UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA 22041

In re:	)	
Martin Raul HUERTA-SOTO,	)	**File No. A 093 219 001**
Respondent.	)	

Brief of the American Immigration Lawyers Association, Amicus Curiae

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Introduction and Issue Presented

On May 9, 2011, the Board requested supplemental briefing from counsel for the Respondent and Office of District Counsel, and also invited briefs from amici to address the following issue:

> In light of the Board's decisions in *Matter of Lamus,* 25 I&N Dec. 61 (BIA 2009) and *Matter of Hashmi,* 24 I&N Dec. 785 (BIA 2009), and circuit court precedent, including *Ahmed v. Mukasey*, 548 F.3d 768 (9th Cir. 2008), should the Board of Immigration Appeals reconsider its decision in *Matter of Gutierrez-Lopez,* 21 I&N Dec. 479 (BIA 1996), that both parties must consent to administrative closure of removal proceedings?

See attached Exhibit #1.

This brief responds in the affirmative, and explains why the Board's rule requiring both parties to consent to administrative closure should be replaced with a rule that would require consideration of whether administrative closure is warranted for good cause. The new rule should allow the Immigration Judge or the Board to consider the respective positions of both parties, but recognize that neither party's consent nor opposition to administrative closure can be dispositive without consideration of additional relevant factors.

Amicus takes no position on whether the Respondent in this action should be entitled to administrative closure of his case.

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Statement of Interest

The American Immigration Lawyers Association (AILA), founded in 1946, is a nonpartisan, not-for-profit organization comprised of over 11,000 attorneys and law professors who practice and teach immigration law. AILA members provide professional services, continuing legal education, information and, additionally, representation for U.S. families, businesses, foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis. AILA has participated as amicus curiae in numerous cases. As a friend of the court, AILA hopes to provide a larger context for the present appeal in order to promote the just administration of law.

Argument

I. The Board should reconsider and modify its previous decisions requiring no opposition by either party before the Immigration Judge or Board can order administrative closure

In *Matter of Gutierrez-Lopez*, the Board reaffirmed a principle first articulated six years earlier, that neither party must oppose administrative closure of removal proceedings before it can be granted. *Gutierrez-Lopez*, 21 I&N Dec. at 480 (citing *Matter of Lopez-Barrios*, 20 I&N Dec. 203 (BIA 1990)). AILA believes the Board should modify that position and hold that requests for administrative closure should be independently assessed by the tribunal, with consideration of the positions of both sides, but with neither

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party possessing a unilateral veto power. Such a position would be consistent with the statutory and regulatory power conferred upon Immigration Judges and the Board to independently conduct removal proceedings, as well as with recent Board and circuit court decisions that have rejected a uniform consent rule in analogous contexts.

A. Providing either party veto power over a request for administrative closure conflicts with EOIR's statutory and regulatory authority to independently conduct removal proceedings.

The commencement of removal proceedings with the filing of a charging document with the immigration court is a clear line of demarcation. 8 C.F.R. § 1239.1(a). It separates the broad discretionary powers of the Department of Homeland Security (DHS, or the Department) in choosing whether or not to initiate removal proceedings from its more limited powers once those proceedings have begun. Past that clear boundary, all decisions regarding the conduct of proceedings should be assessed independently by the administrative tribunal, with the positions of either side considered, but not given preemptive power. Most motions before the Executive Office for Immigration Review (EOIR) adhere to this common sense principle; the fact that requests for administrative closure do not is an anachronism that needs

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to be corrected, in order to give full effect to the statutory and regulatory powers conferred upon EOIR.

The decision to *initiate* proceedings is a broad, essentially unfettered, discretionary power conferred upon DHS and not subject to review by the Immigration Court or the Board. *See, e.g., Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Similarly, an Immigration Judge may not interfere with the unrestricted authority of an authorized officer to cancel a Notice to Appear *prior* to commencement of proceedings. 8 C.F.R. §§ 239.2(a), 1239.2(a).

Once DHS commences removal proceedings, however, EOIR assumes exclusive jurisdiction to hear and decide cases, with that authority grounded in the Act. INA § 240(a)(1) confers upon an IJ the power to "conduct proceedings," while section 240(a)(3) confirms that removal proceedings "shall be the sole and exclusive procedure for determining whether an alien may be admitted to . . . or . . . removed from the United States." Congress did not provide DHS with authority to encroach on what is, by law, EOIR's exclusive authority.[1]

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[1] Indeed, once proceedings have begun, even a DHS decision to abandon prosecution of a matter must be adjudicated on the merits, and is no longer in the agency's unbounded discretionary power. *Matter of G-N-C-*, 22 I&N Dec. 281 (BIA 1998) (holding that once proceedings have commenced, the government "merely has the privilege to move for

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Consistent with the statutory power to conduct proceedings, the regulations require Immigration Judges and Board members to be independent adjudicators. 8 C.F.R. § 1003.10(b) (requiring Immigration Judges to exercise independent judgment and discretion and take any action consistent with their authority that is appropriate and necessary for the disposition of the case); 8 C.F.R. § 1240.1(a)(1)(i)-(iv) (clarifying that an Immigration Judge has the authority to determine removability and make decisions, including orders of removal; determine applications for relief from removal; order withholding of removal; and take any other actions that may be appropriate for the handling of proceedings); 8 C.F.R. § 1003.1(d)(1)(ii) (Board members also "shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member . . . may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.").

None of these broad grants of authority suggest that the Department (or a respondent) might possess anything amounting to a veto power over independent decisions or orders of the Immigration Court or Board. Instead,

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dismissal of proceedings"); *see also*, 8 C.F.R. § 239.2(c) (government "may move for dismissal of the mater on the grounds set out" in this section); 8 C.F.R. § 1239.2(c) (same, noting that termination of proceedings is without prejudice to either party).

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such unilateral veto power would necessarily conflict with the regulations' requirements for independent judgment and discretion, and with the underlying statutory authority to "conduct proceedings."

With regard to the specific regulatory powers to control and manage a court docket, section 1240.6 makes clear that an Immigration Judge may postpone or adjourn a hearing "either at his or her own instance or, for good cause shown, upon application by the respondent or the Service." This section is separate and distinct from a similar provision stating that an Immigration Judge "may grant a motion for continuance for good cause shown." 8 C.F.R. § 1003.29. Neither of these specific grants of authority for an Immigration Judge to control his or her docket contemplates the veto power exemplified in the rule stated in *Gutierrez-Lopez* and *Lopez-Barrios.*

Nevertheless, in the aftermath of those two decisions, the Department has come to regard administrative closure as a matter of its *own* prosecutorial discretion, encroaching on EOIR's independence. *See* William Howard, Principal Legal Advisor, ICE, "Prosecutorial Discretion" (Oct. 24, 2005), at 6. *See attached* Exhibit #2). In recent years, the Board and the circuit courts have restricted similar encroachments in comparable settings, reasserting EOIR's independence from any unilateral decisions of the Department about how a particular case is handled.

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In *Matter of Lamus*, the Board reexamined standards for reviewing a marriage-based motion to reopen as set forth in *Matter of Velarde-Pacheco*, 23 I&N Dec. 253 (BIA 2002). It clarified that the fifth *Velarde* element—that the Service either does not oppose the motion, or bases its opposition solely on *Matter of Arthur*—did not create a unilateral veto power. *Lamus*, 25 I&N Dec. at 64-65. Rather, *Lamus* instructed that the Immigration Judge must determine whether the government's argument is persuasive and should prevail. *Id.*

In deciding this way, the Board cited with apparent approval the circuit courts that have rejected an absolute or deferential reading of the *Velarde* elements. In particular, in *Melnitsenko v. Mukasey*, 517 F.3d 42, 51 (2nd Cir. 2008), the Second Circuit criticized *Velarde's* fifth element on the basis that there was "no rational explanation for why the fact of the DHS's opposition alone is sufficient to deny a motion." And the Ninth Circuit determined in *Ahmed v. Mukasey*, 548 F.3d 768 (9th Cir. 2008), that the regulation at 8 C.F.R. § 1003.1(d)(1)(ii), directing Board members to exercise their independent judgment and discretion, could not coexist with a rule allowing DHS to veto an otherwise well-founded motion: "Allowing the adversarial party to a proceeding to unilaterally block a motion, for any or no reason, deprives the BIA, and by extension this court, of any

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meaningful review." *Ahmed*, 548 F.3d at 772 (citing *Sarr v.Gonzalez,* 485 F.3d 354, 363 (6th Cir.2007)).

The reasoning applied by those tribunals in the context of motions to reopen applies equally well to requests for administrative closure. As with *Velarde*, the Board in *Lopez-Barrios* and *Gutierrez-Lopez* did not provide a rational explanation for providing DHS with a unilateral veto to an order to administratively close proceedings, and thus must be modified. *C.f., Ahmed v. Mukasey*, 548 F.3d at 772.

B. Because administrative closure is similar to an indefinite continuance, the Board should adopt the same clear standard for granting either type of request.

The Board itself has recognized administrative closure as a type of continuance. *Gutierrez-Lopez*, 21 I&N Dec. at 480 ("On January 14, 1991, the Board continued indefinitely the appeal in this case pending the respondent's opportunity to apply and be considered for temporary protected status."). Courts similarly classify administrative closure as a "temporary removal of the case from the docket [that] is similar to a court's granting of a continuance, albeit an indefinite one." *Vahora v. Holder,* 626 F.3d 907, 914-15 (7th Cir. 2010); *Garza-Moreno v. Gonzales,* 489 F.3d 239, 242 (6th Cir. 2007) ("The decision to administratively close a case is, in this [jurisdictional] context, not distinguishable from a continuance"); *Masih v.*

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Mukasey, 536 F.3d 370, 372 n.2 (5th Cir. 2008) ("We cannot discern any difference in treatment between a request for a 'continuance' and a request for an 'abeyance' [which the Board stated would take the form of administrative closure]").

The regulations provide that an Immigration Judge may postpone or adjourn a hearing on his or her own or on motion of a party for good cause shown. 8 C.F.R. § 1240.6. Why a similar standard was not adopted for administrative closure is perhaps best explained by the context from which the seminal cases arose, where the Board was addressing *in absentia* scenarios—situations where the weight to be afforded a Department opposition was likely at its zenith.

Amicus notes that the rule in *Gutierrez- Lopez*[2] is simply a restatement of the same rule from an earlier decision, *Matter of Lopez-Barrios*, 20 I&N Dec. 203 (BIA 1990). In *Lopez-Barrios*, an Immigration Judge administratively closed a proceeding over the government's objection

[2] In *Gutierrez-Lopez*, the Board had already administratively closed respondent's appeal to allow him to apply for Temporary Protected Status under the *ABC* lawsuit settlement. When he later filed a motion to reopen to apply for adjustment of status, the Board agreed to reopen the proceedings for new relief without disturbing the previously closed issues inasmuch as neither party requested that the Board reinstate the appeal. While it restated the rule that a case may not be administratively closed if opposed by either party, the Board did not need to apply it in order to decide the issue presented. *Gutierrez-Lopez*, 21 I&N Dec. at 480.

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after the respondent failed to appear. The government filed an interlocutory appeal. The Board agreed that administrative closure over the government's objection was error, and remanded for the Immigration Judge to determine whether there was proper notice and either terminate proceedings or enter a deportation order *in absentia*. *Lopez-Barrios,* 20 I&N Dec. at 204.

The Board's subsequent cases endorsing the principle that an Immigration Judge may not administratively close proceedings or refuse to conduct proceedings *in absentia* where the government objects similarly involved respondents who failed to appear. *Matter of Peugnot*, 20 I&N Dec. 233, 234 n.1 (BIA 1991); *Matter of Munoz-Santos*, 20 I&N Dec. 205, 208 (BIA 1990). The rule developed by the Board rested entirely on its view that a respondent should not be allowed to fail to attend a hearing and still avoid a potential *in absentia* removal order where the government objects to administrative closure. *See Matter of Amico,* 19 I&N Dec. 652 (BIA 1988). Had the Board's earlier decisions not arisen from these *in absentia* scenarios, its reasoning may have hued closer to the accepted standards for continuances, given the recognized similarity between a continuance and administrative closure.

In cases where the issue is the availability of relief from removal, an Immigration Judge and the Board are authorized to determine such relief,

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and should be able to enter an administrative closure order on motion of a respondent where relief is not immediately available. By the same measure, the Department should have the ability to argue that a particular case should or should not be administratively closed, even over a respondent's objection, based on the particular circumstances presented. For example, the Department may want to temporarily close proceedings while it investigates a respondent's factual assertions.

The point is that the Immigration Judge or the Board, and not any one party, should decide the request. As is recognized with motions to continue, providing for a unilateral veto of administrative closure can lead to unreasoned objections that threaten the availability of statutory relief. *Vahora*, 626 F.3d at 919 (recognizing that the "decision to continue a matter without a specific date for its restoration to a trial docket" . . . is "an area where an administrative tribunal's decision to proceed immediately or to defer decision can affect an individual's liberty and thus 'infringe upon areas that courts often are called upon to protect.'").

Cases often arise in which a respondent is prospectively eligible for relief, but the Immigration Judge cannot grant it immediately. This may be due to retrogression in a particular visa category. *See, e.g., Matter of Ho,* 15 I&N Dec. 692 (BIA 1976). Or the alien might establish a prima facie case

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for a family-based adjustment of status, but the Department must first act on a pending petition, *See, e.g., Matter of Garcia,* 16 I&N Dec. 653, 656-57 (BIA 1978); *Matter of Velarde-Pacheco,* 23 I&N Dec. 253 (BIA 2002). Or the Department of Labor must complete processing of a labor certification application, after which the respondent's employer may file a petition and respondent may be eligible to apply for an employment based adjustment of status . *Matter of Rajah,* 25 I&N Dec. 127 (BIA 2009); *Subhan v. Ashcroft,* 383 F.3d 591 (7th Cir. 2004). Unlike in cases where a respondent fails to appear for a hearing, aliens in these cases have every reason to appear and press their claim for relief, and administrative closure may be the best approach to alleviate burdens to all concerned.

The Board has recognized that "[a]dministrative closure is an attractive option in these situations, 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. 785, 792 n.4 (BIA 2009); *Matter of Rajah*, 25 I&N Dec. 127, 136 n.10 (BIA 2009). As with its recent decisions withdrawing from an inflexible consent rule concerning motions to reopen, an Immigration Judge or the Board should be permitted decide a motion for administrative closure based on consideration of all relevant

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factors, where "the focus of the inquiry is the likelihood of success" in the relief application. *Rajah*, 25 I&N Dec. at 130; *Hashmi,* 24 I&N Dec. at 790-794 (indicating the focus is on the likelihood of success and providing a non-exclusive list of factors that an IJ may consider); *Garcia,* 16 I&N Dec. at 656. In such cases where an application is likely to be granted after certain prerequisites are satisfied, there is little reason to subject the parties to repeated court appearances for cases that are approvable but not yet ready for decision. 8 C.F.R. § 1240.6.

Accordingly, since the two actions are so closely related, and the regulations already provide a "good cause" standard for continuances, the Board should modify its ruling in *Gutierrez-Lopez* and *Lopez-Barrios* to provide a similar standard for deciding motions to administratively close proceedings. Like it did in *Hashmi*, *Rajah* and *Lamus*, the Board should hold that Immigration Judges and Board members must exercise their independent judgment, considering any arguments against a motion, but not making either party's objection automatically dispositive. Accordingly, in appropriate cases, where good cause has been established, a request for administrative closure may be granted even over the objection of a party to the proceedings.

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C. Each party has remedies available to it if it disagrees with a decision to administratively close or when circumstances change.

Once a case has been closed administratively, "either party can move to have the case recalendered" once circumstances "indicat[e] that the case is ready for a hearing." *Hashmi*, 24 I&N Dec. at 792 n.4. Also, if a party is dissatisfied with a decision, it may file an interlocutory appeal. *Matter of Amico*, 19 I&N Dec. 652 (BIA 1988).

Conclusion

The Board should modify its rule requiring both parties to not oppose the entry of an order administratively closing proceedings. The absolute rule announced in *Gutierrez-Lopez* and *Lopez-Barrios* is inconsistent with the independence of Immigration Judges and Board members. Any question of administrative closure should be decided with regard to factors concerning the availability of relief from removal and other relevant considerations, including the reasons why a party may object to entry of such an order. Neither party, however, should be given a veto power trumping the independent judgment of the tribunal. Amicus suggests that the proper standard for administrative closure is good cause.

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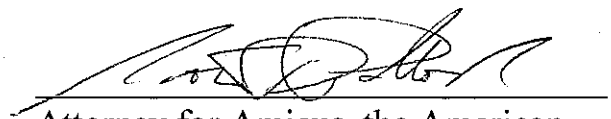
June 9, 2011

Respectfully submitted,



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Certificate of Service

Scott D. Pollock, an attorney, hereby certifies that he caused the foregoing Brief of the American Immigration Lawyers Association, Amicus Curiae, to be served on Thursday, June 9, 2011, by placing it in regular U.S. mail at 105 W. Madison, Chicago, IL 60602, first class postage prepaid, addressed to the following parties:

Claudia Lopez, Esq.
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1545 Wilshire Boulevard, Suite 408
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and

Office of District Counsel/LOS
U.S. Department of Homeland Security
606 So. Olive Street, 8th Floor
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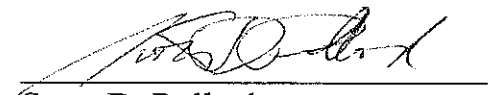

Scott D. Pollock

June 9, 2011

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U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

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May 9, 2011

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606 SO. Olive Street, 8th Floor.
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Re: HUERTA-Soto, Martin Raul
A 093 219 001

Dear Counsel:

The Board requests supplemental briefing for the subject case. Both parties are granted until **June 10, 2011**, to submit a supplemental brief to the Board of Immigration Appeals. The briefs must be RECEIVED at the Board on or before this date. **Please note: The supplemental brief is limited to 25 double-spaced pages.** Two copies of this letter have been sent to you. Please attach one copy of this letter to the front of your brief when you mail or deliver it to the Board, and keep one for your records. Amicus Curiae's AILA & FAIR are also permitted to submit a supplemental brief by June 10, 2011. The parties should address the following issue:

In light of the Board's decisions in *Matter of Lamus*, 25 I&N Dec. 61 (BIA 2009), and *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), and circuit court precedent, including *Ahmed v. Mukasey*, 548 F.3d 768 (9th Cir. 2008), should the Board of Immigration Appeals reconsider its decision in *Matter of Gutierrez-Lopez*, 21 I&N Dec. 479 (BIA 1996), that both parties must consent to the administrative closure of removal proceedings?

A fee is not required for the filing of a brief. Your brief must be RECEIVED at the Office of the Board of Immigration Appeals within the prescribed time limits. It is NOT sufficient simply to mail the brief and assume your brief will arrive on time. We strongly urge the use of an overnight courier service to ensure the timely filing of your brief. If you have any questions about how to file something at the Board, you should review the Board's Practice Manual and Questions and Answers at www.usdoj.gov/eoir.

Proof of service on the opposing party at the address above is required for ALL submissions to the Board of Immigration Appeals–including correspondence, forms, briefs, motions, and other documents. If you are the Respondent or Applicant, the "Opposing Party" is the Chief Counsel for the DHS at the address shown above. Your certificate of service must clearly identify the document sent to the opposing party.

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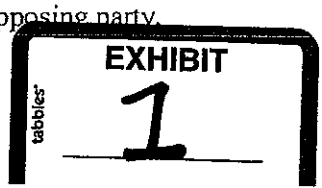

the opposing party's name and address, and the date it was sent to them. Any submission filed with the Board without a certificate of service on the opposing party will be rejected.

Filing Address:

To send by courier or overnight delivery service, or to deliver in person:

Board of Immigration Appeals,
Clerk's Office
5107 Leesburg Pike, Suite 2000,
Falls Church, VA 22041

Business hours: Monday through Friday, 8:00 a.m. to 4:30 p.m.

To mail by regular first class mail:

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Sincerely,

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U.S. Immigration and Customs Enforcement

October 24, 2005

MEMORANDUM FOR: All OPLA Chief Counsel

FROM: William J. Howard
Principal Legal Advisor

SUBJECT: Prosecutorial Discretion

As you know, when Congress abolished the Immigration and Naturalization Service and divided its functions among U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (CIS), the Office of the Principal Legal Advisor (OPLA) was given exclusive authority to prosecute all removal proceedings. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 442(c), 116 Stat. 2135, 2194 (2002) ("the legal advisor * * * shall represent the bureau in all exclusion, deportation, and removal proceedings before the Executive Office for Immigration Review"). Complicating matters for OPLA is that our cases come to us from CBP, CIS, and ICE, since all three bureaus are authorized to issue Notices to Appear (NTAs).

OPLA is handling about 300,000 cases in the immigration courts, 42,000 appeals before the Board of Immigration Appeals (BIA or Board), and 12,000 motions to reopen each year. Our circumstances in litigating these cases differ in a major respect from our predecessor, the INS's Office of General Counsel. Gone are the days when INS district counsels, having chosen an attorney-client model that required client consultation before INS trial attorneys could exercise prosecutorial discretion, could simply walk down the hall to an INS district director, immigration agent, adjudicator, or border patrol officer to obtain the client's permission to proceed with that exercise. Now NTA-issuing clients or stakeholders might be in different agencies, in different buildings, and in different cities from our own.

Since the NTA-issuing authorities are no longer all under the same roof, adhering to INS OGC's attorney-client model would minimize our efficiency. This is particularly so since we are litigating our hundreds of thousands of cases per year with only 600 or so attorneys; that our case preparation time is extremely limited, averaging about 20 minutes a case; that our caseload will increase since Congress is now providing more resources for border and interior immigration enforcement; that many of the cases that come to us from NTA-issuers lack supporting evidence like conviction documents; that we must prioritize our cases to allow us to place greatest emphasis on our national security and criminal alien dockets; that we have growing collateral duties such as

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EXHIBIT 2 tabbies

assisting the Department of Justice with federal court litigation; that in many instances we lack sufficient staff to adequately brief Board appeals or oppositions to motions to reopen; and that the opportunities to exercise prosecutorial discretion arise at many different points in the removal process.

To elaborate on this last point, the universe of opportunities to exercise prosecutorial discretion is large. Those opportunities arise in the pre-filing stage, when, for example, we can advise clients who consult us whether or not to file NTAs or what charges and evidence to base them on. They arise in the course of litigating the NTA in immigration court, when we may want, among other things, to move to dismiss a case as legally insufficient, to amend the NTA, to decide not to oppose a grant of relief, to join in a motion to reopen, or to stipulate to the admission of evidence. They arise after the immigration judge has entered an order, when we must decide whether to appeal all or part of the decision. Or they may arise in the context of DRO's decision to detain aliens, when we must work closely with DRO in connection with defending that decision in the administrative or federal courts. In the 50-plus immigration courtrooms across the United States in which we litigate, OPLA's trial attorneys continually face these and other prosecutorial discretion questions. Litigating with maximum efficiency requires that we exercise careful yet quick judgment on questions involving prosecutorial discretion. This will require that OPLA's trial attorneys become very familiar with the principles in this memorandum and how to apply them.

Further giving rise to the need for this guidance is the extraordinary volume of immigration cases that is now reaching the United States Courts of Appeals. Since 2001, federal court immigration cases have tripled. That year, there were 5,435 federal court cases. Four years later, in fiscal year 2004, that number had risen to 14,699 federal court cases. Fiscal year 2005 federal court immigration cases will approximate 15,000. The lion's share of these cases consists of petitions for review in the United States Courts of Appeal. Those petitions are now overwhelming the Department of Justice's Office of Immigration Litigation, with the result that the Department of Justice has shifted responsibility to brief as many as 2,000 of these appellate cases to other Departmental components and to the U.S. Attorneys' Offices. This, as you know, has brought you into greater contact with Assistant U.S. Attorneys who are turning to you for assistance in remanding some of these cases. This memorandum is also intended to lessen the number of such remand requests, since it provides your office with guidance to assist you in eliminating cases that would later merit a remand.

Given the complexity of immigration law, a complexity that federal courts at all levels routinely acknowledge in published decisions, your expert assistance to the U.S. Attorneys is critical.[1] It is all the more important because the decision whether to

[1] As you know, if and when your resources permit it, I encourage you to speak with your respective United States Attorneys' Offices about having those Offices designate Special Assistant U.S. Attorneys from OPLA's ranks to handle both civil and criminal federal court immigration litigation. The U.S.

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proceed with litigating a case in the federal courts must be gauged for reasonableness, lest, in losing the case, the courts award attorneys' fees against the government pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412. In the overall scheme of litigating the removal of aliens at both the administrative and federal court level, litigation that often takes years to complete, it is important that we all apply sound principles of prosecutorial discretion, uniformly throughout our offices and in all of our cases, to ensure that the cases we litigate on behalf of the United States, whether at the administrative level or in the federal courts, are truly worth litigating.

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With this background in mind, I am directing that all OPLA attorneys apply the following principles of prosecutorial discretion:

1) Prosecutorial Discretion Prior to or in Lieu of NTA Issuance:

In the absence of authority to cancel NTAs, we should engage in client liaison with CBP, CIS (and ICE) via, or in conjunction with, CIS/CBP attorneys on the issuance of NTAs. We should attempt to discourage issuance of NTAs where there are other options available such as administrative removal, crewman removal, expedited removal or reinstatement, clear eligibility for an immigration benefit that can be obtained outside of immigration court, or where the desired result is other than a removal order.

It is not wise or efficient to place an alien into proceedings where the intent is to allow that person to remain unless, where compelling reasons exist, a stayed removal order might yield enhanced law enforcement cooperation. See Attachment A (Memorandum from Wesley Lee, ICE Acting Director, Office of Detention and Removal, Alien Witnesses and Informants Pending Removal (May 18, 2005)); see also Attachment B (Detention and Removal Officer's Field Manual, Subchapters 20.7 and 20.8, for further explanation on the criteria and procedures for stays of removal and deferred action).

Examples:

- **Immediate Relative of Service Person-** If an alien is an immediate relative of a military service member, a favorable exercise of discretion, including not issuing an NTA, should be a prime consideration. Military service includes current or former members of the Armed Forces, including: the United States Army, Air Force, Navy, Marine Corps, Coast Guard, or National Guard, as well as service in the Philippine Scouts. OPLA counsel should analyze possible eligibility for citizenship under

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Attorneys' Offices will benefit greatly from OPLA SAUSAs, especially given the immigration law expertise that resides in each of your Offices, the immigration law's great complexity, and the extent to which the USAOs are now overburdened by federal immigration litigation.

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sections 328 and 329. See Attachment C (Memorandum from Marcy M. Forman, Director, Office of Investigations, Issuance of Notices to Appeal, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service (June 21, 2004)).

- **Clearly Approvable I-130/I-485-** Where an alien is the potential beneficiary of a clearly approvable I-130/I-485 and there are no serious adverse factors that otherwise justify expulsion, allowing the alien the opportunity to legalize his or her status through a CIS-adjudicated adjustment application can be a cost-efficient option that conserves immigration court time and benefits someone who can be expected to become a lawful permanent resident of the United States. See Attachment D (Memorandum from William J. Howard, OPLA Principal Legal Advisor, Exercising Prosecutorial Discretion to Dismiss Adjustment Cases (October 6, 2005)).

- **Administrative Voluntary Departure-** We may be consulted in a case where administrative voluntary departure is being considered. Where an alien is eligible for voluntary departure and likely to depart, OPLA attorneys are encouraged to facilitate the grant of administrative voluntary departure or voluntary departure under safeguards. This may include continuing detention if that is the likely end result even should the case go to the Immigration Court.

- **NSEERS Failed to Register-** Where an alien subject to NSEERS registration failed to timely register but is otherwise in status and has no criminal record, he should not be placed in proceedings if he has a reasonable excuse for his failure. Reasonably excusable failure to register includes the alien's hospitalization, admission into a nursing home or extended care facility (where mobility is severely limited); or where the alien is simply unaware of the registration requirements. See Attachment E (Memorandum from Victor Cerda, OPLA Acting Principal Legal Advisor, Changes to the National Security Entry Exit Registration System (NSEERS)(January 8, 2004)).

- **Sympathetic Humanitarian Factors-** Deferred action should be considered when the situation involves sympathetic humanitarian circumstances that rise to such a level as to cry for an exercise of prosecutorial discretion. Examples of this include where the alien has a citizen child with a serious medical condition or disability or where the alien or a close family member is undergoing treatment for a potentially life threatening disease. DHS has the most prosecutorial discretion at this stage of the process.

2) **Prosecutorial Discretion after the Notice to Appear has issued, but before the Notice to Appear has been filed:**

We have an additional opportunity to appropriately resolve a case prior to expending court resources when an NTA has been issued but not yet filed with the immigration court. This would be an appropriate action in any of the situations

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identified in #1. Other situations may also arise where the reasonable and rational decision is not to prosecute the case.

Example:

- **U or T visas-** Where a "U" or "T" visa application has been submitted, it may be appropriate not to file an NTA until a decision is made on such an application. In the event that the application is denied then proceedings would be appropriate.

3) Prosecutorial Discretion after NTA Issuance and Filing:

The filing of an NTA with the Immigration Court does not foreclose further prosecutorial discretion by OPLA Counsel to settle a matter. There may be ample justification to move the court to terminate the case and to thereafter cancel the NTA as improvidently issued or due to a change in circumstances such that continuation is no longer in the government interest.[2] We have regulatory authority to dismiss proceedings. Dismissal is by regulation without prejudice. See 8 CFR §§ 239.2(c), 1239.2(c). In addition, there are numerous opportunities that OPLA attorneys have to resolve a case in the immigration court. These routinely include not opposing relief, waiving appeal or making agreements that narrow issues, or stipulations to the admissibility of evidence. There are other situations where such action should also be considered for purposes of judicial economy, efficiency of process or to promote justice.

Examples:

[2] Unfortunately, DHS's regulations, at 8 C.F.R. 239.1, do not include OPLA's attorneys among the 38 categories of persons given authority there to issue NTAs and thus to cancel NTAs. That being said, when an OPLA attorney encounters an NTA that lacks merit or evidence, he or she should apprise the issuing entity of the deficiency and ask that the entity cure the deficiency as a condition of OPLA's going forward with the case. If the NTA has already been filed with the immigration court, the OPLA attorney should attempt to correct it by filing a form I-261, or, if that will not correct the problem, should move to dismiss proceedings without prejudice. We must be sensitive, particularly given our need to prioritize our national security and criminal alien cases, to whether prosecuting a particular case has little law enforcement value to the cost and time required. Although we lack the authority to sua sponte cancel NTAs, we can move to dismiss proceedings for the many reasons outlined in 8 CFR § 239.2(a) and 8 CFR § 1239.2(c). Moreover, since OPLA attorneys do not have independent authority to grant deferred action status, stays of removal, parole, etc., once we have concluded that an alien should not be subjected to removal, we must still engage the client entity to "defer" the action, issue the stay or initiate administrative removal.

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- **Relief Otherwise Available**- We should consider moving to dismiss proceedings without prejudice where it appears in the discretion of the OPLA attorney that relief in the form of adjustment of status appears clearly approvable based on an approvable I-130 or I-140 and appropriate for adjudication by CIS. See October 6, 2005 Memorandum from Principal Legal Advisor Bill Howard, supra. Such action may also be appropriate in the special rule cancellation NACARA context. We should also consider remanding a case to permit an alien to pursue naturalization.[3] This allows the alien to pursue the matter with CIS, the DHS entity with the principal responsibility for adjudication of immigration benefits, rather than to take time from the overburdened immigration court dockets that could be expended on removal issues.

- **Appealing Humanitarian Factors**- Some cases involve sympathetic humanitarian circumstances that rise to such a level as to cry for an exercise of prosecutorial discretion. Examples of this, as noted above, include where the alien has a citizen child with a serious medical condition or disability or where the alien or a close family member is undergoing treatment for a potentially life threatening disease. OPLA attorneys should consider these matters to determine whether an alternative disposition is possible and appropriate. Proceedings can be reinstituted when the situation changes. Of course, if the situation is expected to be of relatively short duration, the Chief Counsel Office should balance the benefit to the Government to be obtained by terminating the proceedings as opposed to administratively closing proceedings or asking DRO to stay removal after entry of an order.

- **Law Enforcement Assets/CIs**- There are often situations where federal, State or local law enforcement entities desire to have an alien remain in the United States for a period of time to assist with investigation or to testify at trial. Moving to dismiss a case to permit a grant of deferred action may be an appropriate result in these circumstances. Some offices may prefer to administratively close these cases, which gives the alien the benefit of remaining and law enforcement the option of calendaring proceedings at any time. This may result in more control by law enforcement and enhanced cooperation by the alien. A third option is a stay.

4) **Post-Hearing Actions:**

Post-hearing actions often involve a great deal of discretion. This includes a decision to file an appeal, what issues to appeal, how to respond to an alien's appeal, whether to seek a stay of a decision or whether to join a motion to reopen. OPLA

[3] Once in proceedings, this typically will occur only where the alien has shown prima facie eligibility for naturalization and that his or her case involves exceptionally appealing or humanitarian factors. 8 CFR §1239.1(f). It is improper for an immigration judge to terminate proceedings absent an affirmative communication from DHS that the alien would be eligible for naturalization but for the pendency of the deportation proceeding. Matter of Cruz, 15 I&N Dec. 236 (BIA 1975); see Nolan v. Holmes, 334 F.3d 189 (2d Cir. 2003) (Second Circuit upholds BIA's reliance on Matter of Cruz when petitioner failed to establish prima facie eligibility.).

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attorneys are also responsible for replying to motions to reopen and motions to reconsider. The interests of judicial economy and fairness should guide your actions in handling these matters.

Examples:

- **Remanding to an Immigration Judge or Withdrawing Appeals**- Where the appeal brief filed on behalf of the alien respondent is persuasive, it may be appropriate for an OPLA attorney to join in that position to the Board, to agree to remand the case back to the immigration court, or to withdraw a government appeal and allow the decision to become final.

- **Joining in Untimely Motions to Reopen**- Where a motion to reopen for adjustment of status or cancellation of removal is filed on behalf of an alien with substantial equities, no serious criminal or immigration violations, and who is legally eligible to be granted that relief except that the motion is beyond the 90-day limitation contained in 8 C.F.R. § 1003.23, strongly consider exercising prosecutorial discretion and join in this motion to reopen to permit the alien to pursue such relief to the immigration court.

- **Federal Court Remands to the BIA**- Cases filed in the federal courts present challenging situations. In a habeas case, be very careful to assess the reasonableness of the government's detention decision and to consult with our clients at DRO. Where there are potential litigation pitfalls or unusually sympathetic fact circumstances and where the BIA has the authority to fashion a remedy, you may want to consider remanding the case to the BIA. Attachments H and I provide broad guidance on these matters. Bring concerns to the attention of the Office of the United States Attorney or the Office of Immigration Litigation, depending upon which entity has responsibility over the litigation. See generally Attachment F (Memorandum from OPLA Appellate Counsel, U.S. Attorney Remand Recommendations (rev. May 10, 2005)); see also Attachment G (Memorandum from Thomas W. Hussey, Director, Office of Immigration Litigation, U.S. Department of Justice, Remand of Immigration Cases (Dec. 8, 2004)).

- **In absentia orders.** Reviewing courts have been very critical of in absentia orders that, for such things as appearing late for court, deprive aliens of a full hearing and the ability to pursue relief from removal. This is especially true where court is still in session and there does not seem to be any prejudice to either holding or rescheduling the hearing for later that day. These kinds of decisions, while they may be technically correct, undermine respect for the fairness of the removal process and cause courts to find reasons to set them aside. These decisions can create adverse precedent in the federal courts as well as EAJA liability. OPLA counsel should be mindful of this and, if possible, show a measured degree of flexibility, but

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only if convinced that the alien or his or her counsel is not abusing the removal court process.

5) **Final Orders- Stays and Motions to Reopen/Reconsider:**

Attorney discretion doesn't cease after a final order. We may be consulted on whether a stay of removal should be granted. See Attachment B (Subchapter 20.7). In addition, circumstances may develop whether the proper and just course of action would be to move to reopen the proceeding for purposes of terminating the NTA.

Examples:

- **Ineffective Assistance-** An OPLA attorney is presented with a situation where an alien was deprived of an opportunity to pursue relief, due to incompetent counsel, where a grant of such relief could reasonably be anticipated. It would be appropriate, assuming compliance with Matter of Lozada, to join in or not oppose motions to reconsider to allow the relief applications to be filed.
- **Witnesses Needed, Recommend a Stay-** State law enforcement authorities need an alien as a witness in a major criminal case. The alien has a final order and will be removed from the United States before trial can take place. OPLA counsel may recommend that a stay of removal be granted and this alien be released on an order of supervision.

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Prosecutorial discretion is a very significant tool that sometimes enables you to deal with the difficult, complex and contradictory provisions of the immigration laws and cases involving human suffering and hardship. It is clearly DHS policy that national security violators, human rights abusers, spies, traffickers both in narcotics and people, sexual predators and other criminals are removal priorities. It is wise to remember that cases that do not fall within these categories sometimes require that we balance the cost of an action versus the value of the result. Our reasoned determination in making prosecutorial discretion decisions can be a significant benefit to the efficiency and fairness of the removal process.

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removal proceedings, in litigation with the United States, or in any other form or manner. Discretionary decisions of the OCC regarding the exercise of prosecutorial discretion under this memorandum are final and not subject to legal review or recourse. Finally this internal guidance does not have the force of law, or of a Department of Homeland Security Directive.

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