

U.S. Department of Justice
Immigration and Naturalization Service

FACT SHEET

11/28/00

Prosecutorial Discretion Guidelines

The use of prosecutorial discretion by the Immigration and Naturalization Service (INS) in deciding which cases to pursue has received increased attention since passage of the Illegal Immigration Reform and Immigrant Responsibility Act in 1996. Part of this legislation limited the authority of immigration judges to provide relief from removal in many cases, and persons facing removal have sought to avoid removal by other means, including prosecutorial discretion from INS.

Prosecutorial discretion is the authority that every law enforcement agency has to decide whether to exercise its enforcement powers against someone. INS, like other law enforcement agencies, has prosecutorial discretion and exercises it every day. In the immigration context, the term applies not only to the decision to issue, serve or file a Notice to Appear (NTA) when starting removal proceedings, but also to a broad range of other discretionary enforcement decisions. These include focusing investigative resources on particular offenses or conduct; deciding whom to stop, question, and arrest; deciding whether to detain certain aliens in custody; settling or dismissing a removal proceeding; granting deferred action or staying a final removal order; agreeing to voluntary departure, permitting withdrawal of an application for admission, or taking other action in lieu of removing an alien; pursuing an appeal; or executing a removal order.

While INS can refrain from exercising its law enforcement authority against a particular person on a case-by-case basis, it cannot regularize someone's immigration status or grant a benefit that an alien is not legally entitled to receive. For example, INS has no discretion to admit into the United States an alien who is inadmissible and cannot adjust the status of a person who isn't qualified for adjustment. INS has prosecutorial discretion not to place a removable alien in removal proceedings, but it does not have prosecutorial discretion to approve a naturalization application by an alien who is ineligible for that benefit under the Immigration and Nationality Act.

Exercising prosecutorial discretion does not lessen INS' commitment to enforce the immigration laws to the best of the agency's ability. It is not an invitation to violate or ignore the law. Rather, it is a means to use the agency's resources in a way that best accomplishes INS' mission of administering and enforcing the immigration laws of the United States.

(more)

■ **Factors Used in Determining Use of Prosecutorial Discretion**

The factors that can be taken into account in deciding whether to exercise prosecutorial discretion favorably include the following:

- Immigration status
- Length of residence in the United States
- Criminal history
- Humanitarian concerns
- Immigration history
- Likelihood of ultimately removing the alien
- Likelihood of achieving enforcement goal by other means
- Whether the alien is eligible or is likely to become eligible for other relief
- Effect of action on future admissibility
- Current or past cooperation with law enforcement authorities
- Honorable U.S. military service
- Community attention
- Resources available to INS

• ■ **Impact of Prosecutorial Discretion**

Prosecutorial discretion is not a full or adequate substitute for the forms of relief previously available from an immigration judge prior to the changes in the law in 1996. In many cases, the exercise of prosecutorial discretion by INS leaves a person in limbo, at risk of future immigration enforcement action and unable to travel outside the United States without the fear of being denied readmission.

Although it is INS policy that a favorable exercise of discretion by an INS office should be respected by other INS offices unless the facts and circumstances have changed, the exercise of prosecutorial discretion does not grant a lawful status under the immigration laws, and there is no legally enforceable right to the exercise of prosecutorial discretion.

Ultimately, INS believes that a complete solution requires legislation to restore,

to certain aliens affected by the 1996 changes, the possibility of a grant of relief by immigration judges during the removal process.

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