



**Administrative Closure After *Matter of Cruz-Valdez*  
Practice Advisory<sup>1</sup>  
Issued January 18, 2022<sup>2</sup>**

**I. Introduction**

Administrative closure is a docket-management mechanism that immigration judges (IJs) and the Board of Immigration Appeals (BIA) have used for more than three decades to indefinitely suspend removal proceedings in appropriate cases. Under the BIA’s legal standard as set forth in *Matter of Avetisyan* and *Matter of W-Y-U-*, cases were administratively closed in a variety of situations, frequently with the Department of Homeland Security’s (DHS) consent during the Obama administration.<sup>3</sup> For example, noncitizens have obtained administrative closure to await the adjudication of a relevant collateral matter, such as an application with U.S. Citizenship and Immigration Services (USCIS), or when they have received a grant of deferred action. In May 2018, former Attorney General Sessions ruled in *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), that IJs and the BIA lack general authority to administratively close cases, restricting administrative closure to circumstances where it is explicitly provided for by regulation or settlement agreement.

On July 15, 2021, Attorney General Garland issued *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021), which overruled *Castro-Tum* “in its entirety and restore[d] administrative closure” pending the ongoing Department of Justice (DOJ) rulemaking on the subject.<sup>4</sup> The Attorney General directed that “while the [rulemaking] reconsideration proceeds and except when a court of appeals has held otherwise, immigration judges and the Board should apply the standard for administrative closure set out in *Avetisyan* and *W-Y-U-*.”<sup>5</sup>

Prior to the issuance of *Cruz-Valdez*, three courts of appeal had rejected *Castro-Tum* and found that IJs and the BIA have authority under the applicable regulations to administratively close cases. The Sixth Circuit was the only court of appeals to have “held otherwise,” agreeing

---

<sup>1</sup> Copyright (c) 2022, American Immigration Council and ACLU Immigrants’ Rights Project. [Click here](#) for information on reprinting this practice advisory. This practice advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case. Questions regarding this practice advisory should be directed to [clearinghouse@immcouncil.org](mailto:clearinghouse@immcouncil.org).

<sup>2</sup> This practice advisory supersedes our earlier advisory, *Administrative Closure Post-Castro-Tum*, originally issued on June 14, 2018, and updated October 22, 2019.

<sup>3</sup> *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012); *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017).

<sup>4</sup> *Matter of Cruz-Valdez*, 28 I&N Dec. at 329.

<sup>5</sup> *Id.*

with *Castro-Tum* that IJs and the BIA lack a general administrative closure authority.<sup>6</sup> However, the Sixth Circuit held in a subsequent case that administrative closure remains available in cases where a respondent is seeking a provisional unlawful presence waiver pursuant to 8 C.F.R. § 212.7(e), and there is room to argue that it should also be available in other circumstances.<sup>7</sup>

This practice advisory provides a brief overview of administrative closure, discusses recent developments affecting the availability of administrative closure from *Castro-Tum* to *Cruz-Valdez*, and explains the current state of administrative closure. This advisory then includes a more detailed discussion of the law in the Sixth Circuit, where the general administrative closure authority IJs and the BIA exercised prior to *Castro-Tum* may remain unavailable because of a circuit case affirming the reasoning in *Castro-Tum*. Practitioners nonetheless should be prepared to argue for administrative closure in appropriate cases, and the advisory gives an overview of arguments that practitioners in the Sixth Circuit should be prepared to make. Finally, this advisory discusses potential alternative mechanisms to dispose of proceedings or hold them in abeyance if administrative closure is unavailable due to Sixth Circuit precedent.

## **II. What is administrative closure and in what circumstances has it been employed?**

Administrative closure is an important tool long used by IJs and the BIA “to temporarily pause removal proceedings” in appropriate circumstances.<sup>8</sup> When a case is administratively closed, the proceedings are halted, the case is removed from the active docket, and the respondent has no future hearing dates scheduled.<sup>9</sup> Removal proceedings remain suspended unless one party (either the noncitizen or DHS) successfully moves to recalendar it. Administrative closure does not terminate or dismiss the case and it “does not provide [a noncitizen] with any immigration status”,<sup>10</sup> the individual remains “in” removal proceedings.<sup>11</sup> Either party may seek administrative closure at any point during the pendency of a case, until a final removal order is entered.

Until 2012, BIA case law prevented IJs from granting administrative closure if either party opposed,<sup>12</sup> which frequently resulted in DHS having “veto power” over such decisions.<sup>13</sup> However, in *Matter of Avetisyan*, the BIA expressly overruled its prior precedent and held that authority to administratively close a case rests entirely with the IJ or the BIA.<sup>14</sup>

---

<sup>6</sup> *Hernandez-Serrano v. Barr*, 981 F.3d 459, 466 (6th Cir. 2020).

<sup>7</sup> *Garcia-DeLeon v. Garland*, 999 F.3d 986, 992 (6th Cir. 2021).

<sup>8</sup> *Matter of Cruz-Valdez*, 28 I&N Dec. at 326 (internal quotation marks omitted) (quoting *Matter of W-Y-U-*, 27 I&N Dec. at 18).

<sup>9</sup> *Matter of W-Y-U-*, 27 I&N Dec. at 18.

<sup>10</sup> *Id.*

<sup>11</sup> Immigration Court Practice Manual, Glossary 1 (2017) (“Once a case has been administratively closed, the court will not take any action on the case until a request to recalendar is filed by one of the parties.”).

<sup>12</sup> See *Matter of Gutierrez-Lopez*, 21 I&N Dec. 479, 480 (BIA 1996) (“A case may not be administratively closed if opposed by either of the parties.”).

<sup>13</sup> *Matter of Avetisyan*, 25 I&N Dec. at 692.

<sup>14</sup> *Id.* at 694.

Prior to *Matter of Castro-Tum*, administrative closure was used in a variety of circumstances:

- To allow noncitizens adequate time to pursue action outside of immigration court that could lead to relief from removal, such as an application with USCIS or a state court.<sup>15</sup>
- Where DHS chose to exercise prosecutorial discretion in a particular case, including where the individual had received a grant of deferred action.<sup>16</sup>
- To allow certain respondents with approved immigrant visa petitions to submit an I-601A application to “provisionally waive” the unlawful presence ground of inadmissibility prior to leaving the country to process their visas at a consulate.<sup>17</sup>
- To ensure a fair hearing for noncitizens with significant mental competency issues; for example, to allow time for treatment before proceeding.<sup>18</sup>

### III. Recent legal developments concerning administrative closure

#### *Matter of Castro-Tum*

In *Matter of Castro-Tum*, issued in May 2018, former Attorney General Sessions ruled that IJs and the BIA do not have the general authority to suspend immigration proceedings through

---

<sup>15</sup> For example, administrative closure has frequently been granted to allow USCIS to adjudicate a pending petition or application that could lead to relief from removal, including, but not limited to: Petitions for Alien Relative (Form I-130); Petitions for Amerasian, Widow(er), or Special Immigrant, for those who are seeking relief under the Violence Against Women Act or Special Immigrant Juvenile Status provisions (Form I-360); Applications to Register Permanent Residence or Adjust Status filed by “arriving aliens” where USCIS had sole jurisdiction (Form I-485); Refugee/Asylee Relative Petitions (Form I-730); Petitions to Remove Conditions on Residence (Form I-751); Applications for Temporary Protected Status (Form I-821); Applications for T Nonimmigrant Status (Form I-914); Petitions for U Nonimmigrant Status (Form I-918); and Applications for Naturalization pursued by a family member/spouse of a noncitizen in removal proceedings (Form N-400). In addition, administrative closure has been granted to await the results of a family court proceeding necessary to apply for Special Immigrant Juvenile Status or the results of a criminal court processing, including a direct appeal or post-conviction relief. *See, e.g., Matter of Cruz-Valdez*, 28 I&N Dec. at 327.

<sup>16</sup> *Matter of Cruz-Valdez*, 28 I&N Dec. at 327. Under the Obama administration, DHS routinely consented to administratively close removal proceedings in low priority cases by means of a joint motion for administrative closure. This included cases where USCIS had granted the respondent’s application for Deferred Action for Childhood Arrivals (DACA).

<sup>17</sup> *See* 8 C.F.R. § 212.7(e). DHS regulations require that noncitizens in removal proceedings have closed cases at the time of filing. *See* 8 C.F.R. § 212.7(e)(4)(iii) (noncitizens in removal proceedings are ineligible for an I-601A waiver “unless the removal proceedings are administratively closed and have not been recalendared at the time of filing the application for a provisional unlawful presence waiver”).

<sup>18</sup> *Matter of M-A-M-*, 25 I&N Dec. 474, 483 (BIA 2011).

administrative closure.<sup>19</sup> The decision held that IJs and the BIA therefore could only administratively close cases where an existing DOJ-issued regulation or judicially-approved settlement expressly authorized such closure.<sup>20</sup>

Notably, Attorney General Sessions concluded that IJs and the BIA do not even have authority to administratively close cases to permit a noncitizen to apply for a provisional unlawful presence waiver pursuant to Form I-601A—even though such closure is explicitly contemplated in 8 C.F.R. § 212.7(e)(4)(iii)—because that regulation was issued by the Department of Homeland Security (DHS) and no corresponding authorization for closure was reflected in a DOJ-promulgated regulation.<sup>21</sup>

*Matter of Castro-Tum* purported to overrule *Matter of Avetisyan*, *Matter of W-Y-U-*, and any other BIA precedent, “to the extent those decisions [were] inconsistent with [it].”<sup>22</sup> The decision also directed IJs and the BIA, upon the motion of either party, to recalendar cases that had been administratively closed under circumstances not authorized by a DOJ-promulgated regulation or a judicially-approved settlement.<sup>23</sup>

#### Circuit court decisions addressing *Matter of Castro-Tum*

Between the time *Castro-Tum* was issued in May 2018 and the time it was overruled in July 2021, four federal courts of appeals—those for the Third, Fourth, Sixth, and Seventh Circuits—issued decisions substantively considering whether the decision was correctly decided. The Third, Fourth, and Seventh Circuits all rejected *Castro-Tum* and held that the plain language of the DOJ regulations at 8 C.F.R. §§ 1003.10(b) and/or 1003.1(d)(1)(ii) grant adjudicators the general authority to administratively close cases when appropriate.<sup>24</sup> In particular, all three courts pointed to the regulations’ broad authorization for adjudicators to “take *any* action” that is

---

<sup>19</sup> *Matter of Castro-Tum*, 27 I&N Dec. at 272, 292-93.

<sup>20</sup> *Id.* at 272.

<sup>21</sup> *Id.* at 278 n.3 (“Regulations that apply only to DHS do not provide authorization for an immigration judge or the Board to administratively close or terminate an immigration proceeding.”); *id.* at 287 n.9 (“Because only the Attorney General may expand the authority of immigration judges or the Board, that regulation cannot be an independent source of authority for administrative closure.”).

<sup>22</sup> *Id.* at 272.

<sup>23</sup> *Id.* at 272, 293-94.

<sup>24</sup> See *Zuniga Romero v. Barr*, 937 F.3d 282, 297 (4th Cir. 2019); *Meza Morales v. Barr*, 973 F.3d 656, 667 (7th Cir. 2020); *Arcos Sanchez v. Att’y Gen. U.S. of Am.*, 997 F.3d 113, 120-22 (3d Cir. 2021). The Third and Fourth Circuits expressly relied on both § 1003.10(b) and 1003.1(d)(1)(ii) to hold that IJs and the BIA have such authority. *Zuniga Romero*, 937 F.3d at 297; *Arcos Sanchez*, 997 F.3d at 121-22. The Seventh Circuit relied only upon § 1003.10(b), which applies to IJs. *Meza Morales*, 963 F.3d at 667 & n.6.

“appropriate and necessary” in a given case.<sup>25</sup> All three likewise held that no *Auer* deference<sup>26</sup> was due to *Castro-Tum*’s contrary interpretation of the regulations, since they unambiguously provided general administrative closure authority.<sup>27</sup>

Only the Sixth Circuit held that *Castro-Tum* had correctly interpreted the regulations to conclude that IJs and the BIA lack a general administrative closure authority.<sup>28</sup> In *Hernandez-Serrano v. Barr*, a divided Sixth Circuit agreed with much of *Matter of Castro-Tum*’s reasoning and concluded that the regulations at 8 C.F.R. § 1003.10(b) and 1003.1(d)(1)(ii) “do[] not delegate a general authority for administrative closure.”<sup>29</sup> The majority reasoned that the regulations’ grants of authority for IJs and the BIA to actions taken “in *deciding*” cases, and their admonition that adjudicators “‘resolve the questions before them in a *timely*’ manner” reflected “the absence of any general authority . . . to set aside those cases indefinitely.”<sup>30</sup> The *Hernandez-Serrano* majority expressed particular disagreement with the view that the regulations could permit “indefinite” or “permanent closure” of cases in response to DHS’ exercise of favorable prosecutorial discretion (as became common under the Obama administration), suggesting that such widescale indefinite closure of cases was “facially unlawful.”<sup>31</sup>

Significantly, although *Hernandez-Serrano* noted the *Auer* deference doctrine,<sup>32</sup> the court nowhere indicated that it was applying *Auer* deference to hold that *Matter of Castro-Tum* was a reasonable interpretation of ambiguous regulations. Rather, its analysis indicates that the court simply “agree[d]” with (and so had no need to defer to) *Matter of Castro-Tum*’s conclusion that “[8 C.F.R.] §§ 1003.10 and 1003.1(d) do not delegate to IJs or the Board ‘the general authority to suspend indefinitely immigration proceedings by administrative closure.’”<sup>33</sup>

---

<sup>25</sup> *Zuniga Romero*, 937 F.3d at 292-93; *Meza Morales*, 963 F.3d at 665; *Arcos Sanchez*, 997 F.3d at 120-21.

<sup>26</sup> Under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), courts will often defer to an agency’s reasonable interpretation of its own ambiguous regulation. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019). *Auer* deference “can arise only if a regulation is genuinely ambiguous . . . after a court has resorted to all the standard tools of interpretation,” and “[i]f genuine ambiguity remains, . . . the agency’s reading must still be ‘reasonable’” to receive deference. *Id.* at 2414-15.

<sup>27</sup> *Zuniga Romero*, 937 F.3d at 292, 294; *Meza Morales*, 963 F.3d at 667; *Arcos Sanchez*, 997 F.3d at 122.

<sup>28</sup> *Hernandez-Serrano v. Barr*, 981 F.3d 459, 463 (6th Cir. 2020).

<sup>29</sup> *Id.* A dissenting judge would have rejected *Matter of Castro-Tum*, agreeing with the Fourth and Seventh Circuits that the regulations unambiguously provide general administrative closure authority. *Id.* at 470-71, 475 (Clay, J., dissenting).

<sup>30</sup> *Id.* at 463 (maj. op.) (emphases added); see also, e.g., *id.* at 461 (“A regulation delegating to [IJs] authority to take certain actions ‘[i]n deciding the individual cases before them’ does not delegate to them general authority not to decide those cases at all.”).

<sup>31</sup> *Id.* at 465.

<sup>32</sup> *Id.* at 462 (citing *Kisor*, 139 S. Ct. at 2415).

<sup>33</sup> *Id.* at 466 (quoting *Matter of Castro-Tum*, 27 I&N Dec. at 272).

As with *Castro-Tum* itself, *Hernandez-Serrano* did not disturb the authority of IJs and the BIA to administratively close cases pursuant to DOJ regulations and judicially-approved settlement agreements.<sup>34</sup> And importantly, unlike *Castro-Tum*, *Hernandez-Serrano* specifically did not reach the question of whether administrative closure is available for noncitizens applying for Form I-601A provisional unlawful presence waivers under 8 C.F.R. § 221.7(e).<sup>35</sup> More generally, the court reasoned that the noncitizen in *Hernandez-Serrano* “did not argue before the IJ or the Board that administrative closure was ‘necessary for the disposition’ of his case within the meaning of §§ 1003.10(b) and 1003.1(d)(1)(ii) on the ground that the pendency of his removal proceedings itself legally barred him from obtaining an adjustment of status for which he appeared eligible under a statute or regulation.”<sup>36</sup> The court “therefore lack[ed] authority to consider that argument.”<sup>37</sup>

In *Garcia-DeLeon v. Garland*, the Sixth Circuit considered a case that presented the provisional waiver issue left open by *Hernandez-Serrano*, and held “that [the immigration regulations] give[] IJs and the BIA the authority for administrative closure to permit noncitizens to apply for and receive provisional unlawful presence waivers.”<sup>38</sup> The court explained that, “[a]dministrative closure is ‘appropriate and necessary’ in this circumstance for the disposition of [the] immigration case” because, “[a]bsent administrative closure, . . . noncitizens in removal proceedings who are seeking permanent residency would be unable to apply for a provisional unlawful presence waiver despite the authorizing regulation.”<sup>39</sup> The court also noted two reasons that “the concern raised in *Hernandez-Serrano* that a general authority to grant administrative closure results in non-adjudication of immigration cases is not present” in the provisional unlawful presence waiver context.<sup>40</sup> First, “[a]dministrative closure for the purpose of applying for a provisional unlawful presence waiver brings an end to the removal process and permits the noncitizen to voluntarily depart the U.S. for an immigrant visa appointment abroad,” and, second, “upon USCIS’s approval of their provisional unlawful presence waiver, [noncitizens generally] seek to recalendar and terminate their removal proceedings.”<sup>41</sup>

Accordingly, while “indefinite” or “permanent” administrative closure—for example, due to an indefinite exercise of favorable prosecutorial discretion by DHS—may not be available at present in cases arising within the Sixth Circuit, administrative closure to seek a provisional unlawful presence waiver is permissible under *Garcia-DeLeon*. And, as discussed below in Section IV, practitioners representing noncitizens in cases arising within the Sixth Circuit should also be prepared to seek administrative closure in other circumstances where it is arguably

---

<sup>34</sup> *Id.* at 465-66.

<sup>35</sup> *Id.* at 466-67.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; *see also id.* at 474 (Clay, J., dissenting) (noting that this unexhausted argument was not foreclosed by the majority’s decision).

<sup>38</sup> *Garcia-DeLeon v. Garland*, 999 F.3d 986, 990 (6th Cir. 2021) (citing 8 C.F.R. § 212.7(e)(4)(iii), 8 C.F.R. §§ 1003.10(b), and 1003.1(d)(1)(ii)).

<sup>39</sup> *Id.* at 991-92.

<sup>40</sup> *Id.* at 992.

<sup>41</sup> *Id.* (cleaned up).

appropriate and necessary for the noncitizen to obtain relief or for the IJ to otherwise dispose of the case.

### The Trump administration's administrative closure rulemaking

In *Matter of Castro-Tum* itself, former Attorney General Sessions stated that he had intentionally chosen to address “the practice of administrative closure” through administrative adjudication rather than rulemaking.<sup>42</sup> In August 2020, however, after the Fourth and Seventh Circuits had rejected *Castro-Tum*, DOJ and the Executive Office for Immigration Review (EOIR) issued a proposed rule that would in part amend the relevant regulations to explicitly prohibit IJs and the BIA from administratively closing removal cases “absent an express regulatory or settlement basis to do so.”<sup>43</sup> In December 2020, the Trump administration issued a final rule purporting to codify that amendment, with an effective date of January 15, 2021.<sup>44</sup> The rule was only in effect for a short time before it was preliminarily enjoined nationwide in March 2021.<sup>45</sup>

### Matter of Cruz-Valdez and the Biden administration's rulemaking

On July 15, 2021, Attorney General Garland issued *Matter of Cruz-Valdez*, which “overruled [*Castro-Tum*] in its entirety and restore[d] administrative closure pending [DOJ's] reconsideration of the 2020 rule.”<sup>46</sup> The decision states that “while the reconsideration proceeds and *except when a court of appeals has held otherwise*, [IJs] and the Board should apply the [pre-*Castro-Tum*] standard for administrative closure set out in *Avetisyan* and *W-Y-U*.”<sup>47</sup> Because the Sixth Circuit is the only court of appeals to have decided that administrative closure is not available in all circumstances as it was prior to *Castro-Tum*, practitioners representing noncitizens within that circuit should be prepared to make additional arguments and/or seek alternative measures, as discussed below in Sections IV and V.

On November 22, 2021, EOIR Director David L. Neal issued a memorandum reiterating that, while the administrative closure rulemaking is pending, IJs and the BIA “must evaluate requests to administratively close cases under *Matter of Avetisyan* and *Matter of W-Y-U*,” as well as

---

<sup>42</sup> *Matter of Castro-Tum*, 27 I&N Dec. at 282.

<sup>43</sup> Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52,491, 52,492 (Aug. 26, 2020) (proposed rule).

<sup>44</sup> Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81,588 (Dec. 16, 2020) (final rule).

<sup>45</sup> *Centro Legal de la Raza v. Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919 (N.D. Cal. 2021) (concluding that the rule likely violated the Administrative Procedure Act). A second court entered a nationwide stay of the rule under Rule 705 of the Administrative Procedure Act. See *Cath. Legal Immigr. Network, Inc. v. Exec. Off. for Immigr. Rev.*, No. CV 21-00094 (RJL), 2021 WL 3609986, at \*3–4 (D.D.C. Apr. 4, 2021).

<sup>46</sup> *Matter of Cruz-Valdez*, 28 I&N Dec. at 329.

<sup>47</sup> *Id.* (emphasis added).

other consistent pre-*Castro-Tum* BIA precedent.<sup>48</sup> The memorandum also noted that, for the time being, in cases arising within the Sixth Circuit, “adjudicators have the authority to administratively close cases only in limited circumstances,” in light of *Hernandez-Serrano* and *Garcia DeLeon*.<sup>49</sup>

*Matter of Cruz-Valdez* and the EOIR Director’s memorandum make clear that, outside the Sixth Circuit, administrative closure is now available in all circumstances when it was available prior to *Castro-Tum*, including in response to a favorable exercise of discretion by DHS.<sup>50</sup> For information on seeking administrative closure under that pre-*Castro-Tum* regime, refer to the American Immigration Council’s 2017 practice advisory [Administrative Closure and Motions to Recalendar](#), and the authorities discussed therein.

As of the issuance of this advisory, the DOJ rulemaking process noted in *Cruz-Valdez* remains pending. The Biden administration’s Fall 2021 regulatory agenda posted in December 2021 states that DOJ intends to issue a new proposed rule, which would in relevant part more clearly “provid[e] general administrative closure authority” to IJs and the BIA.<sup>51</sup> The issuance of such a final rule would likely also restore pre-*Castro-Tum* administrative closure practice within the Sixth Circuit.

#### **IV. Administrative closure in cases arising in the Sixth Circuit**

Until a regulation fully restoring administrative closure takes effect nationwide—including in the Sixth Circuit—the availability of administrative closure in that circuit will be governed by *Hernandez-Serrano*, *Garcia-DeLeon*, and any further circuit caselaw on the issue. Those practicing within the Sixth Circuit should be familiar with the circumstances in which administrative closure may be available and arguments to support such requests.

First, administrative closure is available in the Sixth Circuit where it is specifically permitted by existing, DOJ-issued regulations or by judicially-approved settlements.<sup>52</sup> IJs and the BIA may continue to grant administrative closure in such circumstances in cases arising in the Sixth Circuit. This includes the following categories of cases:

---

<sup>48</sup> Memorandum from David L. Neal, Director, Exec. Office for Immigration Rev., Administrative Closure, DM 22-03, at 2 (Nov. 22, 2021) (“Neal Memorandum”), available at [https://www.justice.gov/eoir/book/file/1450351/download#:~:text=On%20July%2015%2C%202021%2C%20the,Board\)%20to%20administratively%20close%20cases](https://www.justice.gov/eoir/book/file/1450351/download#:~:text=On%20July%2015%2C%202021%2C%20the,Board)%20to%20administratively%20close%20cases).

<sup>49</sup> *Id.*

<sup>50</sup> *Matter of Cruz-Valdez*, 28 I&N Dec. at 327 (stating that administrative closure “facilitat[es] the exercise of prosecutorial discretion”); Neal Memorandum at 3.

<sup>51</sup> Fall 2021 Unified Regulatory Agenda, DOJ/EOIR, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1125-AB18>.

<sup>52</sup> See *Hernandez-Serrano*, 981 F.3d at 465 (stating that several such DOJ regulations provide “specific authorization for administrative closure under specific circumstances,” and that several of them “indeed mandate it under specified circumstances”); *id.* at 466 (acknowledging that court-approved settlements to permit or require administrative closure under certain circumstances).



1. Individuals eligible for a T visa pursuant to the Victims of Trafficking and Violence Protection Act (TVPA). *See* 8 C.F.R. § 1214.2(a).<sup>53</sup>
2. Spouses and children of lawful permanent residents eligible for a V visa pursuant to the Legal Immigration Family Equity Act. *See* 8 C.F.R. § 1214.3.<sup>54</sup>
3. Certain nationals of Vietnam, Cambodia, and Laos eligible for adjustment of status under Section 586 of Public Law No. 106-429. *See* 8 C.F.R. § 1245.21(c).<sup>55</sup>
4. Certain nationals of Guatemala and El Salvador covered by the settlement agreement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 805-06 (N.D. Cal. 1991) (*ABC*). *See* 8 C.F.R. §§ 1240.62(b)(1)(i), (2)(iii) and 1240.70(f)-(h).<sup>56</sup>
5. Certain nationals of Nicaragua and Cuba eligible for adjustment of status under Section 202 of the Nicaraguan Adjustment and Central American Relief Act (NACARA). *See* 8 C.F.R. § 1245.13(d)(3)(i).<sup>57</sup>

---

<sup>53</sup> Section 1214.2(a) instructs individuals in removal proceedings eligible for a T Visa to “request that the [immigration] proceedings be administratively closed (or that a motion to reopen or motion to reconsider be indefinitely continued).” 8 C.F.R. § 1214.2(a). If the noncitizen appears eligible for the visa, the IJ or BIA “may grant such a request to administratively close the proceeding or continue a motion to reopen or motion to reconsider indefinitely.” *Id.*

<sup>54</sup> Section 1214.3 instructs individuals in immigration proceedings eligible for a V Visa to “request before the immigration judge or the Board of Immigration Appeals, as appropriate, that the proceedings be administratively closed (or before the Board that a previously-filed motion for reopening or reconsideration be indefinitely continued)” to allow the individual to pursue the visa application with USCIS. 8 C.F.R. § 1214.3. If the noncitizen appears eligible for the visa, the IJ or BIA “shall administratively close the proceedings or continue the motion indefinitely.” *Id.*

<sup>55</sup> Section 1245.21(c) instructs qualifying individuals in immigration proceedings to “contact [DHS] counsel after filing an application to request the consent of [DHS] to the filing of a joint motion for administrative closure.” If DHS does not consent, the IJ or the BIA may not administratively close the case. *Id.* (“Unless [DHS] consents to such a motion, the immigration judge or the Board may not defer or dismiss the proceeding . . .”).

<sup>56</sup> This set of regulations incorporates the requirements of the settlement agreement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991), which covers certain Salvadoran and Guatemalan nationals who have been in the United States since before certain dates in 1990. Under the *ABC* settlement, *ABC* class members with pending asylum claims could have their cases administratively closed. *Id.* at 805-06. Section 1240.62(b)(1)(i) refers to *ABC* class members “for whom proceedings before the Immigration Court or the Board have been administratively closed or continued.” Section 1240.62(b)(2)(iii) refers to non-class member spouses, unmarried sons, and unmarried daughters who have had their immigration proceedings administratively closed.

<sup>57</sup> Section 1245.13(d)(3)(i) requires the IJ or BIA to administratively close (or “continue indefinitely” a motion to reopen or reconsider) cases involving Nicaraguan and Cuban individuals who appeared eligible for adjustment of status pursuant to NACARA, “upon request of the alien and with the concurrence of [DHS].”

6. Certain nationals of Haiti eligible for adjustment of status under the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA). *See* 8 C.F.R. § 1245.15(p)(4)(i).<sup>58</sup>
7. Class members covered by the settlement in *Barahona-Gomez v. Ashcroft*, 243 F. Supp. 2d 1029, 1035-36 (N.D. Cal. 2002), which includes certain individuals who applied for suspension of deportation in the Ninth Circuit in the 1990s.<sup>59</sup>
8. Any other DOJ regulations or court-approved settlements expressly authorizing administrative closure.

Second, administrative closure is available in the Sixth Circuit in the specific situation addressed by *Garcia-DeLeon*: when a noncitizen seeks administrative closure to pursue a provisional unlawful presence waiver so as to seek adjustment of status pursuant to the DHS regulation at 8 C.F.R. § 212.7(e)(4).<sup>60</sup>

Additionally, practitioners should be prepared to argue that administrative closure is available in other circumstances not foreclosed by *Hernandez-Serrano*. Specifically, practitioners should be ready to argue that administrative closure in a particular instance is “appropriate and necessary” under 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii). Such arguments may be strongest where one or both of the following circumstances apply:

1. Where “the [non-adjudication] concern raised in *Hernandez-Serrano* . . . is not present” because administrative closure will “increase[] the likelihood that noncitizens will obtain legal status and resolve their immigration proceedings,”<sup>61</sup> such as when the noncitizen has a pending application for relief before USCIS.
2. Where “the pendency of [the] removal proceedings itself legally bar[s] [the noncitizen] from obtaining” lawful status through other means.<sup>62</sup>

Unfortunately, under *Hernandez-Serrano* it will likely be difficult to obtain administrative closure based on a favorable exercise of prosecutorial discretion by DHS, where administrative closure does not facilitate some resolution of the immigration proceeding but instead appears likely to indefinitely prolong it.<sup>63</sup> Therefore, even where DHS has indicated a willingness to deprioritize a case in the exercise of prosecutorial discretion, individuals may consider requesting

---

<sup>58</sup> Section 1245.15(p)(4)(i) requires that the IJ or BIA administratively close (or “continue indefinitely” a motion to reopen or reconsider) cases involving certain Haitian nationals who appeared eligible to file an application for adjustment of status under HRIFA.

<sup>59</sup> The *Barahona-Gomez* settlement provided for *sua sponte* reopening of certain proceedings to allow class members an opportunity to apply for suspension of deportation. If the class member subsequently failed to appear for a noticed hearing, the case was to be ordered administratively closed for a period of time after which the case could be recalendared under certain circumstances and an appropriate order issued, including an *in absentia* order that could be subject to reopening for lack of notice. *See Barahona-Gomez*, 243 F. Supp. 2d at 1035. Unlike the *ABC* settlement, no DOJ regulations address the *Barahona-Gomez* settlement.

<sup>60</sup> *Garcia-DeLeon*, 999 F.3d at 993.

<sup>61</sup> *Id.* at 991-92.

<sup>62</sup> *Hernandez-Serrano*, 981 F.3d at 467.

<sup>63</sup> *Id.* at 465.

that DHS move to dismiss their removal proceedings or one of the other strategies noted in Part V, below.

To fully preserve such a challenge, individuals should present arguments to the IJ orally at hearings and in writing in the form of a written motion for administrative closure (for cases that are currently on the active docket). Practitioners should also present and preserve these arguments where DHS moves to recalendar an administratively closed case. Additionally, practitioners should brief these issues to the BIA on appeal. Doing so fully preserves the individual's ability to argue to the Sixth Circuit that administrative closure is necessary and appropriate (or that recalendarings was improper) in the particular circumstances at issue.<sup>64</sup>

Individuals pursuing arguments for greater availability of administrative closure in the Sixth Circuits at the petition for review stage may contact [clearinghouse@immcouncil.org](mailto:clearinghouse@immcouncil.org) for possible amicus support, ideally as soon as they receive a decision from the BIA.

#### **V. What options remain for cases arising within the Sixth Circuit in which administrative closure is unavailable under *Hernandez-Serrano*?**

Various alternatives to administrative closure remain for individuals whose cases arise within the Sixth Circuit and who are not eligible for administrative closure due to *Hernandez-Serrano*. These options include scheduling hearings based on the timing of relevant events, continuances, motions to terminate, and dismissal. Each of these tools has distinct requirements and benefits. Decisions about which option(s) to pursue depend on the noncitizen's individual circumstances.

- Scheduling Hearings Strategically: Although the immigration court typically sets the initial master calendar hearing, the IJ assigned to the case generally sets subsequent master calendar hearings and merits hearings based on the court's and the parties' schedules and the case's readiness for resolution. IJs have latitude to set an appropriate hearing date in light of anticipated future events that will likely impact the proceedings—e.g., an expected decision from USCIS or the expiration of deferred action. Accordingly, noncitizens who are, for example, awaiting the adjudication of an application by USCIS, or who have a deferred action grant, should ask the IJ to schedule a hearing after the date that the relevant event is reasonably expected to occur. Practitioners should support the request with any relevant documentation, including, e.g., proof of a current application and processing times, evidence of a forthcoming court date, a DACA approval notice, etc.

---

<sup>64</sup> Cf. *Hernandez-Serrano*, 981 F.3d at 467 (court could not consider noncitizen's argument that administrative closure "was 'necessary for the disposition' of his case within the meaning of §§ 1003.10(b) and 1003.1(d)(1)(ii)" where he had not made that argument before the IJ or the BIA).

- Motions to Continue:<sup>65</sup> Like administrative closure, a motion to continue<sup>66</sup> for good cause may be appropriate for a variety of reasons. Because continuances are generally shorter and require the noncitizen to return to court, an individual may need to seek several continuances. Practitioners should consider filing a written motion for a continuance, laying out the reasons for good cause and providing evidence to support the basis for the motion. In general, the more concrete the evidence of a specific need for a delay, the better. As with arguments supporting the authority to administratively close proceedings, practitioners should make sure to properly preserve their arguments for a continuance orally and in writing. *See* Section IV, above.
- Motions to terminate: Unlike administrative closure or continuances, termination formally ends removal proceedings but allows USCIS to exercise its jurisdiction over applications that would otherwise be within the jurisdiction of the immigration courts.<sup>67</sup> Noncitizens should consider moving to terminate wherever possible. In some cases, DACA recipients have reported success in securing termination based on DHS’s decision to defer action in their cases.
- Dismissal: Individuals with sympathetic cases, including DACA recipients who may have been placed in proceedings based on incorrect information, may consider asking DHS to move to dismiss their proceedings.<sup>68</sup> Among other reasons, DHS may move to dismiss if continuing proceedings is no longer “in the best interest of the government.”<sup>69</sup> Under current Biden administration guidance, DHS has stated it will consider dismissal in cases involving “compelling humanitarian factors,” among other reasons.<sup>70</sup>

---

<sup>65</sup> For more information on continuances, see the American Immigration Council’s September 2018 practice advisory [Motions for a Continuance](#).

<sup>66</sup> *See* 8 C.F.R. § 1003.29 (“The Immigration Judge may grant a motion for continuance for good cause shown.”).

<sup>67</sup> Termination would be without prejudice, as there would be no fundamental error meriting termination with prejudice, but would allow for vesting of jurisdiction elsewhere.

<sup>68</sup> *See* 8 C.F.R. §§ 239.2(c), 1239.2(c).

<sup>69</sup> 8 C.F.R. § 239.2(a), (c).

<sup>70</sup> *See* Memorandum from John D. Trasviña, Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities 8-10 (May 27, 2021), available at [https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement\\_interim-guidance.pdf](https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf).