

AN ANALYSIS OF PRESIDENT OBAMA'S EXECUTIVE ACTION ON IMMIGRATION
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"SAFE ON THE STREETS: ENFORCEMENT/STATE/LOCAL"

Priority Enforcement Program (PEP): Summary: Unless the alien poses a demonstrable risk to national security, enforcement actions through PEP will only be taken against aliens who are convicted of specifically enumerated crimes

- A) Effective Date 11/20/2014
- B) Via Memoranda
 - I) http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf
 - II) http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf
- C) ICE should only seek the transfer of an alien in the custody of state or local law enforcement through the new program when the alien has been convicted of an offense listed in http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf
 - I) Priority 1 Aliens described in this priority represent the highest priority to which enforcement resources should be directed
 - (a) aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;
 - (b) aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States;
 - (c) aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 52 I(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang;
 - (d) aliens convicted of an offense classified as a felony in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status; and
 - (e) aliens convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the Immigration and Nationality Act at the time of the conviction.
 - (f) Exception: The removal of these aliens must be prioritized unless they qualify for asylum or another form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief or CBP Director of Field Operations, there are compelling and

exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.

- II) Priority 2 (misdemeanants and new immigration violators). Aliens described in this priority, who are also not described in Priority 1, represent the second-highest priority for apprehension and removal.
- (a) aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element was the alien's immigration status, provided the offenses arise out of three separate incidents;
 - (b) aliens convicted of a "significant misdemeanor," which for these purposes is an offense of
 - (i) domestic violence
 - 1. In evaluating whether the offense is a significant misdemeanor involving "domestic violence," careful consideration should be given to whether the convicted alien was also the victim of domestic violence; if so, this should be a mitigating factor.
 - 2. See generally, <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>
 - (ii) sexual abuse or exploitation;
 - (iii) burglary;
 - (iv) unlawful possession or use of a firearm;
 - (v) drug distribution or trafficking; or
 - (vi) driving under the influence;
 - (vii) or if not an offense listed above, one for which the individual was sentenced to time in custody of
 - 1. 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence);
 - (c) aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014; and **[*NOTE DYSJUNCTIVE "AND"]**
 - (d) aliens who, in the judgment of an ICE Field Office Director, USCIS District Director, or USCIS Service Center Director, have significantly abused the visa or visa waiver programs.
 - (e) Exception: Priority 2 aliens should be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or users [USCIS] Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority
 - (f) Or when, in the judgment of an ICE Field Office Director, the alien otherwise poses a danger to national security
- III) Priority 3 aliens are those who have been issued a final order of removal ON OR AFTER JANUARY 1, 2014.
- (a) Exception: aliens in Priority 3 should generally be removed
 - (b) unless they qualify for asylum or another form of relief under our laws or,

- (c) unless, in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system **OR** there are factors suggesting the alien should not be an enforcement priority
- (d) “On or after January 1, 2014” – what does this mean for every removal order going forward? Does this stand for the untenable notion that every removal order henceforth renders the Respondent a Priority 3 alien?

Secure Communities 287(g) to be Replaced by Priority Enforcement Program (PEP)

- (A) Effective Date January 5, 2015
- (B) Via Memoranda
- (C) [Apprehension, Detention and Removal Enforcement Priorities](#)

PEP

At this time, we presume Interoperability of Identification Systems will continue. DHS, DOJ/FBI and DOS/Bureau of Consular Services entered into a Memorandum of Understanding (MOU) for Improved Information Sharing Services (Interoperability MOU) in 2008. There is no indication either on the FBI website nor the above two DHS memoranda that the Interoperability of FBI identification system IAFIS/NGI will cease interoperability with DHS’ IDENT or other relevant databases.

<http://www.fbi.gov/foia/privacy-impact-assessments/iafis-ngi-interoperability-1>

Detainers

- (A) Effective Date January 5, 2015
- (B) Via Memoranda
 - a. [Apprehension, Detention and Removal Enforcement Priorities](#)
 - b. [PEP](#)
- (C) The automatic issuance of detainers will be discontinued for all except national security cases
- (D) Instead of automatic detainers, there will be
 - a. a request for notification when a law enforcement entity is about to release a convicted criminal
 - b. If, in special circumstances ICE seeks to issue a request for detention (rather than a request for notification), ICE must
 - i. Specify that the person is a Priority 3 alien subject to a final order of removal **OR**
 - ii. There is other sufficient probable cause to find that the person is a removable alien, thereby addressing the Fourth Amendment concerns raised in recent federal court decisions.
 - iii. Read the Law Enforcement Officer’s understanding of “[probable cause](#)”
 - iv. Immigration Practitioners will challenge I-213 as probable cause statements in Article I Courts as well as in EOIR? Say, at the first appearance for bond? Doesn’t this mean all detainees are entitled to the NTA and the I-213 starting January 5, 2015?

No change to family detention

No changes to Operation Streamline which targets immigration entry and reentry for federal prosecution.