



Prosecutorial Discretion Template Request - Afghan Clients

This document is intended to serve as a general resource for attorneys making prosecutorial discretion requests to DHS for Afghans in removal proceedings.

How to use this document:

- 1) First, determine the form of prosecutorial discretion you are requesting: dismissal (also called termination) or administrative closure—these are not the same thing! For existing proceedings, dismissal is OPLA's preferred form of exercising prosecutorial discretion (see [here](#)). However, it should be a case by case determination whether to consider administrative closure of a case.

When proceedings are *dismissed* or *terminated*, the client is no longer in removal proceedings and can file for asylum or other permanent status affirmatively. This might take longer for your client, but it takes them out of the adversarial process. USCIS can take over jurisdiction and adjudicate the asylum application. When proceedings are *administratively closed*, they are effectively paused but could be resumed by OPLA at any point. EOIR retains jurisdiction over the client's asylum application, so they cannot file with USCIS. This is often NOT the best route for an Afghan removal case, because it may mean that the respondent's case is stuck for years. We generally discourage this in cases where an individual is separated from immediate family. In such cases, timely adjudication of the asylum application could be the fastest route to family reunification, so you may want to consider whether you want to request prosecutorial discretion at all. Still, if a judge chooses to administratively close the case, there are other routes to advocate for reopening or to challenge the decision.

- 2) Customize the template below specific to your client.
- 3) Submit the request. Check requirements specific to your local OPLA field office [here](#). For example, many offices, including Los Angeles and San Francisco, require that any PD request includes whether any biometrics have been previously collected by DHS. You can also check with your local AILA chapter or contact OPLA to see if there are any filing preferences for your OPLA field office. For a list of email addresses that receive PD requests, see [here](#). You can also submit the PD request via ICE eService at eservice.ice.gov as a legal representative. For more information on eService, see [here](#).

Additional Resources:

- [NIJC Explainer on Offers of Prosecutorial Discretion](#)
- [NIPNLG Practice Advisory on Advocating for Prosecutorial Discretion](#)
- [ICE Doyle Memo Explainer](#)
- [DHS Enforcement Priorities Memo](#)
- [Immigration Policy Center 2011 Explainer on Prosecutorial Discretion](#)

NB: while the legal guidance is outdated, this source provides a helpful overview of the history of the authority for prosecutorial discretion

Filed via E-mail and OCC E-Service

Month XX, 2023

Office of the Chief Counsel, [FIELD OFFICE]
Immigration and Customs Enforcement
U.S. Department of Homeland Security
[FIELD OFFICE ADDRESS]

**Re: REQUEST FOR PROSECUTORIAL DISCRETION [based on... (TPS, Departure from the U.S., parole, etc.)]
[First Name LAST NAME], A# [XXX-XXX-XXX]**

Dear Chief Counsel:

We represent [Ms./Mr. CLIENT NAME, A#], [insert any relevant, key facts, i.e. an Afghan national, an individual who became our client while detained in XX, a child...etc.]. This letter and the supporting documents outline the details of our request for Prosecutorial Discretion for [Ms. CLIENT]. Respondent reserves the right to supplement this request with additional documentation as soon as possible. A supplemental request is forthcoming.

Respondent respectfully requests that your office move to terminate without prejudice her removal proceedings pursuant to 8 C.F.R. §§ 1239.2(c) and § 239.2(a)(7) in that circumstances have changed to such an extent that continuation is no longer in the best interest of the government. In the alternative, Respondent asks for administrative closure of these proceedings. As clearly demonstrated below, the totality of the circumstances surrounding Ms. CLIENT supports a favorable exercise of prosecutorial discretion. [IMPORTANT NOTE - Specify the type of relief sought. In most instances, we encourage including language requesting that the case *NOT* be administratively closed. Of course, this will depend on many other factors including the strength of the claim, and any bars to asylum.]

Statement of Facts and Procedural History

[Ms. CLIENT] is a [xx]-year-old citizen of Afghanistan who arrived in the United States as an asylum seeker in 2023. She suffers from [medical condition] that requires regular ongoing treatment, and for which she relies on the support of her family.

[Ms. CLIENT] fled Afghanistan with her family, including her parents and siblings because their lives were at risk following the Taliban takeover in August 2021. [Ms. CLIENT]

worked with U.S. based and affiliated nonprofit organizations in Afghanistan and thus her life was in danger at the hands of the Taliban.

Upon her arrival in the U.S., [Ms. CLIENT] was egregiously separated from her family and faced prolonged detention. [Additional Facts]. She was ultimately paroled pursuant to INA 212(d)(5).

Summary of Argument for Dismissal or Administrative Closure

These proceedings should be terminated pursuant to 8 C.F.R. § 1239.2(c) because circumstances have changed to such an extent from the inception of these proceedings that continuation is no longer in the best interest of the government. For all of the following reasons, these removal proceedings should be terminated or, in the alternative, administratively closed. [see note above!]

[SELECT THOSE THAT ARE APPLICABLE, ADAPT AND ADD OTHERS]

[Ms. CLIENT] merits a favorable exercise of prosecutorial discretion for the following reasons:

- [Ms. CLIENT] has no known criminal history in any country
- [Ms. CLIENT] came to the United States as an asylum seeker and did not secure legal representation until several months later
- [Ms. CLIENT] suffers from a disability in the form of her chronic medical condition, which limits her ability to live and work on her own
- [Ms. CLIENT] is no longer in the United States and is seeking asylum elsewhere
- It is in the public interest to exercise discretion for cases like [Ms. CLIENT]'s, given she has suffered as a result of misinterpretations of her case by adjudicators, and faced an egregious prolonged detention that worsened and exacerbated her illness
- [Ms. CLIENT] was granted parole pursuant to INA § 212(d)(5)
- [Ms. CLIENT] is eligible for Temporary Protected Status and/or has been granted Temporary Protected Status
- [Ms. CLIENT] is eligible for relief through USCIS because his/her spouse/parent was granted asylum, AND he/she has already filed an I-730 petition

As detailed below and in the forthcoming supporting documentation, [Ms. CLIENT] merits an exercise of prosecutorial discretion in her favor and her removal proceedings should be terminated or, in the alternative, administratively closed. [SEE NOTE ABOVE!]

1. The Circumstances Have Significantly Changed

Most notably, [Ms. CLIENT] [IMPORTANT FACTS - CLIENT HAS NOW BEEN PAROLED, CAN BE PROCESSED AFFIRMATIVELY, CAN PURSUE OTHER PATHWAYS. ELIGIBLE FOR TPS] It is no longer in the government's interests to pursue this case.

2. Recent Injunctions on the Mayorkas Memo Does Not Limit DHS's Ability to Exercise Prosecutorial Discretion; DHS May Still Rely on the Factors Set Forth in the Doyle Memo.

Recent injunctions on the Mayorkas Memo¹ do not limit DHS's ability to exercise its prosecutorial discretion in this case. On June 10, 2022, Judge Andrew Tipton of the U.S. District Court for the Southern District of Texas, in *Texas v. United States*, 2022 WL 2109204, enjoined the Mayorkas Memo as of June 24, 2022. Crucially, the sole effect of this decision was to vacate the categorical priorities established in the Mayorkas Memo, but nothing in that decision precludes DHS from exercising prosecutorial discretion on an individual or case-by-case basis. Moreover, Judge Tipton's decision does not enjoin the Doyle Memo² and, in fact, does not mention the Doyle Memo. Therefore, the Respondent requests that DHS consider this case on its individual, unique merits and in accordance with the Doyle Memo.

The Doyle Memo says OPLA attorneys must exercise discretion by considering a noncitizen's compelling factors, which include, but are not limited to following : 1) lengthy presence in the United States; 2) a mental condition that may have contributed to the criminal conduct; 3) a physical or mental condition requiring care or treatment; 4) status as the victim of a crime or victim, witness, or party in legal proceedings; 5) whether the noncitizen may be eligible for humanitarian protection or other immigration relief.

[Ms. CLIENT] RELEVANT FACTS ESTABLISHING THEY ARE NOT A PRIORITY.

Furthermore, [Ms. CLIENT] has a strong prima facie case for relief. She has a strong case for asylum, withholding of removal, and protection under the Convention Against Torture. Extensive country conditions make clear that individuals like [Ms. CLIENT] – women, and those who worked with the United States, are at risk under the Taliban controlled government of Afghanistan. In fact, [Ms. CLIENT] has already passed the initial threshold of the Credible Fear Interview. [Ms. CLIENT] has been keeping up with her case and deadlines. She proactively sought out *pro bono* counsel to represent her while detained.

3. DHS has authorized Temporary Protected Status and the Respondent is prima facie eligible and/or has been granted Temporary Protected Status as an Afghan national

¹ Alejandro Mayorkas, Guidelines for the Enforcement of Civil Immigration Law, DHS Memorandum, September 30, 2021 (hereinafter "Mayorkas Memo").

² Kerry E. Doyle, Principal Legal Advisor, ICE, Office of the Principal Legal Advisor (OPLA), to ALL OPLA Attorneys, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion, April 3, 2022 (hereinafter "Doyle Memo").

As a matter of public policy, prosecutorial discretion should be exercised to dismiss these proceedings. Secretary Mayorkas stated in September 2023 that, “[The] announcement to extend and redesignate TPS for Afghanistan allows us to continue to offer safety and protection to Afghan nationals who are unable to return to their country...DHS will continue to support Afghan nationals through this temporary form of humanitarian relief.” Thus, DHS has acknowledged that Afghan nationals are in need of special protection during the present humanitarian crisis in Afghanistan. It would be unconscionable to pursue immigration enforcement against Afghan nationals eligible for this relief, including **Ms. Client**.

[describe Ms. Client’s eligibility for TPS: Afghan national, resident since September 20, 2023, and physically present since November 21, 2023. Address any potential bars to TPS or indicate that there are none. Include whether the client has gotten a biometrics appointment, or other relevant details about the status of their application].

Ms. Client does not fall under the third priority category, border security.³ According to the Doyle Memo, mitigating circumstances should be considered when determining whether an individual falls within the border security priority.⁴ **Ms. Client’s** likely imminent receipt of TPS points to a mitigating circumstance that weighs in favor of declining enforcement action. **Ms. Client** crossed the border to seek asylum. This choice is protected under international and U.S. law.⁵ DHS itself recognized that Afghan nationals cannot safely return to Afghanistan when it designated it for TPS.⁶ **Ms. Client** arrived at the border because she was fleeing a country that is not safe, where she is being persecuted [personalize to client]. So while she was apprehended at the border, she belongs to a group of people—Afghan nationals—that DHS has recognized are in need of protection. Thus, she is not a threat to border security and not a civil immigration enforcement priority.

Moreover, according to the Doyle Memo, an individual’s eligibility for humanitarian protection is a mitigating factor that militates against the enforcement of immigration action.⁷ **Ms. Client** is prima facie eligible for TPS, which would grant her temporary lawful status for the duration of the TPS designation. [address any relevant eligibility bars to TPS, or state that there are none.] As someone very likely to soon receive humanitarian relief, **Ms. Client** should be classified as a nonpriority case and receive a favorable exercise of prosecutorial discretion.⁸

4. Respondent has been granted parole pursuant to INA § 212(d)(5)

³ Mayorkas Memo at 4; Doyle Memo at 3.

⁴ Doyle Memo at 3.

⁵ Refugee Convention of 1951; Universal Declaration of Human Rights of 1948; US Refugee Act of 1980.

⁶ Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990).

⁷ Doyle Memo at 5. The de-prioritization of individuals eligible to receive humanitarian or other immigration relief is a longstanding practice for DHS. See the Morton Memo (2011) at 4: “Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker.”

⁸ Doyle Memo at 7, 10.

As a parolee, [Ms. CLIENT] has temporary lawful status to remain in the United States. [Ms. CLIENT] was granted parole because [applicable agency - generally ICE or CBP] determined there was an “urgent humanitarian reason or significant public benefit.” INA § 212(d)(5). [describe situation of Ms. CLIENT, relevant facts]. According to the Doyle Memo, mitigating factors that militate against the exercise of enforcement action include “whether the noncitizen may be eligible for humanitarian protection or other immigration relief.”⁹ Here, Ms. [client name] has received temporary relief from USCIS. Thus, she should be classified as a nonpriority case and receive prosecutorial discretion.¹⁰

[if paroled from custody] Moreover, as a parolee, Ms. [client name] is not a threat to national security or a threat to public safety. An individual is only paroled from custody “provided [they] present neither a security risk nor a risk of absconding.”¹¹ [relevant facts]. Thus, DHS has determined Ms. [client name] does not pose a threat to national security or to public safety, and she does not fall within the first two priority categories.¹² Therefore, she should be classified as a nonpriority case.

Lastly, Ms. Client does not fall under the third priority category, border security.¹³ [If used in the preceding section, reference the argument here] According to the Doyle Memo, mitigating circumstances should be considered when determining whether an individual falls within the border security priority.¹⁴ Ms. Client’s parolee status points to a mitigating circumstance that weighs in favor of declining enforcement action. Ms. Client crossed the border to seek asylum. This choice is protected under international and U.S. law.¹⁵ By paroling Ms. Client, DHS has recognized there is an urgent humanitarian reason that she not be returned to Afghanistan. Ms. Client arrived at the border because she was fleeing a country that is in a state of humanitarian crisis, where she is being persecuted [personalize to client]. So while she was apprehended at the border, she has an urgent humanitarian reason to remain in the United States that DHS has already recognized. Thus, she is not a threat to border security and not a civil immigration enforcement priority.

CONCLUSION

As described herein, Respondent Ms. [client name] respectfully requests the favorable exercise of prosecutorial discretion in the form of dismissal of these removal proceedings or, in

⁹ Doyle Memo at 5.

¹⁰ Doyle Memo at 7, 10.

¹¹ 8 C.F.R. § 212.5

¹² Mayorkas Memo at 3; Doyle Memo at 2.

¹³ Mayorkas Memo at 4; Doyle Memo at 3.

¹⁴ Doyle Memo at 3.

¹⁵ Refugee Convention of 1951; Universal Declaration of Human Rights of 1948; US Refugee Act of 1980.

the alternative, **termination of these proceedings**, due to the many humanitarian considerations of her case. **[SEE NOTE ABOVE!]**

Thank you for your kind consideration of this request. Should you have any questions, please do not hesitate to contact me by phone at **[atty phone]**, by email at **[atty email]**, or by mail at **[address]**. I am happy to provide any further information or evidence necessary to support dismissal of this case.

Sincerely,

[Signature block]

Attorney's name

Pro Bono Attorney for [Respondent]

CC: Immigration Judge [Judge's Name]