

## Immigration in the Time of COVID-19

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*Current as of April 8*

The Coronavirus outbreak has impacted the U.S. legal system in profound ways and immigration is no exception. Congress wrote a statute called the Immigration and Nationality Act, which outlines the primary categories in which a person can seek admission to the United States, the reasons a person might be deported, or the bases for applying for relief from the government. Congress delegated much of the administration of immigration law to federal agencies. Three federal agencies that play a significant role in making decisions affecting immigration are the Department of Homeland Security (DHS), Department of Justice (DOJ), and Department of State (DOS).<sup>2</sup> These same agencies have played a pivotal role in making or revising immigration policy in the time of COVID-19.

*DHS.* DHS is an agency created in the wake of September 11, 2001, and effective March 1, 2003. DHS houses important immigration agencies in the realms of services and enforcement. In the wake of COVID-19, DHS has used social media or electronic means to communicate office closures and changes for the immigrants they serve and the attorneys who represent them. In the time of COVID-19, it is crucial that DHS maximize its use of prosecutorial discretion for vulnerable immigrants. Prosecutorial discretion is a powerful sword and a vital part of the immigration system. Because of limited resources, DHS has historically set priorities for whom it

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<sup>2</sup> Megan Davy, Deborah W. Meyers, and Jeanne Batalova, *Who Does What in U.S. Immigration*, MIGRATION POL'Y INST. (Dec. 1, 2005), <https://www.migrationpolicy.org/article/who-does-what-us-immigration>.

will target for immigration enforcement and whom it will leave alone.<sup>3</sup> Humanitarian factors and events that include long term residence in the United States, natural disasters, seriously ill children, and survivors of sexual assault are among the reasons DHS has used discretion to protect people without an immigration status.<sup>4</sup>

*USCIS.* U.S. Citizenship and Immigration Services (USCIS) is a hub in DHS handling immigration benefits and applications that include asylum, Deferred Action for Childhood Arrivals (DACA), and green cards. Due to COVID-19, USCIS suspended in-person services like marriage-based green card interviews and affirmative asylum interviews, with current plans to reopen offices on May 4, 2020.<sup>5</sup>

USCIS also announced that it would extend the deadlines by 60 days for attorneys and immigrants to provide responses to requests for more evidence or notices to deny, revoke, or terminate a benefit for requests dated March 1, 2020, through May 1, 2020.<sup>6</sup> In the wake of COVID-19, USCIS also announced that it would use previously submitted “biometrics” (fingerprints) for people who applied to extend their work authorization but are unable to go to a regularly scheduled fingerprint appointment due to office closures. This will make a huge difference for noncitizens who are employed in the United States and dependent on having work authorization.<sup>7</sup> Notably, 27,000 people with DACA work in the healthcare industry, are in the frontlines during this pandemic, and are dependent on these work permits.<sup>8</sup> USCIS has made steps in the right direction, but there is so much more it can do.

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<sup>3</sup> Memorandum from Jeh Charles Johnson, Sec’y of the Dep’t. Homeland Security to Thomas S. Winkowski, Acting Director, U.S. Citizenship and Immigration Servs., R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection, Leon Rodriguez, Director, U.S. Citizenship and Immigration Servs., and Alan D. Bersin, Acting Assistant Sec’y for Pol’y (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

<sup>4</sup> SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015).

<sup>5</sup> *USCIS Response to Coronavirus 2019 (COVID-19)*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Apr. 1, 2020), <https://www.uscis.gov/about-us/uscis-response-coronavirus-2019-covid-19>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Adam Liptak, *Dreamers’ Tell Supreme Court Ending DACA During Pandemic Would Be ‘Catastrophic’*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/2020/03/27/us/dreamers-supreme-court-daca.html>.

On April 3, 2020, the immigration bar association known as the American Immigration Lawyers Association (AILA) filed a lawsuit in the federal district court for the District of Columbia challenging the inaction by USCIS as a violation of administrative law and procedural due process.<sup>9</sup> The complaint argues in part: “Defendants’ decision not to toll deadlines, expiration dates, and otherwise hold time-sensitive applications and communication in abeyance during the COVID-19 national emergency is wholly irrational and damaging to the safety of Plaintiff’s members, their staff, and their clients, and possibly USCIS employees as well.”<sup>10</sup> In the lawsuit, AILA requested that the Court order USCIS to recognize the global pandemic as an “extraordinary circumstance” and to toll the deadlines for immigration benefits and requests in its jurisdiction.<sup>11</sup>

Now is the most critical time for USCIS to use their discretion to automatically extend status, postpone deadlines, or automatically renew benefits. Since the outbreak of COVID-19, this author has interacted with dozens of people residing in the United States with a temporary immigration status who are afraid of the future and of their ability to preserve their legal status. Meanwhile, DACA recipients with pending renewals are unsure about receiving a timely decision or losing the jobs that support them or their families. USCIS should also renew or grant those requesting deferred action protection outside of DACA. Last September, this author testified before Congress, along with several brave patients and advocates to highlight the history of deferred action and the way it serves as a life-saving form of protection.<sup>12</sup>

*ICE.* Immigration and Customs Enforcement (ICE) is an arm of DHS with the responsibility to arrest, detain, and deport immigrants from the United States. Early memos from the Trump administration created the possibility that any person with a criminal history, arrest, plausible crime, or removal order would be a priority for removal.<sup>13</sup> In the wake of COVID-19, ICE scaled

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<sup>9</sup> *AILA Files Complaint Seeking Maintenance of Status, Extended Deadlines from USCIS*, AM. IMMIGRATION LAW. ASS’N (Apr. 3, 2020), <https://www.aila.org/infonet/aila-files-complaint-seeking-maintenance-of-status>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*, at 28.

<sup>12</sup> *Hearing on The Administration’s Apparent Revocation of Medical Deferred Action for Critically Ill Children*, 116<sup>th</sup> Cong. (2019) (testimony of Shoba Sivaprasad Wadhia, Clinical Professor of Law and Director, Center for Immigrants’ Rights Clinic, Penn State Law).

<sup>13</sup> Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

back by issuing a directive that ICE will refrain from taking immigration enforcement actions against noncitizens except for those who are a risk to public safety or are subject to mandatory detention for criminal reasons.<sup>14</sup> ICE has also stated that it will not conduct enforcement at medical facilities, including hospitals, except under “extraordinary circumstances.”<sup>15</sup> So much more will be needed to ensure that immigrants feel safe to come forward to request medical help or be confident that ICE will in fact implement this new enforcement directive. How will the immigrant community and in particular those living in undocumented or mixed status families shift their perspective from one that fears ICE to one that trusts them? This kind of shift will require something more than a website publication announcing policy changes.

ICE also has prosecutorial discretion about whether to release or detain immigrants who are incarcerated. Yet ICE continues to keep immigrants in detention even when health and safety are at risk. Further, the continued detention of immigrants appears to violate ICE’s own recent policy to limit immigration enforcement to only those who pose a public safety risk or subject to mandatory detention on criminal grounds. The most recently available data indicates that in March 2020, 61.2% of the roughly 35,000 immigrants in detention had no criminal conviction.<sup>16</sup> In pointing out this contradiction, the author does not suggest (or support) incarcerating immigrants with criminal convictions during a global pandemic.

As of April 8, 2020, ICE has reported 74 confirmed cases of COVID-19 among ICE employees and 32 confirmed cases of COVID-19 among immigration detainees, five of whom include immigrants held in Pike County Jail.<sup>17</sup> Pike County Jail is one of several facilities in Pennsylvania (where I am based) that contracts with ICE to incarcerate immigrants. The discovery of ICE staff and detainees testing positive for the novel COVID-19 virus should be more than a wake-up call that ICE must

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<sup>14</sup> *ICE Guidance on COVID-19*, U.S. CUSTOMS AND IMMIGRATION ENFORCEMENT (Apr. 7, 2020), <https://www.ice.gov/coronavirus>.

<sup>15</sup> *Id.*

<sup>16</sup> TRAC Immigration. *Decline in ICE Detainees with Criminal Records Could Shape Agency’s Response to COVID-19 Pandemic*, (Apr. 3, 2020) <https://trac.syr.edu/immigration/reports/601/>

<sup>17</sup> *Id.*

use its discretion to release, especially in cases where individuals and families do not pose public safety risks.<sup>18</sup>

In addition to the continued detention of adult immigrants in Pennsylvania and across the country is the choice by ICE to continue detaining families. Berks County Residential Center (Berks) is a family detention center based in Leesport, PA, and one of three in the country. Despite the issuance of a “stay at home” order by Pennsylvania Governor Tom Wolf, Berks continues to detain babies, children, and parents who should be released. Keeping immigrants in detention even when their health and safety are at risk is an abuse of discretion and, according to several lawsuits filed around the country demanding release of individuals, violates federal statutes and the U.S. Constitution.

Though several immigration detainees have been released as a result of these lawsuits, there has not been uniform effort by the administration to release immigration detainees despite ICE’s discretionary authority to release.<sup>19</sup> Said Bridget Cambria, immigration attorney and Executive Director of ALDEA- The People’s Justice Center in Reading, PA whose organization is in the trenches representing detained immigrants in Pennsylvania, “Anything short of immediately releasing every person detained in ICE custody at this point is irresponsible and will result in the deaths of people who are in civil custody.”<sup>20</sup>

CBP. Customs and Border Protection (CBP) is another leg of DHS. They are responsible for arrests at the border, “short term” detentions, and decisions on admission along with other responsibilities. CBP plays a role in facilitating a new policy to shut down non-essential travel at

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<sup>18</sup> *Id.*

<sup>19</sup> Kim Langona, *Ongoing Litigation Over Migrants’ Release Amid COVID-19*, CRIMMIGRATION (Apr. 3, 2020, 11:40 AM), <http://crimmigration.com/2020/04/03/ongoing-litigation-over-migrants-release-amid-covid-19/>; See also, *Thakker, et al., v Doll, et al.* <https://www.aclupa.org/en/cases/thakker-et-al-v-doll-et-al>; *Hope, et al., v. Doll, et al.* <https://www.aclupa.org/en/cases/hope-et-al-v-doll-et-al>

<sup>20</sup> Jeff Gammage, *Five migrants test positive for COVID-19 in ICE detention centers in Pennsylvania*, Philadelphia Inquirer (Apr. 4, 2020)

the southern and northern borders of the United States.<sup>21</sup> These changes have been compounded by new rules issued by the Center for Disease Control to return any person who “introduces” themselves at the border without permission or valid documents. The implications are significant and may in fact violate other statutes such as the Refugee Act of 1980. Beyond the statutes, CBP has the prosecutorial discretion to allow the entry of individuals on the micro level or implement policies at the macro level that protect immigrants and public health.<sup>22</sup> CBP can choose to place people in regular removal proceedings without subjecting them to speedy removal such as “expedited removal” or dangerous new inventions (a discretionary choice) like “Migration Protection Protocols” (MPP), where asylum seekers are forced to wait in Mexico pending their removal hearings.

*DOJ.* The Department of Justice (DOJ) is an agency with an important role in immigration matters. A hub in DOJ called the Executive Office for Immigration Review (EOIR) houses more than 60 courts and employs nearly 400 immigration judges across the country.<sup>23</sup> Immigration judges hold a variety of hearings, the most common of which are called “removal proceedings.”<sup>24</sup> For example a person charged under the immigration statute for overstaying a tourist visa or committing certain crimes might be placed in removal proceedings and be scheduled to go before an immigration judge in the EOIR. In the wake of COVID-19, EOIR has delayed non-detained hearings as well as MPP hearings through May 1, 2020.<sup>25</sup> Further, EOIR has set up temporary email accounts for the immigration courts nationwide and the appellate unit known as the Board of Immigration Appeals (BIA) to facilitate electronic filing due to COVID-19.<sup>26</sup>

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<sup>21</sup> *Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus*, U.S. DEP’T. HOMELAND SECURITY (Mar. 23, 2020), <https://www.dhs.gov/news/2020/03/23/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus>.

<sup>22</sup> Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. L. J. 243 (2010).

<sup>23</sup> *Office of the Chief Immigration Judge*, U.S. DEP’T. JUST. (Jan. 21, 2020), <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge>.

<sup>24</sup> I.N.A. § 240; see also *Statistics Yearbook: Fiscal Year 2018*, U.S. DEP’T. JUST., EXEC. OFF. IMMIGRATION REV., <https://www.justice.gov/eoir/file/1198896/download>.

<sup>25</sup> *Office of the Chief Immigration Judge*, U.S. DEP’T. JUST. (Jan. 21, 2020), <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge>.

<sup>26</sup> U.S. DEP’T. JUST., EXEC. OFF. IMMIGRATION REV., *EOIR OPERATIONAL STATUS DURING CORONAVIRUS PANDEMIC*, <https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic>

Many immigration detainees are scheduled for hearings before immigration judges. As of this writing, DOJ has continued to hold these hearings, placing a variety of players at risk: immigration judges, court staff, detained immigrants, ICE trial attorneys (who represent the government in removal proceedings), and immigration attorneys. Immigration attorneys, prosecutors and immigration judges have been unified in their demand that DOJ close the immigration courts.<sup>27</sup> Said one immigration judge “I don’t say this lightly, but EOIR has demonstrated that they need to be gutted and rebuilt from the ashes. I’ve never witnessed an utter lack of concern for people like I have here. In my former life, we treated captured Taliban and ISIS with more humanity. Moreover, I’ve never seen worse leadership. A crisis usually brings good and bad to the light. We have seen nothing but darkness.”<sup>28</sup> On April 7, 2020, immigration advocacy organizations filed an emergency motion demanding that DOJ pause in-person hearings for immigration detainees and allow hearings to proceed remotely.<sup>29</sup>

*DOS.* Department of State is responsible for issuing visas to foreign nationals seeking admission into the United States. DOS officers work at U.S. embassies and consulates around the world.<sup>30</sup> On March 20, 2020, DOS suspended routine visa services around the world.<sup>31</sup> This suspension will have profound effects on the ability of green card holders to obtain a visa and enter the United States based on a qualifying relationship to a family member or employer. The visa suspension also affects the ability of scores of foreign nationals to enter the United States temporarily. This applies to students, scholars, exchange visitors, tourists, and those traveling for business reasons. Of note, DOS has carved out an exception for medical professionals seeking

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<sup>27</sup> *Immigration Judges, Prosecutors, and Attorneys Call for the Nationwide Closure of All Immigration Courts*, AM. IMMIGRATION LAW. ASS’N (Mar. 15, 2020), <https://www.aila.org/advo-media/aila-correspondence/2020/ijs-prosecutors-and-attorneys-call-for-nationwid>.

<sup>28</sup> Communication to NAIJ [National Association of Immigration Judges] from Immigration Judge (Name Withheld), (March. 30, 2020)

<sup>29</sup> *Temporary Restraining Order Requested to Stop Dangerous EOIR and ICE Policies During the COVID-19 Pandemic*, NATIONAL IMMIGRATION PROJECT ET AL., (Apr. 8, 2020), [https://nipnl.org/pr/2020\\_08Apr\\_nipnlg-v-eoir-tro.html](https://nipnl.org/pr/2020_08Apr_nipnlg-v-eoir-tro.html)

<sup>30</sup> *About Us – Bureau of Consular Affairs*, U.S. DEP’T. ST., <https://www.state.gov/about-us-bureau-of-consular-affairs/>.

<sup>31</sup> *Suspension of Routine Visa Services*, U.S. DEP’T. ST., BUREAU OF CONSULAR AFF. (Mar. 20, 2020), <https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html>.

admission to the United States based on approved immigration petitions, advising such foreign nationals to check with their closest embassy or consulate to request an emergency visa appointment.<sup>32</sup>

DOS has also delivered information about presidential proclamations<sup>33</sup> restricting entry to certain individuals who were physically present in China, Iran, the Schengen Area, the United Kingdom, or Ireland.<sup>34</sup> U.S. citizens and lawful permanent residents (green card holders) are among those exempt from the entry restrictions.

*Conclusion.* The COVID-19 pandemic has had a huge impact on the immigration system. Many of the changes have been implemented by agencies in the executive branch. Moving forward, agencies must make decisions that prioritize the health and safety of government employees, noncitizens, and immigration attorneys while preserving fairness and due process.

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<sup>32</sup> *Update for Visas for Medical Professionals*, U.S. DEP'T. ST., U.S. Visas News, (Apr. 8, 2020), <https://travel.state.gov/content/travel/en/News/visas-news/update-on-h-and-j-visas-for-medical-professionals.html>

<sup>33</sup> Proclamation No. 9984, 85 Fed. Reg. 6,709 (Jan. 31, 2020); Proclamation No. 9992, 85 Fed. Reg. 12,855 (Feb. 29, 2020); Proclamation No. 9993 (Mar. 11, 2020); Proclamation No. 9996, 85 Fed. Reg. 15,341 (Mar. 14, 2020); *see also Presidential Proclamation on Novel Coronavirus*, U.S. DEP'T. ST., BUREAU OF CONSULAR AFF., <https://travel.state.gov/content/travel/en/traveladvisories/ea/Presidential-Proclamation-Coronavirus.html>.

<sup>34</sup> *Presidential Proclamation on Novel Coronavirus*, U.S. DEP'T. ST., BUREAU OF CONSULAR AFF., <https://travel.state.gov/content/travel/en/traveladvisories/ea/Presidential-Proclamation-Coronavirus.html>