NATIONAL IMMIGRANT JUSTICE CENTER
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NIJC Explainer:
DHS OPLA OFFERS OF PROSECUTORIAL DISCRETION AND MOTIONS TO DISMISS
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Recently, in some asylum cases pending in immigration court, counsel for the Department of Homeland Security (DHS), Office of the Principal Legal Advisor (OPLA) has offered to exercise "prosecutorial discretion" (PD). In some cases, counsel has moved to dismiss the case at the merits hearing.

PD is a blanket term for various measures DHS may pursue to resolve cases before the immigration court or otherwise extend a benefit to noncitizens in their immigration processing. These measures "may include unilaterally moving to dismiss or administratively close cases; agreeing to stipulations on issues such as relief, bond, or continuances; waiving appeal; or joining in motions to reopen proceedings." U.S. Immigration & Customs Enforcement, Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor, available at https://www.ice.gov/about-ice/opla/prosecutorial-discretion. OPLA may make an offer of or unilateral motion for PD at any point during proceedings. Two important forms of PD are **administrative closure** and **dismissal/termination**. Both remove a case from the court's active docket, but they have very different legal and procedural consequences.

Administrative closure removes the case from the active calendar but the case remains in removal proceedings. A case may remain administratively closed indefinitely, but either party may move to recalendar the case at any time. Crucially, while the case is administratively closed, the client's application remains pending. So, an asylum seeker with an administratively closed case can generally continue with their I-589 asylum petition at a later date if desired. Meanwhile, client remains eligible to renew their Employment Authorization Document (EAD) based on their pending application for asylum.

Dismissal and termination are procedurally distinct terms that are often used interchangeably. Both refer to a decision to remove the case from the court's docket and end removal proceedings (usually without prejudice). Any applications pending before the court are terminated or withdrawn and no longer pending. So, no removal order is entered, but the client also obtains no relief. Critically, the client will lose any rights, benefits, or protections arising from their application, including the ability to renew an application related EAD.

OPLA may take the position that the client can file a new affirmative application for asylum with USCIS, but OPLA has no authority to make this assurance. In many instances, USCIS refuses to accept the new filing, leaving the client with no avenue through which to seek asylum. Moreover, even where I client successfully refiles for asylum with USCIS, the client is likely to confront the one-year filing deadline because the new application will almost always be filed more than a year after arrival and USCIS may not honor the filing date of the first application. Additionally, cases that proceed before USCIS may languish for years before adjudication, during which time claims may grow stale, legal teams may disband, and other complications may arise. During this time, the client is left in a state of legal limbo, unable to petition for family members who may remain abroad, and unable to move beyond

the stress and anxiety of their asylum proceedings. In most instances, accepting termination or dismissal in an NIJC will not ultimately benefit the client or be in their legal interest.

What Should I do if DHS offers PD or moves to dismiss/terminate the case?

- In advance of the merits hearing, ensure the client understands what PD is and discuss whether it is in client's legal interest.
- Assuming it is not, decline the offer and/or object to a motion to administrative close, terminate, or dismiss proceedings.
- If the judge is inclined to grant PD over your objection, ask the court to permit briefing and contact NIJC.
- If the court dismisses the case, reserve appeal. Alert NIJC.

Key Points to Oppose a Motion to Dismiss:

- **DHS Does Not Have Unilateral Authority to Demand Dismissal.** OPLA counsel may argue that it is entitled to dismissal based on its "sole and unreviewable prosecutorial discretion." This is incorrect. While DHS may determine whether and when to place someone in removal proceedings, once proceedings have commenced, authority rests with the immigration judge. DHS does not have "absolute veto power over the authority of an Immigration Judge or the Board to act in proceedings…." *Matter of Avetisyan*, 25 I&N Dec. 688, 694 (BIA 2012); *accord Matter of W-Y-U-*, 27 I&N Dec. 17, 20 n.5 (BIA 2017); *see also Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 890 (9th Cir. 2018). OPLA must be treated as any other movant in the context of a motion to dismiss filed after jurisdiction has vested with the Court.[1] 8 C.F.R. §§ 239.2,2 1239.[2,3] *Matter of G-N-C-*, 22 I&N Dec. 281, 284 (BIA 1998) (The regulatory language "marks a clear boundary between the time prior to commencement of proceedings, where a [DHS] officer has decisive power to cancel proceedings, and the time following commencement, where the . . . officer merely has the privilege to move for dismissal of proceedings.")

- **The Court Must Consider Both Parties' Arguments**. *See G-N-C-*, 22 I&N Dec. at 284-85 ("To the extent that these proceedings were terminated without considering arguments from both

[1] 8 C.F.R. 1003.14 (a) provides that: "Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by [DHS]."

[2] DHS has sole authority to commence removal proceedings, 8 C.F.R. 239.1(a), 8 C.F.R. 235.6(a), and may cancel proceedings *before* jurisdiction vests with the immigration court. (Emphasis added). 8 C.F.R. 239.2 (a) provides: "Any officer authorized by § 239.1(a) to issue a notice to appear may cancel such notice *prior to jurisdiction vesting with the immigration judge* pursuant to § 3.14 of this chapter (subject to, as relevant here, a determination that "[c]ircumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government.") (emphasis added).

[3] 8 C.F.R. s. 1239.2(c) is entitled "Motion to Dismiss" and provides: "After commencement of proceedings pursuant to 8 CFR 1003.14, government counsel or an officer enumerated in 8 CFR 239.1(a) may move for dismissal of the matter on the grounds set out under 8 CFR 239.2(a). Dismissal of the matter shall be without prejudice to the alien or the Department of Homeland Security." 8 CFR 239.2 (a) (7) provides, as relevant: [the] [c]ircumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government."

sides, the Immigration Judge erred."); *Matters of Jaso & Ayala*, 271&N Dec. 557, 558 (BIA 2019) ("the regulation presumably contemplates …an informed adjudication by the Immigration Judge or this Board based on an evaluation of the factors underlying the [DHS's] motion.") (*quoting Matter of G-N-C-*, 221&N Dec. at 284); *Matter of Avetisyan*, 25 1&N Dec. at 691 ("[W]e are persuaded that neither an Immigration Judge nor the Board may abdicate the responsibility to exercise independent judgment and discretion in a case by permitting a party's opposition to act as an absolute bar to administrative closure of that case when circumstances otherwise warrant such action….").

- **Dismissal will Harm the Client.**
  - There is no guarantee that client can re-initiate an asylum petition with USCIS.
  - Even if permitted, this application will likely be filed after the one-year deadline so USCIS could deem the asylum application untimely. Client might have to litigate a one-year exception, placing client in a less favorable position. *See* 8 C.F.R. § 204.8(a)(5).
  - Client may lose work authorization. Losing "asylum seeker" status precludes asylum application related EAD renewal. If client files for asylum before USCIS, client will most likely need to wait 150 days before submitting a new application for work authorization, and possibly significant adjudication time after that.
  - Lengthy delay will prejudice the merits of client's case, making it more difficult to remember the traumatic events underlying the claim or to obtain evidence of country conditions; witnesses may become unavailable; and the case may appear stale, thereby compromising client's meaningful "right to a hearing on the merits of [her] claim." 8 C.F.R. § 1240.11(c)(3) (directing that applications for asylum and withholding "will be decided by the immigration judge . . . after an evidentiary hearing to resolve factual issues in dispute"); *Matter of W-Y-U-*, 27 I&N Dec at 19-20. ("An unreasonable delay in the resolution of the proceedings may operate to the detriment of [noncitizens] by preventing them from obtaining relief that can provide lawful status. . .").
  - Dismissal will lead to judicial inefficiency, as the case is appealed, possibly remanded, and possibly re-referred to the court following adjudication by USCIS.[4]

- **To Merit Dismissal DHS Must Show That The "Circumstances Of The Case Have Changed" Such That "Continuation Is No Longer In The Best Interest Of The Government."**
  Often, OPLA simply asserts that it has discretion to dismiss. This is inaccurate. 8 C.F.R. § 239.2(a)(7) allows DHS to *seek* dismissal where "[c]ircumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government." DHS's own guidance states that OPLA should only invoke PD to "preserve

[4]*See* U.S. CITIZENSHIP & IMMIGRATION SRVS, ASYLUM QUARTERLY ENGAGEMENT AND LISTENING SESSION SCRIPT & TALKING POINTS (Oct. 6, 2022), available at https://www.uscis.gov/sites/default/files/document/outreach-engagements/Asylum-Quarterly-Engagement-Oct-6-22.pdf (listing over 543,000 pending affirmative asylum applications); Anagilmara Vilchez, *Immigration backlog has a U.S. asylum seeker feeling like he's imprisoned in a country'*, NBC News (June 2, 2023), available at https://www.nbcnews.com/news/latino/asylum-seekers-are-limbo-years-immigration-backlog-rcna87228.

limited government resources, achieve just and fair outcomes in individual cases, reduce government redundancies, and advance DHS's mission of administering and enforcing the immigration laws of the United States in an efficient and sensible way that promotes public confidence." Memorandum from Kerry E. Doyle, ICE Principal Legal Advisor, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion, at 9 (Apr. 3, 2022) (emphasis added, internal citation omitted).[5] Merely claiming client's case is no longer an enforcement priority is also insufficient. A shift in one party's priorities does not constitute a change to the circumstances of an individual case. *See, e.g.*, *R-G-H-M-*, AXXX XXX 972 (Aug. 9, 2017) (noting that a respondent being a low DHS enforcement priority was no guarantee that she would remain so in the future and was not a sound basis for terminating her case and denying her the opportunity to have her cancellation claim adjudicated).

For more information or to talk about your case, please contact your NIJC point-of-contact.

[5] Available at: https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.