

# PRO SE GUIDE TO PROSECUTORIAL DISCRETION

\*\*\*\*\*

## Overview

“Prosecutorial discretion” is a kind of **temporary** relief from deportation for people who are considered a low priority for deportation. This term became popular after the Director of Immigration and Customs Enforcement (ICE) wrote a memo in June 2011 giving the ICE field offices guidance on ICE’s priorities and when to exercise prosecutorial discretion.

ICE has limited resources and must prioritize the use of its resources to ensure that the people it removes reflect the nation’s priorities. ICE focuses its resources on high priority cases in order to promote national security and public safety. Prosecutorial Discretion is used to temporarily suspend deportation in low priority cases. Cases that may qualify for prosecutorial discretion are considered on a case-by-case basis.



Prosecutorial discretion gives ICE the authority to decide to when and to what extent it will enforce the law against a specific person. Basically, if you are in immigration proceedings and are granted prosecutorial discretion, it means that your case moves to the bottom of ICE’s priority list for deportation. When you get prosecutorial discretion the government will generally move for administrative closure of your case. **Do not ask for prosecutorial discretion unless you are already in immigration proceedings!** People who are not in immigration proceedings and request prosecutorial discretion may be arrested and detained by ICE and removed.

There is no right to the favorable exercise of prosecutorial discretion and there is no guarantee that your case will be considered a low priority. Prosecutorial discretion is not a pathway to residency or citizenship. It will only temporarily suspend the immigration proceedings against you. If you are granted prosecutorial discretion, it is not a permanent form of relief and ICE can re-open its case against you at any time in the future.

## ***When can ICE exercise Prosecutorial Discretion?***

ICE can exercise prosecutorial discretion at *any stage* in immigration proceedings, including but not limited to:

- ➔ Deciding to issue or cancel a Notice to Appear (NTA)
- ➔ Deciding whom to question or arrest
- ➔ Deciding who to detain
- ➔ Deciding who to release on bond or personal recognizance
- ➔ Dismissing a case
- ➔ Granting deferred action or parole
- ➔ Executing a final order of removal
- ➔ After a final order of removal
- ➔ Pursuing an appeal

Even though ICE may grant prosecutorial at any stage, it is generally preferred to do it as early in the case as possible. If you ask for prosecutorial discretion and are denied at any point in the process, you can ask for it again and ICE will reconsider it. For example, if your circumstances change and there are things that make you more sympathetic to ICE.

## ***Who may grant Prosecutorial Discretion?***

Prosecutorial Discretion can be granted by:

- ➔ The ICE Director, Deputy Director and senior staff
- ➔ ICE attorneys and their supervisors
- ➔ Officers, agents, and their supervisors within Enforcement and Removal Operations (ERO)

### **Low Priority Cases**

If your case is considered a low priority case you may be granted prosecutorial discretion. There is no specific definition of what ICE will consider a low priority cases. ICE has to consider a long list of different factors.

People who *may* be considered a low priority include:

- ➔ Do not pose a danger to national security.
- ➔ Do not have a history of violent crimes or felony convictions
- ➔ Have lived in the U.S. for a long time
- ➔ Came into the U.S. as young children
- ➔ Are minors or elderly individuals
- ➔ Have not been deported in the past
- ➔ Have U.S. citizen children or spouses
- ➔ Have graduated high school and are pursuing a college degree in the U.S.



- ➔ Have served in the U.S. military or have close relatives who served in the U.S. military
- ➔ Have strong ties and involvement with the community
- ➔ Are pregnant or nursing
- ➔ Have serious health conditions or are the primary caretaker for someone with serious health conditions.
- ➔ Were victims of domestic violence, human trafficking, or of any other serious crime in the U.S.

Unfortunately if you are already in detention, chances are that ICE views your case as a high priority and is unlikely to grant you prosecutorial discretion or release from detention (sometimes called “humanitarian parole”).

Cases where people have extreme medical conditions may be more likely to receive prosecutorial discretion. Those conditions include:

- ➔ Advanced chronic conditions with complications
- ➔ HIV/AIDS or Cancer
- ➔ Pending or recent organ transplants
- ➔ Terminal illness
- ➔ Paraplegics or amputees confined to wheelchairs
- ➔ Blindness
- ➔ Extreme mental retardation or mental illness

### **High Priority Cases**

If your case is considered a high priority you are unlikely to be granted prosecutorial discretion. There is no specific definition of what ICE will consider a high priority cases. ICE has to consider a long list of different factors.

People who are considered high priority *may* include people who:

- ➔ Pose a national security threat and suspected terrorists
- ➔ Have a history of violent crimes or felony convictions
- ➔ Are serious felons, repeat offenders, or have a long criminal record
- ➔ Are gang members, human rights violators, or other clear threat to public safety
- ➔ Have prior deportation orders
- ➔ Have been previously removed and reentered the U.S.
- ➔ Have made false claims to being a U.S. citizen

Even though ICE has an interest in protecting the public from violent criminals, you should be aware that any DUI or drug conviction, including a minimal marijuana conviction will likely make someone ineligible for prosecutorial discretion.

## **Should I Ask for Prosecutorial Discretion?**

Do not ask for prosecutorial discretion unless you are already in immigration proceedings. If you are in immigration proceedings, ICE can exercise discretion on its own, or you can ask for it.

Carefully review the factors listed on the previous page and ask yourself if you fit into one or more of the categories listed for **low priority** cases. Even if you do, ICE still may not grant you prosecutorial discretion but it is worth it to ask.



If you currently have strong case for relief, a lot of supporting evidence, and are likely to win your case, you may not want to ask for prosecutorial discretion and should rather go ahead with your case because you don't get any kind of relief with prosecutorial discretion like a green card. However, you should consider all options and the consequences of losing your case.

In situations where you don't have a very strong case, you may want to consider asking for prosecutorial discretion IF you think you fall into one or more of the low priority categories. In weak cases or if you have no relief available, prosecutorial discretion may be your best chance to fight your deportation. Remember though, that if you are granted prosecutorial discretion your case is just temporarily closed.



## **How Do I Ask for Prosecutorial Discretion?**

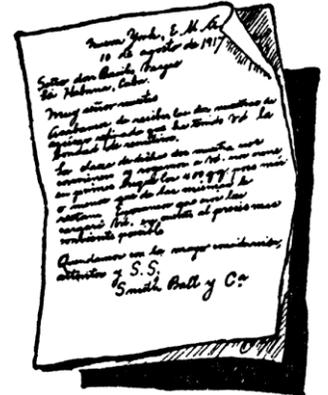
Although ICE has a program in place to review cases on its own, you should take a proactive approach to submit a request for prosecutorial discretion. There is no form or filing fee to request prosecutorial discretion.

To ask for prosecutorial discretion, you should write a letter to ICE. The letter to ICE should have the reasons why you deserve prosecutorial discretion and why you should not be removed. You have the burden of proving equities of your case so you will need to provide evidence to support your request.

In order to prove equities, you should attach documents that will support the reasons why you should be granted prosecutorial discretion.

Supporting documents may include, but are not limited to:

- ➔ Birth certificates of U.S. citizen children, spouse, or parents.
- ➔ Marriage license
- ➔ School transcripts
- ➔ School degrees, honors, or awards
- ➔ Medical Records
- ➔ Proof of long-term residence in the U.S. such as taxes, bank statements, bills, pay stubs, etc.
- ➔ Letters of support from doctors, family, employer, friends, and other members of your community.
- ➔ Evidence of rehabilitation (if you have a criminal record)



**You should never lie or make up facts!** It is very important to be honest and forthcoming in your letter and all supporting documents. If you have a criminal record, you should address it and not try to hide it.

### Work Authorization

If you are granted prosecutorial discretion you do *not* automatically get a work permit. Unless there is an independent basis of eligibility for an employment authorization document (EAD), you are not likely to be issued a work permit.

For example, if you are eligible to apply for cancellation of removal or adjustment of status, and you file before you are granted prosecutorial discretion, you will likely be issued a work permit and would likely be eligible for renewals during the period you are granted prosecutorial discretion. There is one exception. Individuals granted “deferred action” are currently eligible for a work permit.

\*\*\*\*\*

*Pro Se Guide to Prosecutorial Discretion* was prepared and updated by the staff of the Florence Immigrant & Refugee Rights Project and was written for immigrant detainees in Arizona who are representing themselves pro se in their removal proceedings. This guide is not intended to provide legal advice or serve as a substitute for legal counsel. The Florence Project is a nonprofit legal services organization and does not charge for its services to immigrant detainees in Arizona. This guide is copyright protected but can be shared and distributed widely to assist indigent immigrants around the country. All of our guides are available to download on our website: [www.firrp.org](http://www.firrp.org). We kindly ask that you give credit to the Florence Project if you are adapting the information in this guide into your own publication.