

Prosecutorial Discretion: A New Approach to Deportation



By Jerry Grzeca and John Sesini
December 2011



For the approximately eleven million people who live in the United States without legal immigration status, minor, random events can change everything. With the threat of deportation looming large, any contact with law enforcement can result in catastrophic personal consequences to that individual and

his or her family. And it could all start with something as insignificant as a broken tail light. But a recent policy memo from Immigration and Customs Enforcement (ICE) takes one step toward reducing that fear.

The randomness of deportation is a product of simple math. ICE, the federal agency that enforces the nation's immigration laws, can effectively deport less than one in twenty of the estimated unlawful population in any given year. Because there has been no change in law which would reduce the unlawful population, and no vast influx in government resources, those numbers seem unlikely to change. And chance encounters with law enforcement are inevitable.

But under a new policy called "prosecutorial discretion," those chance encounters need not necessarily result in deportation. According to a June 17, 2011 policy memo, ICE officers and attorneys are free—and indeed encouraged—*not* to enforce the nation's immigration laws

against certain individuals. Instead, they are encouraged to focus the agency's limited resources on deporting higher priority targets, such as criminals and threats to national security or public safety

Lower priority individuals benefit from this policy in several ways. Immigration authorities may simply choose not to place an individual into deportation proceedings. Or, for those people already facing removal, ICE attorneys may agree to end the case without an order of deportation. The memo also suggests detaining fewer people and releasing more people on bond.

Who, then, are low priority targets? The memo suggests many factors to consider. A person's ties to the United States are important: a long presence in the country, extensive family ties, and education are all favorable factors; as are humanitarian factors like personal illness, illness in the family, or old age. Weighing against those factors are the negatives, including an individual's history of crime, fraud, or serious immigration violations.

In practice, unfortunately, ICE officials are unlikely to screen every case for prosecutorial discretion. So anyone facing removal proceedings must be proactive and bring evidence of the favorable factors to an official's attention as soon as possible. The practice continues to evolve, and varies between local ICE offices, but the trend is toward a more rational, values-based approach to deportation.

Finally, it is important to note what prosecutorial discretion is not. It is not a path toward citizenship or permanent residence. In fact, it will probably not entitle an individual to a work permit. Any such relief would have to come through an act of the US Congress. But the new policy of prosecutorial discretion promises to soften the cruel randomness of deportation.

For more information about prosecutorial discretion and its implications, or for information on any other immigration matter, please contact Grzeca Law Group at (414) 342-3000 or visit our website at www.grzecalaw.com.

Milwaukee: 414-342-3000
Madison: 608-234-5004
Toll Free: 866-342-0445

GRZECA LAW GROUP, S.C.
1434 West State Street
Milwaukee, WI 53233

www.grzecalaw.com
clients@grzecalaw.com