Operational Mechanics for Proposed EOIR Headquarters-Led Docket Review and Refresh

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This memorandum is intended as a follow up to two memos proposing a review and refresh of Executive Office of Immigration Review's ("EOIR") docket during the incoming administration's contemplated deportation moratorium period.[1] The purpose of this memorandum is to propose specific operational steps EOIR can take to implement the systematic review and refresh of the EOIR docket proposed in the Chen & Markowitz Memorandum, in a manner that will promote efficient and effective implementation while minimizing litigation exposure.[2] The analysis and policy justifications set forth in that previous memorandum are not repeated herein and familiarity with its contents is presumed.

Overview

Each recommended operational step is detailed in the sections below. In summary, those steps are:

1. *Moratorium Deferral Order* – On day one of the new administration, the Attorney General ("AG" or Deputy Attorney General ("DAG") would order the EOIR Director ("Director") to defer all non-detained cases with hearings scheduled within a 100-day period ("Moratorium Period") and defer issuance of any decisions by the immigration court or Board of Immigration Appeals ("BIA") within that period ("Moratorium Deferral Order").

2. *Identification of Low Priority Cases* – EOIR Headquarters would then immediately undertake a systematic analysis of EOIR case data to identify all pending cases (both detained and non-detained) that fit within four low priority categories, which can be identified through such existing data without the need for a case-by-case individualized review.

3. *Notices of Intent to Defer Low-Priority Case* – Thereafter, at the direction of the AG or DAG, the Director would issue notices in the identified low priority cases stating an intent to defer adjudication for a five-year period under 8 C.F.R. § 1003.0(b)(1)(ii) ("Notices of Intent to Defer"). The notices would direct Department of Homeland Security ("DHS") to consider whether dismissal of the cases is appropriate under 8

[1] *Year One Recommendations to the Executive Branch: Interior Enforcement, Affirmative Relief, and Temporary Protected Status*, December 14, 2020 [hereinafter Community Change Memorandum]; Greg Chen & Peter Markowitz, *Recommendations for DOJ and EOIR Leadership to Systematically Remove Non-Priority Cases from the Immigration Court Backlog*, December 21, 2020 [hereinafter Chen & Markowitz Memorandum].

[2] It would be challenging for an entity outside the federal government, other than respondents in removal proceedings, to establish standing to challenge any of the policies proposed herein. Since these proposals would dramatically improve the fairness and promote just outcomes for respondents, such individuals would be unlikely to initiate legal challenges. Nevertheless, out of an abundance of caution, we discuss the legal merits of the proposals herein assuming such standing would exist.

C.F.R. § 239.2(c) because the notice to appear in this low priority case was "improvidently issued" or continuation is "no longer in the best interest of the government."[3] In addition, the notices would direct that, within sixty days, DHS should file such motion, if warranted, and either party should file any objections to the Notice of Intent to Defer.

4. *Motions to Dismiss and Objections to Deferral* – Within sixty days, DHS may file a motion to dismiss and either party could file an objection to a Notice of Intent to Defer with the presiding immigration judge ("IJ") or, in appropriate cases, with the BIA. Such objections would be limited to any assertion that the case does not actually fit within a designated low priority category or that a party would be prejudiced by the deferral.

5. *IJ or BIA Review and Dismissals or Deferral Recommendations* – The presiding IJ or, in appropriate cases, the BIA would review any DHS motion to dismiss and any objections to the Notice of Intent to Defer. Absent extraordinary circumstances, such motions should be granted. If the case is not dismissed and objections were filed, the IJ or BIA would make a recommendation to the EOIR Director whether or not to order the contemplated deferral.

6. *Director Deferral Orders in Low-Priority Case* – Unless the case has been dismissed, the Director would then defer, for a five-year period, the adjudication of all cases where a Notice of Intent to Defer was issued and no objections were filed. For cases where objections where filed, the Director would establish a centralized EOIR Headquarters process to review IJ and BIA recommendations and issue five-year Director deferrals in appropriate cases.

7. *Post-Moratorium Period Individualized Deferral Mechanism* – For cases where no five-year deferral order was issued by the Director, at the first hearing following the conclusion of the Moratorium Period, the IJ, with input from the parties, would consider the appropriateness of dismissal or deferral based on the individualized circumstances of the case. For cases pending before the BIA, respondents should be afforded an opportunity to submit similar individualized requests for DHS motions to dismiss or for EOIR deferral in writing. Where appropriate, the IJ or BIA would encourage DHS to move to dismiss the case under 8 C.F.R. § 239.2(c). If DHS declines to so move, the IJ or BIA may make a recommendation to the Director to issue a five-year deferral.

8. *Administrative Steps to Facilitate the Disposition of Deferred Cases* – EOIR and DHS have a number of potential tools at their disposal to facilitate the ultimate disposition of low priority deferred cases. Examples of such tools are discussed in this section.

A detailed explanation of each of these eight steps is set forth below.

Step One: Moratorium Deferral Order

[3] *See* 8 C.F.R. § 239.2(c) (permitting DHS to move to dismiss any case where the notice to appear was "improvidently issued" or where "continuation is no longer in the best interest of the government" (incorporating grounds enumerated in 8 C.F.R. § 239.2(a))); 8 C.F.R. § 1239.2 (same). *See also Matter of S-O-G- & F-D-B-*, I&N Dec. 462, 464 (A.G. 2018) (reaffirming DHS authority to move to dismiss on such bases).

The President-Elect has stated his intention to order a 100-day moratorium on deportations on day one of the Biden-Harris Administration. This Moratorium Period should be used to put in place a number of reforms and policies that are essential to ensure that the immigration enforcement system is humane, fair, and effective. The Department of Justice (“”DOJ”) and EOIR leadership should use this Moratorium Period to aggressively review personnel and policies put in place during the Trump administration and to begin to unwind ill-conceived Trump-era regulatory changes and administrative decisions. In addition, that period should be used by DOJ and EOIR leadership to substantially reduce the unprecedented backlog of removal cases clogging the EOIR docket. This step is essential to the eventual efficient disposition of all pending cases.

In order to create capacity for those steps and to ensure that no person is inappropriately removed before such efforts can be completed:

> On day one of the new administration, the AG or DAG should order the EOIR Director to defer adjudication of all non-detained removal cases, before both IJs and the BIA, for 100 days.[4] The immigration court would be directed to reschedule any hearing during that period and both the IJs and the BIA would be directed not to issue any decisions during that period.

The EOIR Director has authority to “direct that the adjudication of certain cases be deferred” under 8 C.F.R. § 1003.0(b)(1)(ii). The Director’s deferral authority is plain on the face of the regulation has been recently been reaffirmed in *Matter of Castro-Tum*, 27 I. & N. Dec. 271, 286 (A.G. 2018), and in both the final rule and notice of proposed rulemaking limiting IJ and BIA administrative closure authority.[5] Indeed, systemwide deferrals have previously been implemented by EOIR leadership through policy memorandum without a challenge.[6]

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[4] It may be that 100 days is not sufficient to complete all work essential to ensure that the immigration enforcement system is humane, fair, and effective. The administration should not be wedded to an arbitrary 100-day period if additional time is needed, in which case the Moratorium Period could be extended through subsequent order of the Director.

[5] *See* 8 C.F.R. § 1003.10(b) (effective Jan. 15, 2021) (“Only the Director or Chief Immigration Judge may direct the deferral of adjudication of any case or cases by an immigration judge.”); 8 C.F.R. § 1003.1(d)(1)(ii) (effective Jan. 15, 2021) (“Only the Director or Chief Appellate Immigration Judge may direct the deferral of adjudication of any case or cases by the Board.”); *see also* Final Rule, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 81588-01 (“Moreover, both the Director and the Board Chairman already possess longstanding authority to defer adjudication of Board cases, 8 C.F.R. § 1003.0(b)(1)(ii) and 1003.1(a)(2)(i)(C).”); Notice of Proposed Rulemaking, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 52491 (critiquing *Matter of Avetsiyan*, 26 I. & N. Dec. 688 (BIA 2012), for not addressing “regulatory provisions that assign the authority to defer adjudication of cases to the Director, the Board Chairman, and the Chief Immigration Judge—but not to immigration judges or Board members themselves) (*citing* 8 C.F.R. §§ 1003.0(b)(1)(ii), 1003.1(a)(2)(i)(C), 1003.9(b)(3)).

[6] *See e.g.,* EOIR, Policy Memorandum: *Immigration Court Practices During The Declared National Emergency Concerning the COVID-19 Outbreak,* PM 20-10, fn.2, March 18, 2020 available at https://www.justice.gov/eoir/file/1259226/download (deferring all non-detained cases at the outset of the pandemic for a limited period of time); EOIR, Notice: *Executive Office for Immigration Review Operation During Lapse in Government Funding*, October 1, 2013 available at https://www.justice.gov/eoir/legacy/2013/10/24/Shutdown09302013.pdf (deferring all non-detained cases during government shutdown)

Accordingly, an order from the EOIR Director deferring all non-detained removal cases for the duration of the moratorium is within the Director's regulatory authority and is unlikely to prompt serious legal challenge. However, to best insulate such order from any potential legal challenge, the Director should make clear through implementing memorandum:

- That the purpose of the deferral is to facilitate the "efficient disposition of all pending cases." 8 C.F.R. § 1003.0(b)(1)(ii). The reality is that the current unprecedented backlog is a significant obstacle to this goal. Accordingly, a temporary pause in adjudications to allow EOIR to develop a coherent system of prioritization and to implement key personnel and policy changes, is necessary to the long-term efficient disposition of all pending cases.

- That the deferral does not apply to all cases. While the authorizing regulation requires the Director to "ensure the efficient disposition of *all* pending cases" it only authorizes the deferral of "*certain* cases." 8 C.F.R. § 1003.0(b)(1)(ii) (emphasis added). Limiting the deferral to non-detained cases should satisfy the "certain cases" limit, if it imposes any.

One operational concern with the blanket non-detained deferral of cases is the need to ensure that the delay caused by deferral does not prejudice the parties. This should only occur in a small category of unusual cases. Examples of such prejudice include respondents with pending non-LPR cancellation applications if an impacted child would become too old during the deferral period to be considered a child under 8 U.S.C § 1229b(1)(d). *See Matter of Isidro*, 25 I. & N. Dec. 820 (BIA 2012). Other such cases could involve a *pro se* respondent who was ordered to prepare an asylum application for submission at the next master calendar hearing (MCH) who could be prejudiced if the deferral period pushes the next MCH beyond the one-year asylum filing deadline. *See* 8 U.S.C. § 1158(a)(2)(B); 8 C.F.R. § 208.4(a)(2). In other cases, the individual circumstances of the respondent or her family could necessitate the swift resolution of the proceeding and thus the deferral could be prejudicial. Either party could be prejudiced in rare cases if the deferral were to compromise access to a potential witness. The implementing memorandum should make clear that DHS' general interest in speedy adjudication is insufficient to constitute such prejudice. Accordingly, to avoid such prejudice, the Director should:

- Send notifications to all parties with hearings that were scheduled during the Moratorium Period of the deferral ("Moratorium Deferral Notices"). The notice should provide a mechanism for either party to object to the Moratorium Deferral if they believe they may be prejudiced by the delay in their proceedings. A non-exhaustive list of examples of the types of situations where such prejudice could arise should be provided in the notice to assist *pro se* individuals in identifying potential prejudice. In addition, the assigned DHS assistant chief counsel and immigration judge should be directed to endeavor to identify any such potential prejudice in *pro se* cases. If any party, or the immigration judge, identifies potential prejudice, the case should proceed as necessary to avoid such prejudice or, if the scheduled hearing date has passed, should be immediately rescheduled during the Moratorium Period.

- The Director's implementing memorandum should also toll all deadlines imposed by the immigration judges or BIA during the deferral period and, to the extent such deadlines are imposed by regulation or statute, provide guidance to IJs and the BIA to liberally construe exceptions to such deadlines, to the extent permissible by law, to be satisfied by the unique circumstances of the deferral order.[7]

Step Two: Identification of Low Priority Cases.

During the moratorium period, pursuant to the initial guidance of the AG or DAG, EOIR Headquarters should systematically identify large categories of low priority cases. Even though the Moratorium Deferral Order pertains only to non-detained cases, this step, and all subsequent steps, pertains to *all* pending cases, whether or not detained. The Chen & Markowitz Memorandum recommends that EOIR use existing data in EOIR's case management system to identify four categories of such low priority cases. *See* Chen & Markowitz Memorandum, pp. 2-5. Those four categories are: 1) old cases pending for years; 2) cases eligible for relief that could potentially be adjudicated affirmatively by U.S. Citizenship and Immigration Services ("USCIS"); 3) cases previously administratively closed under the Obama administration but reopened during the Trump Administration; and 4) cases in which the grounds for removability are based on a drug use offense (collectively the "Low Priority Systematic Deferral Categories").[8] Those four categories of cases can be identified by EOIR in a systematic manner at a headquarters level in the following manner:

Category 1: Old Cases Pending for Years

This category suggests that EOIR should explicitly deprioritize cases that have been de facto deprioritized insofar as they have been pending before EOIR for more than five years. These cases can be easily identified in the EOIR Case Data,[9] as it includes a field for the date of the filing of the Notice to Appear (NTA).[10] Any case with an NTA filing date more than five years

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[7] EOIR Director McHenry put in place certain ill-advised policies rushing immigration cases to disposition. *See, e.g.*, Memorandum from James R. McHenry III, EOIR Director, *Enhanced Case Flow Processing in Removal Proceedings* (Nov. 30, 2020). To the extent such memoranda are not immediately withdrawn, the Director should clarify that the deferral directive overrides any contrary provision in previous guidance and constitutes an exception to any conflicting regulatory provision, to the greatest extent permissible under law.

[8] These four categories are a subset of the categories of cases recommended in the Community Change Memorandum for removal from the EOIR docket. *See* Community Change Memorandum, pp. 14-16. The categories discussed above are limited to those that can be identified systematically, without a case-by-case review. EOIR identification of such cases systematically would facilitate the case-by-case review proposed in the Community Change Memorandum by significantly shrinking the haystack and, thereby, enable DHS to conduct a case-by-case review of the remaining cases for the categories that cannot be systematically identified through existing EOIR data. *See also* discussion *supra* at Step Seven. Such remaining categories, that would require a case-by-case review include, for example, cases involving individuals who care for minor children and cases where the charges are stale, as the basis for removal is more than five years old. *Id*. at 3-6

[9] "EOIR Case Data" refers to the publicly available EOIR Case Data posted on EOIR's FOIA Reading Library, *see* DOJ, Executive Office for Immigration Review, Freedom of Information Act, EOIR Case Data (November 2020), *available at* https://www.justice.gov/eoir/foia-library-0. Once President-Elect Biden takes office, his designees will have full access to more up-to-date and additional EOIR data, as well as career personnel with expertise in such data. Accordingly, additional mechanisms are likely available to refine and improve upon the identification methodology proposed herein.

[10] This field is called "osc_date" and is included in the table called "B_TblProceeding."

prior to the conclusion of the moratorium deferral period should be deemed low priority. Using this methodology, we identified 215,787[11] low priority pending cases.[12] This represents 17 percent of the current case backlog.[13]

Category 2: Cases Eligible for Relief that could be Adjudicated by USCIS

This category suggests that EOIR should deprioritize cases pending before EOIR where the respondent has a potential pathway to status that could be adjudicated affirmatively by USCIS. It is not possible to identify every such case systematically using EOIR data. However, many such cases can be systematically identified through existing EOIR data.

First, EOIR Headquarters could identify such cases by searching the EOIR Case Data field for application type[14] for cases with pending application that could be affirmatively adjudicated by USCIS. Such application types (all of which are uniquely coded in the EOIR Case Data), include: NACARA adjustment; removal of conditions on LPR's status; section 245 adjustment of status; registry; Haitian Refugee Immigration Fairness Act; asylum or asylum/withholding (hereinafter collectively "Qualifying Relief Applications").[15]

Second, for cases where the only Qualifying Relief Applications is asylum or asylum/withholding, EOIR Headquarters would need to identify and exclude cases where a previous affirmative asylum application has been adjudicated by USCIS' Asylum Office and resulted in a referral for removal proceedings. Such cases could be identified in the EOIR Case Data through the field that indicates asylum applications that were initiated affirmatively.[16] An additional source of data on such cases could come from USCIS. Once such cases are excluded, there are 439,545 unique cases that had at least one of the Qualifying Relief Applications.

Third, for cases where USCIS has sole authority to adjudicate affirmative pathways to relief (usually involving some type of predicate application), relevant applications will not appear in the application type field of the EOIR Case Data. Such applications include, for example: I-360 Petition for Special Immigrant; I-918, Petition for U Nonimmigrant Status; and I-130 Petition for Alien Relative. One way to identify the existence of individuals with such USCIS applications is to search the EOIR Case Data for cases where the reason for the most recent adjournment was coded as 7a or 7b, which indicate the adjournment was related to an application pending before USCIS.[17] However, based upon the relatively low number of cases coded as such,[18] this mechanism will likely be significantly underinclusive of cases where respondents have

[11] All EOIR Case Data analysis in this memo is based on data through October 1, 2020. Because the backlog has continued to grow, we anticipate that the numbers presented herein represent an undercount of what EOIR would identify.
[12] Pending cases include all Removal, Exclusion, Deportation, Asylum Only, and Withholding Only cases in the EOIR Case Data that do not have a completion code or that had the non-final completion code for change of venue. This yielded 1,265,695 "pending cases."
[13] A three-year rule would expand this category significantly, impacting 458,382, or 36% of, current cases.
[14] This field is called "appl_code" and is included in the table called "tbl_Court_Appln."
[15] USCIS data could be also be used to identify cases where respondents have submitted application fees to USCIS.
[16] This field is called "c_asy_type" and is included in the table called "A_TblCase."
[17] This field is called "adj_rsn" and is included in the table called "tbl_schedule."
[18] There are only 36,175 pending cases in which the most recent adjournment is 7a or 7b.

applications pending before USCIS. Accordingly, EOIR data experts should be tasked to develop other methods to systematically identify such cases.[19] In addition, coordination with USCIS, and access to its data systems, would likely be an effective mechanism to identify such cases.

This three-step process should yield a list of over 462,000 low priority pending cases (or 37 percent of the current backlog) that could be affirmatively adjudicated by USCIS.[20]

Category 3: Previously Administratively Closed Cases that were Reopened under the Trump Administration

During the Obama administration, immigration courts administratively closed over 200,000 cases, generally because they fell outside of enforcement priorities or because the individual was eligible for relief from USCIS.[21] The Trump administration reopened almost 75,000 of those cases.[22] Such cases could be easily identified through the EOIR Case Data using the same methodology employed in the cited TRAC report.[23]

Category 4: Cases in which the Grounds for Removability are Based on Drug Use Offenses

Identifying cases where the sole removal charge is based on a drug *use* offense should be relatively straight forward. EOIR Case Data reliably records all removal charges on the NTA. Accordingly, EOIR Headquarters can compile a list of all cases where the sole removal charge was either 8 U.S.C. § 1227(a)(2)(B) or 8 U.S.C. § 1182(a)(2)(A)(i)(II). These are the deportability and inadmissibility charges related to controlled substance offenses. There are separate removability charges that relate to individuals with drug trafficking offenses.[24] There

[19] If no such other methods exist, EOIR coding should be modified going forward to facilitate future identification of such cases.

[20] USCIS will lack jurisdiction to adjudicate many such cases until and unless the removal proceedings are dismissed, terminated, or administratively closed. Recommendations for how to reach those outcomes in appropriate cases are discussed below. However, whether or not such outcomes can be achieved initially, the availability of a pathway to status remains a sound criterion for deprioritization.

[21] TRAC Immigration, *The Life and Death of Administrative Closure,* Appendix Table 1 (Sept. 10, 2020), https://trac.syr.edu/immigration/reports/623/.

[22] *Id.*

[23] While this analysis was completed by TRAC, it appears cases were identified in the "other_comp" field in the "B_TblProceeding" table.

[24] *Compare* 8 U.S.C. §§ 1101(a)(43)(B) (defining drug trafficking aggravated felony), 1182(a)(2)(C) (reason to believe drug trafficker inadmissibility ground), 1227(a)(2)(A)(iii) (aggravated felony deportability ground); *see also Lopez v. Gonzales*, 549 U.S. 47, 53 (2006) (rejecting the Governments attempt to "turn simple possession into trafficking" and clarifying that the drug trafficking aggravated felony ordinarily involves "commercial dealing"); *Matter of Casillas-Topete*, 25 I. & N. Dec. 317, 321 (BIA 2010) (explaining that a person is inadmissible under § 1182(a)(2)(C) when an "immigration official knows or has reason to believe that the alien is a trafficker in controlled substances"); *Matter of P-,* 5 I. & N. Dec. 190 (B.I.A. 1953) (holding that a single sale, even after keeping drugs in his possession for three months, brought alien within statutory proscription of those who are believed to be illicit traffickers in narcotics).

are approximately 2,500 such cases where the sole removal charge is under one of these designated charges indicating a drug use offense.[25]

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Collectively, using this methodology, EOIR Headquarters could likely identify over 700,000 cases in the Low Priority Systematic Deferral Categories without any case-by-case review.[26]

Step Three: Notices of Intent to Defer Low-Priority Case

The EOIR Director should then issue Notices of Intent to Defer to all parties in cases in the Low Priority Systematic Deferral Categories, with a copy sent to the presiding IJ or to the BIA, as applicable.

The Notices of Intent to Defer should state:

- That because of the overwhelming and unmanageable backlog of cases pending before immigration courts and the BIA, and the resulting lengthy delays in adjudicating all cases, it is necessary to defer adjudication of low priority pending cases in order to facilitate the efficient resolution of high priority cases and, ultimately, for the efficient disposition of all pending cases.[27]

- That the four Low Priority Systematic Deferral Categories enumerated above have been used to determine low priority cases for deferral. The notice should explain in plain language what deferral is and how it will impact the respondent. The notice should specify which of the four Low Priority Systematic Deferral Categories the case falls within.

- That the Director intends to defer adjudication of this case for a five-year period—the period which the Director anticipates will be necessary to work through the backlog of higher priority cases.[28]

- That DHS is directed to consider whether the case is appropriate for dismissal under 8 C.F.R. § 239.2(c) because the notice to appear in this low priority case was

[25] That is, there are approximately 70,000 pending proceeding where "237a02Bi," "237a02Bii," and/or "212a02Ai II" is listed in the "charge" field in the "B_TblProceedCharges" table and no other charge is listed.
[26] The total number of cases we have identified in the four categories is approximately 755,000 but we have not checked to ensure that cases are not double counted in different categories.
[27] The Director's regulatory deferral authority is for the purpose of ensuring "the efficient disposition of *all* pending cases." 8 C.F.R. § 1003.0(b)(1)(ii) (emphasis added). Accordingly, the notices should avoid suggesting that the low priority cases are being deferred because the agency does not intend to adjudicate them.
[28] Imposing a time limit on the deferral (even if later extended) would help insulate the orders against a claim that indefinite deferrals are not authorized by the regulation. *Cf. Matter of Castro-Tum*, 27 I. & N. Dec. 271, 285 (AG 2018) (*"*Grants of general authority to take measures 'appropriate and necessary for the disposition of such cases' would not ordinarily include the authority to suspend such cases *indefinitely*.") (emphasis added). Tying the time period to a rationale that will further the "disposition of all pending cases" will further insulate the deferral from legal challenge. 8 C.F.R. § 1003.0(b)(1)(ii).

"improvidently issued" or continuation is "no longer in the best interest of the government."[29] If DHS deems the case appropriate for such dismissal, it should file the necessary motion within sixty days.[30] In addition, in detained cases, whether or not it intends to file a motion to dismiss, DHS should consider whether release is appropriate.

- That the Director will not, however, defer adjudication on this case if either: (1) the case does not actually fall within a Low Priority Systematic Deferral Category or (2) deferral would prejudice either party. A non-exhaustive list of examples of the types of situations where such prejudice could arise should be provided in the notice to assist *pro se* individuals in identifying potential prejudice. Prejudice to the respondent will include, *inter alia*, the loss of eligibility for relief and the unwarranted delay in access to potential relief or the immigration benefits that could follow therefrom. Prejudice to DHS will be limited to the loss of access to critical witnesses or evidence that would be unavailable after the deferral period. DHS' general interest in speedy adjudication would be insufficient to constitute such prejudice.

- That if either party believes (1) the case does not actually fall within a Low Priority Systematic Deferral Categories or that (2) the party would be prejudiced by the deferral, it must file any objection to the Notice of Intent to Defer with the presiding IJ, or if appropriate with the BIA, within sixty days of receiving the notice. Such filing should include an explanation of the objection and any supporting evidence. Thereafter, the IJ or the BIA will notify the Director (and the parties) if it believes deferral is unwarranted on either basis and the Director will make a final determination and, if deferral is warranted, issue the five-year deferral order.

- If no motion to dismiss or objection is filed, that the Director's Notice Intent to Defer will be converted to a five-year deferral order in sixty days.

Step Four: Motions to Dismiss and Objections to Deferral

Within sixty days of the issuance of the Notice of Intent to Defer, DHS may file a motion to dismiss under 8 C.F.R. § 239.2(c) because the notice to appear in this low priority case was "improvidently issued" or continuation is "no longer in the best interest of the government." In addition, either party could file an objection to a Notice of Intent to Defer with the presiding IJ or, in appropriate cases, with the BIA. Such objections should be limited to any assertion that the case does not actually fit within a Low Priority Systematic Deferral Category or that a party would be prejudiced by the deferral. This objection mechanism will not only be critical to identify potential prejudice to the parties that will not be apparent in the EOIR Case Data but also as a quality control check on the EOIR Case Data identification methodology.

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[29] *See* 8 C.F.R. § 239.2(c) (permitting DHS to move to dismiss any case where the notice to appear was "improvidently issued" or where "continuation is no longer in the best interest of the government" (incorporating grounds enumerated in 8 C.F.R. § 239.2(a))); 8 C.F.R. § 1239.2 (same). *See also Matter of S-O-G- & F-D-B-*, I&N Dec. 462, 464 (A.G. 2018) (reaffirming DHS authority to move to dismiss on such bases).

[30] Of course, DHS would retain the authority to so move at any time, but coordination with DHS to, where possible and appropriate, file such motions within the sixty-day window would minimize unnecessary work and assist with the timely resolution of such cases.

Step Five: Immigration Judge or BIA Review and Dismissals or Deferral Recommendations

The Director should provide strong and clear guidance to IJs and the BIA, that any resultant DHS motions to dismiss under 8 C.F.R. § 239.2(c) should be liberally granted, absent opposition from the respondent. In cases involving *pro se* respondents, the IJ should assist the respondent in determining whether they could be prejudiced in any way by dismissal, in which case dismissal should be denied. Dismissal is often a superior outcome to deferral insofar as it permanently removes the case from EOIR docket and removes any barriers to full adjudication of any affirmative pathways to status by USCIS. *See* discussion *infra* at Step Eight.

If the case is not dismissed and either party has objected to the Notice of Intent to Defer, the IJ or BIA should consider any claim that the case does not actually fit within a Low Priority Systematic Deferral Category or that a party would be prejudiced by the deferral. The IJ or BIA should liberally construe any assertion of prejudice by the respondent and, absent extraordinary circumstances, defer to a respondent's judgment that they would be prejudiced because extended delayed adjudication against the will of the respondent could offend notions of fair play and due process. In addition, continued detention during a deferral period should be deemed *per se* prejudicial and impermissible. Accordingly, deferral is only appropriate in detained cases to the extent DHS or the IJ orders the release of the respondent. Finally, in cases involving *pro se* respondents, the IJ and BIA should assist the respondent, where possible, in determining whether they could be prejudiced in any way by deferral.

After considering the parties' objections, the IJ or BIA should make a formal recommendation to the Director whether or not to order the contemplated deferral.[31] If the IJ recommends against deferral or recommends deferral based upon a different Low Priority Systematic Deferral Category than the one originally designated by the Director, the IJ or BIA should communicate that recommendation and its rationale to the Director in a brief written statement, noting the position of both parties. If the IJ agrees with the Director's intent to defer and rationale thereof, such agreement should likewise be communicated to the Director, but no narrative statement would be required.

Step Six: Director Deferral Orders in Low-Priority Case

In cases where no motion to dismiss or objections to the Notice of Intent to Defer have been filed, the Director's Notice of Intent to Defer should be converted to an order from the Director deferring the case for a five-year period. In other cases, where the IJ or BIA agrees with the Director's intent to defer and rationale therefor, the Director should order the contemplated five-year deferral. In cases where the IJ or BIA recommends against deferral or recommends deferral for a reason not designated by the Director, the Director should establish a centralized

[31] It is critical that the IJ and BIA action comes in the form of a recommendation because they do not have independent deferral authority under 8 C.F.R. § 1003.0(b)(1)(ii). We have not endeavored to investigate the viability of the Director delegating such authority to the IJs and BIA because maintaining Headquarters control is important to ensure that resistance from potentially hostile Trump-era IJs and BIA does not undermine the deferral program.

mechanism to review such recommendations and should make the final determination as to whether or not to defer adjudication of the case. To the extent this process cannot be completed within the initial Moratorium Period, the Moratorium Deferral Order should be extended, as necessary, for cases where a Notice of Intent to Defer was issued.

Step Seven: Post-Moratorium Period Individualized Deferral Mechanism

For any cases not dismissed or deferred through the process set forth in Steps One through Six, at the initial immigration court hearing following the conclusion of the Moratorium Period,[32] the IJ should conduct a brief conference with the parties to determine:

- If the case falls within a Low Priority Systematic Deferral Category,[33] or
- If other individualized factors militate in favor of deprioritizing and deferring the case. Cases that fall within any of the four forbearance grounds enumerated in the Community Change Memorandum at pp. 3-7, should presumptively be deemed appropriate for such individualized deprioritization and deferral.

These conferences will be an effective mechanism to identify additional appropriate cases for deferral in the normal course of litigation, while the parties are before the IJ and focused on the facts and circumstances of the case. This would not require any additional hearing or any off-calendar individualized review and thus would not trigger the type of agency burden that was experienced in past case-by-case review efforts.[34]

If, based on the individualized review and conference, the IJ determines that case is appropriate for deferral, the IJ should, absent opposition from the respondent, encourage DHS to move to dismiss the case under 8 C.F.R. § 239.2(c) because the notice to appear in this low priority case was "improvidently issued" or continuation is "no longer in the best interest of the government." If DHS declines to so move, the IJ should, absent opposition from the respondent, make a recommendation to the Director to issue a five-year deferral, including a brief written statement noting the rationale for the deferral recommendation and the position of both parties. For cases pending before the BIA, respondents should be afforded an opportunity to submit in writing similar individualized requests for DHS to move to dismiss or for deferral. The resultant IJ and BIA deferral recommendations will be reviewed by the same centralized review mechanism provided for in Step Six *supra*.

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[32] Respondents should also be permitted to file off-calendar requests for deferral. To the extent IJs can resolve such requests on the papers that could increase efficiency and avoid the need for unnecessary hearings.

[33] This inquiry would not be necessary in cases where a Notice of Intent to Defer had been issued. While the majority of cases falling within the Low Priority Systematic Deferral Category should be identified through the EOIR headquarters systemic review, *see* Step Two, because of imperfections in the EOIR Case Data, some qualifying cases will not be identified through the EOIR Headquarters review.

[34] *ICE Prosecutorial Discretion by Location As of May 31, 2012*, TRAC Immigration (June 19, 2012) (documenting that ICE case-by-case file review resulted in the closure of only 1.5% of cases), https://trac.syr.edu/immigration/reports/284/; *see also Prosecutorial Discretion: A Statistical Assessment*, American Immigration Council (June 11, 2012), https://www.americanimmigrationcouncil.org/sites/default/files/research/pd_-_a_stastical_assessment_061112.pdf.

Thereafter, some cases that were not appropriate for dismissal or deferral at the initial appearance following the Moratorium Period will later fall within the Low Priority Systematic Deferral Category (for example through the filing of an adjustment application) or develop new individualized factors that militate in favor of deprioritizing and deferring the case. Parties should be able to bring such developments to the IJ or BIA's attention when they arise and subsequent motions to dismiss and recommendations for deferral should be issued as appropriate.

Step Eight: Administrative Steps to Facilitate the Disposition of Deferred Cases

Deferral of a large category of low priority cases is a critical first step to restore the just and efficient administration of the immigration enforcement system. However, deferral alone will not lead to a final resolution of removal proceedings.[35] Even long deferred cases remain on the court's docket and people with open removal proceedings cannot effectively and completely avail themselves of affirmative pathways to status through USCIS in most cases.[36]

That is why DHS motions to dismiss play a critical role in the procedures set forth above. A dismissal pursuant to such motion is a final resolution of the case and is sufficient to both move the case off EOIR's docket permanently and to enable USCIS to fully adjudicate any current or future affirmative applications.[37] Accordingly, the cleanest and most efficient existing mechanism to ensure that low priority cases are moved off the docket and that people with affirmative pathways to status can access them, is for the incoming administration to ensure that DHS is on board with the priorities and process set forth above and will move swiftly to submit motions to dismiss in low priority cases.

However, to the extent that cases are deferred and not dismissed through the above procedures, EOIR and DHS have a number of existing and potential mechanisms available to them to provide for the future final resolution of deferred cases. One critical component of the work both agencies should do during the Moratorium Period, should be to investigate such mechanisms and to put in motion the steps necessary to provide for the future final disposition of deferred cases. Below are examples of some of the mechanisms that the agencies should explore. Full vetting of these and other potential mechanisms should be completed during the moratorium period. The examples are provided herein solely as illustrative non-exhaustive suggestions for exploration and have not been full vetted.

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[35] *See Matter of Castro-Tum,* 27 I&N Dec. 271, 286 (A.G. 2018) (explaining that deferral, unlike closure or termination, merely "delay[s] the scheduling of certain cases to prioritize others").

[36] *See e.g.*, 8 C.F.R. § 1245.2(a)(1)(i) (depriving USCIS of jurisdiction over applications for adjustment of status for people "placed in deportation proceedings or in removal proceedings") (emphasis added); USCIS, Policy Manual, Ch. 3, D. Jurisdiction ("Except if the applicant is an 'arriving alien,' the IJ (and not USCIS) has jurisdiction if an applicant is in removal proceedings, even if the proceedings have been administratively closed or if there is a final order of deportation or removal which has not yet been executed."); 8 C.F.R. § 208.2(b) (providing for exclusive IJ jurisdiction over asylum applications filed by a noncitizen in removal proceedings).

[37] *See* 8 C.F.R. § 245.2(a)(1) (USCIS has jurisdiction once IJ no longer has jurisdiction); USCIS, Affirmative Asylum Procedures Manual, May 2016, p. 68, *available at* https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf (establishing that termination, which is akin to dismissal, returns jurisdiction over an asylum application to USCIS) (*citing* USCIS, Memorandum, Delegation to Asylum Office Directors of District Director Authority and Discretion to Issue Form I-863, "Notice of Referral to Immigration Judge," to Certain Asylum Applicants, (July 26, 2004)).

The ultimate goal should be completion of these cases in a manner that allows the respondents to pursue any available affirmative pathway to legal status. The mechanism used previously to achieve these goals in similar situations has been a two-step process. First, in the past, cases have been either administratively closed or placed on the status docket.[38] Then, when an affirmative pathway to status ripened, the parties filed a joint motion to terminate. During the Trump administration new administrative case law, regulations, and agency policy have closed off this mechanism.[39]

Accordingly, the Biden-Harris administration must work to swiftly identify additional existing authority, to restore such prior mechanisms, and/or to open up new mechanisms. Some options to explore include:

1. **Continue to utilize existing mechanisms -** USCIS retains exclusive jurisdiction to adjudicate most predicate applications necessary to support adjustment of status.[40] Accordingly, USCIS can continue to adjudicate such applications during the deferral period. Even if DHS previously declined to dismiss a case, once such applications are approved and/or when a visa becomes available to a respondent in a deferred case, the respondent could submit a request for DHS to reconsider using its authority under 8 C.F.R. § 239.2(c) to move to dismiss.[41] If the IJ or the BIA were to grant such motions, the cases would be removed from the EOIR docket and USCIS could adjust such individuals' status.

2. **Implement new sub-regulatory policies to allow for USCIS adjudication of deferred cases** - The controlling regulations state that "In the case of any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien), the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file." 8 C.F.R. §

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[38] *See* Memorandum for All Immigration Judges, from Brian M. O'Leary, Chief Immigration Judge, EOIR, *Re: Operating Policies and Procedures Memorandum 13-01: Continuances and Administrative Closure* at 4 (Mar. 7, 2013) (encouraging the use of administrative closure in cases with a pending underlying visa petition to allow IJs to "manage their dockets, by helping to focus resources on those matters that are ripe for resolution").

[39] *See Matter of Castro-Tum,* at 272 (overturning long-standing Board precedent to deprive IJs of the ability to administratively close cases); *Matter of S-O-G- & F-O-D-*, at 468 (holding that "the authority to dismiss or terminate proceedings is not a free-floating power an immigration judge may invoke whenever he or she believes that a case no longer merits space on the docket."); Memorandum for All Immigration Court Personnel, from James R. McHenry III, EOIR, *Re: Use of Status Dockets Policy Memorandum 19-13* (significantly limiting the use of the status docket).

[40] *See* 8 C.F.R. § 103.2(a)(1) (establishing that benefits requests must be submitted to DHS); *Matter of E-A-L-O-*, Adopted Decision 2019-04 (AA, Oct. 11, 2019) (granting USCIS jurisdiction over Form I-360 petitions for Special Immigrant Juvenile Status); 8 C.F.R. § 103.2(a)(1) (giving USCIS jurisdiction over Form I-918 petitions for U nonimmigrant status). In a small category of cases, USCIS retains jurisdiction to fully adjudicate affirmative applications during the pendency of removal proceedings and thus deferral will not be an impediment to full resolution of affirmative applications. *See, e.g.*, 8 C.F.R. § 1245.2(a)(1) (exempting "arriving aliens" from the general rule that an IJ has jurisdiction over adjustment applications for individuals in removal proceedings). Once such status is granted, the individual could simply move to reopen and terminate the deferred proceedings.

[41] *See Matter of S-O-G- & F-D-B-*, at 468 (highlighting DHS's role in initiating and prosecuting removal cases but explicitly leaving open the ability of "respondents, in appropriate circumstances, [to] request[] that DHS file an unopposed motion to dismiss proceedings under 8 C.F.R. § 1239.2(c).")

1245.2(a)(1)(i). Similarly, the regulations state the immigration court "shall have exclusive jurisdiction over asylum applications filed by an alien . . . after the charging document has been filed with the Immigration Court." 8 C.F.R. § 208.2(b). However, despite the bright line purported in these regulations, there are individuals who have "been placed in deportation proceedings or in removal proceedings" and who have had a "charging document . . . filed with the Immigration Court" who are nevertheless eligible to adjust status or seek asylum from USCIS. For example, individuals whose cases are terminated.[42] Accordingly, it appears that the intention of these regulations is to give primacy to EOIR when it intends to adjudicate such applications. However, if deferral is explicitly granted to allow a respondent to pursue an affirmative pathway through USCIS, as with terminated cases, the underlying purpose of the regulation is no longer served. Accordingly, USCIS could institute a new policy interpreting cases deferred for such purpose to fall outside the bounds of these jurisdiction-stripping regulations. Such a policy would permit people with deferred cases to have their USCIS applications fully adjudicated. If granted, they could then move to terminate their removal deferred proceedings.

3. **Rescind *Matter of Castro-Tum* and the Related Regulation[43] and Promulgate New Regulations Restoring Administrative Closure Authority and Establishing USCIS Jurisdiction to Fully Adjudicate Administratively Closed Cases** - The advantage of restoring traditional administrative closure authority is to ensure the IJs, who are most familiar with the facts and circumstances of individual cases, can act independently to close cases based on compelling discretionary factors.[44] Accordingly, the cleanest, though not quickest, way to provide for the final disposition of deferred cases is to withdraw *Matter of Castro-Tum,* 27 I. & N. Dec. 271 (A.G. 2018), to withdraw the new related regulations and to promulgate new regulations granting IJs (as well as the Director) broad discretion to administratively close cases and to provide that such closures shall enable USCIS jurisdiction to fully adjudicate all affirmative applications. With such regulations in place, the Director could then administratively close all deferred cases. Whether or not other steps are pursued to allow final dispositions in deferred cases, withdrawal of *Matter of Castro-Tum* and the related regulations is critical.

This is a non-exhaustive sample of the types of options that should be explored by EOIR and DHS. Whatever mechanism is pursued, it should provide for permanent removal of deferred cases from the EOIR docket and the full restoration of USCIS jurisdiction.

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[42] *See* USCIS*, Affirmative Asylum Procedures Manual,* May 2016, at 68*, available at* https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf (providing that upon termination, jurisdiction over an asylum application returns to USCIS)*; see also* 8 C.F.R. § 1245.13(d)(1) (affording USCIS jurisdiction over NACARA-adjustment applications when the case has been administratively closed despite otherwise providing that the IJ has sole jurisdiction over such applications for individuals in removal proceedings).

[43] 8 C.F.R. § 1003.10(b) (effective Jan. 15, 2021).

[44] Administrative closure is also superior to deferral insofar as it provides USCIS with jurisdiction over I-601A waivers, *see* 8 C.F.R. § 212.7(e)(4)(iii) (allowing individuals whose proceedings are administratively closed to have their Provisional Unlawful Presence Waiver adjudicated by USCIS), or where predicate applications, such as a U-Visa or Special Immigrant Juvenile Status application, will likely to take a long time before ripening, *see Matter of Hashmi*, 24 I. & N. Dec 785, 791 n.4 (BIA 2009) (recommending administrative closure to avoid repeated rescheduling of cases not ready for conclusion, such as where there is a pending prima facie approvable visa petition).