American Immigration Council

PRACTICE ADVISORY[1]
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ADMINISTRATIVE CLOSURE AND MOTIONS TO RECALENDAR

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I. Introduction

Administrative closure is an important tool for attorneys defending noncitizens in removal proceedings as it suspends adjudication of the proceeding, sometimes indefinitely. Administrative closure was used extensively as a form of prosecutorial discretion during the later years of the Obama Administration; in particular, the Department of Homeland Security (DHS) often joined in motions to administratively close cases that did not fall within its enforcement priorities. Under the Trump Administration, this is no longer the practice; in fact, DHS is moving to recalendar cases that previously were administratively closed. Increasingly, attorneys will need to be prepared to file *opposed* motions for administrative closure and to oppose DHS motions to recalendar previously closed cases. This practice advisory covers both such motions and discusses the governing Board of Immigration Appeals (BIA) decisions, including its recent decision *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017).

II. Basics of Administrative Closure

What is administrative closure?

Administrative closure is a docket management tool in which a case currently pending in immigration court or at the BIA is removed from the court or BIA's active docket. The case is not terminated and the individual remains "in" removal proceedings, although adjudication of the proceedings is halted. Administrative closure is primarily a "tool that is used to temporarily pause removal proceedings,"[2] and is "not a form of relief from removal and does not provide [a noncitizen] with any immigration status."[3]

The most important aspect of administrative closure is that a case will remain administratively closed indefinitely, and will only be returned to the active docket following a successful motion to recalendar. Unlike a continuance, where the Immigration Judge (IJ) sets a new court date that the respondent must attend, respondents whose cases are administratively closed have no new court dates. Until the case is recalendared, the respondent does not need to appear in court.

[2] *Matter of W-Y-U-*, 27 I&N Dec. 17, 18 (BIA 2017).
[3] *Id*.

An IJ's authority to grant administrative closure stems generally from his or her authority to "regulate the course of the hearing and to take any action consistent with applicable law and regulations."[4] Thus, when an IJ finds that placing a case on hold for a period of time is "necessary or … in the interests of justice and fairness to the parties,"[5] she may remove the case from the active docket by administratively closing it.

Who can ask for administrative closure?

Either DHS or the noncitizen may ask for a case to be administratively closed. Administrative closure may be sought by either party to the case at any point during the pendency of a case, until a final removal order is entered.

How long does administrative closure last?

A case will remain administratively closed indefinitely, until such time as an IJ orders the case to be recalendared.[6] This means that a noncitizen may potentially remain in removal proceedings for years, should neither DHS nor the noncitizen move to recalendar the case.

When should you ask for administrative closure?

Administrative closure is a powerful tool to remove your client from the immediate danger of proceeding with a case in immigration court. By having his or her case taken off of the court's active docket, a noncitizen in removal proceedings may be granted significantly more time to pursue action outside of immigration court that could lead to relief from removal, for example, with U.S. Citizenship and Immigration Services (USCIS), or a criminal or family court. Relevant actions occurring outside of immigration court that may require significant periods of time include, but are not limited to:

1. I-130, Petitions for Alien Relative;
2. I-360, Petition for Amerasian, Widow(er), or Special Immigrant, for those who are seeking adjustment under the Violence Against Women Act or Special Immigrant Juvenile Status provisions;
3. I-601A, Application for Provisional Unlawful Presence Waiver;[7]
4. I-730, Refugee/Asylee Relative Petition;
5. I-751, Petition to Remove Conditions on Residence;
6. I-821, Application for Temporary Protected Status;

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[4] *Matter of Avetisyan*, 25 I&N Dec. 688, 691 (BIA 2012) (citing to the authority granted to IJs in 8 C.F.R. §§ 1240.1(a)(1)(iv), (c)).
[5] *Id.*
[6] 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.").
[7] Individuals in removal proceedings seeking an I-601A, Application for Provisional Unlawful Presence Waiver, must have the proceedings administratively closed or terminated in order for USCIS to adjudicate the waiver. 8 C.F.R. § 212.7(e)(4)(iii).

7. I-821d, Consideration of Deferred Action for Childhood Arrivals;
8. I-914, Petition for T Nonimmigrant Status;
9. I-918, Petition for U Nonimmigrant Status;
10. Direct appeal of a conviction;[8]
11. Certain other forms of post-conviction relief;
12. Family court orders necessary for an award of Special Immigrant Juvenile Status; and
13. N-400, Application for Naturalization pursued by a family member/spouse of a noncitizen in removal proceedings which would make the respondent eligible to apply for relief.

In *Matter of Avetisyan*, the BIA provided an example of when administrative closure would "be appropriate": when the respondent "demonstrates that he or she is the beneficiary of an approved visa petition filed by a lawful permanent resident spouse who is actively pursuing, but has not yet completed, an application for naturalization."[9]

In recent years, administrative closure also has been the primary form of prosecutorial discretion employed by DHS. When DHS agrees to exercise prosecutorial discretion, it often agrees to do so via a joint motion to administratively close a case. Noncitizens granted such prosecutorial discretion receive a reprieve from immediate removal but remain in removal proceedings and are subject to the possibility of having their case recalendared in the future.

Finally, administrative closure is a tool that may be use to protect noncitizens with significant mental competency issues.[10] Where an IJ has determined that no procedural safeguards exist to ensure a fair hearing for a person with mental competency issues, the IJ may administratively close the case "while other options are explored, such as seeking treatment for the respondent."[11]

When is administrative closure not appropriate?

Although administrative closure is technically available in all circumstances, the BIA has provided some guidance on scenarios where it may not be appropriate, providing three examples where an IJ should not grant administrative closure. These are when the request is based on:

1. [A] purely speculative event or action (such as a possible change in a law or regulation);
2. [A]n event or action that is certain to occur, but not within a period of time that is reasonable under the circumstances (for example, remote availability of a fourth-preference family-based visa); or

[8] *See Matter of Montiel*, 26 I&N Dec. 555, 557 (BIA 2015) (holding that administrative closure may be appropriate where a conviction is on direct appeal, and instructing IJs to examine the "circumstances of the appeal" when deciding whether to administratively close the case).
[9] *Matter of Avetisyan*, 25 I&N Dec. at 696.
[10] *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011). For more information on *Matter of M-A-M-*, see the American Immigration Council's practice advisory, *Representing Clients with Mental Competency Issues under Matter of M-A-M-*.
[11] *Id*. at 483.

3. [A]n event or action that may or may not affect the course of [a noncitizen's] immigration proceedings (such as a collateral attack on a criminal conviction).[12]

However, because requests for administrative closure must be evaluated on a case by case basis, these scenarios are not dispositive.[13] Thus, respondents whose requests for administrative closure arguably fall within one of the three scenarios listed by the BIA should be prepared to submit ample evidence as to why their case should be an exception to these disfavored uses of administrative closure.

The BIA also has directed that an IJ should not administratively close a case on purely humanitarian grounds, as prosecutorial discretion is within DHS's sole authority and IJs should not delay proceedings in a way which could "thwart the operation of statutes providing for removal."[14]

What is the difference between administrative closure, a continuance, and a motion to terminate without prejudice?

Administrative closure, continuances, and motions to terminate without prejudice may all be used as a method to gain the time necessary to pursue relief from removal outside of immigration court. However, each has a distinct usage and a decision as to which one to pursue depends on your client's individual situation.

A motion to continue, like administrative closure, may be used to secure additional time to await the adjudication of a benefit outside of immigration court. The BIA has endorsed the use of continuances while awaiting adjudication of a pending family-based visa petition,[15] an employment-based visa petition or labor certification,[16] and a prima facie eligible U-visa.[17] However, continuances are shorter than administrative closure, and may require the respondent to return to court before a petition is adjudicated by USCIS. For that reason, the BIA has suggested that administrative closure is a better remedy than a continuance if there is a prima

[12] *Matter of Avetisyan*, 25 I&N Dec. at 696.
[13] *Id.* (emphasizing that "each situation must be evaluated under the totality of the circumstances of the particular case"). In the case of collateral attacks on a criminal conviction, for example, practitioners might present an affidavit from the respondent's criminal defense attorney confirming his or her ineffective assistance of counsel in failing to advise the respondent of the immigration consequences of pleading to a removable offense, as well as other evidence demonstrating a strong likelihood of success in seeking to overturn the prior conviction. Where a case is on direct appeal, the BIA has endorsed administrative closure after a similar review of the "circumstances of the appeal." *See Matter of Montiel*, 26 I&N Dec. at 556-557.
[14] *Matter of W-Y-U-*, 27 I&N Dec. at 20 (quoting *Ukpabi v. Mukasey*, 525 F.3d 403, 408 (6th Cir. 2008)).
[15] *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009).
[16] *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009).
[17] *Matter of Sanchez-Sosa*, 25 I&N Dec. 807 (BIA 2012).

facie approvable visa petition or if a significant period of time will pass before the case is ready to proceed.[18]

Unlike administrative closure or continuances, termination without prejudice[19] formally ends removal proceedings and allows USCIS to exercise its jurisdiction over applications that would otherwise be within the jurisdiction of the immigration courts, such as the I-485, Application to Register Permanent Residence or Adjust Status (except in cases involving "arriving aliens').[20] Those seeking to have USCIS adjudicate an application over which it would not have jurisdiction while removal proceedings are pending should consider filing a motion to terminate without prejudice.

What are the effects of administrative closure on ancillary benefits?

Individuals whose cases are administratively closed may remain eligible for an Employment Authorization Document (EAD) that was issued as a result of a pending application in immigration court, such as an application for cancellation of removal or asylum.[21] If the case was administratively closed pursuant to a joint motion, some states may also consider the noncitizen

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[18] "In appropriate circumstances, such as where there is a pending prima facie approvable visa petition, we urge DHS to consider administrative closure. Administrative closure is an attractive option … as it will assist in ensuring that only those cases that are likely to be resolved are before the Immigration Judge. This will avoid the repeated rescheduling of a case that is clearly not ready to be concluded." *Matter of Hashmi*, 24 I&N Dec. at 791 n4. Note that the Board directed its remarks to DHS in *Matter of Hashmi* because, at that time, Board precedent held that an IJ could not administratively close a case over the objection of either party. This is no longer the case. *Matter of Avetisyan*, 25 I&N Dec. at 692; see below at 8. Consequently, *Matter of Hashmi* should now be read as directed to IJs rather than to DHS.

[19] Termination would be without prejudice because there would be no fundamental error which would merit termination with prejudice, and would be solely to vest jurisdiction elsewhere.

[20] USCIS has jurisdiction over the adjustment application of an "arriving alien" regardless of whether that individual is in removal proceedings. 8 C.F.R. §§ 245.2(a)(1). For more information, see the American Immigration Council's practice advisory, *"Arriving Aliens" and Adjustment of Status*.

[21] *See, e.g.*, 8 C.F.R. § 274a.12(c)(8)-(c)(10) (providing EADs for applicants with pending applications). In 2012, USCIS confirmed to the American Immigration Lawyers Association (AILA) that applicants for cancellation of removal or adjustment of status whose cases are administratively closed while a cancellation application is pending (that is, already filed) are eligible for EADs. *USCIS-American Immigration Lawyers Association Meeting*, USCIS at 11 (Oct. 9, 2012). The Administrative Appeals Office has held in at least one non-precedent decision that a noncitizen who filed an asylum application in immigration court, received an EAD on the basis of that application, and whose case was subsequently administratively closed, remains eligible for an EAD because the application is still "undecided" under the regulations. *See* Daniel M. Kowalski, *Asylum Applicant with Administratively Closed Case Entitled to EAD: AAO*, LexisNexis (Sept. 28, 2013). In practice, however, AILA members report that USCIS on occasion will deny EADs to individuals in this situation.

to be in the status of a person Permanently Residing Under Color of Law (PRUCOL), and thus eligible for certain state benefits.[22]

How has the use of administrative closure changed under the Trump administration?

The use of administrative closure as a tool in immigration court has risen dramatically in the last five years, from 15,477 cases in 2012 to 48,285 cases in 2016.[23] Most of this increase is due to the Obama administration's call for increased use of prosecutorial discretion via the 2011 Morton memorandum (setting out standards for prosecutorial discretion) and the 2014 Johnson memoranda (setting out removal priorities). Following guidance issued after the Johnson memo, DHS attorneys were instructed to seek administrative closure for non-priority cases.[24]

However, on January 25th, 2017, President Trump signed Executive Order 13,768, which declared that all removable noncitizens were a priority for enforcement.[25] On February 20, 2017, DHS Secretary Kelly issued an implementation memorandum formally rescinding the Johnson memorandum and all previous memoranda reflecting enforcement priorities "to the extent of the conflict" with the new implementation memorandum.[26] While Secretary Kelly's memorandum does not end prosecutorial discretion entirely, it limits its use to cases that have been approved "in consultation with the head of the field office component … that initiated or will initiate the enforcement action, regardless of which entity actually file[d] any applicable charging documents." The memorandum also indicates that new guidance will be issued to ICE attorneys on the use of prosecutorial discretion.[27] To-date, this guidance has not been issued.

Under the Trump administration's priorities, the numbers of joint motions for administrative closure will be reduced significantly. Practitioners report that DHS has already begun to close down email boxes set up to accept prosecutorial discretion requests, and the restrictions in Secretary Kelly's memo indicate that DHS will severely scale back the exercise of prosecutorial discretion. DHS has also indicated that it will no longer agree to systematically administratively close cases in order for respondents to seek I-601A Provisional Unlawful Presence Waivers.[28]

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[22] *See, e.g.*, 18 NY ADC 360-3.2(j)(ii) (conferring PRUCOL status to noncitizens "whose departure from the U.S. [DHS] does not contemplate enforcing"); *see also* NY Dep't of Health, Clarification of PRUCOL Status for the Purposes of Medicaid Eligibility (2008).

[23] *See* Executive Office for Immigration Review, *FY 2016 Statistical Year Book* C5 (2017). Prior to 2012, administrative closures had never risen above 9,000 in a year.

[24] Riah Ramlogan, *Guidance Regarding Cases Pending Before EOIR Impacted by Secretary Johnson's Memorandum* 2 (2015).

[25] Executive Order 13,768, Enhancing Public Safety in the Interior of the United States, 82 FR 8799, 8800 (Jan. 25, 2017).

[26] Secretary Kelly, Enforcement of the Immigration Laws to Serve the National Interest 2 (Feb. 20, 2017). While the phrase "to the extent of the conflict" appears to leave open the question of whether any portions of the Johnson or Morton memos survive, practitioners should assume that neither memo is currently being followed in any material fashion.

[27] *Id.* at 4.

[28] *See Chasing Down Rumors: ICE No Longer Agrees to Systematically Administratively Close Cases for Form I-601A Filings*, AILA.org (Apr. 26, 2017) (noting that ICE confirmed this at an

Practitioners should expect DHS to oppose the majority of motions to administratively close cases, and be prepared to fully litigate such motions in the face of DHS opposition.[29]

Finally, practitioners have reported that DHS has begun rescinding prosecutorial discretion and is moving to recalendar proceedings that have been closed for years.[30] This is particularly troubling as there could be as many as 160,000 cases currently administratively closed[31] and many involve respondents who have not been in court in years, potentially decades.

III. How to Move for Administrative Closure

How do you make a request for administrative closure?

Either party may make a motion for administrative closure at any time, either in writing or orally. Following general motion practice, a motion for administrative closure will be more likely to be granted if you submit it with supporting evidence and legal arguments.

Can the IJ grant administrative closure over a party's objection?

Until 2012, IJs were not permitted to administratively close cases over the objections of either the noncitizen or the DHS.[32] However, in *Matter of Avetisyan*, the BIA squarely addressed this rule and overturned it, holding that authority to administratively close a case rests entirely with the IJ or the BIA. The BIA noted that the previous rule was "troubling" in part because it gave "a party, typically the DHS, [] absolute veto power over administrative closure requests."[33] The BIA found that this conflicted with the "delegated authority" of IJs and the BIA to "exercise

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open forum during AILA's spring conference). Practitioners have reported that in some locations, ICE has continued to evaluate requests to join motions to administratively close a case to seek an I-601A. Other reports indicate that ICE has begun offering unopposed voluntary departure instead of I-601As. However, because taking voluntary departure would make a noncitizen ineligible for an I-601A waiver, accepting this offer is not a viable alternative for those who want to pursue such a waiver. Such individuals remain eligible to file a motion for administrative closure even over the opposition of DHS.

[29] *See pp 8-10*, below for how to respond to DHS's opposition to administrative closure.

[30] *See Chasing Down Rumors: ICE Recalendaring Cases that Were Previously Administratively Closed*, AILA.org (May 30, 2017). While AILA reports that ICE has claimed to be seeking to recalendar only cases where there was an arrest or conviction after the case was administratively closed, AILA members have reported cases being recalendared with no subsequent criminal history. *Id.*

[31] See FY 2016 Statistical Year Book, *supra note* 23 at C5 (listing 164,613 administrative closures between FY 2012 and FY 2017).

[32] *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.").

[33] *Matter of Avetisyan*, 25 I&N Dec. at 692.

independent judgment" and "take any action necessary and appropriate for the disposition of the case."[34]

Following *Matter of Avetisyan*, there is no longer any dispute that an immigration judge may administratively close a case over the objection of one or both parties.

What factors will an IJ or the BIA consider in evaluating a motion to administratively close a case?

In *Matter of Avetisyan*, the BIA laid out a set of six factors that an IJ or the BIA should weigh in deciding whether to administratively close a case. These six factors are:

(1) [T]he reason administrative closure is sought;
(2) [T]he basis for any opposition to administrative closure;
(3) [T]he likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings;
(4) [T]he anticipated duration of the closure;
(5) [T]he responsibility of either party, if any, in contributing to any current or anticipated delay; and
(6) [T]he ultimate outcome of removal proceedings (for example, termination of proceedings or entry of removal order) when the case is recalendared before the Immigration Judge or the appeal is reinstated before the Board.[35]

Taken together, these factors give respondents broad leeway to argue that proceedings should be administratively closed. Recently, in *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017), however, the BIA clarified how an adjudicator is to weigh a party's opposition to administrative closure or a motion to recalendar an administratively closed case.[36] Specifically, the BIA held that the factors in *Matter of Avetisyan* are a tool for IJs to use to evaluate motions to administratively close a case, but "the primary consideration for an Immigration Judge in determining whether to administratively close or recalendar proceedings is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits."[37]

In *Matter of W-Y-U-*, the BIA did not explain what it means for "a persuasive reason for the case to proceed" to be the "primary consideration for an [IJ]." Because the basis for an opposition to administrative closure is *already* a factor that an IJ must consider under *Matter of Avetisyan*,[38] this new holding appears to indicate that an IJ should give a greater weight to this factor when balancing the *Matter of Avetisyan* factors. Arguably, therefore, even where an opposing party offers a "persuasive reason" to proceed with the case, the other five *Matter of Avetisyan*

[34] *Id.* at 693; *see id.* at 694 (noting that allowing one party to have such a veto would be to "abdicate the responsibility to exercise independent judgment and discretion").
[35] *Id.* at 696.
[36] The BIA made clear that its decision does not apply when the motion is unopposed. *Matter of W-Y-U-*, 27 I&N Dec. at 20 n5.
[37] *Id.* at 20.
[38] *Matter of Avetisyan*, 25 I&N Dec. at 692.

factors—although secondary considerations—may still tip the balance in favor of administrative closure if singly or in combination they are particularly strong.

Under *Matter of W-Y-U-*, respondents seeking administrative closure should explain—and provide evidence where possible—why the *Matter of Avetisyan* factors weigh in favor of the closure. If DHS then opposes the motion, respondents should challenge the persuasiveness of the reason it provides for opposing administrative closure. Even if DHS offers a "persuasive reason" to oppose administrative closure, if that reason is strongly counterbalanced by the remaining *Matter of Avetisyan* factors then practitioners should argue that *Matter of W-Y-U-* still permits the IJ to administratively close the case because the balance of factors merits it.

What effect do DHS enforcement priorities have on motions for administrative closure?

Under the Trump administration's new priorities, virtually every removable noncitizen is considered a priority for removal. Practitioners report that DHS has begun opposing motions to administratively close cases and invoking the new enforcement priorities, even in cases in which the government in recent years would have joined the motion, such as when the respondent is seeking an I-601A (Application for Provisional Unlawful Presence Waiver).

In *Matter of W-Y-U-*, the BIA provided an important check on the power of DHS to oppose administrative closure by holding that, "in considering administrative closure, an Immigration Judge cannot review whether [a noncitizen] falls within the DHS's enforcement priorities or will actually be removed from the United States."[39] The Board reasoned that, because enforcement priorities are fundamentally a matter of prosecutorial discretion, they fall outside of the immigration courts' jurisdiction. However, the operative effect of this command from the BIA is not entirely clear.

Practitioners can argue that the case categorically forecloses an IJ from considering DHS enforcement priorities in deciding on a motion for administrative closure. By declaring that "an Immigration Judge cannot review" the enforcement priority status of a noncitizen, the BIA arguably removed factors *unrelated to the individual's case* from consideration. This enforces the independence of IJs to determine the course of proceedings[40] by requiring IJs to examine each case solely on its individual merits.

Thus, under this reading of *Matter of W-Y-U-*, if you move for administrative closure and DHS's only reason for opposition is that your client is an enforcement priority, you should argue to the IJ that DHS's enforcement priorities cannot be considered and therefore DHS has offered no "persuasive reason" to oppose administrative closure.

In at least one case known to the author, DHS argues that this holding from *Matter of W-Y-U-* requires an IJ to accept at face value all DHS assertions that an individual is an enforcement

[39] *Matter of W-Y-U-*, 27 I&N Dec. at 19. The BIA also indicated that an IJ's invocation of court congestion as a ground to deny a motion to recalendar was inappropriate. *Id.* at 18-19.
[40] As emphasized in both *Matter of Avetisyan* and *Matter of W-Y-U-*.

priority. Pursuant to this interpretation, DHS contends that it may validly assert enforcement priorities as a persuasive reason for proceeding with a case.

Practitioners who encounter this posture should push back strongly against this interpretation. First, the facts of *Matter of W-Y-U-* undermine DHS' argument; there, the BIA overturned an IJ who had relied on DHS priorities with respect to recalendaring a case that had been administratively closed, and in doing so made clear that this was not an appropriate factor for an IJ to consider.[41] In essence, the response to DHS's argument would be that, while the IJ may accept as true DHS's assertion that the individual is an enforcement priority, that fact is immaterial to the motion for administrative closure and, as such, is not a persuasive reason for proceeding with the case. Second, the BIA clarified in *Matter of W-Y-U-* that "we continue to hold that neither party has 'absolute veto power over administrative closure requests.'"[42] DHS's interpretation would in essence provide it with absolute veto power over administrative closure requests, and should not be followed.

Can the IJ's decision granting or denying administrative closure be appealed?

Yes. The BIA treats appeals from administrative closure decisions as interlocutory appeals. *Matter of Avetisyan* was an interlocutory appeal of a grant of administrative closure and *Matter of W-Y-U-* was an interlocutory appeal of a denial of a motion to recalendar. The BIA will grant an interlocutory appeal only if a decision is "necessary to address important jurisdictional questions regarding the administration of the immigration laws or to correct recurring problems in the handling of cases by Immigration Judges."[43]

A review of unpublished caselaw demonstrates that when following this heightened standard for accepting interlocutory appeals, the BIA is generally unwilling to overturn decisions to administratively close a case where the IJ applied the *Matter of Avetisyan* factors and provided a persuasive rationale for his or her decision.[44] However, the BIA appears far more likely to exercise its authority to hear interlocutory appeals where the IJ has significantly misapplied *Matter of Avetisyan*.[45]

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[41] *Matter of W-Y-U-*, 27 I&N Dec. at 17, 19.
[42] *Id*. at 20 n5 (quoting *Matter of Avetisyan*, 25 I&N Dec. at 692).
[43] *Matter of Avetisyan*, 25 I&N Dec. at 688-689.
[44] *Compare Matter of Ortuno Hernandez*, 2016 WL 65199998 (BIA Sept. 19, 2016) (noting that "the issue of whether the [IJ] properly denied the DHS's Motion does not present a significant jurisdictional question about the administration of the immigration laws" and declining to exercise jurisdiction); *Matter of Malagon Galvan*, 2016 WL 1722606 (BIA Mar. 23, 2016) (same); *with Matter of Sandoval Arias*, 2016 WL 1084528 (BIA Feb. 22, 2016) (remanding to the IJ where the order to administratively close "[did] not specifically set forth the basis for the [IJ's] decisions."); *Matter of Tarpeh*, 2012 WL 2252996 *2 (BIA May 21, 2012) (remanding to the IJ where "the record does not indicate that the [IJ] … weighed and considered all the relevant factors [from *Matter of Avetisyan*]."
[45] *See, e.g.*, *Matter of Olivares-Munoz*, 2015 WL 5180622, *1 (BIA Aug. 11, 2015) (concluding that administrative closure was not appropriate where Respondent had no form of relief

If you successfully have a case administratively closed, what should you tell your client?

If you successfully have a client's case administratively closed, you may want to advise your client of the following:

1. Administrative closure is not a permanent form of relief, and your client is still in removal proceedings;
2. There will be no hearings scheduled in the case while it is administratively closed;
3. If your client was detained at the time of administrative closure, they will likely remain detained while the case is administratively closed;[46]
4. If your client was released on an order of supervision, they will still have to abide by that order of supervision and follow whatever requirements ICE has set;
5. DHS may seek to recalendar the case at any time, even years later, and even if it granted prosecutorial discretion;
6. Until proceedings are formally terminated or you file a motion to withdraw, you will remain the attorney of record on the case;
7. If the case was administratively closed in order for the client to take particular action, and the client does not take that action, it is possible that an IJ may view this lack of action negatively in the future; and
8. The client has a continuing obligation to inform the court and you of any change in address of contact information, and the consequence of failing to do so, including the possibility of an *in absentia* order should the case be recalendared.

Regardless of the length of the administrative closure, as an attorney you should endeavor to maintain communication with your client, as DHS can move to recalendar the case at any time. If your client is not in contact with you or with the immigration court, your client may be ordered removed *in absentia*. This risk is particularly high if administrative closure was indefinite.

IV. Motions to Recalendar – How to File and How to Oppose

How do you get a case back on the active docket?

While a case is administratively closed, any party may file a "motion to recalendar" with the Immigration Court or the BIA (whichever body closed the case) in order to have the case returned to the active docket. Unlike a motion to reopen, no filing fee is required.[47] The motion to recalendar should include the date the case was administratively closed and, if possible, the reason for closure and a copy of the original order if available.[48] If the respondent no longer

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available, was currently in mandatory detention and so "would be detained indefinitely at government expense," and DHS had indicated it would not grant prosecutorial discretion).

[46] *See id.* (noting that a person held under mandatory detention who was granted administrative closure would be "detained indefinitely"). If detention is under INA § 236(a) and bond had previously been denied, administrative closure may constitute a change in material circumstances meriting a bond redetermination hearing. 8 C.F.R. § 1003.19(e).

[47] Immigration Court Practice Manual § 3.4(b)(ii) (2017).

[48] *Id.* at § 5.10(t).

resides at the last address on file with the immigration court, an EOIR-33 Change of Address form should be included as well.

Why might you want a case back on the active docket?

When administrative closure is used to temporarily "pause" a case while relief is sought through USCIS, a case should be returned to the active docket once relief is successfully obtained. If the person is no longer subject to removal because of a decision outside of the immigration court, you can file both a motion to recalendar simultaneously with a motion to terminate proceedings, attach the decision and argue why your client is no longer removable. If the client has become eligible for a form of relief in immigration court, such as adjustment or non-LPR cancellation of removal, you only will seek to recalendar the case so that the client can pursue this relief.

How do you oppose a motion to recalendar filed by the government?

A party seeking to recalendar an administratively closed case must provide a "persuasive reason for the case to proceed and be resolved on the merits."[49] As with any motion, the IJ must give the non-moving party an opportunity to respond before granting or denying a motion to recalendar.[50] In evaluating whether the moving party has made a persuasive case to recalendar an administratively closed case, the IJ must consider the *Matter of Avetisyan* factors.[51] Therefore, those practitioners faced with a DHS motion to recalendar should be prepared to fully litigate anew the *Matter of Avetisyan* factors.

The underlying reason for the administrative closure will greatly influence the outcome of a motion to recalendar. The two most likely scenarios where DHS seeks to recalendar proceedings are where the case was administratively closed in order for the respondent to seek relief outside of immigration court, and where DHS agreed to a joint motion for administrative closure in the exercise of prosecutorial discretion.

How should you respond if the government moves to recalendar while the respondent is still pursuing action outside of removal proceedings?

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[49] *Matter of W-Y-U-*, 27 I&N Dec. at 20.

[50] The non-moving party has ten days after the motion to recalendar is filed with the immigration court to respond, after which an immigration judge may deem the motion unopposed. *See* Immigration Court Practice Manual § 3.1(b)(i)(A), Appendix D (2017). Because of delays in service, however, some practitioners have reportedly received DHS motions to recalendar with less than five days to respond. Practitioners in this situation may consider filing an emergency motion requesting that the IJ strike the filing as an "improper filing," *id.* at §3.1(d)(i), because "[s]ervice must be calculated to allow the other party sufficient opportunity to act upon or respond to served material," *id.* at § 3.2(d), or because DHS failed to "make a good faith effort to ascertain the opposing party's position on the motion." *Id.* at § 5.2(i).

[51] *Id.* at 18 n4 (noting that "[t]he [*Matter of Avetisyan*] factors should be weighed in evaluating a motion to recalendar or reinstate.").

If DHS moves to recalendar while the respondent is still pursuing action outside of the removal proceedings that could lead to relief from removal, practitioners should argue that, because the original basis for administrative closure has not been satisfied, it is premature to recalendar at this point. Where DHS opposed the original motion to administratively close the case, you could also argue that it is improperly attempting to relitigate this original opposition, especially if DHS did not appeal the original decision. If there has been no material change in circumstances, the *Matter of Avetisyan* factors should continue to weigh in favor of administrative closure. This is especially true where DHS provides a rationale for recalendaring that was available at the time of the original decision to administratively close (such as prior criminal history).

In opposing such a motion, practitioners may want to update the IJ on the respondent's progress in seeking an alternative form of relief, to further emphasize that administrative closure remains the appropriate course of action. If DHS is relying on a change in circumstances since the grant of administrative closure—such as a subsequent arrest or conviction—consider whether this is material to the relief the client is seeking outside of removal proceedings. Where that relief remains available, you can argue that the change in circumstances is not material and thus should not be considered.

How should you respond if the government moves to recalendar after revoking prosecutorial discretion?

If DHS seeks to recalendar a case where it previously granted prosecutorial discretion, and the respondent is not seeking any other form of relief, then opposing the motion to recalendar will be more difficult. IJs do not have the authority to grant prosecutorial discretion,[52] and the BIA has looked poorly on IJs' decisions to grant administrative closure for what the BIA believes to be purely humanitarian grounds.[53] Although *Matter of W-Y-U-* commands IJs not to consider DHS enforcement priorities in deciding to grant or deny a motion to administratively close, this does not prevent DHS from citing the "important public interest in the finality of immigration proceedings" and arguing that a decision denying the motion to recalendar would "thwart the operation of statutes providing for removal."[54]

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[52] *See Matter of W-Y-U-*, 27 I&N Dec. at 19; *Matter of Yazdani*, 17 I&N Dec. 626, 630 (BIA 1981) ("[S]o long as [DHS] choose[s] to … prosecute [removal] proceedings to a conclusion, the immigration judge and the Board must order deportation if the evidence supports a finding of deportability on the ground charged."); *see also Matter of Pascual*, 2012 WL 1705592 *2 (BIA Apr. 30, 2012) (unpublished) (noting that these principles "are directly implicated when DHS moves to recalendar a case … because DHS is making a specific, renewed effort to proceed to a final resolution of the case.").

[53] *See, e.g.*, *Matter of Pascual*, 2012 WL 1705592 at *2 ("If DHS is denied its request to recalendar proceedings after action on the case has been deferred for a period of time, particularly when DHS is not contributing to any delay in resolving any petition, collateral matter or other action that formed the basis for the administrative closure, the denial of the motion could undermine DHS's ability to enforce the immigration laws.").

[54] *Matter of W-Y-U*, 27 I&N Dec. at 19-20 (citations omitted). For this reason, *Matter of W-Y-U*'s holding restricting an IJ from considering enforcement priorities, *see supra* at 9-10, has

An IJ reviewing a motion to recalendar in this scenario will have to balance the *Matter of Avetisyan* factors, which generally do not provide reasons to oppose recalendaring a case that was administratively closed solely on the basis of prosecutorial discretion. Specifically, the "anticipated duration" of administrative closure for prosecutorial discretion is generally indeterminate, which the BIA specifically disapproved of in *Matter of Avetisyan*.[55] Furthermore, where the respondent had no form of relief other than prosecutorial discretion, the "ultimate outcome of the proceeding" factor weighs in favor of recalendaring.

Although the case law strongly suggests that an IJ should recalendar a case in these circumstances, if the reason your client was granted prosecutorial discretion was particularly compelling, you may argue that DHS's reason to recalendar is not persuasive enough to justify the effect it would have on your client. Should you encounter a particularly sympathetic IJ, this argument may work. If DHS chooses not to appeal, your client's case will remain administratively closed. If DHS appeals, however, the BIA may reverse the IJ on the grounds that refusing to recalendar where no relief is available runs counter to *Matter of W-Y-U-*.

For these reasons, should the IJ agree that DHS's revocation of prosecutorial discretion is a "persuasive reason for the case to proceed and be resolved on the merits," it is likely, but not certain, that a motion to recalendar will be granted if the noncitizen has not presented independent reasons that administrative closure is warranted.

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substantially less impact where DHS is seeking to recalendar proceedings, as the BIA did not explicitly include motions to recalendar in this holding.

[55] *Matter of Avetisyan*, 25 I&N Dec. at 696.