncitizen is a crime victim. However, the evidence that ICE specifically mentions to demonstrate an individual is a victim of a crime is limited and raises questions about what other criteria ICE will be considering in determining victimization. In addition, it is unclear how ICE will assess situations in which there may be cross-petitions issued.

II. Q&A: What do we know now?

To whom does this Directive apply?

This Directive applies to any noncitizen crime victim who comes before ICE ERO, but its effect depends on whether the noncitizen has a pending victim-based immigration benefit. For those

⁵ Directive at Section 2.1.

⁶ *Id.* at Section 2.

⁷ *Id.*

⁸ *Id.* at Section 2.2.

⁹ *Id.*

with a pending or approved application or petition, ICE will not take enforcement action against them absent “exceptional circumstances.” For those who do not have a pending or approved application or petition, ICE must look for indicia of victimization. Such indicia constitute a positive discretionary factor that must be considered before taking any enforcement action.

While not directly mentioned in the Directive, advocates should also argue that noncitizens participating in civil legal proceedings based on victimization should also be able to show “indicia of victimization” for purposes of this Directive.¹⁰

Does it apply to derivatives as well as principals?

Yes, the Directive applies to both principals and derivative beneficiaries.¹¹

What are considered “victim-based immigration benefits”?

Victim-based immigration benefits include SIJS, U and T visas, Continued Presence, and VAWA-related relief, including self-petitions and cancellation.¹² However, this is a non-exhaustive list, and practitioners whose clients have applied for other victim-related benefits such as EADs for abused nonimmigrant spouses¹³ or S visas should argue that their clients also fit within the scope of this Directive.

Does the Directive apply to people who have a criminal record?

Yes, noncitizens with arrests or convictions are still protected under this Directive. However, ICE may still take enforcement actions against noncitizen crime victims where there are exceptional circumstances. As outlined above, exceptional circumstances “generally exist only” where (1) the noncitizen poses national security concerns; or (2) the noncitizen poses an articulable risk of death, violence, or physical harm to any person.¹⁴ Of note, the “risk of death, violence, or physical harm” criterion is significantly narrower than the factors that OPLA articulated in assessing whether someone poses a public safety risk.¹⁵

It is also possible that ICE could take enforcement action where the noncitizen has engaged in

¹⁰ In a public engagement session on August 10, 2021, ICE personnel suggested it may be possible that those involved in civil investigations or proceedings may also be able to show “indicia of victimization” under this Directive, though not specifically mentioned in the text.

¹¹ Directive at Section 2.1.

¹² Id. at Section 3.8.

¹³ INA § 106

¹⁴ Directive at Section 3.4.

¹⁵ ICE. [Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities](#) (May 27, 2021) “ In evaluating whether a noncitizen currently “pose[s] a threat to public safety,” consideration should be given to the extensiveness, seriousness, and recency of the criminal activity, as well as to mitigating factors, including, but not limited to, personal and family circumstances, health and medical factors, ties to the community, evidence of rehabilitation, and whether the individual has potential immigration relief available”). However, [ICE announced](#) on August 20, 2021, “Due to an August 19, 2021 preliminary injunction issued in *Texas v. United States*, 6:21-cv-16 (S.D. Tex. Aug. 19, 2021), OPLA **has suspended reliance on** the May 27, 2021 memorandum from the Principal Legal Advisor, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities*. Questions from noncitizens and their legal representatives about OPLA’s exercise of prosecutorial discretion in individual cases should be referred to your [local OPLA office](#).” While this preliminary injunction has been [stayed through August 30, 2021](#), practitioners are encouraged to use both the [ICE Policy Directive on Immigrant Crime Victims](#) and [the stay of litigation agreement](#) in ASISTA’s pending litigation against ICE when advocating for survivors at risk of removal.

criminal activity that does not “directly stem[] from their victimization,” even where exceptional circumstances do not exist.¹⁶

In addition, if ICE exercises prosecutorial discretion in favor of the noncitizen, and exceptional circumstances arise, ICE may review its decision. (The Directive also raises the possibility of enforcement if the noncitizen is convicted of a crime that meets the criteria for prioritization under DHS’s enforcement priorities. At the time of publication, ICE was following the enforcement priorities outlined in the January 20, 2021 memorandum [“Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities”](#). That memo has since been enjoined, so it is unclear what DHS’s current enforcement priorities are.)

While the Directive emphasizes exceptional circumstances as the primary exception to the general rule of prosecutorial discretion, allowing ICE to take enforcement action based on criminal activity even where no “risk of death, violence, or physical harm to any person” exists could allow ICE to continue detaining and removing crime victims with pending applications who pose no significant threat.

What if the victim-based immigration benefit is denied?

ERO is permitted to take enforcement actions against a noncitizen whose victim-based immigration benefit has been denied, or, in the case of U and T visas and VAWA self-petitions, if USCIS makes a “negative bona fide or prima facie determination.”¹⁷

However, neither the denial of a victim-based benefit nor the absence of a BFD or prima facie determination necessarily means that the applicant or petitioner was not the victim of a crime. In fact, USCIS may go on to grant the benefit application even where it initially declined to issue a BFD or prima facie determination, such as in the case of U visa and VAWA self-petitioners. Therefore, practitioners should argue that even where the benefit has been denied or where there is no BFD or prima facie determination, ICE remains obligated to consider indicia of victimization as a discretionary factor when determining whether to take enforcement action.

Wait, I thought USCIS said that there is no such thing as a “negative bona fide determination.” What gives?

USCIS stated during a webinar on August 18, 2021 that it does not render “negative bona fide determinations” in U visa cases. Rather, USCIS merely decides whether to issue a bona fide EAD. The decision not to issue a bona fide EAD is not considered a negative determination. It is unclear at this time how ICE views USCIS’s BFD process, and what action ICE will take should USCIS fail to issue a bona fide determination in an individual’s case.

What about T visa applicants?

The current T visa regulations currently outline a heightened standard for bona fide determinations, indicating that USCIS must find an applicant admissible or eligible for a waiver of inadmissibility under INA § 212(d)(3) before the agency will issue a bona fide determination.¹⁸

However, for purposes of the Directive, bona fide determinations **for both U and T visa** are

¹⁶ See Directive at Section 5.8.

¹⁷ Directive at Section 5.4(c).

¹⁸ 8 CFR § 214.11(e)(1).

defined as showing a T and/or U visa petition has been:

- initially reviewed,
- is complete and properly filed;
- includes biometric and biographical background checks; and
- presents a prima facie case for approval as defined by INA § 237(d)(1).

Thus, for purposes of this memo, the Directive does not adopt the stricter standard for bona fide determinations outlined by the January 20, 2021 memorandum, [“Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities.”](#)

What if someone witnessed a crime but was not a victim?

ICE must have approval from a Headquarters Responsible Official (HRO) in order to take enforcement action against a witness while a known criminal investigation or prosecution is ongoing.¹⁹ However, if exceptional circumstances apply, then ICE may take enforcement action without approval from an HRO, even if it knows that the noncitizen is a witness in an ongoing criminal investigation or prosecution.²⁰

In addition, ICE may issue deferred action or a stay of removal to the witness.²¹

What is considered an “enforcement action”?

The Directive provides a non-exhaustive list of covered actions at Section 3.2. Among others, it includes issuing, filing, or canceling a Notice to Appear; detaining or releasing someone from custody; granting deferred action or parole; and executing a final order of removal.

What does this policy mean for detained individuals?

It is unclear how the Directive applies to detainees. On the one hand, it defines custody decisions as a civil immigration enforcement action²² and states that “absent exceptional circumstances, ICE will refrain from taking civil immigration enforcement action against known beneficiaries of victim-based immigration benefits”.²³ One could logically conclude that ICE will refrain from detaining beneficiaries of, and applicants for, victim-based immigration benefits unless there are exceptional circumstances. However, the Directive later characterizes a pending or approved victim-based immigration benefit as a discretionary factor and states that ICE “should consid[er] . . . release from detention” for those *approved* for victim-based benefits.²⁴

Practitioners should make the argument that under the stated policy and definitions of this Directive, ICE should not detain noncitizens with pending or approved victim-based applications or petitions and should consider victimization as a discretionary factor for those who do not have a pending or approved benefit.

Now that the Albence Directive (11005.2) has been superseded, does this mean that ICE will start requesting expedited processing of U visa petitions again?

¹⁹ Directive at Section 2.2.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at Section 3.2.

²³ *Id.* at Section 2.

²⁴ *Id.* at Section 5.6 (emphasis added).

There is no general rule that ICE will request expedited processing of U visa petitions, though ICE is authorized to request expedited processing of USCIS petitions (not just U visa petitions) when “necessary and appropriate.”²⁵ However, ICE is obligated to request expedited processing of USCIS applications for detained individuals whose release is prohibited by law or where there are exceptional circumstances.²⁶

Does this mean that ICE will grant stays of removal to U visa petitioners? What if USCIS has already granted deferred action or made a bona fide determination?

ICE will generally issue stays of removal to noncitizens with a pending victim-based application or petition who have a final order of removal unless there are exceptional circumstances or where USCIS has administratively closed the case “for failure of the applicant to prosecute the application.”²⁷ This policy is not limited to U visa petitioners. ERO is also instructed to consider issuing a discretionary stay of removal to those who have received deferred action or a bona fide determination (BFD) from USCIS.²⁸

It is unclear why ICE would generally issue stays to those with pending applications but only consider issuing stays to noncitizens who have received deferred action or a BFD. In addition, neither deferred action nor a BFD constitutes a final adjudication of the case, so many noncitizens who have USCIS-issued deferred action or BFDs will also have a pending victim-based application or petition and should benefit from the general rule that ICE will issue a stay of removal.

What about people who are in removal proceedings?

Although this Directive applies generally to ICE, most of the enforcement actions described pertain to ERO, not OPLA.²⁹ To the extent that this Directive relates to OPLA, it instructs ICE officers to inform OPLA of respondents in proceedings who have a pending victim-based application so that OPLA can consider whether a continuance would be appropriate.³⁰ In addition, officers are instructed to notify OPLA when a respondent has received a bona fide determination or deferred action from USCIS so that OPLA can consider whether to dismiss the proceedings.³¹ This Directive does not contain specific guidance for OPLA regarding the exercise of prosecutorial discretion for crime victims in proceedings. However, practitioners should refer to [PM 10076.1, “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs” \(June 17, 2011\)](#) (“Morton Memo”).

USCIS says that they will expedite my client’s case, but ICE has the A-file. What should I do?

Historically, ICE has been slow to transfer A files to USCIS, particularly for noncitizens in removal proceedings. This Directive instructs ICE to create a temporary A-file and transfer the original A-file to USCIS “as soon as practicable.”³² This policy is not limited to respondents in proceedings or to cases that USCIS has agreed to expedite.

²⁵ *Id.* at Section 2.

²⁶ *Id.* at Section 5.4(a).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See id.* at Section 3.2.

³⁰ *Id.* at Section 5.4(a).

³¹ *Id.*

³² *Id.* at Section 5.2.

What if someone was already removed?

This Directive does not reach noncitizens who have already been removed, even if they were removed while their victim-based application or petition was pending. In its [FAQ](#), ICE suggests that humanitarian parole may be an option for these individuals.³³

My local ERO is not following this Directive. What can I do?

During the August 10, 2021 public engagement session, ICE personnel suggested contacting the local Field Office Director (FOD) if you believe ERO has violated the Directive. In addition, the Directive provides that each Field Responsible Officer (FRO) should establish a point of contact within their areas of responsibility regarding victim based benefits, coordinating with USCIS as well as with victims, and victim advocates and attorneys.³⁴ Advocates should contact their District Offices to ascertain whether this new point of contact has been put in place. If you are dissatisfied with their response, you can file a complaint with the [DHS Office for Civil Rights and Civil Liberties](#) (CRCL).

In addition, if you have questions about this policy, you can contact ICE's [Community Relations Officers](#) or email the Office of Partnership and Engagement at ope@ice.dhs.gov.

What's the difference between this Directive and the ICE Enforcement Priorities memos from January and February 2021 and the Prosecutorial Discretion memo from May 2021?

1. On January 20, 2021, ICE published [“Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities”](#) (“Pekoske memo”), in which it set out ICE’s priorities for discretionary enforcement decisions, among other things. Namely, it specified three priority categories: National Security, Border Security, and Public Safety.³⁵ This directive was previously enjoined in part due to the 100 day moratorium on removals.³⁶
2. On February 18, 2021, ICE published [“Interim Guidance: Civil Immigration Enforcement and Removal Priorities”](#) (“Johnson memo”), which provided ICE officers and agents with operational guidance pursuant to the enforcement priorities described in the Pekoske memo.³⁷ Neither of these memoranda provided any special consideration for noncitizen crime victims, though eligibility for immigration relief was included as a mitigating factor.³⁸
3. On May 27, 2021, ICE published [“Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities”](#) (“Trasviña memo”), which provided operational guidance to OPLA attorneys pursuant to the enforcement priorities in the Pekoske and Johnson memos. OPLA attorneys were authorized to

³³ See ICE, [“Policy Notification: Enforcement Actions Involving Noncitizen Crime Victims”](#) (August 2021), available at: https://drive.google.com/file/d/1g2MT_qLvcqa-os0VIGCncRyjILOGQW_ph/view?usp=sharing.

³⁴ See Id. Section 4.2(c)

³⁵ This section was enjoined pursuant to *Texas v. United States*, No. 21-00016 (S.D. Texas fil. Aug. 19, 2021). However, that injunction [has been stayed through August 30, 2021](#).

³⁶ Priscilla Alvarez. [“Judge Temporarily Blocks Biden's Plans to Halt Deportations”](#) CNN, January 26, 2021.

³⁷ This section was also enjoined and then stayed pursuant to *Texas v. United States*, No. 21-00016 (S.D. Texas fil. Aug. 19, 2021).

³⁸ Johnson Memo at 5.

exercise prosecutorial discretion in keeping with the principles and priorities from these memos and other guidance. While the Trasviña memo did not provide any carve-outs for victims, “status as a victim, witness, or plaintiff in civil or criminal proceedings” and “whether the individual has potential immigration relief available” were allowable mitigating factors. In addition, proceedings involving respondents “likely to be granted temporary or permanent relief” would generally “merit dismissal in the absence of serious aggravating factors.”³⁹ In contrast, the Directive establishes a general policy against carrying out enforcement actions against noncitizen crime victims absent exceptional circumstances.

What is the status of these ICE Enforcement Priority Memos and how does that impact this new Directive on victims and witnesses?

The Pekoske and Johnson memos were temporarily enjoined as they relate to the enforcement priorities pursuant to the recent case *Texas v. United States*.⁴⁰ The Biden Administration sought and received a stay of the nationwide injunction through August 30, 2021.

While the Trasviña memo has not been formally enjoined, it is based on the Pekoske and Johnson memos at issue in *Texas v. United States*. OPLA temporarily paused implementation of the Trasviña memo when Pekoske and Johnson memos were temporarily enjoined. OPLA reinstated the Trasviña upon issuance of the stay by the 5th Circuit. Please refer to [ICE’s website on prosecutorial discretion](#) for updates on OPLA Prosecutorial Discretion.

Importantly, the Directive on victims is not based on the enforcement priorities at issue in *Texas v. United States* and should not be affected by an injunction. If you are hearing from your local OPLA that the Directive on victims is affected by the *Texas v. United States* litigation, please contact ASISTA at questions@asistahelp.org.

ASISTA will update this advisory should there be new developments.

III. Conclusion

ASISTA and its partners will continue to monitor the implementation of this Directive at the Headquarter and District levels, including how ICE personnel are being trained on the contents of the Directive, victim-centered approaches, and confidentiality practices and policies. In addition, we hope to better understand how and if ICE is connecting victims and witnesses to local legal and social services when victimization is discovered.

Please share with us your experiences of how and if the Directive is being followed in your community by emailing us at questions@asistahelp.org.

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³⁹ Trasviña Memo at 9.

⁴⁰ Maria Sacchetti. “Federal judge in Texas blocks Biden’s efforts to limit immigration arrests” Washington Post, (August 19, 2021)