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**Explanation of the Department of Homeland Security's New Deportation Policy**

On August 18, 2011, Department of Homeland Security (DHS) Secretary Janet Napolitano announced<sup>1</sup> that the Obama Administration had established a new, two-pronged process to ensure that its immigration enforcement resources are focused on what the Administration has, in recent memoranda, identified as “high priority” individuals for removal.

According to the announcement, DHS, together with the Department of Justice (DOJ) will participate in an interagency working group to review the nearly 300,000 removal cases presently pending to identify those cases that are deemed high priority and thus accelerate them for removal. At the same time, this working group will conduct a scrub of these 300,000 cases to identify any potentially “low priority” cases to determine whether they merit an exercise of prosecutorial discretion. If they do, they may be closed and removed from the active immigration court docket.<sup>2</sup> This could mean that many already in the removal pipeline who clearly merit an exercise of prosecutorial discretion, such as would-be DREAM-Act-eligible youth, would not be removed from the United States at this time.

In addition, DHS will issue formal guidance to each of its immigration-related component agencies – including Immigration and Customs Enforcement (ICE), Citizenship and Immigration

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<sup>1</sup> See [http://durbin.senate.gov/public/index.cfm/files/serve?File\\_id=1180a746-c6d4-4fe9-b11f-cf9be50b6226](http://durbin.senate.gov/public/index.cfm/files/serve?File_id=1180a746-c6d4-4fe9-b11f-cf9be50b6226), in which Secretary Napolitano wrote to Senator Durbin informing the Senator of the Administration's decision in response to his and others requests on behalf of certain vulnerable populations and what it means moving forward.

<sup>2</sup> Note, that per DHS, this will be determined on a case-by-case basis. This announcement creates neither an affirmative right for which an individual may apply, a right to appeal any determination made pursuant to the process, or any affirmative right to immigration-related benefits, other than those provided for under current federal immigration law and for which the individual may be eligible. For instance, a beneficiary of the exercise of prosecutorial discretion will not be eligible by virtue of the exercise of discretion for Lawful Permanent Residency. Further, the individual may request work authorization, but that request will be determined on a case-by-case basis by USCIS, per existing federal law. Finally, this exercise of discretion does not apply to individuals apprehended at the border. **For more information, please see DHS's Frequently Asked Questions (FAQs) fact sheet on this announcement, available at: <http://www.ice.gov/doclib/about/offices/ero/pdf/immigration-enforcement-facts.pdf>.**

Services (CIS), and Customs and Border Protection (CBP) – to ensure that the prosecutorial discretion policy is exercised by all of those working to enforce federal immigration law within DHS.

This new process builds on the Administration’s immigration enforcement prioritization of the removal of individuals who have been convicted of crimes in the United States – a prioritization that was most recently articulated in a June 17, 2011 memorandum issued by U.S. Immigration and Customs Enforcement (ICE) Director, John Morton [hereinafter, the “Morton Memo”].<sup>3</sup>

In the June 17, 2011, memorandum, which was issued to all ICE Field Office Directors, Special Agents in Charge, and Chief Counsel, Director Morton provided ICE personnel with updated guidance on the exercise of prosecutorial discretion in the enforcement of immigration law. In so doing, Director Morton noted that ICE

has limited resources to remove those illegally in the United States. ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency’s enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system.<sup>4</sup>

According to the Morton Memo, such discretion applies to a “broad range of discretionary enforcement decisions” from deciding to issue or cancel a notice of detainer, deciding to issue, reissue, serve, file or cancel a Notice to Appear (NTA), deciding who to stop, question or arrest for an administrative immigration violation, and settling or dismissing a proceeding, among numerous other scenarios.

Pursuant to the August 18, 2011, announcement by Secretary Napolitano, the interagency working group will develop specific criteria to identify low-priority cases for removal that would then be considered for an exercise of prosecutorial discretion. The working group’s criteria will be based on those outlined in the Morton Memo, which include, but are not limited to: the circumstances of a person’s arrival in the United States and the manner of his or her entry, particularly if he/she came as a young child; length of presence in the United States; ties and contributions to the community, including family relationships; age of the individual; women who are pregnant or nursing; individuals suffering from severe mental or physical illness; service in the U.S. military; pursuit of post-secondary education in the United States; and various others.

For more information, contact Kevin Appleby or Antonio Cube at 202-541-3000.

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<sup>3</sup> See <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>

<sup>4</sup> See *id.* at 2.