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## ADMINISTRATIVE CLOSURE

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PURPOSE: Provide guidance to adjudicators on administrative closure in light of *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021)

OWNER: David L. Neal, Director 

AUTHORITY: 8 C.F.R. § 1003.0(b)

CANCELLATION: None

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### I. Introduction

On July 15, 2021, the Attorney General issued a precedential decision in *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021). In that decision, the Attorney General restored the authority of immigration judges and the Board of Immigration Appeals (Board) to administratively close cases. This memorandum discusses the practical implications of the Attorney General's decision, particularly in light of the Executive Office for Immigration Review's (EOIR) pending caseload.

### II. Administrative Closure to Date

Administrative closure “is a docket management tool that is used to temporarily pause removal proceedings.” *Matter of W-Y-U-*, 27 I&N Dec. 17, 18 (BIA 2017). An immigration judge's or appellate immigration judge's administrative closure of a case “temporarily remove[s] [the] case from [the] Immigration Judge's active calendar or from the Board's docket.” *Matter of Avetisyan*, 25 I&N Dec. 688, 692 (BIA 2012). Administrative closure came into widespread use by EOIR adjudicators in the 1980s. Cases have been administratively closed for a variety of reasons over the years, and the Board has issued several decisions addressing when administrative closure is appropriate. The Board's two most recent such decisions are *Matter of Avetisyan* and *Matter of W-Y-U-*, issued in 2012 and 2017, respectively.

In 2018, Attorney General Sessions issued *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018). He held that, with limited exceptions, “immigration judges and the Board do not have the general authority” to administratively close cases. *Matter of Castro-Tum*, 27 I&N Dec. at 272. The Third, Fourth, Sixth, and Seventh Circuits subsequently ruled on challenges to *Matter of Castro-Tum*. A circuit split emerged, with the Third, Fourth, and Seventh Circuits holding that

adjudicators have the general authority to administratively close cases,<sup>1</sup> but with the Sixth Circuit holding that adjudicators have the authority to administratively close cases only in limited circumstances.<sup>2</sup> In 2020, the Department of Justice (Department) promulgated a final rule that essentially codified *Matter of Castro-Tum*, restricting EOIR adjudicators' ability to administratively close cases. See "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," 85 Fed. Reg. 81588 (Dec. 16, 2020). However, this rule has been preliminarily enjoined nationwide. See *Centro Legal de La Raza v. Exec. Office for Immigration Review*, 524 F.Supp.3d 919 (N.D. Cal. Mar. 10, 2021).

In *Matter of Cruz-Valdez*, the Attorney General noted that *Matter of Castro-Tum* "departed from long-standing practice" by prohibiting administrative closure in the vast majority of circumstances. *Matter of Cruz-Valdez*, 28 I&N Dec. at 329. He also noted that the Department is "engaged in a reconsideration" of the enjoined 2020 rule. *Id.* Given these factors, the Attorney General, in *Matter of Cruz-Valdez*, "overrule[d] [*Matter of Castro-Tum*] in its entirety," and he "restore[d] administrative closure" pending the current rulemaking. *Id.* He specified that, in deciding whether to administratively close cases pending the rulemaking, "except when a court of appeals has held otherwise, immigration judges and the Board should apply the standard for administrative closure set out in *Avetisyan* and *W-Y-U*." *Id.*

### III. Administrative Closure after *Matter of Cruz-Valdez*

With administrative closure restored, EOIR adjudicators have the authority, under the Board's case law, to administratively close a wide variety of cases. Going forward, pending the promulgation of a regulation addressing administrative closure, adjudicators must evaluate requests to administratively close cases under *Matter of Avetisyan* and *Matter of W-Y-U*, as well under as the Board's case law predating those decisions, to the extent that case law is consistent with those decisions. Adjudicators should accordingly familiarize themselves with *Matter of Avetisyan*, *Matter of W-Y-U*, and the Board's prior case law addressing administrative closure.

The restoration of administrative closure will assist EOIR adjudicators in managing their dockets given EOIR's caseload. In *Matter of Cruz-Valdez*, the Attorney General recognized that administrative closure has in the past "served to facilitate the exercise of prosecutorial discretion, allowing government counsel to request that certain low-priority cases be removed from immigration judges' active calendars or the Board's docket, thereby allowing adjudicators to focus on higher-priority cases." *Matter of Cruz-Valdez*, 28 I&N Dec. at 327. EOIR has finite resources and a daunting caseload. Given this reality, it is important that adjudicators focus on two categories of cases: those in which the Department of Homeland Security (DHS) deems the respondent to be an immigration enforcement priority,<sup>3</sup> and those in which the respondent

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<sup>1</sup> See *Arcos Sanchez v. Att'y Gen.*, 997 F.3d 113, 121-24 (3d Cir. 2021); *Meza Morales v. Barr*, 973 F.3d 656, 667 (7th Cir. 2020); *Romero v. Barr*, 937 F.3d 282, 292-94 (4th Cir. 2019).

<sup>2</sup> Specifically, the Sixth Circuit initially held that the regulations do not delegate to immigration judges or the Board the general authority to administratively close cases. *Hernandez-Serrano v. Barr*, 981 F.3d 459, 466 (6th Cir. 2020). But the Sixth Circuit later held that the regulations provide adjudicators "the authority for administrative closure" to allow respondents to apply with U.S. Citizenship and Immigration Services for provisional unlawful presence waivers. *Garcia-DeLeon v. Garland*, 999 F.3d 986, 991 (6th Cir. 2021).

<sup>3</sup> Effective November 29, 2021, DHS's immigration enforcement priorities are noncitizens DHS deems to pose risks to national security, public safety, and border security. See Memorandum from Alejandro N. Mayorkas, Secretary,

desires a full adjudication of his or her claim or claims. Being able to administratively close low priority cases will help adjudicators do this.

Under case law, where DHS requests that a case be administratively closed because a respondent is not an immigration enforcement priority, and the respondent does not object, the request should generally be granted and the case administratively closed. *See Matter of Yewondwosen*, 21 I&N Dec. 1025, 1026 (BIA 1997) (stating that the parties' "agreement on an issue or proper course of action should, in most instances, be determinative"); *Matter of Cruz-Valdez*, 28 I&N Dec. at 327 (recognizing the role of administrative closure in "facilitat[ing] the exercise of prosecutorial discretion").

Administrative closure is appropriate in many other situations as well. For example, it can be appropriate to administratively close a case to allow a respondent to file an application or petition with an agency other than EOIR. *See Matter of Avetisyan*, 25 I&N Dec. at 696 (identifying "the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings" as a factor for adjudicators "to weigh" in evaluating requests for administrative closure); 8 C.F.R. § 212.7(e)(4)(iii) (permitting a respondent in removal proceedings to file a Form I-601A, *Application for Provisional Unlawful Presence Waiver*, with U.S. Citizenship and Immigration Services where the "proceedings are administratively closed and have not yet been recalendared at the time of filing the application"). It can also be appropriate to administratively close a case while an agency adjudicates a previously filed application or petition, or, if a visa petition has been approved, while waiting for the visa to become available. *See Matter of Avetisyan*, 25 I&N Dec. at 696. It is generally appropriate to administratively close a case where a respondent has been granted temporary protected status. *See Matter of Sosa Ventura*, 25 I&N Dec. 391, 396 (BIA 2010). This is only a partial list; administrative closure can be appropriate in other situations not mentioned here. *See Matter of Avetisyan*, 25 I&N Dec. at 696 (stating that each request for administrative closure "must be evaluated under the totality of the circumstances of the particular case").

Where a respondent requests administrative closure, whether in a scenario described above or another scenario where administrative closure is appropriate, and DHS does not object, the request should generally be granted and the case administratively closed. *See Matter of Yewondwosen*, 21 I&N Dec. at 1026. Where a request for administrative closure is opposed, "the primary consideration . . . is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits." *Matter of W-Y-U-*, 27 I&N Dec. at 20. But adjudicators should bear in mind that "neither party has 'absolute veto power over administrative closure requests.'" *Id.* at n. 5 (quoting *Matter of Avetisyan*, 25 I&N Dec. at 692).

Where at all possible, issues involving administrative closure should be resolved in advance of individual calendar hearings and not at hearings. Immigration judges are therefore encouraged to send scheduling orders to parties well before the hearing takes place, inquiring of DHS whether the respondent is an immigration enforcement priority, and otherwise soliciting the parties' positions on administrative closure and other issues related to prosecutorial discretion. Where

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*Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), available at <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

such issues have not been resolved in advance of an individual calendar hearing, the immigration judge should ask DHS counsel on the record at the beginning of the hearing whether the respondent is an immigration enforcement priority. Where DHS counsel responds that the respondent is not a priority, the immigration judge should further ask whether DHS intends to exercise some form of prosecutorial discretion in the case. As part of this colloquy, the immigration judge should ask whether the parties want the case administratively closed.<sup>4</sup>

#### **IV. Conclusion**

Administrative closure is a longstanding, and valuable, tool for EOIR adjudicators. As the Attorney General noted in *Matter of Cruz-Valdez*, the Department is currently engaged in rulemaking that will address adjudicators' authority to administratively close cases. Pending that rulemaking, adjudicators have the authority under *Matter of Cruz-Valdez* to administratively close many cases before them when warranted under Board case law. Adjudicators should familiarize themselves with the situations in which administrative closure is appropriate, and adjudicators should be proactive in inquiring whether parties wish for cases to be administratively closed. If you have any questions, please contact your supervisor.<sup>5</sup>

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<sup>4</sup> There is one potential caveat to the guidance and instructions in this section. As noted above, the Attorney General stated that, pending the promulgation of a regulation addressing administrative closure, immigration judges and the Board should apply the Board's case law "except when a court of appeals has held otherwise." *Matter of Cruz-Valdez*, 28 I&N Dec. at 329. For cases arising in the Sixth Circuit, adjudicators must determine to what extent administrative closure is permitted given that court's case law, and they must handle issues involving administrative closure accordingly. See *Garcia-DeLeon*, 999 F.3d 986; *Hernandez-Serrano*, 981 F.3d 459.

<sup>5</sup> This memorandum does not create any legal rights or benefits for either party, and it does not mandate that a particular motion for administrative closure be granted or denied. In all cases, immigration judges and appellate immigration judges must exercise their independent judgment and discretion in adjudicating motions for administrative closure consistent with the law. See 8 C.F.R. §§ 1003.1(d)(1)(ii), 1003.10(b).