

CRIMMIGRATION COMMUNICATION



DHS Enforcement Priorities Update

On November 29, 2021, new ICE detention and removal guidelines went into effect. The new guidance instructed ICE officers to prioritize ICE enforcement-related activities against people who fell into any of the following categories:

- **Threat to National Security** – People the agency alleges are involved in terrorism or espionage, or related activities, or who otherwise poses a danger to national security;
- **Threat to Public Safety** – “People who pose a current threat to public safety,” “typically because of serious criminal conduct;”
- **Threat to Border Security** – People apprehended at the border or a port of entry trying to enter unlawfully and people apprehended in the United States who entered unlawfully after Nov. 1, 2020.

Shortly after DHS issued new enforcement priorities; two primary challenges were filed in court against the new detainer policy.

- On March 22, 2022, an Ohio district court issued an injunction limiting DHS’s enforcement priorities. On July 5, 2022, the Sixth Circuit overruled this injunction. *Arizona v. Biden*, No. 22-3272 (6th Cir., 2022).
- On June 10, 2022, a Texas district court issued a preliminary injunction striking down the enforcement priorities nationwide. On July 6, 2022, the Fifth Circuit stayed this injunction. *Texas v. United States*, No. 22-40367 (5th Cir., 2022).

After these two competing decisions, the Department of Justice submitted a request to the Supreme Court of the United States asking them to restore the enforcement priorities while litigation continues, but this request was denied on a 5-4 decision. *Texas v. United States*, No. 22-40367 (5th Cir., 2022) *cert. granted*, No. 22-58 (U.S. July 21, 2022). In December, the Supreme Court will hear arguments on whether the enforcement priorities are lawful. **Until then, the Fifth Circuit’s decision stands and the enforcement priorities are blocked from being implemented.**

As of June 10, 2022, DHS has not been guided by *any* enforcement priorities. The three enforcement priority categories are no longer in effect and have been vacated in their entirety. DHS officers now exercise broad discretion to make enforcement decisions. In practice, we have seen several instances of non-citizen defendants being detained by ICE who would not have been detained under the enforcement priority guidelines.

Although the enforcement priorities have been vacated, other DHS directives are still in effect, including the DHS memos regarding victims of crime, protected areas, parental interests, etc. Furthermore, this litigation only concerns DHS officers, and it does not affect New York state laws. Even though DHS/ICE may now seek to detain someone, nothing compels local law enforcement to assist ICE or transfer that person to ICE. **The Francis decision prohibiting detention at ICE’s request remains in effect.** *Francis v. DeMarco*, 168 AD3d 31 (2D App.Div. 2018).

The current litigation does not change the application of the *Padilla* decision to defense counsel. Criminal defense counsel continues to have a duty to advise noncitizen clients on the immigration consequences that could stem from a criminal case.

Please contact the LIRIAC regarding your noncitizen clients so that we can discuss strategies to minimize ICE detention risk or to assess the risk of ICE detention at the end of a jail sentence.

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