Questions for PD Outreach 05/03/2022

*As you know, on April 25, the Doyle memorandum went into effect and ushered in a new paradigm for OPLA attorneys to exercise prosecutorial discretion, focusing on the priority designation process and streamlining the overall PD process. In general, any case that is designated as a* ***nonpriority*** *will be eligible for PD. OPLA’s preferred form of PD will be dismissal without prejudice. As a general rule, administrative closure should not be used as a means of indefinitely removing cases from the docket; dismissal is a more appropriate tool in these circumstances and will not simply be a backup if you decline our offer of dismissal without prejudice. There are examples and rare circumstances in the Doyle memo where we will agree to administrative closure as a matter of prosecutorial discretion. Please look at page 12 of the Doyle Memo. Also, please note that if a case falls within Matter of Avetisyan, it is amenable to administrative closure as a matter of law.*

Will OCC entertain requests to withdraw appeals filed by DHS prior to the memo’s effective date?

 *Yes, on a case-by-case basis. However, as stated in Section II.B.6. of the Doyle Memorandum, OPLA attorneys may continue to pursue legally viable appeals or respond to noncitizen appeals or motions in nonpriority cases where compelling bases exist to include seeking clarity on important legal issues or correcting systemic legal errors.*

Will OCC be amenable to dismissal of non-priority cases on appeal with the BIA that are awaiting briefing schedules?

 *See above but generally yes.*

It is my understanding that for cases that are not eligible for PD based on entry after 11/1/2020 but are eligible for administrative closure based on having pending petitions with USCIS, we do not need to seek OPLA’s opinion prior to filing the motion or include a statement from our client regarding desire for admin closure. Is this correct?

 *Cases that fall within Avetisyan guidelines may be administratively closed, as per past protocol. Minneapolis/Omaha OPLA has been corrected as to administrative closure in other cases. DHS will not agree to administratively close cases solely because the noncitizen wants to retain his or her EAD, absent compelling circumstances.*

We received word that a group of Ukrainian asylum seekers have arrived and been paroled in to South Dakota. I imagine this is not the end of that story. Given the Doyle memo, humanitarian crisis in Ukraine, and the likelihood of a good number of asylum seekers arriving in the near future, have you all considered what OPLA’s position might be on facially-valid asylum claims from Ukrainian nationals? We are always hoping to streamline things and can likely get a good number of pro bono attorneys on board, but it would be helpful to know if you’ve considered these claims at all and what your general position might be (keeping in mind each case is, of course, unique). Open to any ideas you may have here.

 *There is no single OPLA position regarding Ukrainian asylum claims. Each is assessed individually. It should be pointed out that the offer of Temporary Protected Status to many Ukrainians already in the U.S. points to a situation more akin to civil strife.*

We are getting a lot of requests for guidance from our pro bonos regarding the Doyle memo and what your positions might be on stipulations in asylum hearings (general types of claims, general pieces of the claim, what you definitely won’t stipulate to, etc.). Dismissal is not really a viable option for many of our clients, though I know that is the preferred outcome from DHS’ perspective. I am also wondering what would be helpful for us to provide to you as you consider PD requests.

 *Generally, protection claims are very fact-specific and dependent upon testimony. Prosecutorial discretion should not be seen as a substitute for the noncitizen’s statutory burden to meet all the requirements. As far as PD is concerned, asylum applicants are treated no differently than other noncitizens.*

The SOP states that general questions regarding PD can be sent to your office.  The SOP states that affirmative requests for PD should be mailed to the PD mailbox ice-opla-spm-pd@ice.dhs.gov .  The SOP does not state that practitioners must email a motion to OPLA, only a request.  We just received a call from an OPLA attorney stating that we must email a motion to them for consideration which is not supported by the SOP.  Can you please clarify?

 *Email a request for PD to* *ICE-OPLA-SPM-PD@ice.dhs.gov* *with the name, A#, and next hearing date of the noncitizen..  If PD is granted, OPLA will send an email from to that effect, (i.e. “Let this email serve as evidence of this office’s non-opposition to dismissing without prejudice.”) Once you receive the response from OPLA, you should then file your motion to dismiss with the court.*

*It is very important to keep the swim lanes clear:  IJs have no prosecutorial discretion so a unilateral motion is improper. Given the volume of requests OPLA Mpls and Oma receive, a real timesaver for us is to review and then, if we agree, send the email to the atty who will then attach it to the motion and label it “unopposed.”*

A few questions:

* any thoughts/guidance about cases pending at the BIA? (*See above)*
* what if there are no fingerprints in the system to run a background check?

*If a noncitizen has not submitted fingerprints to DHS in the past, it is the noncitizen’s responsibility to request his or her Identity History Summary Checks directly from the FBI and to provide those results to OPLA. The Frequently Asked Questions posted on OPLA’s public facing website contains the link to the FBI site where the request can be made.*

* if a case is administratively closed, can we seek dismissal instead?

*If a case is administratively closed, a noncitizen may seek to recalendar and dismiss removal proceedings. However, please be mindful that OPLA attorneys will prioritize case reviews and requests for prosecutorial discretion in cases that are on the court’s active docket.*

For UACs with pending TVPRA/SIJS who request termination with the court. Will they be NTA’d if they are denied relief/referred to the court?

*That would be up to the asylum Office*

Would DHS be amenable to seeking termination instead of requesting an in absentia be ordered for UACs/Juveniles who fail to appear?

*No, if service was proper, DHS will move for an in absentia order*

Understanding that each claim is unique and the Respondent bears the burden of proof, how does DHS plan to approach stipulations in asylum cases? Are there any pieces of a claim they are more likely to stipulate to if the evidence supports it?

 *See above*

Would it be possible to do a shortened/expedited hearing based on a conditional stipulation if the Court deems the witness credible on the stand?

 *See above*