

Practice Advisory: The Return of Administrative Closure

Two years ago, then-Attorney General Sessions upended immigration court practice by decreeing that neither immigration judges nor the Board of Immigration Appeals (BIA) “have the general authority to suspend indefinitely immigration proceedings by administrative closure.” *Matter of Castro-Tum*, 47 I&N Dec. 271, 271 (A.G. 2018). In June 2020, the U.S. Court of Appeals for the Seventh Circuit joined the Fourth Circuit in rejecting that decision. *Meza Morales v. Barr*, 963 F.3d 629 (7th Cir. 2020); *see also Zuniga Romero v. Barr*, 927 F.3d 282 (4th Cir. 2019). As a result, administrative closure is once more generally available in immigration proceedings within these circuits.

This practice advisory aims to be a resource for attorneys practicing within jurisdictions that permit administrative closure, and also to provide some general guidance for practitioners in other jurisdictions. Even where *Castro-Tum* remains law for immigration courts, practitioners are encouraged to preserve the issue of administrative closure for appeal. The advisory consists of two main parts. Section I reviews the basics of administrative closure and the reasons why this tool may be useful to a respondent in immigration proceedings. Section II briefly reviews the past decade or so of case law on administrative closure, culminating in *Meza Morales*. The purpose is to provide an up-to-date picture of the current state of administrative closure in the Seventh Circuit (as well as in the Fourth), while also sketching out some consideration for practitioners elsewhere.

I. Background on Administrative Closure

Administrative closure is a docket-management tool used by the BIA and Immigration Judges (IJs). The effect of an administrative closure is “to temporarily remove a case from an Immigration Judge’s active calendar or from the Board’s docket.” *Matter of Avetisyan*, 25 I&N Dec. 688, 692 (BIA 2012). It does not terminate proceedings or confer any status on the noncitizen. *See Matter of Amico*, 19 I&N Dec. 652, 654 n.1 (B.I.A. 1988).

The typical occasion for administrative closure is a situation where the noncitizen is awaiting a decision regarding a collateral petition or court proceedings. For example, a noncitizen may be simultaneously in removal proceedings and awaiting adjudication of a visa petition filed with USCIS. By granting administrative closure, the IJ can “temporarily pause removal proceedings” while USCIS adjudicates the visa petition. *Matter of W-Y-U-*, 27 I&N Dec. 17, 18 (BIA 2017). Similarly, an IJ might administratively close a case in order to provide a noncitizen facing removal on criminal grounds more time to pursue a direct appeal or post-conviction relief in criminal court.

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Administrative closure has also operated as a tool of prosecutorial discretion, allowing government counsel to temporarily remove low-priority cases from court dockets. *See, e.g.*, Prosecutorial Discretion Implementation: Synthesis of Chapter Reports (Jan. 31, 2012), AILA Doc. No. 12010793; *but see* EO 13,768, *Enhancing Public Safety in the Interior of the United States* (Jan. 25, 2017), §§ 5, 10 (limiting prosecutorial discretion).

More concretely, a respondent may want to request administrative closure for any of the following reasons:

- To await adjudication of a Petition for Alien Relative (form I-130);
- To apply for a T visa (form I-914), U visa (form I-918), Special Immigrant Juvenile Status (form I-360), Adjustment of Status as a VAWA self-petitioner, *id.*, or Temporary Protected Status (form I-821);
- To pursue a direct appeal of a conviction, or to pursue post-conviction relief relevant to maintaining/obtaining lawful immigration status;
- To pursue a family court order required for obtaining Special Immigrant Juvenile Status;
- To seek a provisional waiver of unlawful presence (form I-601A) before departing the United State for consular processing, *see* 8 C.F.R. § 212.7(e)(4)(iii);
- To apply for Deferred Action for Childhood Arrivals, either as a renewal or as a new initial application (I-821d);¹
- On account of issues with mental competency, *see Matter of M-A-M-*, 25 I&N Dec. 474, 483 (BIA 2011); or
- In order to ensure that the cases of parents and children are decided together, where the parent and child have been placed in in separate proceedings.

IJs have also granted administrative closure in situations where a proceeding with a hearing would be unfair to the respondent. For instance, the IJ in *Castro-Tum* originally ordered administrative closure because the respondent was an unrepresented child whose failure to appear in court may have been the result of inadequate notice. *Matter of Castro-Tum*, 27 I&N Dec. 271, 279 (A.G. 2018). More generally, administrative closure may be granted in the interest of ensuring a fair hearing. *See* EOIR, *Operating Policies and Procedures Memorandum 13-01: Continuances & Admin. Closure*, 2013 WL 1091734 (Mar. 7, 2013) (“[I]t is a reality in any court system that fundamental fairness and due process require that legal proceedings be postponed in appropriate circumstances.”).

¹ In *Department of Homeland Security v. Regents of the University of California*, 140 S.Ct. 1891 (June 18, 2020), the Supreme Court upheld a judgment vacating the memorandum rescinding the DACA program. 140 S.Ct. at 1916. This restored DACA to its status prior to September 2017. Unless and until the administration issues a procedurally sound rule to the contrary, DHS is required to consider new DACA applications.

Once a case has been administratively closed, it remains inactive indefinitely, until recalendared by the IJ. Applications for asylum, withholding of removal, adjustment of status, or cancellation of removal filed with the immigration court will remain *pending* during this period. Noncitizens with pending applications for these forms of relief may be eligible for employment authorization under 8 C.F.R. § 274a.12(c)(8)–(10). Respondent’s counsel may also face obstacles to withdrawing from representation or filing a change of address while the case is administratively closed.

Either party may file a motion to recalendar. Immigration Court Practice Manual § 5.10(f) (2020). Such a motion should include the date and reason for closing the case, as well as a Change of Address Form (EOIR-33/IC) if the respondent has moved. *Id.* If one party opposes, the IJ will decide the motion by applying a set of considerations defined by BIA precedent. *See Matter of W-Y-U-*, 27 I&N Dec. at 20; *infra*, section II.A.

II. State of Administrative Closure Today

In most jurisdictions, the availability of administrative closure remains severely limited by *Castro-Tum*. The Fourth and Seventh Circuits, however, have returned to pre-*Castro-Tum* rules, reinstating the general availability of administrative closure in cases arising in these circuits. Thus, in order to understand the state of administrative closure today, this section discusses relevant precedent prior to *Castro-Tum*, briefly recaps the former Attorney General’s reasoning in that case, and summarizes why the Seventh Circuit rejected that reasoning. It concludes with a brief note on best practices in jurisdictions where *Castro-Tum* is still governing precedent.

A. Administrative Closure Prior to *Castro-Tum*

Administrative closure has been practiced in immigration proceedings “since at least the early 1980s.” *Castro-Tum*, 27 I&N Dec. at 273. Prior to *Castro-Tum*, the practice was not only permitted but often encouraged, including where a noncitizen was awaiting a decision on a *prima facie* eligible visa petition. *See, e.g., Matter of Raja*, 25 I&N Dec. 127, 135 n.10 (BIA 2009). While the regulations mention the availability of administrative closure in certain specific situations, *see, e.g.,* 8 C.F.R. § 1214.2(a) (authorizing administrative closure for T visa applicants), “no statute or regulation explicitly confers upon immigration judges a general power of administrative closure.” *Meza Morales*, 2020 WL 3478622 at *7. Nevertheless, it was widely accepted prior to *Castro-Tum* that either an IJ or the BIA could administratively close a case in appropriate circumstances pursuant to their general authority to take actions appropriate to the disposition of a case. *Avetisyan*, 25 I&N Dec. at 692.

The decision to administratively close a case was entrusted to the “independent judgment and discretion” of the adjudicator. *Id.* at 694. In *Avetisyan*, the BIA set out the following non-exhaustive set of considerations for determining whether administrative closure is appropriate:

- (1) the reason administrative closure is sought;

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

Id. at 696. These considerations are equally relevant in the context of considering a motion to recalendar. *W-Y-U-*, 27 I&N Dec. at 20. When deciding whether to administratively close or recalendar proceedings, the *primary* consideration should be “whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits.” *Id.*

Another important aspect of *Avetisyan* was its recognition that DHS does not have an “absolute veto power over administrative closure requests.” 25 I&N Dec. at 692–93. Prior to this decision, the BIA had taken the position that “[a] case may not be administratively closed if opposed by either of the parties.” *Matter of Gutierrez*, 21 I&N Dec. 479, 480 (BIA 1996). Numerous courts had rejected that rule. See *Ahmed v. Mukasey*, 548 F.3d 768, 772 (9th Cir. 2008); *Melnitsenko v. Mukasey*, 517 F.3d 42, 50-52 (2d Cir. 2008); *Sarr v. Gonzales*, 485 F.3d 354, 363-64 (6th Cir. 2007). The Board had started moving away from its prior rule in earlier decisions such as *Matter of Lamus*, 25 I&N Dec. 61, 64-65 (BIA 2009). In *Avetisyan*, the BIA engaged in further analysis and found that power to unilaterally block closure, primarily exercised by DHS, was inconsistent “with the delegated authority of the Immigration Judges and the Board and their responsibility to exercise independent judgment and discretion in adjudicating cases and to take any action necessary and appropriate for the disposition of the case.” 25 I&N Dec. at 692–93. In adjudicating a motion, the *Avetisyan* factors “apply equally to respondents and the DHS.” *Matter of W-Y-U-*, 27 I&N Dec. at 20.

Most circuits have held that federal courts have jurisdiction to review denials of administrative closure.² The standard for review of such decisions is “abuse of discretion.” *Vahora v. Holder*, 626

² See *Vahora v. Holder*, 626 F.3d 907, 918 (7th Cir. 2010) (“Simply put, the decision to grant or deny administrative closure is cut of the same cloth as various other decisions that we review with regularity in both administrative and non-administrative arenas.”); *Romero v. Barr*, 937 F.3d 282, 287 (4th Cir. 2019); *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 893 (9th Cir. 2018) (finding “jurisdiction to review administrative closure decisions” post-*Avetisyan* because that decision

F.3d 907, 918 (7th Cir. 2010). Courts will generally analyze whether the *Avetisyan* factors were applied correctly. *See, e.g., Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 893 (9th Cir. 2018) (“[T]he *Avetisyan* factors provide this Court with a ‘sufficiently meaningful standard’ by which to evaluate the IJ or BIA’s decision, we hold that this Court has jurisdiction to review administrative closure decisions.”).

B. The Reasoning of *Castro-Tum*

The availability of administrative closure was greatly curtailed by *Matter of Castro-Tum*. Whereas IJs and the BIA previously had a general authority to administratively close cases, *Castro-Tum* limited the practice of administrative closure to circumstances expressly contemplated by either a published regulation³ or a judicially approved settlement.⁴

Castro-Tum advances three main arguments that no legal authority exists for a general administrative-closure authority. First, the Attorney General argues that no statute or regulation authorizes a general authority to grant administrative closure. Both parties had agreed that no such delegation was *explicit* in these sources. *Matter of Castro-Tum*, 47 I&N Dec. at 284. But the Attorney General also rejected the respondent’s argument that some regulations implicitly authorized administrative closure as a means for IJs and the BIA to manage their cases. *Id.* (discussing 8 C.F.R. §§ 1003.1(d)(1)(ii), 1003.10(b), 1240.1(a)). Second, *Castro-Tum* suggests that recognition of such a power is inconsistent with express delegations of docket-managing authority made by the regulations and previous Attorneys General. *Id.* at 286–89. Lastly, the former Attorney General Sessions rejected the notion that IJs possess an inherent adjudicatory

provided “a ‘sufficiently meaningful standard’ by which to evaluate the IJ or BIA’s decision” (citation omitted); *Hernandez-Castillo v. Sessions*, 875 F.3d 199, 207 (5th Cir. 2017) (“Today we join several of our sister circuits in holding that federal courts of appeals have jurisdiction to review denials of administrative closure.”); *Gonzalez-Vega v. Lynch*, 839 F.3d 738, 741 (8th Cir. 2016) (finding *Avetisyan* “supplied a useable standard for review[.]”); *Garza-Moreno v. Gonzalez*, 489 F.3d 239, 242 (6th Cir. 2007).

³ *See* 8 C.F.R. § 1214.2(a) (“If the [noncitizen] appears eligible for T nonimmigrant status, the immigration judge or the Board, whichever has jurisdiction, may grant such a request to administratively close the proceeding[.]”); 8 C.F.R. § 1214.3 (applying to spouses and children of LPRs holding temporary visas under the LIFE Act), 8 C.F.R. § 1245.13(d)(3)(i) (applying to certain Nicaraguan and Cuban nationals); 8 C.F.R. § 1245.15(p)(4) (relating to administrative closure in the context of adjustment under HRIFA); 8 C.F.R. § 1245.21(c) (providing for administrative closure pursuant to a joint motion for certain nationals of Vietnam, Cambodia, and Laos).

⁴ *See Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 806–06 (N.D. Cal. 1991) (requiring administrative closure in the case of certain Salvadoran and Guatemalan asylum applicants); *Barahona-Gomez v. Ashcroft*, 243 F. Supp. 2d 1029 (N.D. Cal. 2002).

authority analogous to federal courts. *Id.* at 290–91. On this basis, he concluded that “[t]he current practice of administrative closure lack[ed] a valid legal foundation.” *Id.* at 291.

C. Meza Morales and Zuniga Romero

The two federal appellate courts to consider this issue have both found that the legal foundation for general administrative-closure authority was indeed sound, thus rejecting *Castro-Tum*. First, on August 29, 2019, the Fourth Circuit roundly rejected the reasoning of *Castro-Tum* in *Romero v. Barr*, 937 F.3d 282. Then, on June 26, 2020, the Seventh Circuit followed suit in *Meza Morales v. Barr*, No. 19-1999, 2020 WL 3478622.

The Seventh Circuit determined that the answer could be determined by applying traditional tools of construction to the governing regulations. *Meza Morales* at *7–9. The government had argued in *Meza Morales* that even if *Castro-Tum*’s holding on administrative closure was not required by the plain text of the regulations, the court should nonetheless accord deference to the agency’s interpretation. *Id.* at *7 (citing *Auer v. Robins*, 519 U.S. 452 (1997)). However, applying *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), the court was required first to exhaust the “traditional tools of construction” in interpreting the governing regulations before granting any deference. *Meza Morales*, 2020 WL 3478622 at *7.⁵ Under the *Kisor* standard, the court roundly rejected *Castro-Tum*’s analysis, finding instead that “administrative closure is [] plainly within an immigration judge’s authority” under the regulations. *Id.* at *9.

In reaching this conclusion, the court focused on the “broad authority” granted to immigration judges by 8 C.F.R. § 1003.10(b), which “permits the discretionary exercise of ‘any action’ that is ‘appropriate and necessary for the disposition of . . . cases.’” *Id.* at *8 (quoting 8 C.F.R. § 1003.10(b)). The “capacious phrase” *appropriate and necessary* includes such actions as providing a noncitizen an opportunity to pursue collateral relief. *Id.* Moreover, the court rejected *Castro-Tum*’s various arguments that 8 C.F.R. § 1003.10(b) conflicted with other regulatory provisions. For one thing, a proper exercise of administrative closure conflicts with neither the “general policy of expeditiousness underlying immigration law” nor the regulatory mandate that “immigration judges shall seek to resolve the questions before them in a timely . . . manner.” *Id.*; 8 C.F.R. § 1003.10(b). As the court recognized, “some cases are more complex and simply take longer to resolve,” and a myopic focus on expeditiousness ignores the fact that “[i]mmigration laws and regulations, like all laws and regulations, are the product of compromise over competing policy goals.” *Meza Morales* at *8. The court also rejected the notion that a general power of administrative closure would render superfluous the various regulations that mandate

⁵ The Seventh Circuit also rejected as irrelevant the government’s invocation of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), since the issue was the agency’s interpretation of its own regulations (the object of *Auer* deference), not of the governing statute (the object of *Chevron*). *Meza Morales* at *7 n.5.

administrative closure in certain circumstances⁶: “If anything, the directives in these other provisions that immigration judges ‘shall’ administratively close certain cases imply a preexisting general authority to do so.” *Id.* Similarly, the court found no issue with 8 C.F.R. § 1214.2(a), which specifies instances when an IJ “may” administratively close a case involving a pending T visa application, since this regulation provides additional guidance not found in the general grant of authority in 8 C.F.R. § 1003.10(b). *Id.* at *9. In short, the court found nothing in the regulations that could rebut the “broad authority” granted by 8 C.F.R. § 1003.10(b). The Attorney General exceeded his authority in *Castro-Tum*, as “he may not ‘under the guise of interpreting a regulation, . . . create de facto a new regulation’ that contradicts the one in place.” *Id.* (quoting *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)).

Because it found the text of 8 C.F.R. § 1003.10(b) sufficient to resolve the issue, the Seventh Circuit did not consider the analogous provision granting BIA members authority to “take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.” 8 C.F.R. § 1003.1(d)(1)(ii). Nevertheless, the court’s reasoning would appear to apply equally to this provision as it contains equally “capacious” language. Indeed, the Fourth Circuit analyzed the two provisions in conjunction, and even *Castro-Tum* itself appears to regard them as equivalent. *See Romero*, 937 F.3d at 292 (“[T]he plain language of 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii) unambiguously confers upon IJs and the BIA the general authority to administratively close cases”) (emphases added); *Matter of Castro-Tum*, 27 I&N Dec. at 282–83. It follows from the Seventh Circuit’s opinion that a general power of administrative closure vests in the BIA, as with Immigration Judges; although this issue is technically beyond the scope of the holding.

D. Cases Arising Outside the Fourth and Seventh Circuits

Even though *Castro-Tum* currently remains in effect in most circuits, it is subject to challenge in all circuits, and active challenges are pending in almost half of the federal circuits. At present, the authors are aware of the following challenges to *Castro-Tum*:

Second Circuit: Nos. 18-3460, 20-1303 *Benitez Marquez v. Barr*.

Third Circuit: No. 19-2681, *Ramos-Padilla v. Att’y Gen.*

Sixth Circuit: No. 20-3175, *Hernandez-Serrano v. Barr*

Ninth Circuit: No. 19-70964, *Umana Escobar v. Barr*

Tenth Circuit: No. 20-9559, *Acuna-Prieto v. Barr*

Lawyers for noncitizens outside the Fourth and Seventh circuits should preserve the denial of administrative closure as an issue on appeal. To preserve the issue adequately, attorneys should

⁶ *See supra*, FN 3–4.

raise administrative closure both before the IJ and in briefing to the BIA. The legal argument that *Castro-Tum* is erroneous need not be extensive at the agency level, but it would be wise to explain why administrative closure would be appropriate under the facts of a particular case, in order to exhaust administrative remedies.

Lastly, practitioners outside the Fourth and Seventh Circuits should remember that administrative closure survives in some circumstances even under *Castro-Tum*. Administrative closure still remains available for some T visa applicants (8 C.F.R. § 1214.2(a)), spouses and children of LPRs falling under the LIFE Act (8 C.F.R. § 1214.3), certain Cuban and Nicaraguan nationals (8 C.F.R. § 1245.13(d)(3)(i)), noncitizens adjusting status under HRIFA (8 C.F.R. § 1245.15(p)(4)), and any noncitizen covered by a relevant settlement agreement.

III. Conclusion

Administrative closure is a useful mechanism for providing a noncitizen an opportunity to pursue a collateral petition with USCIS or an adjudication in criminal or civil court. When courts reject *Castro-Tum*, the prior case law becomes applicable again. As a result, practitioners in the Fourth and Seventh Circuits can once again request administrative closure during immigration proceedings. Practitioners should be mindful of the factors articulated by the BIA in *Avetisyan*. *See supra*, Section II.A. The primary consideration, in decisions to administratively close or recalendar alike, is “whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits.” *Matter of W-Y-U-*, 27 I&N Dec. at 20.

For advocates in jurisdictions where *Castro-Tum* still applies, it is recommended that practitioners raise this issue before the IJ and Board, and explain why a particular case is appropriate for administrative closure.