UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

Matter of Reynaldo CASTRO-TUM, Respondent	A206 842 910 In Removal Proceedings

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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The American Bar Association (ABA) is one of the largest voluntary professional membership organizations and the leading organization of legal professionals in the United States. Its more than 400,000 members come from all fifty States, the District of Columbia, and the United States territories, and include attorneys in law firms, corporations, nonprofit organizations, and local, state, and federal governments. Members also include judges, legislators, law professors, law students, and non-lawyer associates in related fields.[1]

The ABA's Commission on Immigration leads the Association's efforts to ensure fair treatment and full due process rights for immigrants and refugees within the United States. Acting in coordination with other Association entities, as well as governmental and non-governmental bodies, the Commission advocates for statutory and regulatory modifications in law and governmental practice consistent with ABA policy; provides continuing education and timely information about trends, court decisions, and pertinent developments for members of the legal community, judges, affected individuals, and the public; and develops and assists the operation of pro bono programs that encourage volunteer lawyers to provide high quality, effective legal representation for individuals in immigration proceedings, with a special emphasis on the needs of the most vulnerable immigrant and refugee populations.

Over the past seventy years, the ABA has devoted significant resources to the study, analysis, and practice of immigration law. Most recently, in 2010, the Commission embarked on

[1] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

a comprehensive review of the current system for determining whether a noncitizen should be allowed to stay in the country or removed from the United States. The resulting report, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2010) (*Reforming the Immigration System*),[2] identified more than two dozen proposals for reforming and improving the immigration adjudication system. The ABA respectfully submits this brief to aid the Attorney General in deciding whether and under what circumstances the Board of Immigration Appeals and immigration judges (IJs) should be able to administratively close cases. Although the ABA takes no position on whether administrative closure is warranted in this case, it urges the Attorney General to retain the mechanism as a procedural tool available to the Board and to immigration judges as they strive to administer a balanced and effective adjudicative system.

SUMMARY OF ARGUMENT

Immigration judges and the Board have the authority to order administrative closure, and that authority should not be withdrawn.

The Attorney General has delegated to IJs and the Board the power to "take any action … appropriate and necessary for the disposition" of the cases that are assigned to them. 8 C.F.R. §§ 1003.1(d)(1)(ii), 1003.10(b). That includes the authority to take administrative and ministerial steps necessary to adjudicate those cases—including the power to stay or administratively close cases. The Supreme Court has described the power to defer adjudication of a case as inherent in the authority to decide cases, and that authority is regularly employed without incident by courts. The Justice Department's practice is no different in that regard: The Board and IJs have used

[2] *Available at* https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf.

administrative closure for three decades, and during that time the Department has promulgated more than a dozen regulations that assume that the Board and IJs are empowered to place cases on inactive status. That assumption is correct. Absent express revocation, the Attorney General's delegation of administrative authority to IJs and the Board should be read to encompass the authority to close cases.

Nor should this authority be revoked. Administrative closure serves the interests of both the parties and the court. By suspending activity in cases that are not (and may never be) ripe for adjudication—typically because the noncitizen may well be eligible for immigration relief after the culmination of proceedings in another forum—an IJ can concentrate scarce resources on those cases that *are* priorities, while also saving the parties time and expense. Withdrawing the authority to order closure would clog IJs' dockets with cases that do not need to be adjudicated and exacerbate an already substantial backlog. No other docket-management tool offers the same advantages as administrative closure; in particular, continuances offer IJs and the parties at best a patchwork solution to a problem better addressed in a more systematic and efficient way. Administrative closure offers the court and the parties those benefits.

Finally, if the Attorney General decides to withdraw the authority to order administrative closure, he should not recalendar the hundreds of thousands of closed cases en masse. Doing so would swamp the courts with previously closed cases, exacerbating the heavy burdens faced by IJs and the Board and adding to a backlog that already threatens the system's ability to dispose of cases in a balanced and efficient manner.

ARGUMENT

I. IMMIGRATION JUDGES AND THE BOARD ARE AUTHORIZED TO ORDER ADMINISTRATIVE CLOSURE

A. Department Of Justice Regulations Authorize Immigration Judges And The Board To Order Administrative Closure As A Docket-Management Tool

The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, charges the Attorney General with administering the Nation's system of immigration adjudication. 8 U.S.C. § 1103(g). For more than three decades, the Attorney General has delegated that authority to the Executive Office for Immigration Review (EOIR), which today is made up primarily of the Board of Immigration Appeals and more than 300 immigration judges. *See* Immigration Review Function, Editorial Amendments, 48 Fed. Reg. 8,038 (Feb. 25, 1983) (codified at 8 C.F.R. § 1003.0) (establishing EOIR). Those entities are authorized by law to preside over and to adjudicate immigration proceedings. *See* 8 C.F.R. § 1003.10(b) (authorizing IJs to "conduct[] hearings under section 240 of the [INA] and such other proceedings the Attorney General may assign to them"); *id.* § 1003.1(d)(1) (The Board "shall function as an appellate body charged with the review of those administrative adjudications under the [INA] that the Attorney General may by regulation assign to it.").

Both the INA and the regulations the Attorney General has promulgated to implement it envision an *adjudicative* system—a system of courts and cases—for determining the rights and entitlements of individuals placed into immigration proceedings. Since its enactment, the INA has authorized immigration judges (originally known as "special inquiry officers") to "conduct proceedings for deciding the inadmissibility or deportability of an alien," 8 U.S.C. § 1229a(a)(1)—proceedings in which IJs "administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses," *id.* § 1229a(b)(1), and after which IJs

"shall decide whether an alien is removable from the United States … based only on the evidence produced at the hearing," *id.* § 1229a(c)(1)(A). The INA, in other words, makes clear that a noncitizen will be removed from the United States only after an individualized adjudication occurs.

The regulations promulgated by the Attorney General implement Congress's expectation, instructing IJs to "decid[e] the individual cases before them … subject to the applicable governing standards," 8 C.F.R. § 1003.10(b), and directing the Board to "function as an appellate body charged with the review of … administrative adjudications," *id.* § 1003.1(d)(1). Of particular importance here, those regulations authorize both entities to "exercise their independent judgment and discretion and … *take any action* … appropriate and necessary for the disposition" of their cases. *Id.* § 1003.10(b) (IJs) (emphasis added); *see also id.* § 1003.1(d)(1)(ii) (the Board shall "exercise [its] independent judgment and discretion [and] … may *take any action* … appropriate and necessary for the disposition of the case" (emphasis added)). Thus, although the immigration courts and the BIA are not Article III courts, by design they exercise adjudicative authority, and their processes and modes of decision closely resemble those used by courts across the Nation.

As the regulation makes clear, the Attorney General has entrusted to the Board and to the IJs the authority to take actions they deem necessary to deciding cases. Inherent in that authority to decide cases is the power to decide whether to defer from acting on a particular case at a particular time. The Supreme Court has explained—in the context of Article III courts—that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Clinton v. Jones*, 520

U.S. 681, 706 (1997) (observing that the "discretion to stay proceedings [is] an incident to [the] power to control [a court's] own docket"). The same is true for the BIA and immigration courts; absent the express withdrawal of such authority by the Attorney General or by Congress, they are entrusted to "take any action … appropriate and necessary for the disposition of" their cases, 8 C.F.R. §§ 1003.1(d)(1)(ii), 1003.10(b),—including the entry of a stay of proceedings. *See Landis*, 299 U.S. at 254.

Administrative closure is simply a version of a stay that removes a case from "active status" on a court's docket. In an era of exceptionally heavy caseloads among courts and agencies alike, such a procedural mechanism is a practical necessity. It permits adjudicative entities to concentrate resources on matters in active litigation—a tool "'particularly useful in circumstances in which a case, though not dead, [is] likely to remain moribund for an appreciable period of time.'" *Papotto v. Hartford Life & Acc. Ins. Co.*, 731 F.3d 265, 275 (3d Cir. 2013) (quoting *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 247 (3d Cir. 2013)). Courts regularly employ administrative closure, or similar practices known by slightly different names. The Third Circuit has described it as "an established practice among district courts" in that circuit, *id.* at 275, and it is widely accepted by courts in circuits across the country. *See, e.g.*, *St. Marks Place Hous. Co. v. HUD*, 610 F.3d 75, 81 (D.C. Cir. 2010); *CitiFinancial Corp. v. Harrison*, 453 F.3d 245, 250 (5th Cir. 2006); *Lehman v. Revolution Portfolio, LLC*, 166 F.3d 389, 392 (1st Cir. 1999); *see also* 15A Charles A. Wright et al., *Federal Practice and Procedure* § 3914.6 & n.29 (2d ed. 1992 & 2017 Supp.) (collecting cases). There is nothing unusual about the practice; it is no more than "a familiar, albeit essentially ad hoc, way in which courts remove cases from their active files without making any final adjudication." *Lehman*, 166 F.3d at 392. There is no obstacle to its use by IJs and the Board.

B. The Department's Own Longstanding And Consistent Use Of Administrative Closure Underscores The Practical Utility Of The Procedure

Consistent with the principles discussed above, the Board and IJs have employed administrative closure without incident as a docket-management tool for at least three decades. During that time, the Department has promulgated several regulations and has issued guidance premised on the availability of administrative closure as a procedural mechanism and providing instructions for its use. The tool is by now familiar, unremarkable, and widely used.

The Board's approval of administrative closure dates at least to its 1988 opinion in *Matter of Amico*, 19 I. & N. Dec. 652 (BIA 1988). In *Amico*, the respondent had sought and received three continuances, but when he failed to appear for a fourth hearing, the IJ administratively closed the case. Although the Board reversed in that case on the ground that administrative closure was not appropriate under those particular circumstances, the Board recognized that IJs have the power to order administrative closure in appropriate circumstances. "The administrative closing of a case," the Board explained, "is merely an administrative convenience which allows the removal of cases from the calendar in appropriate situations." *Id.* at 654 n.1.

Administrative closure has since become widely recognized as an essential aspect of immigration courts' authority and ability to manage their dockets so that they can focus on cases requiring immediate attention. Over the last three decades, more than 1,000 Board opinions have evaluated parties' requests for administrative closure. The ABA is not aware of any opinion in which any Board member has suggested the need to reexamine whether immigration judges have the authority to order administrative closure.

Moreover, the Board's opinions demonstrate that IJs do not indiscriminately terminate cases, but rather properly employ administrative closure in certain sets of circumstances where that tool is most needed and appropriate. Most common are cases in which, as the Board observed in *Matter of Avetisyan*, the most efficient disposition of a case requires the parties and the court to "await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time." 25 I. & N. Dec. 688, 692 (BIA 2012). For instance, a noncitizen may have submitted a visa petition to U.S. Citizenship and Immigration Services (USCIS), *see Matter of Hashmi*, 24 I. & N. Dec. 785, 791 n.4 (BIA 2009), or may be awaiting a certification from a law enforcement agency that she has been helpful to an ongoing criminal investigation, a predicate to obtaining a U-visa, *see Matter of Sanchez-Sosa*, 25 I. & N. Dec. 807, 811 (BIA 2012). In cases like those, "[a]dministrative closure is an attractive option, as it will assist in ensuring that only those cases that are likely to be resolved are before the Immigration Judge." *Hashmi*, 24 I. & N. Dec. at 791 n.4.[3]

[3] Over the last seven years, administrative closure has been used to implement the Department of Homeland Security's decision to exercise prosecutorial discretion with respect to persons in removal proceedings. *See* Memorandum from Riah Ramogan, Acting Principal Legal Advisor, U.S. Immigration & Customs Enforcement, to OPLA Attorneys 2, Apr. 6, 2015, https://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance_eoir_johnson_memo.pdf (explaining that ICE attorneys "should generally seek administrative closure or dismissal of cases it determines are not priorities"). Although the ABA generally supports the use of prosecutorial discretion in immigration proceedings, *see Reforming the Immigration System*, *supra*, at 1-60, the authority to order administrative closure is independent of the power to exercise prosecutorial discretion. Enforcement priorities are for the Department of Homeland Security (DHS), not the immigration courts, to set. *See Matter of W-Y-U-*, 27 I. & N. Dec. 17, 19 (BIA 2017) ("[I]n considering administrative closure, an Immigration Judge cannot review whether an alien falls within the DHS's enforcement priorities or will actually be removed from the United States."). A decision to retain the use of administrative closure would not affect DHS's authority to set or alter those priorities at any time.

Regulations promulgated by the Department of Justice recognize that administrative closure is important to the Department's efficient and balanced implementation of the INA. Over the last two decades, the Department has promulgated more than a dozen regulations that expressly link immigration relief to the availability of administrative closure. Some regulations directly condition relief on a person's ability to obtain administrative closure. The regulations governing provisional unlawful presence waivers, for instance, prohibit a noncitizen in removal proceedings from applying for such a waiver "unless [his or her] removal proceedings are administratively closed and have not been recalendared at the time of filing the application." 8 C.F.R. § 212.7(e)(4)(iii). The regulations implementing the V-visa program operate similarly: An individual in removal proceedings who believes she is eligible for a V-visa is directed to move for administrative closure, and IJs are instructed to grant such closure if the individual appears to be eligible for relief. *See id.* § 1214.3 (IJ "*shall* administratively close the proceeding" in such a case (emphasis added)).[4] These regulations plainly presuppose the availability of administrative closure; indeed, if IJs and the Board were not authorized to order it, these regulations would point noncitizens seeking relief toward a dead end.

Finally, the Department has also repeatedly issued guidance documents recognizing that administrative closure allows the Board and IJs to more efficiently manage their dockets. In 2013, the Chief Immigration Judge issued Operating Policies and Procedures Memorandum (OPPM) 13-01, which described administrative closure as "a docketing tool that has existed for decades," and "strongly encouraged" IJs "to utilize administrative closure in appropriate cases."

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[4] For other examples, *see* 8 C.F.R. §§ 214.11(d)(1)(i), 1214.2(a) (regulations governing T-visas); *id.* §§ 245a.12(b), 245a.20(a)(1) (LIFE Legalization); *id.* §§ 245.13(d)(3), 1245.13(d)(3) (NACARA); *id.* §§ 245.15(p)(4), 1245.15(p)(4) (HRIFA); *id.* §§ 245.21(c), 1245.21(c) (Indochinese Parole Adjustment Act); and *id.* §§ 1240.62(b)(1)(i), 1240.70(f)- (g) (*ABC* benefits).

OPPM 13-01 at 3-4, Mar. 7, 2013, https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/08/13-01.pdf; *see also id.* at 4 ("Administrative closure under the standards set forth in *Avetisyan* provides judges with a powerful tool to help them manage their dockets ….").[5] A 2015 memorandum from the Chief Immigration Judge further directed that in certain cases in which a noncitizen is seeking relief in another forum, "the case *must* be administratively closed or reset for that process to occur." Memorandum from Brian M. O'Leary, Chief Immigration Judge, to All Immigration Judges 2, Mar. 24, 2015, http://bit.ly/2GbwKjZ (hereinafter O'Leary Memo.) (emphasis added). As those agency documents reflect, administrative closure has become an integral component of the Department's efforts to ensure that the immigration adjudication system is efficient and balanced.

C. The Factors Set Out In *Avetisyan* And *W-Y-U-* Offer Appropriate Guidance To IJs And The Board

The decision whether to order administrative closure is well suited to the sound discretion of IJs and the Board. The factors set out in the Board's opinion in *Avetisyan* (as modified by its opinion in *W-Y-U-*) offer useful guidance to IJs and the Board in the exercise of that discretion.

The Board explained in *Avetisyan* that, as a general matter, IJs and the Board should weigh six factors in considering whether administrative closure is justified:

> (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is recalendared before the Immigration Judge or the appeal is reinstated before the Board.

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[5] OPPM 13-01 was supplemented and amended last year by OPPM 17-01, but OPPM 17-01 addresses continuances only; it does not discuss administrative closure. *See* OPPM 17-01 at 1, July 31, 2017, https://www.justice.gov/eoir/file/oppm17-01/download.

25 I. & N. Dec. at 696. As the Board observed in *Avetisyan*, these factors are similar to the factors used by IJs when evaluating motions to reopen and requests for continuances. *Id.* The Board has emphasized that administrative closure is not appropriate where a noncitizen without a reasonable prospect of obtaining relief merely seeks to delay the adjudication of his case "as a dilatory tactic to forestall the conclusion of removal proceedings." *Sanchez-Sosa*, 25 I. & N. Dec. at 815.

The *Avetisyan* factors, at their core, instruct the decisionmaker—the Board or an IJ—to weigh the reasons administrative closure is sought against the reasons (if any) that it is opposed, with an eye toward "the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings" as well as "the ultimate outcome of removal proceedings." 25 I. & N. Dec. at 696. As the Board clarified last year in *Matter of W-Y-U-*, in other words, at least where administrative closure is opposed by one party, "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." 27 I. & N. Dec. at 20. Unsurprisingly, this practical balancing of interests is exactly what courts do when deciding whether to grant an opposed request for a stay. *See, e.g.*, *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 732-33 (D.C. Cir. 2012) (a court should "'weigh competing interests and maintain an even balance' … between [its] interests in judicial economy and any possible hardship to the parties" (quoting *Landis*, 299 U.S. at 254-55)); *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (similar). As those decisions recognize, administrative closure is appropriate where the interest in pausing proceedings is weightier than the interest in allowing them to proceed.

That standard will generally be met where a noncitizen has a realistic possibility of obtaining immigration relief in another forum. As the Board has repeatedly held, a noncitizen with an application pending in another forum that appears to meet the relevant criteria for relief is a paradigmatic candidate for administrative closure. *See Avetisyan*, 25 I. & N. Dec. at 696 (administrative closure appropriate where a noncitizen "has properly appealed from the denial of a prima facie approvable visa petition"); *see also Sanchez-Sosa*, 25 I. & N. Dec. at 815; *Hashmi*, 24 I. & N. Dec. at 790. A noncitizen need not establish that it is absolutely certain he or she will obtain relief in another forum; rather, it should be enough to show that the prospect of obtaining such relief is real, not "purely speculative." *Avetisyan*, 25 I. & N. Dec. at 696; *see also Matter of Montiel*, 26 I. & N. Dec. 555, 557 (BIA 2015) (administrative closure often appropriate where a defendant appeals his criminal conviction). By contrast, where the prospect of relief is remote or speculative, the equities would generally tilt in the other direction, and administrative closure would not be warranted. *Avetisyan*, 25 I. & N. Dec. at 696.

II. WITHDRAWAL OF ADMINISTRATIVE CLOSURE AUTHORITY WOULD COMPROMISE THE INTEGRITY, EFFICIENCY, AND FAIRNESS OF THE IMMIGRATION ADJUDICATION SYSTEM

A. The ABA Has A Longstanding Commitment To The Integrity, Efficiency, And Fairness Of The Immigration Adjudication System

For decades, the ABA and its members have devoted significant resources to the study, analysis, and practice of immigration law. In doing so, the ABA has expended particular time and energy studying the immigration adjudication system—most recently in its comprehensive 2010 study of removal proceedings, *Reforming the Immigration System*, *supra*. That study concluded—echoing the observations of numerous stakeholders and commentators—that the

adjudication system is seriously underfunded and under-resourced, creating significant problems for IJs and noncitizens alike.

It is widely recognized that the immigration adjudication system is under-resourced. In Fiscal Year 2016, more than 328,000 new matters were filed in immigration courts across the country. U.S. Dep't. of Justice, Exec. Office for Immigration Review, *FY 2016 Statistics Yearbook*, A2 & Fig. 1 (Mar. 2017) (hereinafter *FY 2016 Yearbook*), https://www.justice.gov/eoir/page/file/fysb16/download. Such a workload is exceptionally challenging for the Nation's immigration judges to process. Doing so without adding to the backlog would require each IJ to process roughly 20 matters each week, or four matters each weekday—a grueling pace for any court. And the already existing backlog is immense; as of December 2017, more than 667,000 cases were pending on immigration court dockets across the country. *See* Syracuse Univ., Transactional Records Access Clearinghouse (TRAC), *Hot Spots With Highest Growth in Immigration Court Backlog*, http://trac.syr.edu/immigration/reports/497/ (last accessed Feb. 14, 2018). On average, those cases have been pending for 708 days, or just under two years. Syracuse Univ., TRAC, *Immigration Court Backlog Tool*, http://trac.syr.edu/phptools/immigration/court_backlog/ (last accessed Feb. 14, 2018).

The gap in resources available to immigration courts makes it difficult for them to render justice in an efficient and thorough manner. As *Reforming the Immigration System* describes, the demands placed on immigration judges by the current backlog are substantial: They are required to issue multiple reasoned decisions each day with little support by administrative staff or law clerks. *Supra*, at 2-17. Those burdens have exacted a systemic toll on IJs; as one 2008 study recounts, immigration judges report "higher levels of burnout than any other professional group" tested, "including physicians in busy hospitals and prison wardens." *Id.* It is no surprise that IJs

often do not issue reasoned written decisions, *id.* at 2-26; that there are wide and striking disparities among IJs regarding grant rates for various forms of immigration relief, *id.* at 2-15; and that, as a result, stakeholders across a variety of contexts have expressed a concern of the quality of the adjudications that take place in immigration courts, *id.* at 2-16.

B. The Withdrawal Of Administrative Closure Authority Would Compromise The Integrity, Efficiency, And Fairness Of The Immigration Adjudication System

Any decision to discontinue the use of administrative closure would be counterproductive to ongoing efforts to improve the immigration adjudication system.[6]

First, the withdrawal of administrative closure authority would dramatically increase the workload of immigration judges and the BIA. As noted above, the immigration courts are struggling under an enormous backlog of cases: As of December 2017, more than 667,000 matters are pending before IJs nationwide, with many individuals waiting years to receive a hearing. Administrative closure offers one mechanism for releasing some of the pressure on this embattled system. By closing cases that are not priorities, IJs can focus on the most pressing and serious cases and hold other cases in abeyance—often with ICE's agreement. In FY 2016, more than 48,000 cases were administratively closed, representing one in four immigration cases "completed" that year. *See FY 2016 Yearbook*, at A8, C5-C7.

Revoking administrative closure authority would work serious damage to the efficient processing of cases through the system, as these figures illustrate. The addition of more than

[6] Because existing regulations delegate docket management authority to IJs and the Board, thus authorizing administrative closure, *see supra* pp. 4-10, no additional delegation of authority is required to maintain present practices. If the Attorney General concludes that an express delegation is required, however, the ABA urges him to promptly promulgate regulations delegating the authority to administratively close cases, for the reasons set out in this section.

48,000 cases annually to the immigration courts' merits dockets would make it even more difficult for IJs to render decisions in an efficient and thorough manner while simultaneously increasing the pressure on IJs to issue hasty or unreasoned decisions. There is simply no good reason to add thousands of low-priority cases to IJs' already-crowded dockets.

Second, the withdrawal of administrative closure authority would impede meaningful access to relief for many individuals who have meritorious claims. As noted above, the paradigmatic case for administrative closure is a person who may qualify for immigration relief upon the completion of some *other* administrative or judicial process—obtaining the predicate findings necessary to qualify for a U-visa, for instance, *see* 8 C.F.R. § 214.14, or waiting for one's priority date to arrive, *see Hashmi*, 24 I. & N. Dec. at 790. *See also id.* at 791 n.4 ("Administrative closure is an attractive option in these situations, as it will assist in ensuring that only those cases that are likely to be resolved are before the Immigration Judge.").

Withdrawing the authority from IJs and the Board to administratively close proceedings would make it considerably more difficult for those individuals to obtain relief. In the absence of administrative closure, IJs confronted with such cases will either issue continuance after continuance to allow noncitizens to pursue relief in another forum or will issue final orders of removal, pretermitting those proceedings. Neither course is appropriate or desirable in an efficient and balanced adjudicative system. An increased reliance on continuances would be highly detrimental to the effective operation of the courts, forcing IJs and the parties to expend valuable time and resources on cases that do not need to be adjudicated, while simultaneously exposing noncitizens to the risk that their attorneys will fail to notify them of a subsequent hearing date, among other perils. And entering final orders of removal when an immigrant has a fair likelihood of obtaining immigration relief—for instance, a person with a *prima facie* valid

visa application pending—is arbitrary and contrary to the Immigration and Nationality Act's recognition that certain classes of individuals are deserving of relief. A decision to withdraw administrative closure authority, in other words, is not an abstract or procedural one; it would have profound and long-lasting consequences on the operation of the immigration adjudication system and the lives of those who must proceed through it.

C. Other Procedural Tools, Including Continuances, Dismissal, And Termination Of Proceedings, Are Not Effective Substitutes For Administrative Closure

The Attorney General has also asked whether other existing docket management tools—specifically, a continuance for good cause shown, dismissal without prejudice, and termination without prejudice—can substitute for administrative closure. Although those mechanisms are also important tools for docket management and efficient adjudication of cases, they cannot serve as effective substitutes for administrative closure.

A continuance for good cause, *see* 8 C.F.R. § 1003.29, offers the parties only a temporary window of time to seek relief elsewhere. As the Board observed in *Avetisyan*, "[b]ecause it keeps a case on the Immigration Judge's active calendar, a continuance may be appropriately utilized to await additional action required of the parties that will be, or is expected to be, completed within a reasonably certain and brief amount of time." 25 I. & N. Dec. at 691. But many of the judicial and administrative processes that warrant the use of administrative closure will take extended or unpredictable amounts of time to complete. For example, an application for a U-visa must be accompanied by a certification from a law enforcement officer, a process that may take time, especially if a criminal investigation is ongoing. *See* O'Leary Memo., *supra*, at 2. An even longer wait may occur where a person in removal proceedings has submitted a

visa petition to USCIS and must await the arrival of her priority date before she can apply for adjustment of status. *See Hashmi*, 24 I. & N. Dec. at 790.

The parties and the court could perhaps fashion a makeshift replacement for the current system by seeking and granting repeated continuances. *See Hashmi*, 24 I. & N. Dec. at 791 n.4 (describing "the repeated rescheduling of a case that is clearly not ready to be concluded"). Even if EOIR were to acquiesce to such a system, *but see* OPPM 17-01, *supra*, at 2 (memorandum from Chief Immigration Judge discouraging IJs from "granting multiple and lengthy continuances"), such a wasteful regime would serve no conceivable end. It would require the parties to continually reappear for hearings at which nothing would occur—in some cases traveling hundreds of miles to do so—and would squander the time and resources of the parties and the immigration judge alike. The advantages of efficiency offered by administrative closure cannot be found in a patchwork system of continuances.[7]

The increased use of dismissal or termination of proceedings in lieu of administrative closure, by contrast, might be beneficial to noncitizens in immigration proceedings, but it could seriously and unnecessarily inconvenience the ICE attorneys for whom administrative closure offers an equally convenient method of docket management. Whereas administrative closure *pauses* immigration proceedings, dismissal and termination without prejudice *end* those proceedings. *See* 8 C.F.R. § 1239.2(c), (f). The consequences for ICE are significant: To bring an administratively closed proceeding back before the IJ or the Board, ICE must merely move to

[7] If the Attorney General determines that the Board and IJs do not or should not have the authority to order administrative closure, he should swiftly take whatever steps are necessary to ensure that individuals in removal proceedings are eligible to apply for forms of relief currently limited only to those who obtain administrative closure. *See, e.g.*, 8 C.F.R. § 212.7(e)(4)(iii) (limiting provisional unlawful presence waiver to those who obtain administrative closure).

recalendar it, *see W-Y-U-*, 27 I. & N. Dec. at 20, whereas to resuscitate a terminated case ICE must file another Notice to Appear, effectively starting from scratch. *See Avetisyan*, 25 I. & N. Dec. at 695 ("[A]dministrative closure differs from termination of proceedings, where the Immigration Judge or the Board issues a final order, which constitutes a conclusion of the proceedings and which … would require the DHS to file another charging document to initiate new proceedings."). Only administrative closure offers both parties—the noncitizen and ICE—the efficiency and predictability needed to effectively administer the adjudication system.

III. IF THE ATTORNEY GENERAL WITHDRAWS ADMINISTRATIVE CLOSURE AUTHORITY, HE SHOULD NOT RECALENDAR CLOSED CASES EN MASSE

The Attorney General finally asks what consequences should follow if he determines that the Board and IJs do not or should not have the authority to order administrative closure.

The Attorney General should not disturb the thousands of cases that have been administratively closed over the last three decades. Some have estimated the number of administratively closed cases at more than 350,000. A mass recalendaring of 350,000 cases would flood the immigration courts, crippling them beyond their ability to recover. By far the better course, if the Attorney General decides to withdraw the authority to administratively close cases, would be to allow ICE to move to recalendar these cases on an individual basis—as the current regime already does. *See W-Y-U-*, 27 I. & N. Dec. at 18 ("[E]ither party may move to recalendar [a closed case] before the Immigration Court … or to reinstate the appeal before the Board."). That would allow ICE to prioritize those closed cases that it believes require revisiting, while permitting persons who are not enforcement priorities to retain their closed-case status. And it would allow the already-flooded immigration courts to cope with their increased workload in a more deliberate and resource-effective way.

CONCLUSION

For the foregoing reasons, the Attorney General should retain administrative-closure authority and continue to encourage its use.

Respectfully submitted,

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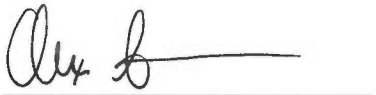
CERTIFICATE OF COMPLIANCE

Pursuant to Order No. 4090-2018, I hereby certify that this brief contains 5,636 words.



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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2018, I caused this brief to be served on the Attorney General of the United States by sending electronic and paper copies to the address below via U.S. first-class mail:

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