

It's a brave (and scary) new world out there

Though the new administration has been in power only a few short (or long) months, it has become readily apparent that there will be no give and take or negotiations with ICE attorneys during removal proceedings. Smart enforcement has become a thing of the past and a new, no-mercy, everyone is fair game mantra is taking place.

Prosecutorial discretion (PD) as we know it is dead. Email addresses to send requests for administrative closure are being taken down as we speak. There is no more systematic application of PD. The new mantra is that every trial attorney will evaluate a case on its merits and if he or she wants to apply PD the matter will be brought to the chief and the decision ends with the chief. There is no more escalation at headquarters either. We all know that means; it's business as it was back 5-10 years ago.

Oh, and no more priorities either. If one is inadmissible or removable one has a target on his or her back; it's just that the size of the target is determined by their past deeds or misdeeds. In other words, the new "priorities" are not priorities in the sense that they exclude from enforcement classes of people who do not fall under those priorities; think of them as a list in order of importance. And of course, everything is left to the "judgment" of the officer. Uncertainly abounds.

ICE has also informed AILA that ICE will no longer agree to administratively close proceedings in order for foreign nationals to file I-601A waivers as required by 8 CFR § 212.7(e)(4). ICE leaders stated that they would agree to voluntary departure so foreign nationals can proceed to the consulate and complete the process, however this would require them to file a regular I-601 waiver after their consular interview.

Practitioners are encouraged to still pursue administrative closure with the court under *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) since this is what the regulatory regime requires. I-601A waivers are by nature a joint venture between various government agencies such as USCIS, Department of State, and until most recently ICE. This framework provides strong support to immigration judges to be a part of that process and allow it to flow freely.

DACA kids are not safe either. Having DACA will no longer provide the ironclad protection from deportation it has provided so far. If someone who holds current DACA does anything to warrant attention from ICE (say gets arrested or is convicted for an offense) they are subject to removal enforcement even if the sin committed is one which would not affect DACA eligibility.

Up until the present day most business immigration practitioners have advised their employer clients that although a good idea, it was not absolutely necessary to keep renewing nonimmigrant status after filing of an I-485 and the employee could continue on AP/EAD. This will have to change. ICE has stated those individuals are at risk for removal enforcement and in ICE's position they are amenable to removal. It is unclear whether they will be sought out actively. It is highly doubtful they will. But doing anything that brings them to the attention of ICE or even just being from a country our government does not particularly like places these workers in high risk of removal operations. So from now forward practitioners are encouraged to advise their employer clients to continue renewing nonimmigrant status for their employees until the I-485 is *approved*.

Parole authority will continue to be exercised as before for asylum seekers who pass a credible fear interview. This is not currently being applied on the ground in certain jurisdictions where parole is routinely denied after a "case by case" determination. This concern was brought up to ICE leadership and they promised to look into it.

I was talking to Ira Kurzban once at a conference. I had heard from someone that it was a fireable offense for anyone in Ira's firm to concede a conviction in immigration court. I asked Ira if that was true. He

informed me I had heard wrong. He explained that it is a fireable offense in his firm to concede *anything*, not just convictions.

Very few practitioners deny charges and force ICE attorneys to meet their burden in immigration court as a matter of routine. I challenge any practitioner to sit in any EOIR courtroom during a master docket and count the number of cases in which charges were admitted and conceded and the number in which they were denied. I would venture a guess the former takes place 90% or more of the time. The rare times charges are denied, ICE attorneys are typically not prepared with proof of alienage or certified records of conviction. Why is that? Because ICE has never really had to be fully prepared since the culture in immigration court is to admit and concede. This culture is so prevalent that I routinely get calls from judges complaining to me why my associates are denying charges in immigration court. Let this sink in, judges are calling me to complain why my associates are doing their job and protecting their clients' rights by making the government meet its burden.

I respectfully submit that we are doing a disservice to our clients and the system by being so quick to admit and concede. Admitting and conceding to the charges means giving away half the case in a matter of 5 seconds. This is the same thing as every criminal defense attorney pleading guilty for the client at arraignment before they have seen anything the government has against the client. Can you imagine sitting through an arraignment docket and seeing 9 out of 10 defense attorneys pleading their clients guilty?

Granted, there are occasions where admitting and conceding can have strategic benefits. There should not be a blanket police of denying everything. However denying charges in this new world, especially for clients without relief should be the rule, not the exception. Unless there is a clear strategic advantage to admitting and conceding, practitioners should put the government's feet to the fire and make them do their job. If not, we are simply allowing the government to fulfill their new plan of removing anyone who has violated the INA.

If Ira Kurzban, the Ira Kurzban, wakes up every morning, brushes his teeth, puts a suit on, goes to court and tells the court "I'd like to see the government prove their case," who are we to do the opposite.

Do the job you swore an oath to do, protect your clients' rights and make the government meet its burden.

Do what Ira does. Deny!