CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

ETHICAL CONSIDERATIONS WHEN THE REMOVAL CASE IS DISMISSED

Posted on April 30, 2023 by Cyrus Mehta & Kaitlyn Box

By Cyrus Mehta and Kaitlyn Box*

In recent times, immigration courts are dismissing the cases of noncitizens with great zeal. Even government attorneys are moving to dismiss these cases and Immigration Judges (IJ) are going along. This bodes well for the noncitizen who is no longer facing the specter of a removal order. On the other hand, the dismissal of the case often leaves the noncitizen in limbo. The noncitizen may have filed a viable cancellation of removal case and has been obtaining interim work authorization for many years due to the case being stuck in an IJ's overcrowded court docket. After the dismissal, the noncitizen can no longer renew work authorization and can lose their job.

These dismissals have their genesis in an April 3, 2022 memorandum from the U.S. Immigration and Custom Enforcement (ICE) Office of the Principal Legal Advisor (OPLA) Kerry E. Doyle ("Doyle Memo"), which empowered ICE attorneys to exercise prosecutorial discretion in handling the cases of noncitizens who are not considered enforcement priorities under the criteria laid out in the earlier Mayorkas memo. The goal of the ICE prosecuting attorney under the Doyle memo was to achieve justice rather than removing the noncitizen. Indeed, under the Doyle memo, the ICE attorney's role as the government's representative in removal proceedings was to proactively alert the immigration judge to potentially dispositive legal issues and viable relief options they have identified.

On June 10, 2022, the U.S. District Court for the Southern District of Texas vacated the Mayorkas memo in *Texas v. United States*, No. 6:21-cv-0016 (June 10, 2022), holding that the guidance laid out in the memo violates the two mandatory detention provisions at INA § 236(c) and INA § 241(a)(2), as well as

the Administrative Procedure Act (APA). As such, OPLA attorneys are no longer relying on the Mayorkas memo, or the sections of the Doyle memo that rely on the criteria provided in the Mayorkas memo. However, recent OPLA guidance on prosecutorial discretion states as follows: "OPLA attorneys, however, may—consistent with longstanding practice—exercise their inherent prosecutorial discretion on a case-by-case basis during the course of their review and handling of cases."

Although the Doyle memo is no longer applicable, the government continues to dispense with many cases in the way it recommends, relying now on traditional principles of prosecutorial discretion rather than a guiding memorandum. As an alternative to dismissing the case, EOIR has recently begun removing some cases from the active calendar. The case thus remains technically open, but without any scheduled hearing date. 8 CFR § 1003.0(b)(1)(ii) provides the authority for this practice, stating:

> ***"(b) Powers of the Director****—(1) In general. The Director shall manage EOIR and its employees and shall be responsible for the direction and supervision of each EOIR component in the execution of its respective duties pursuant to the Act and the provisions of this chapter. Unless otherwise provided by the Attorney General, the Director shall report to the Deputy Attorney General and the Attorney General. The Director shall have the authority to:*
>
> *. . . .*
>
> ***(ii)*** *Direct the conduct of all EOIR employees to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases; to direct that the adjudication of certain cases be deferred; to regulate the assignment of adjudicators to cases; and otherwise to manage the docket of matters to be decided by the Board, the immigration judges, the Chief Administrative Hearing Officer, or the administrative law judges…"*

This provision thus empowers EOIR to "ensure the efficient disposition of all pending cases", "set priorities" for the resolution of cases, "direct that the adjudication of certain cases be deferred", and "otherwise to manage the docket of matters to be decided", which can include removing cases from the active calendar. For the noncitizen who has a cancellation of removal case and

has been renewing work authorization, taking the case off the calendar is preferable than outright dismissal as they can continue to renew work authorization.

Dismissal of the proceeding can raise ethical conundrums for immigration practitioner representing the noncitizen. As already noted, if an individual in removal proceedings has an application for relief pending before EOIR such as an application for cancellation of removal and the case is outright dismissed, the noncitizen might lose work authorization or another benefit associated with the pending application. This individual will also be deprived of the ability to pursue the application and win cancellation of removal. Dismissal will put the noncitizen back to square one as an undocumented person. It is possible that a noncitizen who has been granted cancellation of removal but is waiting in the queue for a number can also be subject to a unilateral motion to dismiss by an ICE prosecutor. Thus, it is crucial for attorneys to promptly notify clients of an outright dismissal and any associated consequences.

Before accepting the dismissal, the client should consent to the dismissal. Winning a request for cancellation of removal is never guaranteed as the respondent has to demonstrate, among other things, that "removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." *See* INA § 240A(b)(1)(D). Hence, even if dismissal would deprive the client of work authorization, in the long term, the client would not want to risk a removal order. On the other hand, a client who may not have any alternative relief on the horizon may want to take the chance and pursue cancellation of removal in the hope of winning even though there is a risk that an IJ may deny the claim.

It is important to communicate the risks and benefits to the client who is facing a dismissal of the proceeding. ABA Model Rule 1.4 requires the attorney to inform the client of any decision or circumstance with respect to which the client's informed consent is required. Under ABA Model Rule 1.0(e) "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." The attorney must also check the state analogue to the ABA model ethical rules where they may be admitted. Moreover, there are independent grounds promulgated by the EOIR that can result in sanctions

for an immigration conduct such as failing to maintain communication with the client throughout the duration of the client-practitioner relationship, 8 CFR 1003.102(r), and failing to abide by a client's decisions concerning the objectives of representation and failing to consult with the client as to the means by which they are to be pursued. 8 CFR § 1003.102(p).

Board of Immigration appeals case law also provides a basis for attorneys to be able to challenge outright dismissals that are deleterious to their clients. In *Matter of G-N-C-*, 22 I&N Dec. 281 (BIA 1998), the BIA held that once the NTA is filed an Immigration Judge must not simply cancel a charging document upon USCIS' invocation of prosecutorial discretion, but should adjudicate the motion to dismiss on the merits, considering arguments from both sides. Certain noncitizens have a right to be placed in removal proceedings. One whose affirmative asylum application is not granted must be referred for removal proceedings pursuant to 8 CFR § 208.14(c)(1). Similarly, under 8 CFR § 216.4(d)(2) and 8 CFR § 216.5(f), the denial of a joint I-751 or waiver I-751 petition requires the issuance of an NTA. A dismissal of such an application would clearly be in violation of not the applicable regulations. Still, the IJ can dismiss a proceeding where a meritless asylum application was filed with the USCIS for the sole purpose of seeking cancellation of removal in immigration court. *See Matter of Andrade*, 27 I&N Dec. 557 (BIA 2019). Thus, attorneys must be vigilant to contest a motion to dismiss if the facts of the case can be distinguished from *Matter of Andrade.* For instance, even if the asylum application may have been filed with the intention for seeking cancellation of removal, but the asylum application had merit, this would not be a basis for an IJ dismiss the proceeding.

ICE attorneys move swiftly to dismiss cases. There is often a short time frame to respond to these motions, so advocates must be vigilant in ensuring that they inform clients and submit a timely response. Advocates should ensure that clients have an avenue for relief before joining a motion to dismiss, and should inform clients about what a dismissal would mean for their case and any negative consequences.

Further, although the current practice is to outright dismiss the case, ICE attorneys may agree to administrative closure when the noncitizen does not oppose and the specific facts of the case warrant administrative closure over other means of clearing the case from the docket. In some instances, though, OPLA can unilaterally seek administrative closure regardless of the wishes of

the noncitizen. As explained above, the case can also be removed from the active calendar. Immigration attorneys should inform their clients of the impact that such actions would have on their case, and vigorously oppose if the clients' interests would be harmed. It is also important to recognize that administrative closure or removing the case from the active calendar is not a permanent termination of removal proceedings, so attorneys must continue to monitor administratively closed cases and seek more lasting forms of relief for their clients.

Despite its beneficial aspect, the various methods for exercising prosecutorial discretion can place noncitizens in uncertain situations and raise ethical dilemmas for their immigration lawyers. The attorney must be competent, diligent and must communicate with the client to ensure that the client is not worse off than in pending removal proceedings. Most important, the attorney must obtain the client's informed consent before responding to any discretionary initiative by the ICE prosecutor or reaching an agreement with the government. The pros and cons of seeking relief under prosecutorial discretion over seeking relief under the INA must be carefully considered and discussed with the client. Because OPLA does not include language in motions that would preserve a noncitizen's ability to work, dismissal of the case often means that a noncitizen will lose work authorization with little warning. Dismissal of a case may also leave individuals with essentially no authorization to remain in the US, giving them little choice but to work without authorization, not pay taxes, and potentially violate the law in other ways. Immigration attorneys must carefully analyze these issues and advocate for their clients when a dismissal or administrative closure may do more harm than good.

This is an update of *Ethical Considerations When ICE Moves to Dismiss Removal Proceedings Under the Doyle Prosecutorial Memo*, published on May 9, 2022, available at http://blog.cyrusmehta.com/2022/05/ethical-considerations-when-ice-moves-to-dismiss-removal-proceedings-under-the-doyle-prosecutorial-discretion-memo.html

**Kaitlyn Box is a Senior Associate at Cyrus D. Mehta & Partners PLLC.*