Practice Alert:
New DOJ Rule: Administrative Closure and Termination in Removal Proceedings For Immigrants Seeking Survivor-Based Relief[1]
August 19, 2024

On May 29, 2024, Department of Justice (DOJ) issued final regulations that confirm the ability of adjudicators within the Executive Office for Immigration Review (EOIR) to administratively close and terminate removal proceedings when certain standards are met.[2] The regulations became effective on July 29, 2024. The preamble to the new regulations discusses U, T, and VAWA petitions, and provides some insight into how the regulations will be implemented in reference to those forms of relief.[3]

This Practice Alert reviews the new regulations, and the potential impact of the regulations on immigrant survivors and their derivative beneficiaries who are seeking administrative closure or the termination of removal proceedings to pursue petitions for U, T, and VAWA based relief before USCIS. As the regulations are implemented and more information becomes available, ASISTA will update this guidance.

I. Joint or Affirmatively Unopposed Motions

The regulations provide that where motions for administrative closure, recalendaring, or termination are joined by both parties or "affirmatively unopposed," an adjudicator "shall grant" the motion unless they articulate reasons that are "unusual, clearly identified, and supported." 8 CFR §§ 1003.1(l)(3), 1003.18(c)(3) (administrative closure and

[1] Copyright 2024, ASISTA Immigration Assistance. This practice alert is authored by Cristina Velez, Legal & Policy Director, with helpful input from Rebecca Eissenova, Senior Staff Attorney, Lia Ocasio, Staff Attorney, and Susan Roy, Law Office of Susan G. Roy and current Practitioner in Residence at Seton Hall Law School. The resource is intended for authorized legal counsel and is not a substitute for independent legal advice provided by legal counsel familiar with a client's case.

[2] In addition to setting standards for administrative closure and terminations, among other things the regulations also clarify authority for Voluntary Departure, Appeals, Sua Sponte Motions to Reopen, and impose limitations on the use of *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019). Although these aspects of the new regulations are also relevant to immigrant survivors, this resource will focus on Administrative Closure and Termination for immigrant survivors eligible for survivor-specific applications.

[3] Executive Office of Immigration Review, Department of Justice, *Efficient Case and Docket Management in Immigration Proceedings*, 89 Fed. Reg. 46742-46795, https://www.govinfo.gov/content/pkg/FR-2024-05-29/pdf/2024-11121.pdf.

recalendaring); 8 CFR §§ 1003.1(m)(1)(i)(G), 1003.18(d)(1)(i)(G) (termination). As the regulations require specific reasoning to be provided in the denial of a joint or unopposed motion, if the EOIR adjudicator fails to follow this process, parties can appeal on that basis. We do not yet know how "unusual, clearly identified, and supported reasons" will be interpreted by appellate authorities in the context of this regulation.

Without an affirmative communication of non-opposition, the motion will be considered opposed.[4] The regulations set forth factors for adjudicators to consider when deciding opposed, or single-party motions for administrative closure, recalendaring, or termination.

When filing a joint or affirmatively unopposed motion for administrative closure, recalendaring, or termination, however, the regulations do not require the parties to provide justification for the action requested. Nevertheless it may be helpful to the adjudicator to provide an explanation and minimal documentation of the basis for the motion.

II. Administrative Closure

Administrative closure is a docket-management tool that allows adjudicators to remove cases from the active docket for a variety of reasons, including a pending U or T visa petition, until either party moves to re-calendar the case. *Matter of Avetisyan,* 25 I&N Dec. 688 (BIA 2012), set forth factors for adjudicators to consider when deciding whether to administratively close a case.[5] The new regulations provide that EOIR adjudicators can administratively close cases upon the written or oral motion of either party. 8 CFR §§ 1003.1(l) (administrative closure before the Board), 1003.18(c)(3) (administrative closure before IJs).

The factors for an IJ or BIA member to consider are those set forth in *Matter of Avetisyan*, along with two additional factors relating to ICE detention status and regulations requiring administrative closure.

A. Opposed Motions for Administrative Closure

The regulations provide that a motion made by only one party that is either opposed or not clearly *un*opposed in writing shall be decided by an adjudicator based on the "totality

[4] The DOJ rejected the suggestion from commenters to treat motions not responded to by DHS as unopposed, and noted that "the EOIR adjudicator will rule upon the motion once any time limits for responses to motions have passed." 89 Fed. Reg. at 46748.

[5] During the Trump administration, *Avetisyan* was overruled by *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), and then restored by *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021) during Biden's administration.

of the circumstances," taking into account the following factors set forth in 8 CFR §§ 1003.1(l)(3)(i) and 1003.18(c)(3)(i), as relevant:

A) The reason administrative closure is sought;

B) The basis for any opposition to administrative closure;

C) Any requirement that a case be administratively closed for a petition, application, or other action to be filed with, or granted by the Department of Homeland Security [DHS];[6]

D) The likelihood the noncitizen will succeed on any petition, application, or other action that the noncitizen is pursuing, or that the noncitizen states in writing or on the record at a hearing that they plan to pursue, outside of removal proceedings before the [IJ or BIA];

E) The anticipated duration of the administrative closure;

F) The responsibility of either party, if any, in contributing to any current or anticipated delay;

G) The ultimate anticipated outcome of the case pending before the [IJ or BIA]; and

H) The ICE detention status of the noncitizen.[7]

Note that a pending application is *not required* for administrative closure to be granted. Thus, practitioners may seek administrative closure on behalf of survivors who are eligible for a U or T nonimmigrant visa, or a VAWA self-petition, prior to filing one of those applications.

i. Likelihood of success:

In a contested motion for administrative closure, one of the factors for an adjudicator to consider is the "likelihood the noncitizen will succeed" in whatever action they seek administrative closure to pursue (subsection (D) above). 8 CFR §§ 1003.1(l)(3)(i)(D) and 1003.18(c)(3)(i)(D). Thus, practitioners should be prepared to address the likelihood of their client's success in one or more of the applications they intend to file. For

[6] This includes applications such as I-601As, where provisional waiver regulations require administrative closure for the application to proceed before USCIS. *See* 8 CFR § 212.7(e)(4)(iii). This factor was not included in *Matter of Avetisyan* because the provisional regulations were issued after that decision.
[7] This factor was also not included in those set forth in *Matter of Avetisyan*. In the preamble to the regulation, EOIR notes that a noncitizen's detention will generally weigh against administrative closure, as it "may prolong the noncitizen's detention, imposing a greater burden on the noncitizen and additional costs to the Government during the pendency of a case." 89 Fed. Reg. at 46749.

example, those intending to file U petitions should provide a copy of their signed I-918B law enforcement certification and/or police report to the court, along with testimony or a signed statement from the applicant of their desire and willingness to file the U visa petition. Unlike for discretionary termination,(discussed further below) the administrative closure provision does not require an adjudicator to conduct a prima facie eligibility determination in order to grant administrative closure. Thus, practitioners should not be required to present a full petition to the court or BIA to obtain a grant of administrative closure.[8]

For U or T visa petitioners with pending applications, the **DOJ notes in the preamble to the regulations that it "declines to make any specific evidence dispositive of this factor, such as bona fide determinations by USCIS**," although such evidence "may often weigh heavily in favor of this factor." 89 Fed. Reg. at 46751. Instead, the regulations authorize the adjudicator to determine the appropriate weight of a BFD depending on the totality of the circumstances. *Id*., *citing Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010) (''Immigration Judges have broad discretion . . . to admit and consider relevant and probative evidence.'').[9]

B. Motions to Recalendar

Once an order to administratively close a case has been issued, the mechanism to return it to the court's docket is a motion to recalendar. If one party opposes recalendaring, the regulations instructs the adjudicator to consider the following non-exhaustive factors set forth in 8 CFR §§ 1003.1(l)(3)(ii) and 1003.18(c)(3)(ii), which are similar to those involved in the decision to administratively close a case based on one party's motion:

A) The reason recalendaring is sought;

B) The basis for any opposition to recalendaring;

C) The length of time elapsed since the case was administratively closed;

D) If the case was administratively closed to allow the noncitizen to file a petition, application, or other action outside of proceedings before the [IJ or BIA], whether the noncitizen filed [it] and, if so, the length of time that

[8] As a matter of course, ASISTA encourages practitioners to avoid sharing unnecessary information that might compromise their clients' confidentiality, and to discuss sharing of sensitive or confidential material with their clients before filing copies with the court.

[9] Note also that the USCIS Policy Manual cautions that the issuance of a BFD "does not guarantee that USCIS will approve the principal petitioner or his or her qualifying family members for U nonimmigrant status." 3 USCIS-PM C.5 (C)(6).

elapsed between when the case was administratively closed and when the noncitizen filed the petition, application, or other action;

E) If a petition, application, or other action that was pending…has been adjudicated, the result of that adjudication;

F) If a petition, application, or other action remains pending…, the likelihood the noncitizen will succeed [ ];

G) The ultimate anticipated outcome if the case is recalendared; and

H) The ICE detention status of the noncitizen.

Recalendaring should not be required for one or both parties to file a motion to terminate removal proceedings upon the positive outcome of a USCIS adjudication.

III. Termination of Removal Proceedings

The new DOJ regulations establish two tracks for termination of removal proceedings: Mandatory and Discretionary. It also defers to the judgment of adjudicators as to whether termination with prejudice is appropriate in any individual case, and does not provide parameters for making that decision. Terminations for pending or approved U, T, or VAWA petitions, without additional factors, will likely be without prejudice. *See* 89 Fed. Reg. at 46764.

A. Mandatory Termination

The regulations provide that termination of removal proceedings is mandatory in the following circumstances, as set forth in 8 CFR §§ 1003.1(m)(1)(i), 1003.18(d)(1)(i):

A) No charge of deportability, inadmissibility, or excludability can be sustained;

B) Fundamentally fair proceedings are not possible because the noncitizen is mentally incompetent and adequate safeguards are unavailable;[10]

C) The noncitizen has…obtained United States citizenship;

D) The noncitizen has…obtained [lawful permanent resident status, refugee status, asylee status, or nonimmigrant status under INA § 101(a)(15)(S), (T), or (U)] and the noncitizen would not have been [removable] as

[10] *See Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011). DOJ declined to codify standards in this rulemaking, but noted that *Matter of M-A-M-* contained sufficient guidelines for competency assessments in EOIR proceedings. 89 Fed. Reg. at 46760.

charged if the noncitizen had obtained such status before the initiation of proceedings;

E) Termination is required under 8 CFR § 1245.13(l) [adjustment of status for certain Cuban and Nicaraguan nationals];

F) Termination is otherwise required by law; or

G) The parties jointly filed a motion to terminate, or one party filed a motion to terminate and the other party affirmatively indicated its non-opposition, unless the [adjudicator] articulates unusual, clearly identified, and supported reasons for denying the motion.

Note that termination of removal proceedings is only mandatory under subsection (D) if the petition for S, T, or U nonimmigrant status is *approved* in a final adjudication. 8 CFR §§ 1003.1(m)(1)(i)(D)(4), 1003.18(d)(1)(i)(D)(4). The USCIS Policy Manual also cautions that the issuance of a BFD "does not guarantee that USCIS will approve the principal petitioner or his or her qualifying family members for U nonimmigrant status." 3 USCIS-PM C.5 (C)(6).

B. Discretionary Termination

Termination of removal proceedings under the new regulations is discretionary in the following circumstances as set forth in 8 CFR §§ 1003.1(m)(1)(ii), 1003.18(d)(1)(ii):

A) The noncitizen has filed an asylum application with USCIS pursuant to section 208(b)(3)(C) of the Act pertaining to unaccompanied children, as defined in 8 CFR 1001.1(hh);

B) The noncitizen is prima facie eligible for naturalization, relief from removal, or lawful status [including U or T nonimmigrant status and VAWA self-petitions resulting in deferred action]; USCIS has jurisdiction to adjudicate the associated petition, application, or other action if the noncitizen were not in proceedings; and the noncitizen has filed the petition, application, or other action with USCIS. However, no filing is required where the noncitizen is prima facie eligible for adjustment of status or naturalization[.][11]

[11] The full text of subsection (B) reads: The noncitizen is prima facie eligible for naturalization, relief from removal, or lawful status; USCIS has jurisdiction to adjudicate the associated petition, application, or other action if the noncitizen were not in proceedings; and the noncitizen has filed the petition, application, or other action with USCIS. However, no filing is required where the noncitizen is prima facie eligible for adjustment of status or naturalization. Where the basis of a noncitizen's motion for termination is that the noncitizen is prima facie eligible for naturalization, the immigration judge shall not grant the motion if it is opposed by DHS. Immigration judges shall not terminate a case for the noncitizen to pursue an asylum

C) The noncitizen is a beneficiary of Temporary Protected Status, deferred action, or Deferred Enforced Departure.;

D) USCIS has granted the noncitizen's application for a provisional unlawful presence waiver pursuant to 8 CFR 212.7(e);

E) Termination is authorized by 8 CFR 1216.4(a)(6) [adjudication of an I-751 petition] or § 1238.1(e) [certain non-LPRs convicted of aggravated felonies];

F) Due to circumstances comparable to those described [above], termination is similarly necessary or appropriate for the disposition or alternative resolution of the case. However, immigration judges may not terminate a case for purely humanitarian reasons, unless DHS expressly consents to such termination, joins in a motion to terminate, or affirmatively indicates its nonopposition to a noncitizen's motion.

Note that under subsection (B), most noncitizens are *required* to have filed the petition for lawful status with USCIS in order to be eligible for discretionary termination. Thus, practitioners seeking discretionary termination based on their clients' eligibility for U or T nonimmigrant status, or deferred action based on VAWA should present the USCIS receipt or other proof of submission from USPS or Federal Express along with their motions. The preamble to the regulations explains that noncitizens may request continuances or administrative closure, instead of termination, if time is needed to prepare an application. 89 Fed. Reg. at 46765.

However, noncitizens eligible for adjustment of status or naturalization *need not* file their applications prior to seeking termination because USCIS cannot adjudicate those applications for noncitizens in removal proceedings.[12] Thus, noncitizens who are otherwise eligible to file one-step VAWA and adjustment of status petitions may need to first file their I-360, obtain termination of their removal proceedings, and *then* file an I-485, unless an adjudicator agrees to a discretionary termination based on a showing of prima facie eligibility for the one-step filing.

i. Prima Facie Eligibility: BFDs Weigh Heavily in Favor

In the preamble to the regulation, DOJ explained that although there is no specific discretionary termination ground for noncitizens with BFDs from USCIS, **a BFD may "weigh heavily in favor of the noncitizen under the factor concerning prima facie**

application before USCIS, except as provided for in paragraph (d)(1)(ii)(A) of this section. 8 CFR §§ 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B).

[12] *See* 8 C.F.R. § 245.2(a)(l) (USCIS has jurisdiction to adjudicate an application for adjustment of status unless an Immigration Judge has jurisdiction to adjudicate under 8 C.F.R. § 1245.2(a)(l)); 8 USC § 1429 (barring DHS from adjudicating petitions for naturalization while the applicant is in removal proceedings).

eligibility for relief with USCIS." 89 Fed. Reg. at 46762. When addressing prima facie eligibility for adjustment of status or naturalization, DOJ reaffirmed that an EOIR adjudicator has the authority to determine prima facie eligibility, and referenced its approach to U visa petitions: "although USCIS has exclusive jurisdiction over U visa applications, an EOIR adjudicator is permitted to assess a noncitizen's prima facie eligibility for U nonimmigrant status. *See Matter of Sanchez-Sosa*, 25 I&N Dec. 807, 813–14 (BIA 2012) (setting forth the inquiry into prima facie eligibility for U nonimmigrant status)." 89 Fed. Reg. at 46761.

Although the reference to *Sanchez-Sosa* in the preamble was not in relation to pending or intended U petitions, its mention raises the possibility that EOIR will import some of the standards used to determine good cause for continuances into the discretionary termination context. If necessary, practitioners may consider distinguishing *Sanchez-Sosa* as being limited to continuance motions and argue that EOIR review of prima facie eligibility for USCIS relief should be limited to whether the application packet meets eligibility requirements on its face and was submitted to USCIS for adjudication. Practitioners should also note that USCIS considers the BFD to satisfy the prima facie standard. *See* 3 USCIS-PM 3, Ch. 5.C.4 ("Where USCIS issues a BFD EAD to a petitioner, the petitioner is also considered to have established a prima facie case for approval within the meaning of INA 237(d)(1)").

Nevertheless, practitioners should utilize best practices from the continuance context when pursuing termination based on prima facie eligibility for U, T, and VAWA relief.[13] Practitioners can also cite to caselaw regarding positive findings of prima facie eligibility. At least one Circuit Court has found that a finding by an immigration judge that there is a "significant probability" that the non-citizen's U-visa application will be granted has met the rebuttable presumption that a continuance is warranted. *Cabrera v. Garland*, 21 F.4th 878 (4th Cir. 2022). **In general, with the consent of the survivor, practitioners should plan to submit a full copy of their petition and receipt notice or other proof of submission from USPS or Federal Express to satisfy this basis for termination.** Practitioners may also consult past ASISTA guidance for resolving receipt delays.[14]

ii. Deferred Action: Separate Basis for Termination

Note that a separate ground for seeking discretionary termination of removal proceedings is receipt of Deferred Action. 8 CFR §§ 1003.1(m)(1)(ii)(C), 1003.18(d)(1)(ii)(C). Although DOJ did not address the possibility that Deferred Action

[13] *See* ASISTA, *Practice Advisory: The Impact of Matter of L-N-Y-, 27 I&N Dec. 755 (BIA 2020)* (updated April 2022), https://asistahelp.org/wp-content/uploads/2022/04/Updated-ASISTA-Practice-Advisory-The-Impact-of-Matter-of-L-N-Y-April-2022.pdf.

[14] ASISTA, *Practice Pointer: Ongoing Receipt Delays in Humanitarian Cases* (March 29, 2023), https://asistahelp.org/wp-content/uploads/2023/03/Practice-Advisory-Receipt-Delays-March-2023.pdf.

may be issued along with a U visa BFD, respondents who receive both should cite to the provision authorizing termination for noncitizens in receipt of deferred action as a separate basis for termination.

Because deferred action is a separate and sufficient ground for termination, the adjudicator need not determine if the respondent is prima facie eligible for the U visa.

iii. Humanitarian Termination: Not Available for Opposed Motions

The regulations do not allow adjudicators to terminate cases for purely humanitarian reasons if OPLA does not agree to termination. 8 CFR §§ 1003.1(m)(1)(ii)(F), 1003.18(d)(1)(ii)(F). Practitioners may still request that OPLA join motions to dismiss or terminate removal proceedings for humanitarian reasons.

IV. Conclusion

The new DOJ regulations establishing a framework for docket management tools including administrative closure and termination of removal proceedings present opportunities and potential challenges for immigrant survivors. ASISTA will continue updating the field as new information comes to light about how these regulations are being implemented on the ground, and what arguments and best practices should guide practitioners who represent immigrant survivors in removal proceedings.

If you have questions about applying any of the guidance contained in this advisory, please feel encouraged to reach out to ASISTA, where we can assist our members and recipients or potential recipients of OVW STOP, LAV, or ELSI funding through one-on-one technical assistance calls.