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VIA Federal eRulemaking Portal

Raechel Horowitz
Chief, Immigration Law Division, Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

EOIR Docket No. 021-0410: Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure

Dear Ms. Horowitz:

The Immigration Reform Law Institute (IRLI) respectfully submits this public comment to the Executive Office for Immigration Review (EOIR), in response to EOIR's notice of proposed rulemaking (NPRM) published in the Federal Register. 88 Fed. Reg. 62242 (September 8, 2023).

IRLI is a non-profit public interest law organization that exists to defend individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to ensure the efficacy of America's comprehensive immigration laws and regulations and the integrity of our nation's enforcement programs. IRLI serves the public interest by monitoring and holding accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws.

IRLI has provided expert immigration-related legal services, training, and resources to public officials, the legal community, and the general public since 1986.

A. In general.

IRLI takes the position that administrative closure is virtually unique to the immigration courts and causes further delay to cases in an environment where there is already an immense backlog. IRLI believes administrative closure is not generally authorized by statute;

however, even if it is so authorized, as an exercise of administrative discretion it is unhelpful, counterproductive, and only promotes further inefficiency in an already highly inefficient backlogged system.

B. Administrative closure is unlawful as it is not authorized by statute.

While subsequently erroneously overruled, the original rationale of *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), was correct and remains correct, not merely with respect to it expressly noting an absence of regulatory authority for administrative closure, but also noting in passing not only a lack of underlying statutory authority for any such regulation but even statutory language actually forbidding any such regulation.

In *Castro-Tum*, the Attorney General noted that "Congress has never authorized administrative closures in a statute, … no statute delegates to immigration judges or the Board the authority to order administrative closure …" *Id.* at 274. Indeed, *Castro-Tum* cites multiple courts of appeals expressly recognizing that "there is no statutory basis for administrative closures." *Id.* at 283 (citing *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 889 (9th Cir. 2018); *Vahora v. Holder*, 626 F.3d 907, 917 (7th Cir. 2010); *Hernandez v. Holder*, 579 F.3d 864, 877 (8th Cir. 2009), vacated in part, 606 F.3d 900 (8th Cir. 2010); *Diaz-Covarrubias v. Mukasey*, 551 F.3d 1114, 1118 (9th Cir. 2009)).

Needless to say, Congress has not subsequently created a statutory basis for administrative closure in the five years since *Castro-Tum*.

Although formally not a determination on the merits, in practice administrative closure has been used "as a way to decline to prosecute low priority cases without formally terminating them." *Id.* at 276. Over and over, it has been simply "assumed without explanation that immigration judges and the Board possessed this general authority," *id.* at 275, and that they "implicitly possess this authority." *Id.* at 282.

Yet no such authority can be implied into existence simply because an unlawful practice has become one of long standing, particularly when not only does no statutory authority exist for it, but as *Castro-Tum* rightly noted, administrative closure is directly contrary to the express congressional commands of the Immigration and Nationality Act (INA):

> This certified case demonstrates how administrative closure particularly undermines the INA's mandate to swiftly adjudicate immigration cases when the respondent fails to appear. The INA unambiguously states that, with respect to in absentia proceedings, so long as DHS adequately alleges that it provided legally sufficient written notice to an alien, the alien "shall be ordered removed in absentia if [DHS] establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." INA § 240(b)(5)(A), 8 U.S.C. § 1229a(b)(5)(A) (emphasis added); see also 8 C.F.R. § 1003.26. Section 240(b)(5) thus imposes an obligation to proceeding

> expeditiously to determine whether the requisite evidence supports the removal charge. *Lopez-Barrios*, 20 I&N Dec. at 204. Congress enacted this requirement "in response to a serious problem of aliens deliberately failing to appear for hearings and thus effectively extending their stay in this country." *Kaweesa v. Gonzales*, 450 F.3d 62, 68 (1st Cir. 2006); *see Arrieta v. INS*, 117 F.3d 429, 431 (9th Cir. 1997). Accordingly, once DHS alleged that it provided adequate notice, the INA required the Immigration Judge to adjudicate the proceedings in absentia. Instead, the Immigration Judge ordered the case administratively closed because of his mistaken understanding of the notice required. Even if the respondent had received deficient notice, the proper course would have been to grant a continuance or terminate the proceedings, not to leave the case in limbo.

Id. at 290-91 (footnotes omitted).

Those courts of appeals that have considered and rejected *Castro-Tum*, as well as the Attorney General who overruled *Castro-Tum* in *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021), did so on the basis of determining that regulatory authority existed for administrative closure, but did not consider whether statutory authority existed to support any such regulation. Even in adopting *Castro-Tum*'s rationale and holding that no regulation at the time conferred general authority for administrative closure, the Sixth Circuit in *Hernandez-Serrano v. Barr*, 981 F.3d 459 (2020), likewise was not presented with and therefore did not decide the question of whether the existing regulation, or any regulation, is authorized by statute.

EOIR like any administrative agency "is entirely a creature of Congress and the determinative question is not what [it] thinks it should do but what Congress has said it can do." *Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961). If Congress thought administrative closure was something valuable worth providing for, Congress would have done so by statute. It has not.

Adopting the proposed rule would not cure the lack or ambiguity in regulatory authority for administrative closure that existed prior to the AA96 Final Rule but do precisely the opposite: by purporting to authorize by regulation what is not merely unauthorized by statute but contrary to statute, it would only more clearly invite a future challenge to all use of administrative closure.

C. Even if administrative closure were lawful, it is a counterproductive exercise of discretion that creates inefficiency rather than reducing it.

Because administrative closure removes a case from EOIR's docket but does not dispose of it on the merits, and such a case remains available to at least theoretically be reopened and re-calendared sometime in the future, any supposed "efficiency" gained from administrative closure amounts to an accounting gimmick at best. Its use can only ever decrease, not increase, the extent to which the goals of federal immigration law are actually effectuated.

To assess the efficiency of any action, one must ask: efficient at what?

IRLI certainly recognizes and concedes that if efficiency were judged solely by the total number of cases in EOIR's backlog, every immigration judge in the country could in theory administratively close every pending case and eliminate that entire backlog overnight and this would be maximum "efficiency." This number has only grown from approximately 600,000 in 2017 to well over two million now and nominally reducing it to zero at the stroke of a pen definitely sounds attractive on its face, though this would actually accomplish less than nothing in practical real-world terms.

But this absurd example only serves to illustrate that efficiency must be judged by how effective a tool or action is at actually achieving substantive policy goals, not playing with numbers arbitrarily detached from them, and in the case of EOIR these are the goals enacted by Congress in statute.

Those statutory goals have not changed in the decades since Congress first adopted the INA: indeed, they have only been further emphasized yet again each time Congress has amended it. Chief among them is a "strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 U.S. 94, 107 (1988).

From this naturally follows not merely a procedural but a substantive congressional aim of reducing rather than encouraging delay, which via finality ultimately works to benefit all parties. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) ("[A]s a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States"); *Matter of W-Y-U*, 27 I&N Dec. 17, 20 (BIA 2017) (citing *Ukpabi v. Mukasey*, 525 F.3d 403, 408 (6th Cir. 2008)) ("An unreasonable delay in the resolution of the proceedings may operate to the detriment of aliens by preventing them from obtaining relief that can provide lawful status or, on the other hand, it may "thwart the operation of statutes providing for removal" by allowing aliens to remain indefinitely in the United States without legal status.")

Since administrative closure does not dispose of a case on the merits, it can only create delay, not reduce delay, in meeting Congress's statutory goals. Therefore any use of it undermines those goals, making it inefficient by definition, and the more it is used, the more inefficiency it creates.

D. Recommendation.

For the aforesaid reasons, IRLI respectfully urges EOIR to reject the proposed rule or to revise it to re-adopt substantially the position of the AA96 Final Rule and *Matter of Castro-Tum*.

Respectfully submitted,

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