

June 11, 2012

PROSECUTORIAL DISCRETION: A Statistical Assessment

In August 2011, the Department of Homeland Security (DHS) announced that it would review more than 300,000 pending removal proceedings to identify low-priority cases meriting favorable exercises of prosecutorial discretion. The initiative was officially launched in November 2011 and is expected to continue for much of 2012. To date, DHS has released statistics on three occasions measuring the progress of the initiative. This fact sheet provides background information about the case-by-case review process and a statistical assessment of those figures.

What is “prosecutorial discretion” and how is it exercised in the immigration system?

Prosecutorial discretion is the authority of an agency or officer to decide what charges to bring and how to pursue each case. A law-enforcement officer who declines to pursue a case against a person has *favorably* exercised prosecutorial discretion. In the criminal system, for example, police officers frequently decline to arrest people for minor infractions (e.g. jaywalking) and prosecutors often bring lesser charges against defendants to facilitate plea bargaining.

In the immigration context, federal authorities have historically exercised their discretion by declining to arrest immigrants who do not meet the federal government’s enforcement priorities; declining to pursue a case or cancelling the charges against immigrants who may be removable; declining to oppose an application for relief that would allow an immigrant to remain in the country; or deferring the removal of an immigrant with a formal order of deportation.

As part of its case-by-case review process, DHS has offered immigrants an alternative form of prosecutorial discretion called “administrative closure,” which is explained below.

What is “administrative closure”?

Another exercise of prosecutorial discretion is known as “administrative closure.” When a removal proceeding is administratively closed, it is indefinitely removed from the docket of an Immigration Judge or the Board of Immigration Appeals until one or both parties ask for it to be recalendered. Immigrants whose cases are administratively closed do not receive any lawful immigration status, and DHS has refused to grant employment authorization documents (EADs) to such immigrants unless they would otherwise be eligible. Administrative closure is only available to immigrants who are currently in removal proceedings but have not yet received a final order of removal.¹

How many cases have been reviewed as part of DHS’ ongoing initiative?

As of May 29, attorneys for Immigration and Customs Enforcement (ICE) had reviewed 288,361 cases of immigrants in removal proceedings. Of those, 232,181 were not in detention and 56,180 were in detention. An additional 111,000 new removal proceedings have been initiated since the review began, and will also reportedly be part of the review.

How many immigrants have been found eligible for administrative closure, received offers of administrative closure, and accepted offers of administrative closure?

As of May 29, ICE attorneys had found 20,648 cases eligible for administrative closure, or approximately 7.2% of those reviewed. Of those, ICE had extended offers of administrative closure in 8,361 cases, with the remaining 12,287 cases still pending criminal background checks. Offers of administrative closure were accepted in 4,363 cases and rejected in 3,998 cases, for an acceptance rate of 52.2%. Of the 20,648 cases that have been found eligible for administrative closure, only 40 involved immigrants who were in detention at the time of review. DHS has not indicated how many detained immigrants have received or accepted offers of administrative closure.

Total Cases Reviewed (as of May 29)

	Total Cases Reviewed	Cases Found Eligible for Administrative Closure	
All cases	288,361	20,648	7.16%
Non-detained cases	232,181	20,608	8.88%
Detained cases	56,180	40	0.07%

How does DHS determine whether a case is eligible for administrative closure?

Under various memoranda, including several issued by ICE Director John Morton in 2011, ICE attorneys are expected to assess, based on the totality of the circumstances, whether an individual case meets DHS enforcement priorities and whether the person has sufficient positive factors to merit a favorable exercise of prosecutorial discretion. Among other factors, ICE attorneys may consider the period of time in which immigrants have lived in the United States; the age at which they arrived in the country; their family ties to U.S. citizens; and whether they have any prior criminal or immigration history. For more analysis of this issue, see [DHS Review of Low Priority Cases for Prosecutorial Discretion](#).

Why have so many immigrants declined offers of administrative closure?

Administrative closure temporarily removes a case from the immigration courts’ calendar but does not confer lawful immigration status or, according to the Administration, provide an independent basis for employment authorization. Thus, many immigrants with strong claims for relief may prefer

to present their case to an immigration judge in lieu of accepting an offer of administrative closure. For example, DHS sources have said that of the 3,998 immigrants who have declined offers of administrative closure, more than 3,000 may be eligible for “cancellation of removal,” a form of relief that provides lawful permanent resident (LPR) status—i.e. a “green card”—to immigrants who, among other things, have continuously resided in the United States for at least 10 years and whose removal would cause “exceptional and extremely unusual hardship” to an immediate relative who is a U.S. citizen or LPR.²

As the ICE review has progressed, have more or fewer cases been found eligible for administrative closure?

ICE has released statistics on three occasions relating to the case-by-case review,³ and the percentage of cases found eligible for administrative closure has fallen each time. Of the cases reviewed before March 5, almost 8.0% were found eligible for administrative closure. Of the cases reviewed between March 5 and April 16, 6.2% were found eligible for administrative closure. Of the cases reviewed between April 16 and May 29, less than 6.0% were found eligible for administrative closure.

Total Cases by Period of Review

Period of Review	Total Cases Reviewed	Cases Found Eligible for Administrative Closure	
Before March 5	165,471	13,190	7.97%
March 5 – April 16	54,083	3,354	6.20%
April 16 – May 29	68,807	4,104	5.96%
Total	288,361	20,648	7.16%

Non-Detained Cases by Period of Review

Period of Review	Total Cases Reviewed	Cases Found Eligible for Administrative Closure	
Before March 5	142,212	13,175	9.26%
March 5 – April 16	37,306	3,343	8.96%
April 16 – May 29	52,663	4,090	7.77%
Total	232,181	20,608	8.88%

Detained Cases by Period of Review

Period of Review	Total Cases Reviewed	Cases Found Eligible for Administrative Closure	
Before March 5	23,259	15	0.06%
March 5 – April 16	16,777	11	0.07%
April 16 – May 29	16,144	14	0.09%
Total	56,180	40	0.07%

When immigrants are placed in removal proceedings, how likely is it that they will be permitted to remain in the United States?

Once removal proceedings have begun, the odds any particular immigrant will be allowed to remain in the United States depend on whether the government can establish removability and, if so, whether he or she qualifies for any forms of relief from removal. In a typical year, between 20-25% of cases resolved by immigration judges result in immigrants being permitted to stay in the country. In each of the past five fiscal years, immigration judges have terminated removal proceedings in an average of 21,000 cases and granted relief from removal in an average of 30,000 cases.

Case Dispositions by Immigration Judges (FY 2007-2011)

Fiscal Year	Orders of Removal	Voluntary Departure	Relief from Removal	Termination of Proceedings	Other	Total Dispositions
2007	146,329	23,972	30,263	21,143	1,382	223,089
2008	156,041	26,686	28,386	17,033	1,339	229,485
2009	158,541	26,880	28,676	17,038	1,278	232,413
2010	139,279	27,581	30,947	24,369	1,336	223,512
2011	130,969	30,385	31,763	25,562	1,369	220,048

Source: Executive Office for Immigration Review (EOIR), [FY 2011 Statistical Yearbook](#).

Definitions: **Order of removal:** immigrant found removable and ordered removed.
Voluntary departure: immigrant found removable but permitted to depart voluntarily.
Relief from removal: immigrant found removable but is eligible for relief permitting them to stay in the United States (e.g. asylum, cancellation of removal, adjustment of status).
Termination of proceedings: respondent found not removable (e.g. the charging document was issued improperly or contained charges not supported by evidence in record).

Conclusion

While the case-by-case review remains ongoing, figures relating to the first 290,000 cases have disappointed immigrant advocates. Thus far, slightly more than 7% of cases have been found eligible for administrative closure, only a few dozen of which involved immigrants being held in detention. Moreover, as the review process has expanded, the number of immigrants being found eligible for administrative closure has steadily decreased. Relative to the number of immigrants that ordinarily prevail in removal proceedings, the number likely to avoid removal as a result of the case-by-case review process is comparatively small.

Endnotes

¹ Administrative closure existed long before the current DHS initiative on prosecutorial discretion; in fact, nearly 40,000 removal cases were administratively closed at one point during the past five fiscal years (Executive Office for Immigration Review (EOIR), [FY 2011 Statistical Yearbook](#), at D3).

² INA § 240A(b), 8 U.S.C. § 1229b(b).

³ Statistics relating to the case-by-case review as of March 5, 2012, are available at <http://www.immigrationpolicy.org/sites/default/files/docs/dhs-email-to-hill-03-09-2012-converted.pdf>. Statistics relating to the case-by-case review as of April 16, 2012, are available at <http://www.immigrationpolicy.org/sites/default/files/docs/DHS-PD-stats-4-24-2012.pdf>. Statistics relating to the case-by-case review as of May 29, 2012, are available at <http://www.immigrationpolicy.org/sites/default/files/docs/DHS-PD-stats-6-6-2012.pdf>.