



HOW PROSECUTORIAL DISCRETION SAVED OUR CLIENT

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By Cyrus Mehta and Jessica Paszko*

This is the story of our client Nadia Habib who was in immigration proceedings from 18 months till 31 years until an Immigration Judge granted her adjustment of status on November 21, 2023!

Nadia Habib came to the US in 1993 from Bangladesh when she was less than 2 years old with her mother Nazmin Habib. They were paroled into the US at JFK airport. Some years later in June 1997 they were placed in removal proceedings in New York, and ordered deported *in absentia* on April 26, 2000 by an Immigration Judge. They did not show up in court on the day of their hearing due to an unfortunate misunderstanding as a result of Nazmin being seriously ill the day before. Several efforts were made to reopen the *in absentia* deportation order but to no avail. However, they continued to live their lives normally as a tightly knit family. Nazmin and her husband Jawad, who had a green card, had three more children in the US who were automatically citizens. Jawad supported the entire family as a yellow taxi driver in New York. Nadia continued to be vulnerable to deportation unlike her citizen siblings, although she showed great promise by doing well in school and getting admitted into the elite Bronx High School of Science in New York.

On [September 10, 2011](#), Nazmin and Nadia, then 19 years old, received a bag and baggage letter from Immigration and Customs Enforcement (ICE) ordering that they surrender for deportation on September 29, 2011. This letter brought their lives and the lives of their family and loved ones to a shocking halt. Nadia's friends and other immigrant students quickly [sprung to action](#), launching campaigns on Facebook and Twitter, in the hope that Nadia and her mother would be allowed to remain in the US with her father and her three US citizen

siblings. On the fateful day she had to appear for deportation on September 29, members of the Youth Leadership Council gathered thousands of petition signatures and turned out over 100 people to rally in support of Nadia and Nazmin and to try to halt the deportation scheduled for that day at 11 am. The community's fervent efforts to keep Nadia and Nazmin from returning to Bangladesh that was entirely foreign to Nadia paid off. [ICE halted the deportation order](#) and decided to review their case. Though September 29, 2011 was marked with victory for Nadia and her mom, their immigration woes were far from over.

At that time when Nadia was about to get deported, President Obama began to be known as the Deporter-in-Chief. Although Obama was sympathetic towards immigrants, he wanted to also show that he was strict on enforcing the law as a way to get his Republican opponents in Congress to pass a comprehensive immigration reform bill. As the deportations under Obama spiked in 2011 and 2012, until they reached a record high by 2013, the then ICE Director John Morton issued a [landmark memo](#) in 2011 providing detailed guidelines on how ICE officers should exercise prosecutorial discretion.

On September 30, 2011, which also happened to be Nadia's 20th birthday, ICE issued a Stay of Removal Order for Nadia and Nazmin. This was the first exercise of prosecutorial discretion that would benefit Nadia and Nazmin and a birthday present that Nadia would never forget. Nadia and Nazmin approached our firm to seek representation. The case was so sympathetic and meritorious that we decided to take on the case pro bono. The goal was to find a pathway for Nazmin and Nadia to reopen their deportation orders and adjust status while keeping them in the US in the interim in an authorized capacity as long as possible.

On February 23, 2012, ICE also issued an order of supervision to both Nadia and Nazmin which required them to report in person to ICE on specified dates, usually once or twice a year. On June 15, 2012, the Secretary of Department of Homeland Security (DHS) Janet Napolitano issued a [memorandum](#) entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children", officially establishing what would later be known as the Deferred Action for Childhood Arrivals (DACA) program. DACA came to be the second form of prosecutorial discretion that benefitted Nadia who clearly qualified as she came to the US well before the age of 16. After

graduating from the Bronx High School of Science, Nadia pursued undergraduate studies at Stony Brook University and later obtained her master's degree in architecture from The City College of New York. On the basis of DACA, Nadia was able to apply for an Employment Authorization Document (EAD) in September 2012. Since then, our firm helped Nazmin and Nadia comply with their annual appointments with ICE and apply for DACA extensions along with the EAD. Nadia had to report each year for her appointment with ICE even though she was authorized to remain in the US under DACA. Every time Nadia wanted to travel outside New York for a trip to another state, even over a long weekend, she had to ask for and receive permission from ICE.

In the meantime, Nadia's US citizen brother filed Form I-130 on behalf of his mother Nazmin which was approved in early 2016. Jawad had not yet naturalized as his application had been erroneously denied and our appeal challenging the denial was pending. This I-130 served as the basis of our request to DHS to join our motion to reopen Nazmin's removal so that Nazmin could apply for adjustment of status based on the approved I-130 petition filed by her US citizen child. A removal order can be reopened at any time if the government joins in a motion to reopen even though prior efforts to reopen the removal were unsuccessful. The ability of the government joining in a motion to reopen depends on the policies of the administration at any given time. We requested the government to join in the motion in September 2016, during the final year of the Obama administration based on Morton's prosecutorial discretion policy. Donald Trump became president in 2017 and our request was pending, but the ICE attorney who got our request to join in the motion fortunately agreed to join in the motion to reopen Nazmin's removal proceedings to the Board of Immigration Appeals (BIA) even though by then prosecutorial discretion became non-existent under Trump's new enforcement oriented immigration focus. In July 2017, the BIA granted our motion based on the government's consent and remanded for further proceedings. After a nearly five year wait (since the I-485 application could not be tracked in the USICS bureaucracy until there was Congressional intervention), Nazmin was scheduled for an adjustment interview in March 2022 at a USCIS field office in Long Island where her adjustment of status application was finally granted.

Nadia was still not eligible to adjust status, so we could not request the government to join in the motion to reopen. Although Nadia's father eventually

naturalized, she was unable to adjust status through him as she was over 21 years old. Despite this, Nadia continued to be able to remain in the US thanks to DACA. When Nadia married her US citizen husband in 2020, he filed Form I-130 on her behalf which was approved the following year. Following a similar path as her mother case, in January 2022, our firm submitted a request to DHS to join our motion to reopen Nadia's removal order so that Nadia could apply for adjustment of status based on the approved I-130 petition filed by her husband. By then Joe Biden was President and he once again instructed ICE to exercise prosecutorial discretion. In November 2022, DHS consented to joining in the motion to reopen for the sole purpose of dismissal of removal proceedings. The following month, in December 2022, we submitted our joint motion to reopen Nadia's removal proceedings to the BIA. In February 2023, the BIA granted our motion and reopened and remanded to the Immigration Court for further proceedings. In September 2023, we learned that Nadia had been scheduled for a merits hearing on November 1, 2023 by happenstance as neither Nadia nor our firm received the notice – imagine if the Immigration Judge would have again deported Nadia *in absentia* at the hearing. Our request to adjust Nadia's status on the basis of her I-130 was unopposed by DHS, though the Immigration Judge could not grant the adjustment as the sealed medical report that we had delivered to the Immigration Court in advance of the November 1st hearing had not made its way to him. The Immigration Judge continued the hearing to November 17, 2023 where finally, after many trials and tribulations, Nadia was adjusted to lawful permanent resident status. Nadia's order of supervision dissolved on that day too relieving her from reporting to ICE each year.

Nadia was 32 years old on the day she was granted adjustment of status, and before then she had been in some form of immigration proceeding since she was 17 months old. Today Nadia is a successful architect and her siblings are also equally successful. Through this period, Nadia benefited from prosecutorial discretion, but the path was never smooth. DACA was declared unlawful by a federal judge and its fate hangs in the balance till this day. Even after Biden became president, courts enjoined his prosecutorial discretion policies that were set forth in the memo of DHS Secretary Mayorkas, but we advocated, when requesting the government to join in the motion to reopen, that the government could still exercise discretion outside the priorities set forth in the Mayorkas memo. Despite the court block of the Mayorkas memo,

the DHS retained the ability to exercise discretion and join in a motion to reopen. Imagine if Nadia did not receive the stay of removal in 2011 and was deported to Bangladesh after she had spent her whole life in the US. But for the prosecutorial discretion policies in place, Nadia would have been deported because of an *in absentia* deportation order that she received, over which she had no control and for no fault of her own. Nadia and Nazmin were also fortunate that ICE attorneys agreed to join in the motions to reopen despite the zigzagging prosecutorial discretion policies over three presidential administrations.

We are proud to have represented Nadia and Nazmin tenaciously and doggedly for well over 10 years in a pro bono capacity!

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