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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of	
Reynaldo CASTRO-TUM,	A 206-842-910
Respondent.	In Removal Proceedings

AMICUS CURIAE BRIEF OF THE FEDERATION FOR AMERICAN IMMIGRATION REFORM

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I. INTEREST OF AMICUS CURIAE

On behalf of the Federation for American Immigration Reform (FAIR), the Immigration Reform Law Institute (IRLI) respectfully responds to the request by the Attorney General on January 4, 2018, for supplemental briefing in this matter. FAIR is a nonprofit, public-interest, membership organization of concerned citizens and legal residents who share a common belief that our nation's immigration policies must be reformed to serve the national interest. Specifically, FAIR seeks to improve border security, stop illegal immigration, and promote immigration levels consistent with the national interest. The Board of Immigration Appeals has solicited *amicus* briefs from FAIR for more than twenty years. *See, e.g.*, *In-re-Q- --M-T-*, 21 I. & N. Dec. 639 (B.I.A. 1996) ("The Board acknowledges with appreciation the brief submitted by amicus curiae [FAIR].").

II. ISSUES PRESENTED

The Attorney General has asked for supplemental briefing on the following issues:

- Do Immigration Judges and the Board have the authority, under any statute, regulation, or delegation of authority from the Attorney General, to order administrative closure in a case? If so, do the Board's decisions in *Matter of Avetisyan*, 25 I. & N. Dec. 688 (B.I.A. 2012), and *Matter of W-Y-U-*, 27 I. & N. Dec. 17 (B.I.A. 2017), articulate the appropriate standard for administrative closure?

- If the Attorney General determines that Immigration Judges and the Board currently lack the authority to order administrative closure, should the Attorney General delegate such authority? Alternatively, if the Attorney General determines that Immigration Judges and the Board currently possess the authority to order administrative closure, should the authority be withdrawn?

- The regulations governing removal proceedings were promulgated for "the expeditious, fair, and proper resolution of matters coming before Immigration Judges." 8 C.F.R. § 1003.12 (2017). Are there any circumstances where a docket management device other than administrative closure—including a continuance for good cause shown (8 C.F.R. § 1003.29 (2017)), dismissal without prejudice (8 C.F.R. § 1239.2 (c)), or termination without prejudice (8 C.F.R. § 1239.2(f)—would be inadequate to promote that objective?

- If the Attorney General determines that Immigration Judges and the Board do not have the authority to order administrative closure, and that such power is unwarranted or unavailable, what actions should be taken regarding cases that are already administratively closed?

III. SUMMARY OF THE FACTS

Respondent is a native and citizen of Guatemala who illegally entered the United States on or about June 26, 2014, without being admitted or inspected. Respondent was 19 years old at the time of his hearing and designated an unaccompanied alien child. Respondent failed to appear at his hearing, and the Department of Homeland Security ("DHS") requested a removal order in absentia. The Immigration Judge ("IJ") declined to enter such an order and, instead, administratively closed Respondent's removal proceedings. The Board of Immigration Appeals ("Board") remanded the case back to the IJ, noting the presumption of regularity in the service of the Notice to Appear ("NTA") on Respondent. On January 4, 2017, Attorney General Sessions referred the case for his review.

IV. SUMMARY OF THE ARGUMENT

There is no statutory or regulatory foundation for the administrative closure of an immigration case. Nevertheless, over the past three decades, immigration courts have increasingly resorted to this practice.

During the last administration, administrative closure mushroomed, and was routinely used in cases, such as this one, involving unaccompanied alien children ("UACs"). This overuse of administrative closure has inflated case closure rates while, in reality, increasing the immigration court backlog. Furthermore, the use of administrative closure in the UAC context often was result-oriented and policy-driven, and amounted to *de facto* amnesty. The overuse and lawless misuse of administrative closure must not be permitted to continue.

The only sure and lasting way to stop the overuse and abuse is for the Attorney General simply to end all use of administrative closure by immigration courts. Other tools that do have a statutory or regulatory foundation, such as continuances, can serve every legitimate function that administrative closure may serve. Unfortunately, the revocation of administrative closure would require the Executive Office for Immigration Review ("EOIR") to recalendar all cases that are administratively closed at present. While this may seem like a large undertaking, it is necessary to correct the mistakes of the past and ensure immigration cases are adjudicated in full compliance with immigration law.

V. ARGUMENT

A. Administrative Closures Take No Root In Statute, Regulation, Or Authority Delegated By The Attorney General.

Administrative closure is defined as "an order by an Immigration Judge removing a case from the Immigration Court's calendar." Department of Justice, *Immigration Court Practice Manual* Glossary 1 (2017).[1] It does not result in a final order. *Matter of Amico*, 19 I. & N. Dec. 652, 654 n.1 (B.I.A. 1988). Sometimes administrative closure has been used when the parties are awaiting an event that is outside of the court's proceedings and may take a significant amount of time. *Matter of Avetisyan*, 25 I. & N. Dec. at 692 (B.I.A. 2012). Administrative closure has been utilized for aliens awaiting forms of relief, such as adjustment of status, where decision-making authority typically rests with DHS.

Neither federal law nor any regulation has specifically authorized administrative closure in immigration cases. Congress and the applicable regulations explicitly outline how

[1] https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf#page=2 [hereinafter Practice Manual].

immigration proceedings are to be conducted and what procedures may be used. Administrative closure is not among them.

The Immigration and Naturalization Act ("INA") is the ultimate source of immigration law and procedure. Under 8 U.S.C. § 1229a, Congress has outlined a specific process for removing aliens that "shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." While the INA lists different procedural tools, such as a motion to reconsider, 8 U.S.C. § 1229a(c)(6), or a motion to reopen, 8 U.S.C. § 1229a(c)(7), it does not mention administrative closure.

Immigration judges are authorized to take actions consistent with applicable laws and regulations. 8 C.F.R. § 1240.1(a)(iv). As discussed below, the Department of Justice ("DOJ") has promulgated certain docket management processes to allow for fair and timely adjudication of removal cases in immigration court. *See infra* Sec.V.C. In doing so, DOJ has not promulgated any regulations that specifically delegate administrative closure authority to IJs. Indeed, no law or regulation specifically addresses an IJ's authority to grant administrative closures. A small number of regulations and final rules mention administrative closure, but none constitutes a specific delegation of administrative closure or states how exactly it should be utilized by an IJ. *See, e.g.*, 8 C.F.R. §§ 245.15 (mentioning that an alien applying for benefits whose case has been administratively closed may only do so under a specific subsection); 212.7(e)(2) (providing that an alien may apply for a waiver of unlawful presence inadmissibility if proceedings have been administratively closed). Administrative closure has simply been adopted without apparent concern for its origin or legitimacy. *Matter of Amico*, 19 I. & N. Dec.

at 654 n.1 (B.I.A. 1988) ("Administrative closing . . . is merely an administrative convenience which allows the removal of a case from the calendar in appropriate situations.").

The only authoritative documents that address administrative closures directly come from the Executive Office for Immigration Review, not directly from the Attorney General. An Operating Policies and Procedures Memorandum was released by the Office of the Chief Immigration Judge that discussed administrative closures and how IJs use them as a docketing tool. Memorandum from Brian M. O'Leary, Chief Immigration Judge, Operating Policies and Procedures Memorandum 13-01: Continuances Administrative Closure (Mar. 7, 2013) [hereinafter OPPM 13-01]. The Immigration Court Practice Manual also mentions administrative closure in passing, without instructing IJs on its proper use. Practice Manual at 105, 112, Glossary 1.

Therefore, the standard announced in *Matter of Avetisyan*, 25 I. & N. Dec. 688 (B.I.A. 2012) and *Matter of W-Y-U-*, 27 I. & N. Dec 17 (B.I.A. 2017) is irrelevant. Because the authority to use administrative closures has not been specifically granted by statute, regulation, or the Attorney General, it is not a proper tool for IJs to use when managing their dockets regardless of how federal courts may use it. *See Matter of Avetisyan*, 25 I. & N. Dec. at 690 n.2 (justifying administrative closure because federal courts have used it as a docket management tool).

B. The Attorney General Should Not Delegate The Power Of Administrative Closure To Immigration Judges Because Of Past Overreaching Use.

The use of administrative closure exploded during the previous administration. This explosion inflated case closure rates, while in reality swelling the immigration court backlog. The previous administration and commentators described administrative closure variously as

"prosecutorial discretion" or a means of "informal relief." But it is not the former, and not an appropriate means of granting the latter.

1. Administrative closure inflates case closure rates while actually adding to the immigration court backlog.

The number of cases administratively closed in recent years is unprecedented. Merit based decisions declined from 95 percent of total decisions in 2006 to 77 percent in 2015. Government Accountability Office, *Immigration Courts: Action Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges* 24 (2017) [hereinafter GAO Report]. During this same period, as a percentage of completed cases, administrative closure underwent more than an elevenfold increase, growing from 2 percent to 23 percent of all completed cases. *Id.* at 25.

In 2016, 48,285 cases were administratively closed by IJs. Executive Office for Immigration Review, *FY 2016 Statistical Year Book* C5 (2017). Prior to 2012, the use of administrative closure had never risen above 9,000 instances in one year. American Immigration Council, *Practice Advisory: Administrative Closure and Motions to Recalendar* 7 n.23 (2017).[2] As a result of the previous administration's overuse of administrative closure, it is possible that well over 100,000 cases have been administratively closed since fiscal year 2012 alone. *FY 2016 Statistical Year Book* at C5; Paul Bedard, *200,000 deportation cases quietly 'closed' under Obama*, Wash. Examiner (Aug. 28, 2017) (calculating how many administrative closures have occurred in recent years).

Under 8 C.F.R. §§ 103.2(b)(1) & 274a.12(c), the administrative closure process can also provide for work authorization while an alien's case is awaiting recalendaring due to a pending application or petition. There is no time limit on administrative closure and therefore an illegal

[2] https://www.americanimmigrationcouncil.org/practice_advisory/administrative-closure-and-motions-recalendar.

alien whose case was administratively closed can live and work in the United States indefinitely while the case is off the IJ's active docket. As a result of the large number of administrative closures within the last five years alone, many thousands of illegal aliens may be working in the United States.

While an administrative closure does not result in admission to the United States and merely takes the case off of the IJ's active docket, the agency still considers the case fully closed for statistical counting purposes. "EOIR records an initial case completion when an immigration judge renders a determination in this proceeding. EOIR includes administrative closures . . . among its initial case completion." Letter from Peter J. Kadzik, Assistant Attorney General, to the Honorable Bob Goodlatte, Chairman of the Committee on the Judiciary (July 6, 2016). Needless to say, this strategy proves useful when EOIR uses case completion times to assess its own performance and report on case completion in the DOJ's Annual Performance Report. OAG Report at 71.

But, of course, administrative closures are not final decisions. Thus, beneath the surface, administrative closures have increasingly been swelling the backlog of unresolved cases in immigration courts.

2. Administrative closure is not a form of prosecutorial discretion.

Both the previous administration and commentators have characterized administrative closure as a form of prosecutorial discretion. Immigration Policy Center, *Prosecutorial Discretion: A Statistical Assessment* 1 (2012)[3]; American Immigration Council, *Practice Advisory: Administrative Closure and Motions to Recalendar* 2 (2017); Memorandum from Peter S. Vincent, Principal Legal Advisor of U.S. Immigration and Customs Enforcement, Case-by-

[3] https://www.americanimmigrationcouncil.org/research/prosecutorial-discretion-statistical-analysis.

case Review of Incoming and Certain Pending Cases (Nov. 17, 2011) ("ICE attorneys should decide whether the proceedings before EOIR should continue or whether prosecutorial discretion in the form of administrative closure is appropriate.").

In fact, administrative closure is not a form a prosecutorial discretion. Prosecutorial discretion takes place before the issuance of an NTA. Once an NTA is issued by DHS, the agency's decision whether to prosecute has been made, and the agency lacks power to "close" the case without the agreement of the IJ. Quite obviously, a decision that is not made by prosecutors, but rather by judges, cannot appropriately be called "prosecutorial discretion."

Nor is administrative closure appropriate "informal relief." In recent years UACs have flooded the United States' southern border. Administrative closure is a tool often used by IJs to keep such minors (or, as in this case, former minors) in the United States unlawfully. Through fiscal year 2014 and 2015 over 11,000 UACs were afforded "informal relief[,]" including administrative closure and termination. Sarah Pierce, *Unaccompanied Child Migrants in U.S. Communities, Immigration Courts, and Schools* 5, Migration Policy Institute (2015). Approximately 97 percent of UACs who are not ordered removed receive some type of "informal relief." *Id.* "Judges provide informal relief . . . as to avoid ordering the removal of a child who is ineligible for formal relief but may still have a sympathetic case . . . ." *Id.* at 7-8; *see* American Immigration Council, *Administrative Closure and Motions to Recalendar* 5 (2017) (discussing when administrative closure is inappropriate).

The Board excludes need for humanitarian relief as a factor for administrative closures. *Id.*; *Matter of Avetisyan*, 25 I. & N. Dec. at 696. The lawless use of it for that purpose amounts to *de facto* amnesty at the hands of judges, who, by so acting, are making and implementing their

own immigration policy, a function far outside of their mandate of "deciding the inadmissibility or deportability of [] alien[s]." 8 U.S.C. § 1229a(a)(1).

C. Adequate Alternative Docket Management Devices Are Provided For In Statute And Regulation.

Title 8 regulations give three excellent tools for IJs to use to manage their dockets by giving parties extra time where necessary or closing cases where appropriate. These tools do not involve any use of administrative closure, and are superior to it on a number of grounds.

1. Motion for Continuance for Good Cause.

Under 8 C.F.R. § 1003.29, an IJ may grant a motion for continuance when good cause is shown. Determining good cause is not based on a rigid set of factors, nor is it an "empty formality." *Baires v. INS*, 856 F.2d 89, 91 (9th Cir. 1988). It allows a temporary adjournment of the case to another date and time for good cause. A motion for continuance can be granted for a broad range of reasons particular to the alien's case, including adjustment of status, asylum claims, and cancellation of removal. 8 C.F.R. § 1003.47(f) (granting continuances for investigations); *Matter of Hashimi*, 24 I. & N. Dec. 785, 790 (2009) (discussing the factors to consider for granting a continuance for adjustment of status); *Matter of L-A-C-*, 26 I.& N. Dec. 516, 518-23 (2015) (discussing continuances to gather corroborating evidence in asylum and withholding of removal cases).

A motion for continuance is preferable to an administrative closure for three reasons. First, using the motion for continuance keeps a case fresh in the parties' and judge's minds. Because an administratively closed case requires a motion to recalendar by one of the parties for the case to return to the active docket, it is easy for administratively closed cases to be disregarded. The problem is compounded because all participants may be satisfied with doing just that. The judges will have cases removed from their dockets, DHS will be content with not

having to litigate, and the respondents will get to stay in the country, often with work authorization. While this situation may appease all participants, it harms the national interest.

The second reason is greater accuracy in the reporting of case closures. When a case is continued under § 1003.29, it remains on the docket and is reported as open and active, unlike cases that are administratively closed. Administratively closed cases are falsely reported as closed even though a final decision has not been rendered.

The third reason is accountability. EOIR already tracks not only how many continuances were granted but why they were granted, by providing approximately 70 different continuance categories. GAO Report at 68. These statistics are extremely important for helping the agency understand why multiple continuances are granted and how the agency can reduce the need for such delays.

This accountability does not come at the cost of reducing IJs' due flexibility in managing their dockets. The regulatory language does not put any hard limits on what an IJ can or cannot grant a continuance for. Instead, general policy guidelines have been provided by the agency that give IJs wide discretion. "The appropriate number of continuances that should be granted, and the length of those continuances, will be based on the specific factors presented . . ." and considerations of administrative efficiency. OPPM 13-01 at 2-3; *see also* Memorandum of MaryBeth Keller, Chief Immigration Judge, Case Processing Priorities (July 31, 2017) (stating that "an assessment of good cause will depend on the specific factors of each case" in addition to general considerations). Because the agency keeps better records of continuances than administrative closures, however, IJs are kept accountable for the number of continuances they grant and why.

Indeed, the Chief Immigration Judge recently has released guidance about granting continuances, stating that "justice delayed is justice denied." Memorandum of MaryBeth Keller, Chief Immigration Judge, Operating Policies and Procedures Memorandum 17-01: *Continuances* (July 31, 2017). From this recent guidance, it seems likely that EOIR will crack down on any flagrant misuse of continuances and encourage limiting them to cases were good cause truly is shown.

2. Dismissal Without Prejudice and Termination Without Prejudice.

In addition to continuances for good case, an IJ could utilize two other tools, dismissal without prejudice and termination without prejudice. While both provide a similar outcome and originate in the same regulation, they serve as two different methods of removing cases from the court's docket.

Under 8 C.F.R. § 1239.2(c), once removal proceedings have commenced, the government may file a motion to dismiss on certain enumerated procedural and substantive grounds.[4] After a case is dismissed without prejudice, DHS may file the same charges against the alien at a later date. Neither party, however, can compel an IJ to dismiss without prejudice without a proper reason for doing so. *See Matter of W-C-B-*, 48 I. & N. Dec. 118, 122 (B.I.A. 2007) (stating that a notice to appear cannot be dismissed absent a ground set forth in the regulation).

[4] Any officer authorized . . . to issue a notice to appear may cancel such notice . . . provided the officer is satisfied that:

(1) The respondent is a national of the United States;
(2) The respondent is not deportable or inadmissible under immigration laws;
(3) The respondent is deceased;
(4) The respondent is not in the United States;
(5) The notice was issued for the respondent's failure to file a timely petition as required by section 216(c) of the Act; but his or her failure to file a timely petition was excused in accordance with section 216(d)(2)(B) of the Act;
(6) The notice to appear was improvidently issued, or
(7) Circumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government.

8 C.F.R. § 239.2(a).

Termination without prejudice allows an IJ to terminate proceedings against an alien "to permit the alien to proceed to a final hearing on a pending application . . . for naturalization when the alien has established prima facial eligibility for naturalization and the matter involved exceptionally appealing or humanitarian factors." 8 C.F.R. § 1239.2(f). For an alien to be eligible for termination without prejudice, the IJ must receive affirmative communication from DHS that the alien is prima facie eligible for naturalization. *In Re Hidalgo*, 24 I. & N. Dec. 103, 107-08 (B.I.A. 2007). Confirmation must come from DHS. An IJ cannot substitute his own judgment about the alien's eligibility for naturalization.

Dismissal and termination without prejudice are preferable to administrative closure because, unlike administrative closure, they are well-grounded in immigration regulations. Having a strong foundation in regulation protects dismissals and terminations without prejudice from being abused by parties or judges as simply a means of removing cases from the docket, or as a vehicle for implementing judge-made public policy. At the same time, their use allows a case to be taken off of the docket completely, and permits far more accurate reporting than does administrative closure.

D. Any Administratively Closed Cases That Never Reached Finality Must Be Placed Back On The Active Docket Or Closed In Accordance With The INA.

The improper use of administrative closure has created a large group of cases in limbo. They are neither open and on the active docket nor closed. This has added to the immigration case backlog rather than helped decrease it. Unfortunately, there is no quick and easy way of resolving these cases. But DOJ must take responsibility for past mistakes in granting administrative closure. In doing so, the agency must balance due process with administrative efficiency.

The first step in resolving administratively closed cases is to determine which have already been recalendared and subsequently closed. There is no indication that the agency keeps track of how many administratively closed cases have be recalendared and then brought to finality. Once the agency has the exact number of cases that were administratively closed but never brought to finality, these cases need to go before an IJ for a hearing.

Once EOIR has an exact number of cases pending in administrative closure, these cases should be made a priority. Because administratively closed cases are normally added back onto the active docket by a motion to recalendar, EOIR would have to recalendar these cases *sua sponte*.

At present, EOIR has announced that certain categories of aliens are a priority for removal. Memorandum by MaryBeth Keller, Chief Immigration Judge, Case Processing Priorities (Jan. 31, 2017) (listing detained individuals, UACs without a sponsor, and individuals released on *Rodriguez* bond as high priorities). The Attorney General should adjust these priorities to include administrative closures that were inappropriately granted.

Even if the Attorney General does not make these cases a priority for completion, under EOIR's Immigration Court Performance Measures, the *sua sponte* motion to recalendar should be adjudicated within 40 days of filing. Memorandum by James R. McHenry III, Director of the Executive Office of Immigration Review, *Case Priorities and Immigration Court Performance* Appendix A (Jan. 17, 2018). Once recalendared, the case should be completed within 365 days. *Id.* Considering the backlog of cases currently queued, this will be no small task. During the 2017 CIS Ombudsman Annual Conference, EOIR recognized the large immigration case backlog and stated that in intends to hire more immigration judges and also bring some immigration judges out of retirement. CIS Ombudsman Seventh Annual Conference (Dec. 7, 2017). EOIR

could quickly get these judges, especially the retired judges who are familiar with administrative closure, up to speed on the Attorney General's decision to no longer permit administrative closures because they are not warranted by statute or regulation.

The Attorney General should release a memorandum to accompany the decision to end administrative closures to assist judges on how and when continuances should be granted in a case that has been recalendared, and whether any special consideration should be given to requests for continuances in such cases. In addition to the preexisting factors, the Attorney General should require the court to consider the length of administrative closure already granted, the alien's diligence in applying for asylum or adjustment of status or other relief for which the administrative closure was granted, and delays at the alien's processing center. Considering the Director of EOIR's memorandum on case priorities, the Attorney General should state that 85% of administratively closed cases should be completed within the 365 day window. Memorandum by James R. McHenry III, Director of the Executive Office for Immigration Review, Case Priorities and Immigration Court Performance Measures Appendix A (Jan. 17, 2018). Additionally, the Attorney General should announce that any UACs or other aliens who were issued a Notice to Appear but did not appear will be processed *in absentia* and a final order of removal will be issued. Such guidance would be instrumental in ensuring that administratively closed cases reach a finality that respects due process, enforces the law, and promotes efficiency, all of which are priorities for EOIR and the Attorney General.

VI. CONCLUSION

For the foregoing reasons, the Attorney General should withdraw administrative closure as a tool for IJs. It has been abused for far too long and the Attorney General should focus on correcting the issues created by this flagrant abuse.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 16, 2018, I electronically submitted the foregoing *amicus curiae* brief to the United States Department of Justice, and, via first class mail, sent one copy of the brief to the Philadelphia Field Office of Immigration and Customs Enforcement and three copies to the Office of the Attorney General at the United States Department of Justice for distribution to respondent.

/s/ Elizabeth A. Hohenstein
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