

3 Garret Mountain Plaza, Suite 302  
Woodland Park, NJ 07424  
T: 973 977 9919  
F: 973 977 2021  
www.bsgslaw.com

Gabrielle Thurin<sup>3</sup>  
Kelly Degen  
Jane Personette  
Stacey Torres  
Reana Garcia<sup>2</sup>

Qualified Rule 1:40 Mediator<sup>1</sup>  
Member NY & NJ Bars<sup>2</sup>  
Member of Puerto Rico Bar<sup>3</sup>

## **BERGEN COUNTY BAR ASSOCIATION PRESENTATION**

### **WHAT IS PROSECUTORIAL DISCRETION?**

Prosecutorial Discretion (also known as “PD”) has been a longstanding process where a State/Federal Attorney reviews an individual case and determines if there is leniency that can be applied to Defendant(s)/Respondent(s) charges.

In the immigration world, prior to determining PD- It must be determined if the case qualifies as a non-priority case.

The Three Priority Groups Are:

**P1 (National Security):** those who engage in or are suspected of terrorism or espionage, or terrorism- related or espionage related activities, whose apprehension, arrest, or custody, is otherwise necessary to protect the national security of the U.S.

**P2 (Border Security):** those noncitizens who were apprehended at the border or at a port of entry while attempting to unlawfully enter the U.S. on or after November 1, 2020, or who were not physically present in the U.S. before November 1, 2020.

**P3 (Public Safety):** noncitizens who have been convicted of an “Aggravated felony,” as defined in INA 101(a)(43) or who have been convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or who are not younger than 16 years of age and intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization; and are determined to pose a threat to public safety.

Once it is determined that the matter is not priority- you can submit a PD request.

*\*\*\*Federal Attorneys (Office of Chief Counsel Attorneys) are supposed to be flagging potential PD cases for review\*\*\**

*The disadvantage is that you will not have control over the proofs they have and if you don't have control over the proofs you may not get the type of PD you want.*

To submit a PD request you will need to determine what type of relief you are after. Most commonly, the relief requested is a dismissal without prejudice or an administrative closure.

### **Dismissal w/o Prejudice\*: The Government's “Go-To”**

- Type of temporary relief that pulls a case from the active docket
  - No more court proceedings
- Case is dismissed- but DHS can file a motion to reopen at a later time
- On non-priority cases DHS usually offers this type of PD
  - Individual will not be deported/ will not have order of removal
  - Same time- won't be eligible for certain privileges like work authorization

## Administrative Closure: Slight Harder to Obtain

- “Usually” need an alternative immigration pathway
  - Case most quoted is *Arcos Sanchez v. Att’y Gen. U.S.*, 997 F.3d 113 (3<sup>rd</sup> Cir. 2021) and *Matter of Bavakan Avetisyan* (25 I&N Dec. 688 (BIA 2012)); which held:
    - Immigration Judges and the Board may administratively close removal proceedings, even if a party opposes it, if it is otherwise appropriate under the circumstances.
    - Factors to be weighed in their consideration are:
      - the reason administrative closure is sought;
      - the basis for any opposition to administrative closure;
      - the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings;
      - the anticipated duration of the closure;
      - the responsibility of either party, if any, in contributing to any current or anticipated delay; and
      - the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is re-calendared before the Immigration Judge or the appeal is reinstated before the Board
- Type of Temporary Relief- cases are technically still pending- no adjudication has been made
  - No more Court dates
  - Do not get bullied in withdrawing applications
    - This type of relief is supposed to remain pending so you can seek alternative relief
  - Part of the Benefit- while case remains pending (though not active) individuals can still apply/renew their work authorization cards (COR and Asylum Cases).

Once you determine the type of relief, you must put together a packet.

### THINGS TO INCLUDE IN BRIEF/PACKET:

- 1) Relief you are requesting
- 2) Analysis of Relevant Mitigating and Aggravating Factors
- 3) All proofs/evidence to support your factors (*A table of contents detailing proofs needed*)
- 4) If your case falls under one of the priorities- why this information is relevant as to whether your case is a priority
- 5) Confirmation that you have no objection to your case being dismissed

**Mitigating Factors Include but Are Not Limited To:**

- Age
- Age at time of criminal offense
- Length of time in the U.S.
- Any mental condition/disability that contributed to criminal history
- Any medical treatment in the U.S.- treatment type and condition
- Victim or witness of a crime/legal proceeding
- Impact of removal on family in U.S.
- Eligibility for humanitarian protection or other immigration relief
- Military Service or other public service
- Length of time from your last offense and any rehabilitation efforts
- Whether conviction was vacated, expunged, or decriminalized
- Pregnancy/Postpartum/Nursing
- LPR and time period with LPR status
- Whether circumstances surrounding the arrest involve discrimination or retaliation by law enforcement
- Cooperation with local law enforcement (state, federal, local, and tribal)

**Aggravating Factors Include but Are Not Limited To:**

- Gravity of the Offense and Sentence (final charge/ type of dispo)
- Nature and degree of harm caused to victim/community
- Sophistication of criminal offense
- Weapons Offense
- Prior Criminal Record
- Victim Vulnerability (child or elderly)
- Criminal Conduct was Sexual in Nature
- Criminal Conduct was in furtherance of a Criminal Street Gang
- Criminal Conduct resulted in Harm to the Public Health

Upon Completion of the Packet- you will need to scan and send a copy to OPLA.

- PD requests should be submitted via eService, using the following naming convention: **“PD\_Request\_[A number].”**
- A courtesy copy should also be sent to the corresponding OPLA email address.
  - Newark OPLA:
  - Newark (Eliz.) OPLA: [ICE-OPLA-NEW-ELZ-PD@ice.dhs.gov](mailto:ICE-OPLA-NEW-ELZ-PD@ice.dhs.gov)

For all the other email addresses by State- visit <https://www.ice.gov/about-ice/opla/prosecutorial-discretion>

## TO STIPULATE DETENTION OR NOT STIPULATE DETENTION- THAT IS THE QUESTION

*The Answer- Well It Depends*

Related to this idea of Prosecutorial Discretion- is the effects a criminal case may have on an immigration case

Considerations:

- Were they already in removal proceedings?
- What is their immigration status?
- What charges/ degrees are they facing?
- How are the proofs looking?
- Are you willing to risk losing your client in the Federal Shuffle Board?
- Best offers you will get from the APs will be right at the beginning- pre-indictment
- Backlog is killing State resources- they need to move cases
  - Especially detained cases!

### MARIJUANA DECRIMINALIZATION AND THE EFFECTS IT HAS HAD ON IMMIGRATION CASES

On February 22, 2021, Governor Phil Murphy Signed three bills changing the legal status of marijuana. Through the new legislations marijuana as a controlled dangerous substance (CDS) was decriminalized for most possessory offenses and marginally for distribution cases.

#### **Possession Cases- 2C:35-10(a):**

Marijuana: More than 6 oz is a crime of the 4<sup>th</sup> degree (anything less than 6 oz. not a crime)

Hashish: More than 17 g. is a crime of the 4<sup>th</sup> degree (anything less than 17 g. not a crime)

#### **Distribution Cases- 2C:35-5(b):**

Marijuana:

First Degree- 25 lbs. or more  
Second Degree- 5 lbs. or more  
Third Degree- More than 1 oz.  
Warning/ Fourth- 1 oz. or less

Hashish:

First Degree- 5 lbs. or more  
Second Degree- 1 lb. or more  
Third Degree- More than 5 g.  
Warning/Fourth- 5 g. or less

Under the Immigration Nationality Act (INA) § 212(a)(2)(A)(i)(II), an individual who has been convicted of or who admits having committed a “violation of law or regulation of a State, the United States, or a foreign country, relating to a controlled substance (as defined in §102 of the Controlled Substances Act) is inadmissible.

A conviction as defined in INA § 101(a)(48)(A) provides (emphasis added): (A) The term “conviction” means, with respect to a [noncitizen], a formal judgment of guilt of the [noncitizen] entered by a court or, if adjudication of guilt has been withheld, where—

- i) a judge or jury has found the [noncitizen] guilty or the [noncitizen] has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- ii) the judge has ordered some form of punishment, penalty, or restraint on the [noncitizen’s] liberty to be imposed.

Just because you are convicted of a possessory marijuana offense, does not mean that you are automatically barred from immigration relief.

Individuals found inadmissible under INA § 212(a)(2)(A) for a controlled substance violation related to a *single* offense **possession** (for personal use) of **30 grams or less of marijuana** may seek a discretionary waiver of inadmissibility under § 212(h). Where the activities resulting in inadmissibility occurred more than 15 years before the date of the application, a waiver is available if admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and the foreign national has been rehabilitated. §212(h)(1)(A).

If you are seeking a waiver under INA § 212(a)(2)(A) you will want to file an I-601 form.

Form Can be found at <https://www.uscis.gov/i-601>

Proofs you may want to consider as additional support of your application are:

1. Affidavits from you or other individuals;
2. Police/Lab reports evidencing the weight of marijuana (under 30 g)
3. If applicable, evidence of rehabilitation;
4. Any evidence you may wish to submit to establish that your admission to the United States would not be against the national welfare, public safety, or national security;
5. Medical reports;
6. If you are applying for a waiver from a ground of inadmissibility that requires a showing of extreme hardship and you are the spouse, parent, son, or daughter of a U.S. citizen or an alien lawfully admitted for permanent residence, the fiancé(e) of a U.S. citizen, or if you are a VAWA self-petitioner (or his or her child), you must submit evidence establishing the family relationship (such as a birth certificate or marriage certificate, etc.) and include evidence that shows your denial of admission would result in extreme hardship to your qualifying relative (the U.S. citizen or lawful permanent resident spouse, parent, child, or your U.S. citizen fiancé(e)), or to yourself (or other qualifying individuals) if you are a VAWA self-petitioner.

#### **ADDITIONAL RESOURCES:**

- **EOIR HELP LINE: 800-898-7180**
- **Newark Immigration Court: 973-848-7600**  
**\*Need A Number for these calls\***
- **EOIR Look Up Link: <https://acis.eoir.justice.gov/en/caseInformation/>**
- **ICE Inmate Locator: <https://locator.ice.gov/odls/#/index>**

#### **PRESENTER INFORMATION:**

Reana Garcia, Esq.

Email: [rgarcia@bsgslaw.com](mailto:rgarcia@bsgslaw.com)

T: 973-354- 2506

Jerard A. Gonzalez, Esq.

Email: [jgonzalez@bsgslaw.com](mailto:jgonzalez@bsgslaw.com)

T: 973-854-2483