# NATIONAL ASSOCIATION OF IMMIGRATION JUDGES

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**VIA Email**

January 30, 2018

Hon. Jefferson B. Sessions
Attorney General of the United States

Re: Administrative Closure of Removal Cases
*Matter of Castro-Tum*, 27 I&N Dec. 187 (AG 2018)

Dear Mr. Attorney General:

I write as the President of the National Association of Immigration Judges (NAIJ), on behalf of the Immigration Judges in the Department of Justice, in response to your invitation for briefing in the *Matter of Castro-Tum*, 27 I&N Dec. 187 (AG 2018) and the use of administrative closure. **The NAIJ urges you to protect the efficient and fair adjudication of cases in the Immigration Court by affirming the authority of your Immigration Judges to use administrative closure as an effective docket management tool.** Leaving IJs without this useful docket management tool will result in an enormous increase in our already massive backlog of cases, which will overwhelm the system and require IJs to spend a substantial amount of time and resources on cases that would be handled more efficiently if administratively closed. Please consider the following factors:

(1) Administrative closure is an important tool for Immigration Judges to efficiently and fairly manage their dockets:

Efficient and fair management of a docket is at the heart of a court's responsibility to the parties before it. Administrative closure allows for cases to be held in abeyance, without unnecessary use of court time and resources, when preliminary matters need to be completed for the case to become ripe for further adjudication. This issue is of paramount importance to us as

this will facilitate the reduction of the huge backlog of cases in our courts while ensuring that due process is not compromised.

All courts require some case management tool, by which proceedings may be held in abeyance or placed on an inactive docket, to await the action of one of the parties.[1] In the complex interaction between the Immigration Judge, Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), Customs and Immigration Services (CIS), and sometimes state courts and other authorities, often the Immigration Judge cannot complete the case until some action is taken over which the court has no direct control. The use of administrative closure, to put a short term hold on cases that are not ready for completion, permits the Immigration Judge to attend to and resolve cases that are ready for resolution and allows Immigration Judges to complete more cases. Removing administratively closed cases from the active docket allows the Immigration Judge to focus on cases which are truly ripe for his or her review. Granting a continuance in these situations is often not efficient. When a case is continued, it still occupies a position on our overcrowded dockets, and generates workload for judges and staff. Further, the fact that the case is still active often causes the ICE trial attorney to hold onto the DHS A-file, thereby impeding action by the appropriate CIS adjudicating division. It is not uncommon to continue a case for a CIS adjudication, only for the IJ to discover at the rescheduled hearing that no action has even started on the application because ICE had neglected to forward the A-file to CIS, which contributes to even greater delay in final adjudication.

Examples of the effective use of administrative closure in this manner are: (1) administrative closure of a case of an unaccompanied minor when his/her application for asylum is pending before USCIS; (2) administrative closure of a case of a minor applying for special immigrant juvenile status before a state court; (3) administrative closure of a case with a U visa application for which the USCIS has found the alien is *prima facie* eligible; or (4) administrative closure of a matter in which a visa petition for an immediate relative has been filed for which an alien appears *prima facie* eligible. If the Court were to insist on proceeding on such cases to a final decision on immediately available relief, it runs the risk of being reversed on appeal. *See, e.g., Bull v. INS*, 790 F. 2d 869 (11th Cir. 1986) (refusal of continuance for processing of petition for immediate relative visa is an abuse of discretion). Even when that is not a problem, proceeding to adjudication which results in deportation or denial of relief becomes a waste of precious hearing time, since in the vast majority of such cases the appeal process is not completed before other relief becomes available which results in the case being remanded. It is precisely because of this experience that Immigration Judges resort to administrative closure in these circumstances.

(2) Administrative closure is a superior tool in handling certain unique circumstances before the Court:

It is not uncommon for Immigration Judges to administratively close cases at the DHS's request in which there are concerns about proper service of charging documents that the DHS is

[1] *See, e.g., Penn-America Ins. Co. v. Mapp*, 521 F.3d 290, 293-296 (4th Cir, 2008) (discussing placing case on "inactive docket" as "administratively closing" a case in federal district court).

unable to immediately cure. Similarly, cases are routinely administratively closed when the respondents are being held in State or Federal criminal custody. In its absence, the case may have to be terminated which may result in application of *res judicata* or issue preclusion against DHS when they initiate proceedings again. It would also create unnecessary work for the Court staff in processing a new Notice to Appear, creating a brand new case, rather than reusing an existing one which has already been entered into the docketing database. Thus, administrative closure allows for DHS to cure a defect or allow the necessary time for the respondent to be released from custody to face pending charges.

(3) Some forms of relief are simply not available to Respondents unless the matter is administratively closed:

Respondents who have obtained the benefit of an approved immediate relative petition (Form I-130) and are not eligible to adjust status in the United States have an opportunity to complete consular processing in their country of citizenship. Consular processing is required to secure the immigrant visa, but the respondent needs a waiver for unlawful presence under INA section 212(a)(9(B)(v) to ensure expeditious processing abroad for purposes of family unity. This is accomplished by filing a Form I-601A with USCIS. *See* 8 CFR § 212.7(e). Pursuant to 8 CFR § 212.7(e)(4)(iii), an alien in removal proceedings may not apply for the waiver unless the case is administratively closed. If administrative closure is not available, Respondent cannot avail himself/herself of this form of relief. In the past, ICE readily agreed to administratively close the case if the alien appeared *prima facie* eligible for the waiver. The waiver is adjudicated by CIS and is generally granted within about 6 to 12 months. Respondent can then move to re-calendar the case to apply for voluntary departure, or termination of proceedings, in order to enable the Respondent to return to his/her home country for consular processing. The matter at this point is completed in the Immigration Court.

In fact, the process of consular processing is so burdensome that without the benefit of the advance waiver many Respondents simply will not embark on it. They will be far more likely to proceed with other, more burdensome and time consuming, applications for relief before the Court, to which they are entitled to pursue but may not have the greatest likelihood of success, such as asylum and cancellation of removal. Thus, denial of administrative closure in this situation will contribute to the huge backlog currently clogging the court's docket by adding years of unnecessary litigation (many courts are setting merits hearing in 2021 or 2022), when the case might have been resolved quickly and expeditiously by administrative closure and subsequent re-calendaring for voluntary departure or termination.

(4) Administrative closure is not the same as exercise of prosecutorial discretion:

The use of administrative closure has become controversial due to its use during the last Administration. The use of administrative closure at the request of DHS is an entirely different creature from the same term used for docket control by the Immigration Courts. Under the last Administration, the DHS utilized the Court's ability to administratively close cases to permit DHS to exercise prosecutorial discretion. Exercising prosecutorial discretion, which DHS has the authority to do at every step of the immigration proceeding, before the NTA is served, after the NTA is served and even after a removal order has been entered by the Immigration Judge,

benefited DHS and was utilized as a case management tool by DHS. Administrative closure for prosecutorial discretion in some ways did little to assist the Immigration Court or reduce the backlog as it was often decided at the time of the individual hearings. Thus, the use of administrative closure at the request of DHS should not be confused with the proper use of administrative closure by Immigration Judges, as an efficient and fair docket management tool.

(5) Permitting DHS to have sole control over administrative closure is inconsistent with due process:

To the extent that DHS may argue that it should have the final say on whether a case is to be administratively closed, we urge you to decline that offer. As you are aware, DHS is a party before the Court on equal footing to Respondents. As such, no one party should be given a veto power over the Court. It is the Immigration Court which must be fully empowered to administer our immigration laws in a fair and neutral manner. Otherwise, history has shown us that the Federal courts will intervene if we do otherwise. Several Circuits have already asserted jurisdiction over administrative closure; *e.g. Vahora v. Holder*, 626 F.3d 907 (7th Cir. 2010); *Garza-Moreno v. Gonzales*, 489 F. 3d 239 (6th Cir. 2007); and *Alcaraz v. INS*, 384 F.3d 1150 (9th Cir. 2004). Please note also that all of these cases were decided **before** *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) was issued.

Moreover, it has been our experience that in the vast majority of cases, DHS's opposition to many requests for administrative closure has generally been rooted in its inability to effectively track cases that are administratively closed, in essence making the Court serve as their tickler system. Clearly, with the resource shortages that the Court is facing, serving as DHS's tickler system should not be condoned.

(6) Immigration Judges have properly administered the law:

There is no basis in fact to support any claim that Immigration Judges have abused the authority to administratively close proceedings. The current case law under *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), sets forth a thoughtful, clear, transparent, and comprehensive analytical framework governing administrative closure. In doing so, the Board of Immigration Appeals ("BIA") properly recognized the authority of the Immigration Judges to administratively close proceedings, but also recognized that the decision must be on a case by case basis, considering a number of key factors. Specifically, the BIA stated that in reaching a decision, the Immigration Judge must consider:

(i) the reason administrative closure is sought;
(ii) the basis for any opposition to administrative closure;
(iii) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings;
(iv) the anticipated duration of the closure;
(v) the responsibility of either party, if any, in contributing to any current or anticipated delay; and

(vi) 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.

*Id.* The factors highlight the complexity of the individual cases before the Immigration Court and the importance of allowing the Immigration Judge to exercise such authority. In reaching a decision, the Immigration Judge is required to set forth the rationale of his or her decision and address the listed factors. If either party is dissatisfied with the decision, the party may seek an appeal before the BIA which will conduct an independent review of the judge's decision. There are many aspects of the Immigration Court system which would benefit from review and reform, however this is not one of them. The current framework is operating properly and should not be disturbed.

On behalf of NAIJ, I thank you for your consideration. NAIJ welcomes the opportunity to work with you and to provide any additional information that you may need.

Respectfully submitted,

*A. Ashley Tabaddor, President*
*National Association of Immigration Judges*

cc: James McHenry, Director, Executive Office for Immigration Review
Honorable Mary Beth Keller, Chief Immigration Judge