20-3957

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARLOS GARCIA-DELEON,
Petitioner,

v.

MONTY WILKINSON, Acting U.S. Attorney General,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

AMICUS BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The American Immigration Lawyers Association (AILA)is a non-partisan, nonprofit national association of more than 15,000 attorneys and law professors who practice and teach immigration law. AILA members represent U.S. families, businesses, foreign students, entertainers, athletes, asylum seekers, applicants for immigrant visas, and people in removal proceedings, often pro bono, as well as providing continuing legal education, professional services, and information to a wide variety of audiences. AILA has participated as amicus curiae in numerous cases before the U.S. Courts of Appeal and the U.S. Supreme Court. As amicus curiae in this case, AILA hopes to provide the regulatory foundation for an Immigration Judge(IJ)'s use of administrative closure as an important docket management tool. Pursuant to Fed. R. App. P. 29(a)(4), AILA states that it is not a corporation, no party counsel authored any part of the brief, and no person or entity other than AILA contributed money to prepare or file it. Petitioner consents to the filing of this amicus brief; respondent opposes.

SUMMARY OF ARGUMENT

A person who entered the U.S. without inspection is, with limited exceptions, unable to adjust her status to that of a lawful permanent resident while remaining in the U.S. 8 U.S.C. §1255(a). Instead, she must proceed abroad and apply for an immigrant visa in order to return to the U.S. as a lawful permanent resident. 8 U.S.C. §1201(a)(1).

For individuals who have accumulated certain periods of unlawful presence in the U.S. prior to their departure, however, the immigration laws impose a three- or ten-year bar to return. 8 U.S.C. §1182(a)(9)(B)(i). Those temporal bars can be pardoned if a waiver under 8 U.S.C. §1182(a)(9)(B)(v) is granted by United States Citizenship and Immigration Services (USCIS), based upon a demonstration of extreme hardship to a limited class of family members with lawful status.

In some cases, a provisional waiver of inadmissibility can be adjudicated by USCIS in advance of a visa applicant's departure to attend her consular interview. 8 C.F.R. §212.7(e). For those foreign nationals in removal proceedings, however, a stateside waiver of inadmissibility can

only be submitted during a period of administrative closure. 8 C.F.R. §212.7(e)(4)(iii). Proceedings do not need to remain administratively closed throughout the pendency of the waiver adjudication; it is sufficient if proceedings are administratively closed on the day of filing and no longer. *Id*.

For several years after the creation of the stateside waiver in 2013, many people in removal proceedings successfully moved for administrative closure to file for the waiver, then proceeded abroad to receive their immigrant visas. The process saved IJs considerable resources, as the successful visa applicants were removed from their dockets without the time and expense of continued removal proceedings, including potentially lengthy relief hearings.

In 2018, Attorney General (AG) Sessions issued a precedential decision holding that an IJ does not have the general authority, under 8 C.F.R. §1003.10(b), to administratively close a case. *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018). The AG held that an IJ may only administratively close a case when authorized to do so by a specific

regulation or judicially-approved settlement. *Id*. at 282-92. This Court has affirmed *Castro-Tum*, agreeing that §1003.10(b) does not give an IJ "the general authority to suspend indefinitely immigration proceedings by administrative closure." *Hernandez-Serrano v. Barr*, 981 F.3d 459, 466 (6th Cir. 2020) (quoting *Castro-Tum*, 27 I&N Dec. at 272).

Amicus does not challenge here the broad holding of *Castro-Tum* and *Hernandez-Serrano*—that no regulation delegates to an IJ the authority to indefinitely suspend action on a removal proceeding, in violation of her duty to process cases in a timely manner. Amicus, instead, makes the narrower point that there is a regulation, left unexamined by *Castro-Tum*, that *does* grant an IJ the more limited power to grant a finite, brief period of administrative closure, where such period of limited closure upholds the IJ's regulatory mandate to process cases in a timely manner. That regulation is 8 C.F.R. §1240.6, which allows the IJ to "grant a reasonable adjournment either at . . . her own instance or, for good cause shown, upon application by the respondent or [DHS]." It is this regulation that is at least one source of authority for the IJ to use when granting a brief

administrative closure for the purpose of allowing a respondent to file an unlawful presence waiver, the approval of which will generally expedite the completion of the deportation case.

ARGUMENT

I. The AG held that an IJ does "not have the general authority to *suspend indefinitely* immigration proceedings by administrative closure," but a limited period of administrative closure for purposes of filing an unlawful presence waiver would not suspend a case indefinitely

In *Castro-Tum*, the AG was concerned with the use of administrative closure to *indefinitely suspend* removal proceedings. He began by stating his conclusion—"that IJs and the Board do not have the general authority to suspend indefinitely immigration proceedings by administrative closure." 27 I&N Dec. at 271. His subsequent analysis was informed by this introduction, clarifying that his use of the term, "administrative closure," meant the *indefinite* suspension of a case.

At the beginning of his analysis, the AG noted that even though administrative closure was frequently called a "temporary suspension," he found that it was "effectively permanent in most instances." *Id*. The reason

for this quasi-permanent suspension was, in his opinion, due to the fact that the IJ was at the mercy of the parties, who held the discretionary power to move for re-calendaring once a case was closed. As the AG commented, absent a party moving to re-calendar, "the case remains indefinitely suspended without a final resolution." *Id*. at 271-72.[1] In the AG's view, a non-citizen rarely had any desire or motivation to re-calendar a case. *Id*. at 272. He noted that since 1980, IJs had re-calendared less than a third of cases that were administratively closed. *Id*. at 272.

Reviewing administrative closure's history, the AG confirmed that he was concerned with the use of the practice to indefinitely suspend proceedings. He noted that despite the lack of any explicit statutory or regulatory authority, IJs had "employed the practice to halt immigration proceedings indefinitely since at least the early 1980s." *Id*. at 273. He reviewed agency policy memoranda that encouraged the use of

[1] *See also id*. at 291 ("IJs and the Board halt proceedings indefinitely, cease tracking the proceedings, and allow proceedings to resume only if the party seeking recalendaring satisfies the burden of demonstrating a good reason to resume proceedings.").

administrative closure not to speed up the adjudication of cases, but to remove them from active dockets indefinitely as a means of conserving agency resources. *Id*. at 274-75.

Reviewing regulations for a possible source of IJ authority, the AG looked at 8 C.F.R. §1003.10(b). He recognized the regulation's directive that IJs could "exercise their independent judgment and discretion and . . . take any action consistent with their authorities under the [Immigration and Nationality] Act and regulations that is appropriate and necessary for the disposition of such cases." *Id*. However, he reasoned that the phrase did not exist in a vacuum and had to be read in combination with the additional mandate that IJs must "seek to resolve the questions before them in a timely . . . manner." *Id*. at 283. While recognizing that the "any action" clause gave IJs considerable latitude, it did not include the power to "indefinitely suspend the adjudication" of cases. *Id*. The AG concluded that "[g]rants of general authority to take measures "appropriate and necessary for the disposition of such cases" would not ordinarily include the authority to suspend such cases indefinitely." *Id*. at 284. Confirming

that he was concerned with the lack of regulatory authority to suspend cases indefinitely, the AG wrote that "[a]dministrative closure . . . is the antithesis of a final disposition," in direct conflict with the requirement that an IJ must resolve matters "in a timely fashion." *Id*.

Casting about further for a regulation that might give an IJ the authority to indefinitely suspend a case, the AG considered 8 C.F.R. §1240.1(c), which permits an IJ to "otherwise regulate the course of the hearing." *Id*. The AG cabined that phrase to procedural details around "the presentation of argument and evidence," finding that it did "not entail an authority to grant an indefinite suspension." *Id*.

The AG then compared his understanding of administrative closure (indefinite suspension) with other powers of an IJ that have a clearer grounding in the regulations. *Id*. at 287. He noted that an IJ has the power to continue or adjourn a case, citing 8 C.F.R. §1003.29 and 8 C.F.R. §1240.6. *Id*. He defined a continuance as "temporarily defer[ring] a case for a fixed period of time while it remains on the active docket." *Id*. He did not define an adjournment, but reasoned that "if general regulatory

provisions already gave IJs the implicit power to suspend cases indefinitely through administrative closure, those same general authorizations would surely empower IJs to suspend cases for finite periods through continuances," making the continuance regulation unnecessary. *Id*. at 287-88.

Finally, the AG reasoned that interpreting the general regulatory powers of an IJ to implicitly include the power to indefinitely suspend a case "would conflict with the policies underlying the INA and its implementing regulations." *Id*. He noted the regulatory requirement for an IJ to resolve issues in an expeditious manner, *id*. (citing 8 C.F.R. §1003.12 and 8 C.F.R. §1003.10(b)), as well as the long-standing understanding that IJs should bring litigation to a conclusion as quickly as is consistent with due process. *Id*.

In sum, the AG in *Castro-Tum* held that an IJ does not have the authority to *indefinitely suspend* a case through administrative closure. That holding is not being challenged in this brief. Instead, this brief argues for a regulatory power not addressed by *Castro-Tum*, to wit: the power to grant a

brief, finite suspension or adjournment of proceedings, with a return to the active docket guaranteed by a pre-scheduled motion for re-calendaring. Unlike in *Castro-Tum,* the decision to grant the motion for for re-calendaring would be a strictly ministerial, non-discretionary action by the IJ. She would have no power to deny a motion for re-calendaring because to do so would convert the brief, finite period of administrative closure into an indefinite suspension of removal proceedings, which *Castro-Tum* clearly prohibits.

II. The IJ's authority to grant a brief, finite period of administrative closure is grounded in her regulatory adjournment power at 8 C.F.R. §1240.6

Even if *Castro-Tum* does not expressly prohibit the granting of a brief, finite period of administrative closure, the AG's analysis makes clear that for any alleged IJ power there must be a clear grant of such authority in the statute, regulations, or judicial settlements. 27 I&N Dec. at 273. By process of elimination, it is evident that the power for the IJ to remove a case from the active docket for a brief, fixed period of time is found at 8 C.F.R. §1240.6, which states that she "may grant a reasonable

adjournment either at . . . her own instance or, for good cause shown, upon application by the respondent or [DHS]."

A. After *Castro-Tum*, IJs still routinely remove cases from their active dockets for finite periods of limited duration when they reserve cancellation decisions

One begins the analysis with a recognition that even after *Castro-Tum*, IJs still use administrative closure. Rather than the indefinite suspension at issue in the AG's critique, however, IJs use the type of administrative closure discussed here—temporary suspensions guaranteed to return to the active docket.

IJs routinely adjudicate applications for cancellation of removal under 8 U.S.C. §1229b(b), a form of relief from removal that has an annual limit of 4,000 grants. 8 U.S.C. §1229b(e)(1). When the cap is reached before the end of the fiscal year, an IJ will continue to conduct hearings, but in cases where she is inclined to grant, but cannot due to the cap, she is instructed to "reserve" her decision until there is room under the cap in a subsequent fiscal year. *Operating Policies and Procedures Memorandum (OPPM) 17-04: Applications for Cancellation of Removal [. . .] that*

are Subject to the Cap, Executive Office for Immigration Review (EOIR) (December 20, 2017), at 2-3.[2]

Reserved decisions are taken off the Court's active docket, with no future hearing dates. In fact, IJs are specifically instructed not to "reschedule a case for the purpose of issuing a decision once a number becomes available for that case." *Id*. at 4. While EOIR guidelines regarding reserved cancellation decisions were issued several months prior to *Castro-Tum*, they have not been rescinded and continue to be adhered to by IJs. Indeed, undersigned counsel has had several clients for whom the IJ reserved cancellation grants after *Castro-Tum*. In such cases, the EOIR on-line information system shows their cases to be "pending" but with no future hearings. For example, here is the on-line information for a person with a reserved cancellation decision where the merits hearing was held October 25, 2019:

[2] Attached in the Addendum.

Future Hearing Information

Hearing Type	Hearing Date	Hearing Location	IJ Assigned
No future hearing information available			

:@usdoj.gov

Proceeding Information

	#	Decision Date	IJ Decision	Immigration Court (Administrative Control Location)
Details	2	N/A	The case is pending.	1961 STOUT STREET, STE. 3101 DENVER, CO 80294

The case bears the tell-tale marks of administrative closure—it is still pending but with no future hearing date scheduled. As the AG noted in *Castro-Tum*, the effect of an administrative closure order is to "remove a case from an IJ's active calendar." 27 I&N Dec. at 271 (quoting *Matter of Avetisyan*, 25 I&N Dec. 688, 692 (BIA 2012)); *see also Aguirre v. Holder*, 728 F.3d 48, 53 (1st Cir. 2013) (holding that "the administrative closure of . . . proceedings did not alter their status as "pending"); *Arca-Pineda v. Att'y Gen.*, 527 F.3d 101, 104-05 (3rd Cir. 2008) (noting that "immigration

proceedings did not end upon administrative closure, and instead . . . were merely removed from the IJ's calendar").

Further support for the fact that reserved cancellation decisions are administratively closed comes from the Chief IJ's instructions to Immigration Court administrators to "establish a tracking system for reserved decisions in their courts so that when [they are] notified that numbers are available, the correct decisions are ready to be issued." OPPM 17-04, at 5. There would be no need for a separate tracking system if cases remained on an active docket. The need for a separate tracking system only arises because, as a general rule, Immigration Courts ordinarily don't track administratively closed cases. As the AG noted, "[b]ecause [an administratively closed] case comes off the active docket, the IJ no longer tracks it." *Castro-Tum*, 27 I&N Dec. at 272; *see also id*. at 291 (noting that when IJs administratively close proceedings, they "cease tracking the proceedings").

Final confirmation that reserved cancellation decisions are administratively closed comes from the fact that they are explicitly subject

to re-calendaring. As the Chief IJ noted, if the Department finds derogatory criminal history regarding a cancellation applicant after a decision is reserved, but prior to a final grant, it "will decide whether to file a motion to recalendar and, if so, will file the motion as usual with the court." OPPM 17-04, at 6. The fact that a case with a reserved cancellation decision is subject to possible re-calendaring is presumptive evidence that the case is administratively closed rather than on the active calendar.

B. If IJs are granting finite periods of administrative closure after *Castro-Tum*, they must be doing so pursuant to an express grant of authority in the regulations

In *Castro-Tum*, the AG held that "IJs . . . may only administratively close a case where a previous regulation or a previous judicially approved settlement expressly authorizes such an action." 27 I&N Dec. at 271. As noted above, however, IJs after *Castro-Tum* continue to use administrative closure as a method for removing reserved cancellation decisions from their active dockets. IJs are bound by the decisions of the AG. 8 C.F.R. §1003.1(g)(1). Accordingly, IJs must have concluded that *Castro-Tum*, with its prohibition against indefinite suspension of removal proceedings via

administrative closure, does not apply to finite periods of administrative closure in which a return to the active docket is guaranteed.

But even if *Castro-Tum* does not expressly prohibit the use of short-term administrative closure to take certain cancellation cases off the active docket, the AG's analysis still makes clear that for any alleged IJ power there must be a clear grant of such authority in the statute, regulations, or judicial settlements. 27 I&N Dec. at 273. There being no explicit statutory or judicial settlement authority to grant short-term administrative closure in cancellation cases, an IJ's authority for such action must lie in the regulations.[3]

[3] Amicus agrees with the Petitioner's argument that the USCIS regulation, 8 C.F.R. §212.7(e)(4)(iii), is tantamount to a regulation issued by the AG or tantamount to a settlement with the AG as a party. Its argument regarding 8 C.F.R. §1240.6 is to be construed as a complementary source of an IJ's authority to grant limited, finite periods of administrative closure.

C. By process of elimination, the regulation giving the IJ power to grant a reasonable adjournment, 8 C.F.R. §1240.6, must authorize the use of short-term periods of administrative closure

The IJ's adjournment authority, at 8 C.F.R. §1240.6, is the most logical source for her ability to temporarily remove a case from her active docket, knowing that it is guaranteed to return. The regulation, with its explicit reference to a power to pause proceedings, has the specificity lacking in 8 C.F.R. §§1003.10(b) and 1240.1(c). And it is slightly broader than her power to grant a continuance, under 8 C.F.R. §1003.29, which is one type of adjournment, defined as a deferral but in which a case remains on the active docket.

1. The regulations analyzed by the AG in *Castro-Tum*, 8 C.F.R. §§1003.10(b) and 1240.1(c), lack the requisite clarity

In *Castro-Tum*, the AG considered both 8 C.F.R. §1003.10(b) and 8 C.F.R. §1240.1(c) as possible sources of authority for an IJ to "indefinitely suspend the adjudication" of removal proceedings. 27 I&N Dec. at 282-84. He found both lacking because a power to suspend proceedings indefinitely conflicted with other regulatory requirements to complete

proceedings in a timely manner, *id.*, and because they lacked the explicit language found in those regulations governing administrative closure for certain, well-defined categories of respondents. *Id.* at 275-77.

One might argue that 8 C.F.R. §1003.10(b) and 8 C.F.R. §1240.1(c) don't conflict with the requirement for an IJ to adjudicate cases in a timely manner to the extent that they authorize temporary, rather than indefinite, suspension of cases via administrative closure. However, they would still both suffer from the second infirmity in that they don't specifically mention a power to suspend, even briefly. Section 1003.10(b) talks broadly of a power to "take any action," but such action must still be "consistent with their authorities under the . . . regulations." Likewise, 8 C.F.R. §1240.1(c) speaks generally of a broad power to "otherwise regulated the course of the hearing," but the AG has limited that phrase to procedural details around "the presentation of argument and evidence," and unrelated to any power to suspend proceedings. *Id.* at 284.

2. The regulation governing continuances, at 8 C.F.R. §1003.29, is too narrow, as continued cases remain on the active docket

The regulation which gives the IJ her authority to grant a motion to continue has the express authorization lacking in 8 C.F.R. §1003.10(b) and 8 C.F.R. §1240.1(c) in that it allows her to suspend the adjudication of a case. That regulation, 8 C.F.R. §1003.29, provides that an IJ "may grant a motion for continuance for good cause shown." As noted by the AG, a continuance is "the docket-management device that most resembles administrative closure." *Id*. at 287. The AG defined a continuance as an action that "temporarily defers a case for a fixed period of time while it remains on the docket." *Id*.

Any regulatory authority for short-term, finite administrative closure must have three attributes. It must: (1) clearly give the IJ the power to suspend a case; (2) the period of deferral must be finite and limited; and (3) the period of suspension must coincide with a removal from the Court's active docket. The regulation governing continuances meets the first two requirements but fails with respect to the third.

First, as understood by the AG, a continuance "defers a case." *Id*. A deferral is synonymous with a suspension, postponement, extension, delay, or adjournment. *See*, *e.g.*, https://www.thesaurus.com/browse/defer. Therefore, like a short-term administrative closure, a continuance suspends the processing of a removal proceeding.

Second, a continuance is finite and brief, as its period of deferral or suspension is temporary and "for a fixed period of time." *Castro-Tum*, 27 I&N Dec. at 287. This is in contrast to the type of administrative closure at issue in *Castro-Tum*, which the AG defined as an *indefinite suspension* of proceedings. *Id*. at 271 ("IJs . . . do not have the general authority to suspend indefinitely immigration proceedings by administrative closure"); *id*. at 271-72 (absent the granting of a motion to re-calendar, an administratively closed case remains "indefinitely suspended"); *id*. at 273 (IJs had "employed the practice to halt immigration proceedings indefinitely"); *id*. at 283 (existing regulations did not not include the power to "indefinitely suspend the adjudication" of cases); *id*. at 284

("[g]rants of general authority to take measures "appropriate and necessary for the disposition of such cases" would not ordinarily include the authority to suspend such cases indefinitely"); *id*. at 284 (finding that 8 C.F.R. §1240.1(c) did "not entail an authority to grant an indefinite suspension"); *id*. at 287-88 (rejecting the idea that the regulations give "IJs the implicit power to suspend cases indefinitely through administrative closure"); *id*. at 291 ("IJs . . . halt proceedings indefinitely" when granting administrative closure). The finite nature of a continuance fits with the argument that a brief, finite suspension of proceedings is permitted.

Third, however, a case that has been continued remains on the Court's active docket as opposed to administrative closure, no matter how brief or finite, which removes a case from the Court's active docket. *Id*. at 287 (a continuance "temporarily defers a case for a fixed period of time while it remains on the docket"); *compare with id*. at 271 ("IJs . . . have increasingly ordered administrative closure to remove a large number of cases from their dockets"); *id*. at 272 (with administrative closure, "the case comes off the active docket"); *id*. at 274 ("[a]dministrative closure . . .

remove[s] a case from the court's active docket") (quoting OPPM 13-01); *id*. at 292 (calling for the return of administratively closed cases to the active docket); *Avetisyan*, 25 I&N Dec. 688 at 692 (administrative closure "remove[s] a case from an IJ's active calendar"). Because the power to continue, under 8 C.F.R. §1003.29, does not include the authority to remove a case from the active docket, it cannot be the regulatory source for the IJ to temporarily administratively close proceedings. The authority for that type of temporary deferment must be found elsewhere.

3. The power to adjourn, under 8 C.F.R. §1240.6, is broader than the power to continue, under 8 C.F.R. §1003.29

The authority for the type of temporary deferment used by IJs currently to reserve cancellation decisions, and which can also be used to briefly administratively close proceedings to allow for the filing of an unlawful presence waiver under 8 C.F.R. §212.7(e)(4)(iii), must be grounded in 8 C.F.R. §1240.6, which allows the IJ to "grant a reasonable adjournment either at . . . her own instance or, for good cause shown, upon application by the respondent or [DHS]."

The authority to grant an adjournment includes within its scope the power to grant a motion to continue, and the two terms—continuance and adjournment—are frequently used interchangeably. *See, e.g., Castro-Tum*, 27 I&N Dec. at 287; *Matter of L-A-B-R-*, 27 I&N Dec. 405, 407 fn.1 (A.G. 2018) (issuing standards for the "good cause" needed for a motion to continue under 8 C.F.R. §1003.29 and noting that the same standard governs adjournments under 8 C.F.R. §1240.6). Despite this considerable overlap, the IJ's adjournment authority is slightly broader than her continuance powers. Every continuance is an adjournment, but not all adjournments are a continuance. This difference can be seen in the regulations' history, text, and their current usage.

Section 1003.29 traces its origins to a reorganization at the Department of Justice in 1983 that created the EOIR. 52 FR 2931. Promulgation of regulations following that reorganization aimed to create a set of uniform procedural rules for Immigration Court proceedings. *Id*. The supplementary information to the new regulations clarified that the new 8 C.F.R. §3.27 (now moved to 8 C.F.R. §1003.29) "codifies current

procedures and restates in simpler terms the discretionary authority of IJs to grant continuances for good cause shown found in 8 C.F.R. §242.13" (the precursor to today's 8 C.F.R. §1240.6). Section 3.27, like the current §1003.29, stated plainly and simply that "[t]he IJ may grant a motion for continuance for good cause shown."

Section 1240.6 has a longer lineage, starting in the 1950's with regulations promulgated to give effect to the new INA of 1952. In 1956, regulations were issued clarifying many procedural aspects of deportation proceedings and the powers of INS special inquiry officers (the precursors to today's IJs). 97 FR 102. Section 242.13 of those 1956 regulations stated, in part, the following:

> After the commencement of the hearing, the special inquiry officer may grant a reasonable adjournment either at his own instance or, for good cause shown, upon application by the respondent or the examining officer.

That language is virtually identical to the current regulation, 8 C.F.R. §1240.6, which states the following:

> After the commencement of the hearing, the IJ may grant a reasonable adjournment either at his or her own instance or,

> for good cause shown, upon application by the respondent or the Service.

The two regulations—8 C.F.R. §1003.29 and 8 C.F.R. §1240.6—are substantially similar. But there are two notable differences. First, the power to grant a continuance is limited to those situations in which one of the parties—the respondent or the government—moves the Court for a new hearing date ("may grant a motion for continuance"). The power to adjourn, however, extends to those situations in which the IJ "at her own instance" wants to postpone proceedings, absent any request from the parties. So, for example, in the case of reserved cancellation decisions, the IJ does not wait for a motion from the parties before taking a case off the active docket; she does it "at her own instance."

The second difference between the two regulations is their choice of words to denote the suspension. Section 1003.29 uses "continuance"; section 1240.6 uses "adjournment." While there is considerable overlap between the terms, and they are often used as synonyms for each other, there are subtle differences. A continuance is defined as a postponement

or adjournment of a court case to a later date, made in response to a motion made by a party to the suit. *See* https://legal-dictionary.thefreedictionary.com/continuance. An adjournment is also a postponement of a proceeding, but it is not dependent on a party's motion, and it can either be a deferment to a later date, or it can be an adjournment "sine die" (without day), in which there is not a time fixed to resume the court's work. *See* https://legal-dictionary.thefreedictionary.com/adjournment.

Where Congress has used different terms within a statute, a common tool of statutory construction requires that different meanings be given to those different terms. *See, e.g., United States v. Nordic Village*, 503 U.S. 30, 36 (1992). A similar rule applies to regulatory interpretations, where one is counseled against reading one regulation in a way that renders another superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

In the case of 8 C.F.R. §1003.29 and 8 C.F.R. §1240.6 then, one must assume that the agency meant for "adjournment" and "continuance" to have different meanings. Otherwise, if they both meant the same thing,

then one of the regulations would have been rendered superfluous. *Black & Decker Corp. v. Comm'r of Internal Revenue*, 986 F.2d 60, 65 (4th Cir. 1993) ("Regulations, like statutes, are interpreted according to canons of construction. Chief among these canons is the mandate that 'constructions which render regulatory provisions superfluous are to be avoided.'" (quoting *Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976))).

The contention that 'adjournment' is not wholly synonymous with 'continuance' can also be seen in the regulations' histories. As noted, 8 C.F.R. §1003.29 was promulgated in 1987 in response to the creation of the EOIR. 52 FR 2931. The supplementary information to the new regulations clarified that the new continuance regulation was meant to "restate[] in simpler terms the discretionary authority of IJs to grant continuances for good cause shown found in 8 C.F.R. §242.13." *Id*. That clarification might suggest that the drafters were merely replacing an old-fashioned term—adjournment—with one more modern—continuance. However, if the drafters meant to completely replace 'adjournment' with 'continuance,' then they would have also made a corresponding change in

8 C.F.R. §242.13. But they did not. The 1987 version of 8 C.F.R. §242.13 continued to state that:

> After the commencement of the hearing, the IJ may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.

52 FR 2931.

Notably, the drafters of the 1987 regulations instructed that "[t]he simplified language of the [continuance] rule" was "not intended to conflict with or expand the discretionary limitations delineated in 8 C.F.R. §242.13." *Id*. In other words, the drafters made sure that the continuance regulation was not interpreted as expanding the scope of the adjournment regulation. But they did not write the converse—that the continuance regulation was intended to shrink the IJ's adjournment authority.

Read together, the two regulations complement each other. The adjournment regulation gives the IJ the broad authority to suspend the processing of a case in whatever fashion she sees fit, as long as it is "reasonable," and no matter if the parties requested the postponement.

The continuance is a narrowed clarification that the adjournment authority includes the power to continue a case to a later date at the request of either party.

Further support for the contention that 'adjournment' is a slightly broader term than 'continuance' can be seen in the language surrounding 8 C.F.R. §242.13 at the time of its initial promulgation. In the 1956 version of the regulation, the sentence preceding the special inquiry's adjournment authority read as follows:

> Prior to the commencement of a hearing, the district director or the officer in charge of a sub-office may grant a reasonable postponement for good cause shown, at his own instance upon notice to the respondent or upon request of the respondent.

97 FR 102. Elsewhere in the new regulations, the "commencement" of a deportation hearing was defined as being triggered with "the issuance and service of an order to show cause by the Service." *Id.* (quoting 8 C.F.R. §242.1(a)). In other words, with respect to the Service's powers, it included the ability to postpone the placement of a respondent onto the Court's active docket. The special inquiry officer's power to postpone, or

adjourn, a hearing is naturally read as being complementary to the Service's, in that she could temporarily remove a case from her active docket once a hearing had been commenced.

In sum, the adjournment regulation at 8 C.F.R. §1240.6 is the most logical source of the IJ's authority to administratively close a proceeding for a brief and finite period of time. The adjournment regulation clearly gives her the power to suspend or postpone a case, the period of deferral must be finite and limited given that it must be "reasonable," and the term 'adjournment' is broad enough to encompass both continuances (adjournments in response to a party's motion in which a case stays on the active docket) and adjournments "sine die," in which there is not immediately a fixed time for the resumption of the Court's work.

Presumably, this is the regulation under which the IJ currently reserves cancellation decisions, taking those cases off her active docket while she waits for room under the cancellation cap. And it is this same regulatory authority which would give her the ability to grant a request for a brief period of administrative closure followed by a pre-planned re-

calendaring, to allow for the filing of a provisional unlawful presence waiver.[4]

III. A brief, finite period of administrative closure is consistent with other regulatory mandates to process cases in a timely manner

Any lingering doubt about whether the IJ's regulatory adjournment authority gives her the power to grant a brief, finite period of administrative closure is resolved by comparing that asserted prerogative to statutes or regulations that might conflict with that power. This was the interpretive tool used by the AG in *Castro-Tum* that underlay his conclusion that IJs "do not have the general authority to suspend indefinitely immigration proceedings by administrative closure." 27 I&N Dec. at 271. The AG reasoned that a claimed power to take a case off an active docket, with no guarantee of its return, would conflict with other, explicit commands to process cases in a timely and expeditious manner. *Id*. at 283-84 (contrasting the power to suspend a case indefinitely with the

[4] At least one IJ has adopted the reasoning put forth by undersigned counsel. The addendum includes an IJ decision from the summer of 2020 in which a brief period of administrative closure was granted under 8 C.F.R. §1240.6 to allow for the filing of a stateside waiver.

requirement in 8 C.F.R. §1003.10(b) that "IJs shall seek to resolve questions before them in a timely . . . manner"); *id*. at 284 (contrasting indefinite suspension with the limitation in 8 C.F.R. §1003.10(b) that the IJ use her powers in a way that is "appropriate and necessary for the disposition of . . . cases," and reasoning that an indefinite suspension "is the antithesis of a final disposition"); *id*. at 286 (contrasting indefinite suspension "with the policies underlying the INA and the regulations that obligate IJs . . . to resolve immigration matters expeditiously"); *id*. at 288 (contrasting an alleged power to indefinitely suspend a case with the Department's statutory authority to initiate proceedings); *id*. (contrasting indefinite suspension with the requirement in 8 C.F.R. §1003.12 that IJs proceed in an "expeditious" manner"); *id*. (contrasting indefinite suspension with the public interest in prompt conclusions to litigation); *id*. (arguing that case postponements almost always harm the government); *id*. at 291 (arguing that indefinite suspensions do not promote finality and have led to a docket backlog).

Applying that same tool here, one can quickly see that a grant of a brief, finite period of administrative closure would facilitate, rather than hinder, the timely and expeditious disposition of many removal proceedings.

An individual in removal proceedings who believes she might qualify for a provisional, stateside waiver of the unlawful presence bar necessarily means that she: (a) has a spouse or parent with lawful status; (b) has no other grounds of inadmissibility, such as a criminal bar; and (c) has a good argument for a favorable exercise of discretion. 8 U.S.C. §1182(a)(9)(B)(v).

The requirements for an unlawful presence waiver overlap considerably with the requirements for one common form of relief from removal—cancellation of removal under 8 U.S.C. §1229b(b)(1). Cancellation also requires the presence of certain family members with lawful status, including a spouse or parent, 8 U.S.C. §1229b(b)(1)(D), the lack of disqualifying criminal convictions, 8 U.S.C. §1229b(b)(1)(C), and evidence of good moral character, 8 U.S.C. §1229b(b)(1)(B). In addition, it

requires a decade-long period of physical presence in the U.S. 8 U.S.C. §1229b(b)(1)(A).

The practical impact of this considerable overlap between the requirements for an unlawful presence waiver and the requirements for cancellation is that many people in proceedings who cannot get proceedings administratively closed in order to pursue a stateside waiver will have to apply for cancellation instead, as their only means of obtaining lawful status.[5] This means that the Immigration Court will have expend considerable agency resources in conducting a merits hearing on cancellation that will likely take several hours. In addition, due to the overwhelming backlog in the Immigration Court system, the waiting period for that final merits hearing could take several years.[6]

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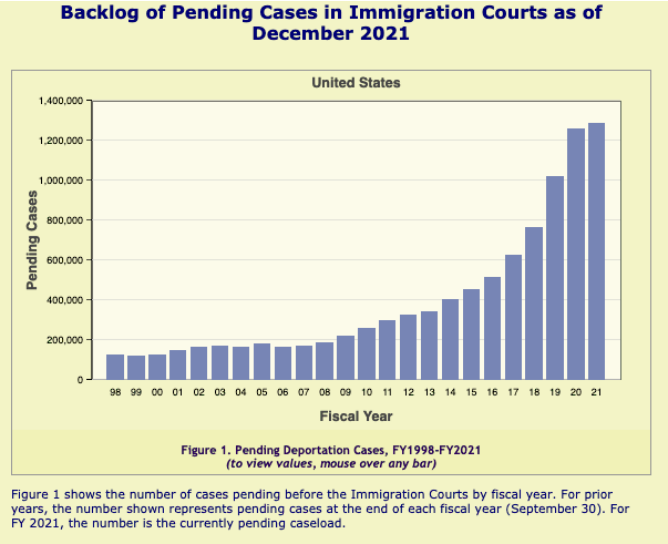
[5] Other would-be waiver applicants might have good-faith claims to asylum or other forms of persecution-based relief in addition to, or in place of, cancellation. These relief applications would also require merits hearings of several hours.

[6] This graph comes from the Transactional Records Access Clearinghouse ("TRAC"), a data gathering, research, and distribution organization at Syracuse University, available at: https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php.



By contrast, should the IJ grant a brief, finite period of administrative closure, allowing a respondent to file a stateside waiver, then USCIS can adjudicate the waiver claim while the individual awaits his merits hearing date several years in the future. If the waiver is approved (and the vast majority of applications are granted[7]), then the merits hearing would be vacated and the person would proceed abroad, following case termination

[7] In response to an AILA FOIA request, USCIS provided statistics on the waiver approval rate for FY2010—FY 2015. Those statistics showed that from March of FY2013 through January of FY2015, the average approval rate for the stateside, unlawful presence waiver was 70.2%. *See* https://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/posts/from-aila-uscis-provides-i-601-and-i-601a-statistics-for-fy2010-fy2015#:~:text=Since%20FY2010%20thru%20January%20of,average%20denial%20rate%20is%2029.8%25.

or the grant of voluntary departure, to process her immigrant visa application. In such a scenario, the IJ would be spared the time and expense of conducting a time-consuming merits hearing. On the other hand, for the minority of waiver applicants who received denials, their merits hearing would still move forward, with the only delay being the brief period of administrative closure during which the waiver applications were filed.

Use of administrative closure for the purpose of allowing for the filing of an unlawful presence waiver would therefore be in harmony with all of the regulations and policies cited by the AG that mandate the prompt and expeditious resolution of removal proceedings. As AG Sessions noted, he is in favor of those IJ actions that allow for a case suspension "for a fixed . . . period of time," and which ensure that "cases do not get lost in the shuffle," and which guarantee that a case "will move forward once the circumstances warranting delay disappear." *Castro-Tum*, 27 I&N Dec. at 291. While it is true that the AG was referring to an IJ's regulatory power to grant motions to continue, the same logic could be applied to her power

to grant a brief, finite period of administrative closure, to the extent that such authority is rooted in her regulatory power to adjourn a case pursuant to 8 C.F.R. §1240.6.

CONCLUSION

For the reasons detailed above, amicus respectfully urges this Court to hold that an IJ retains the regulatory authority to grant brief, finite periods of administrative closure, most notably in those cases where the filing of an unlawful presence waiver during the short period of abatement would actually expedite the resolution of the removal proceedings.

Dated: March 3, 2021

Respectfully submitted,

s/ Cynthia M. Nunez

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that: (1) this brief complies with Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,500 words (one-half the maximum length authorized by the Rules for a party's principal brief), excluding the parts exempted by Rule 32(f); (2) this brief complies with the typeface requirements of Rule 32(a)(5)(A) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Iowan Old Style; (3) the digital submission has been scanned for viruses with the most recent version of macOS Mojave operating system (version 10.14.6) and, according to the program, is free of viruses; and (4) the brief is in compliance with the privacy and redaction requirements of Rule 25(a)(5), as well as Federal Rules of Civil Procedure 5.2, as it does not contain any social security numbers or tax identification numbers, birth dates, minors' names, or financial account numbers.

s/ Cynthia M. Nunez
Attorney of record for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2021, I electronically filed the foregoing amicus brief with the Clerk of Court using the CM/ECF system which will send notification of such filing to Yanal H. Yousef, Trial Attorney for the Office of Immigration Litigation at the U.S. Department of Justice.

s/ Cynthia M. Nunez
Attorney of record for Amicus Curiae

ADDENDUM

I. *Operating Policies and Procedures Memorandum 17-04: Applications for Cancellation of Removal or Suspension of Deportation that are Subject to the Cap*, Executive Office for Immigration Review (EOIR) (December 20, 2017)

U.S. Department of Justice

Executive Office for Immigration Review

Office of the Chief Immigration Judge

Chief Immigration Judge

5107 Leesburg Pike, Suite 2500
Falls Church, Virginia 22041

December 20, 2017

MEMORANDUM

TO: All Immigration Judges
All Court Administrators
All Attorney Advisors and Judicial Law Clerks
All Immigration Court Staff

FROM: MaryBeth Keller
Chief Immigration Judge

SUBJECT: Operating Policies and Procedures Memorandum 17-04: *Applications for Cancellation of Removal or Suspension of Deportation that are Subject to the Cap*

Table of Contents

I. Introduction

This Operating Policies and Procedures Memorandum (OPPM) supersedes and replaces OPPM 12-01, *Procedures on Handling Applications for Suspension/Cancellation in Non-Detained Cases Once Numbers are no Longer Available in a Fiscal Year*. This OPPM is effective as to hearings that are concluded on or after January 4, 2018.

Section 240A(e) of the Immigration and Nationality Act (INA) provides that the Attorney General may not cancel the removal and adjust the status under INA § 240A(b), nor suspend the deportation and adjust the status under INA § 244(a)(1), of more than 4,000 aliens in any fiscal year. This annual limitation on grants of non-permanent resident cancellation of removal[1] and suspension of deportation is referred to as the "cap." This OPPM sets forth the procedures for handling cases involving cancellation of removal or suspension of deportation that are subject to the cap. *See* 8 C.F.R. § 1240.21(c).

When the cap is about to be reached, the Office of the Chief Immigration Judge (OCIJ) will notify Immigration Judges that they must reserve decisions granting cancellation or suspension, with some exceptions as described below. OCIJ is administering the cap so as to permit detained cases involving relief in the form of cancellation of removal or suspension of deportation to proceed to decision throughout the fiscal year. Accordingly, Immigration Judges are not required to reserve decisions in these detained cases. However, as explained below, court staff must enter certain specialized data into CASE even in detained cancellation and suspension cases.

In order to track cases in which hearings have been concluded, OCIJ has created the "Cancellation of Removal (CoR) Cap Date." The CoR Cap Date is a field in CASE located under the "Case Info" tab. It remains fixed in CASE regardless of whether either party files an appeal and regardless of any subsequent remand. The CoR Cap Date will therefore remain with the case irrespective of its posture before the Immigration Court or the Board. Guidance on setting the CoR Cap Date is included in Section VII, below.

II. Exceptions to Requirement to Reserve Decision

In the following situations, Immigration Judges are not required to reserve decision:

- The application is denied or pretermitted for any reason;
- The application pertains to a detained respondent; or
- The relevant application is one for suspension of deportation filed by a battered spouse or parent during proceedings in which the charging document was filed prior to April 1, 1997, or is an application for

[1] This memorandum pertains only to cancellation of removal for certain non-permanent residents pursuant to INA § 240A(b) and not to cancellation of removal for certain permanent residents pursuant to INA § 240A(a).

cancellation of removal under section 203 of NACARA. *See* INA § 240A(e)(3).

Note: When a cancellation or suspension application is denied, a CoR Cap Date will still be automatically generated even though the judge is not required to reserve decision. See sections VII and VIII, below. In cases covered by the third bullet, a CoR Cap Date will not be generated.

III. Concurrent Applications for Relief

If an Immigration Judge is going to grant an application for cancellation or suspension and there is a concurrent pending application for any other form of relief or protection, the Immigration Judge must address that other application as part of his or her reserved decision. If the Immigration Judge is going to deny a concurrent application for relief, but the decision must be reserved because of the cancellation or suspension cap, an adjournment code "RR" (Reserved Decision) must be entered into CASE.[2]

If the Immigration Judge grants an application for asylum or adjustment of status, the application for cancellation or suspension must be denied as a matter of discretion, so the decision need not be reserved (although a CoR Cap Date will still be automatically generated). 8 C.F.R. § 1240.21(c)(2). *See* section II (Exceptions to Requirement to Reserve Decision), above.

IV. Number Availability and Notification to the Immigration Courts

OCIJ will alert the Immigration Courts when there are no available numbers for the remainder of the fiscal year, and OCIJ will designate a "cut-off date." As of the cut-off date, Immigration Judges must reserve decisions granting cancellation or suspension until further notice from OCIJ for all non-detained cases. However, Immigration Judges may continue to deny cancellation or suspension after the cut-off date.

V. At the Conclusion of the Hearing

When the Immigration Judge denies or pretermits a cancellation or suspension application for any reason, the decision should be issued and not reserved. Court staff should enter the decision into the CASE system, reflecting a denial of the application for cancellation or suspension.

When concluding a hearing on cancellation or suspension after the cut-off date, where the cancellation or suspension application is potentially going to be granted, the Immigration Judge must reserve the decision, taking the following steps:

[2] If an asylum application was withdrawn, then adjournment code 23 must be used.

1. Ask DHS to confirm on the record that background checks are current and complete and to state the expiration date of the background checks;[3]

2. Record on the worksheet the date and time the potential grant is reserved. The worksheet should remain in the left-hand side of the Record of Proceedings. The worksheet and ROP should be given to the court staff to record the reserved information into CASE. *See* section VII, below.

3. Prepare a draft reserved decision. *See* section VI, below.

VI. Preparing the Draft Reserved Decision

When granting cancellation or suspension, Immigration Judges may not reschedule a case for the purpose of issuing a decision once a number becomes available for that case. Instead, after completing the worksheet the Immigration Judge must prepare a draft decision in one of the following two ways:

1. **Draft Dictated Decision.** Within 15 workdays, the Immigration Judge may dictate a draft decision outside the presence of the parties. The draft decision should be recorded electronically using the Microsoft Recorder on the judge's workstation and then stored on the EOIR network. OCIJ will transfer the recording to the Transcription Unit to render a Word document of the draft decision, and this will be e-mailed back to the Immigration Judge once completed.[4]

   Upon receipt of the draft decision, the Immigration Judge should review, and edit if necessary, the decision within 5 workdays. Once the judge is satisfied with the decision, the judge should print the decision and give it with the ROP to the Court Administrator (CA), indicating that it is ready for issuance as of that date but has not been signed. Within 5 days of being notified that a number is available, the judge will revise the decision, if necessary, and sign and return it to the CA for issuance.

   Note: Immigration Judges must not record a draft decision using the Digital Audio Recording (DAR) system.

2. **Draft Written Decision.** Immigration Judges may prepare a draft written decision. If an Immigration Judge chooses to draft a written decision, it must be completed within 60 workdays after the hearing.[5] Once the judge is satisfied with the decision, the judge should give the decision and the ROP to the CA,

[3] Immigration Judges need no longer record on the worksheet the status or the expiration date of the background checks.
[4] Immigration Judges may be instructed not to use this method of preparing a draft decision during the final months of the fiscal year.
[5] This sixty-day time frame may be shortened during the final months of the fiscal year.

indicating that it is ready for issuance as of that date but has not been signed. Within 5 days of being notified that a number is available, the judge will revise the decision, if necessary, and sign and return it to the CA for issuance.

Note: When reserving a decision, in no case should a draft decision be released to the parties or to the public.

VII. Setting the CoR Cap Date

When a cancellation or suspension hearing is concluded, court staff must update CASE as follows:

- Reserved decisions: If the Immigration Judge is granting cancellation or suspension, court staff must enter the date and time the Immigration Judge reserved the decision and that the decision is a potential CoR Cap Grant.

- Non-Reserved decisions: When an Immigration Judge is issuing a final decision, court staff must enter the appropriate application decision code and case decision code in CASE. *See* section II, above.

Entry of this information into CASE by court staff automatically generates the CoR Cap Date. Court staff no longer needs to fax the worksheets to OCIJ.

VIII. Tracking Reserved Decisions

CAs must establish a tracking system for reserved decisions in their courts so that when the CA is notified that numbers are available, the correct decisions are ready to be issued. The tracking system must be designed to ensure that the CA can monitor whether the reserved decisions have been drafted within the deadlines stated in this OPPM. *See* section VI, above.

IX. Procedure When an Immigration Judge is Unavailable to Issue a Reserved Decision

If the Immigration Judge who drafted the reserved decision is unavailable to issue that decision when a number becomes available, an Assistant Chief Immigration Judge shall reassign the case to him or herself or to another Immigration Judge. The newly-assigned Immigration Judge "shall familiarize himself or herself with the record in the case" and shall state in the written decision "that he or she has done so." 8 C.F.R. § 1240.1(b). The newly-assigned Immigration Judge is not bound by the original Immigration Judge's preliminary decision but should consider, among all the other facts and circumstances present, that the original Immigration Judge had an opportunity to see and hear the witness(es) testify.

X. Issuing Decisions Granting Cancellation or Suspension

Cases in which the Immigration Judge grants cancellation or suspension are placed into a queue based on the chronological order of their CoR Cap Dates. When numbers become available, OCIJ will determine which reserved decisions may be issued based on their place in the queue.

Prior to allowing the issuance of the decisions that are in the queue, OCIJ will notify DHS of the A-numbers so that DHS can verify that the background checks are current and complete.[6] In detained cases, the court should ensure that DHS has verified that background checks are current and complete.

Once DHS has verified the status of the background checks, court staff should enter the following into CASE:

1. The application decision code "F" (cancellation or suspension grant which is subject to the cap);

2. The case decision code "Q" (Final Grant of EOIR 42B/40); and

3. The codes as appropriate for other applications for relief.

After entering the appropriate codes in CASE, court staff should date and serve the decision and place the original (signed and dated) on the right side of the ROP with the transmittal letter (CASE notice FF).

XI. Conclusion

This OPPM sets forth the procedures for handling cases involving cancellation of removal or suspension of deportation that are subject to the cap. If you have any questions regarding this memorandum, please contact your ACIJ.

[6] If DHS determines that the background check has revealed new criminal history or that the respondent has not complied with biometrics requirements, DHS will decide whether to file a motion to recalendar and, if so, will file the motion as usual with the court.

II. IJ Grant of Administrative Closure under 8 C.F.R. §1240.6 for Purposes of Filing a Stateside Waiver, Denver Immigration Court (July 15, 2020)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1961 STOUT STREET, STE. 3101
DENVER, CO 80294

Joseph Law Firm, P.C.
Hall, Aaron Clarke
12203 East 2nd Avenue
Aurora, CO 80011

In the matter of [redacted] DATE: Jul 15, 2020

__ Unable to forward - No address provided.
__ Attached is a copy of the decision of the Immigration Judge. This decision is final unless an appeal is filed with the Board of Immigration Appeals within 30 calendar days of the date of the mailing of this written decision. See the enclosed forms and instructions for properly preparing your appeal. Your notice of appeal, attached documents, and fee or fee waiver request must be mailed to: Board of Immigration Appeals
Office of the Clerk
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041
__ Attached is a copy of the decision of the immigration judge as the result of your Failure to Appear at your scheduled deportation or removal hearing. This decision is final unless a Motion to Reopen is filed in accordance with Section 242b(c)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(c)(3) in deportation proceedings or section 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) in removal proceedings. If you file a motion to reopen, your motion must be filed with this court:
IMMIGRATION COURT
1961 STOUT STREET, STE. 3101
DENVER, CO 80294
__ Attached is a copy of the decision of the immigration judge relating to a Reasonable Fear Review. This is a final order. Pursuant to 8 C.F.R. § 1208.31(g)(1), no administrative appeal is available. However, you may file a petition for review within 30 days with the appropriate Circuit Court of Appeals to appeal this decision pursuant to 8 U.S.C. § 1252; INA §242.

__ Attached is a copy of the decision of the immigration judge relating to a Credible Fear Review. This is a final order. No appeal is available.

X Other: ORDER OF THE IMMIGRATION JUDGE

C. Lauders
COURT CLERK
IMMIGRATION COURT FF

cc: WILLIAMS, ELIZABETH
12445 E CALEY AVE
CENTENNIAL, CO, 80111

The Department has opposed Respondent's motion, citing to the central holding in *Castro-Tum* that immigration judges do not have the authority to "indefinitely" close cases, and contending that the Court cannot grant administrative closure because there is no specific regulation or settlement agreement that gives an immigration judge authority to do so. "Department of Homeland Security Opposition to Motion to Administratively Close Removal Proceedings," (DHS Opposition) (Jun. 29, 2020) at 2; *Castro-Tum*, 27 I&N Dec. at 272.

Having taken the Attorney General's decision in *Castro-Tum* and the parties positions into careful consideration, the Court, for the below reasons, finds that closing proceedings for a short, definite period is authorized by its regulatory authority to adjourn cases under 8 C.F.R § 1240.6, is in line with the central holding in *Castro-Tum*, and is the most efficient way to reach a final decision in this case.

II. STATEMENT OF LAW AND FINDINGS OF THE COURT REGARDING ADMINISTRATIVE CLOSURE

The final rule expanding the class of individuals eligible to request a provisional waiver of certain grounds of inadmissibility based on the accrual of unlawful presence in the United States went into effect on August 29, 2016. The USCIS has exclusive jurisdiction to grant such waiver applications. 8 C.F.R. 212.7(e)(1). The purpose of the expanded regulation is to improve administrative efficiency, save government resources, and promote family unity, a principle that has been central to immigration policy since 1965. *See* Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911; *see also* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978; 81 FR 50243, DHS Rule: "Expansion of Provisional Unlawful Presence Waivers of Inadmissibility," available at https://www.federalregister.gov/documents/2016/07/29/2016-17934/expansion-of-provisional-unlawful-presence-waivers-of-inadmissibility (referencing family unity as one of the objectives of allowing the Form I-601A stateside waiver process). However, an alien in removal proceedings is ineligible to apply for the waiver, unless his proceedings are administratively closed and have not been recalendared at the time of filing for the waiver. 8 C.F.R. 212.7(e)(4(iii).

Certain respondents in removal proceedings are able to apply for a provisional unlawful presence waiver if their proceedings are administratively closed.[2] 8 C.F.R. 212.7(e)(4)(iii). However, on May 17, 2018, then Attorney General Jeff Sessions decided that immigration judges generally lack the authority to grant administrative closure for an indefinite period of time. *Castro-Tum*, 27 I&N Dec. at 272. In line with that holding, Attorney General Sessions decided immigration judges only have the authority to administratively close cases "where a previous

[2] Notably, the preamble to the final provisional unlawful presence waiver rule shows that DHS considered a comment "that the final rule make clear that USCIS can only accept a provisional unlawful presence waiver once DHS, through ICE's Office of Chief Counsel, affirmatively consents to it in the removal proceedings." 78 Fed. Reg. 536, 544 (Jan. 3, 2013). However, DHS rejected that suggestion: "After careful consideration of all comments on this issue, DHS has decided to limit eligibility for the provisional unlawful presence waiver process to individuals whose removal proceedings are administratively closed and have not been recalendared at the time of filing the Form I-601A." *Id.* While DHS noted that members of this class were "likely individuals whom ICE or EOIR has determined, on a case-by-case basis, to be non-enforcement priorities," (*id.*), it also stated that, "DHS is not limiting eligibility solely to individuals whose cases were closed pursuant to the ICE Prosecutorial Discretion (PD) initiative." *Id.* at 556. Therefore, DHS noted that, "Any alien whose removal proceedings are administratively closed and have not been recalendared at the time of filing of the Form I-601A, can apply for a provisional unlawful presence waiver." *Id.*

regulation or settlement agreement has expressly conferred it," *id.* at 282-83, and, in a footnote, distinguished the regulation that allows respondents in removal proceedings to have their cases closed to pursue the Form I-601A waiver by highlighting that the regulation only gives DHS the authority to do so. *Castro-Tum*, 27 I&N Dec. at 278 n.3; *see* 8 C.F.R. § 212.7(e)(4)(iii).

By regulation, immigration judges are assigned general, independent authority to take "any action" to resolve cases. 8 C.F.R. § 1003.10(b) ("immigration judges shall exercise their independent judgment and discretion to take *any action* ... that is appropriate and necessary for the disposition of such cases") (emphasis added); *see also* 8 C.F.R. § 1003.1(d)(1)(ii); 8 C.F.R. § 1240.1(c) (immigration judges may "receive and consider material and relevant evidence, rule upon objections, *and otherwise regulate the course of the hearing*") (emphasis added). Attorney General Sessions discusses this broad regulatory authority assigned to immigration judges in *Castro-Tum*. 27 I&N Dec. at 284-86. While acknowledging the regulatory "grants of general authority to take measures" to resolve cases, Attorney General Sessions finds the regulatory authority assigned to immigration judges "would not ordinarily include the authority to suspend such cases indefinitely," *id.* at 285, and emphasizes that "[i]n all cases, immigration judges shall seek to resolve the questions before them in a *timely* and impartial manner consistent with the [INA] and regulations." *Id.* at 284 (emphasis in original). Yet, notably, in *Castro-Tum*, Attorney General Sessions specifically references 8 C.F.R. § 1240.6 as authority given to immigration judges to continue cases. *Id.* at 288-89. 8 C.F.R. § 1240.6 specifically allows for the "postponement or adjournment" of removal cases and expressly authorizes an immigration judge to "grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service." Respondent in his motion convincingly argues that this regulation gives the Court authority to briefly adjourn his case for a finite period by administratively closing his proceedings, which would allow him to apply for the I-601A waiver. *See* Respondent's Motion at 19-24.

The Department in its opposition[3] does not meaningfully discuss *Castro-Tum* or its underlying principle of encouraging the expeditious resolution of cases and ending the practice of indefinitely administratively closing cases, which is threaded throughout the decision. *See Castro-Tum*, 27 I&N Dec. at 272 ("I hold that immigration judges and the Board do not have the general authority to suspend *indefinitely* immigration proceedings by administrative closure. *Accordingly*,[4] immigration judges and the Board may only administratively close a case where a previous regulation or a previous judicially approved settlement expressly authorizes such an action") (emphasis added); at 272-76 (discussing the history of administrative closure and how it too often resulted in the indeterminate suspension of removal proceedings); at 273 (identifying *Castro-Tum* as "one example of how administrative closure encumbers the fair and efficient administration of immigration cases"); at 284 ("courts have not identified the adoption of procedures to *indefinitely*

[3] In its opposition, the DHS does not discuss that it has the regulatory authority to agree to administrative closure pursuant to 8 C.F.R. § 212.7(e)(4)(iii) or explain why it does not agree that a brief closure in Respondent's case is the most efficient way to resolve the case. The logical explanation for this omission is because, at the time the DHS filed its opposition, a final hearing was then scheduled in the near future, which is not now the case, due to Court's closure because of the coronavirus pandemic.

[4] Merriam-Webster defines "in accordance with" as follows: "in a way that agrees with or follows (something, such as a rule or request)." https://www.merriam-webster.com/dictionary/in%20accordance%20with (last visited Jul. 14, 2020).

suspend the adjudication as part of that latitude") (emphasis added); at 285 ("Grants of general authority to take measures 'appropriate and necessary for the disposition of such cases' would not ordinarily include the authority to suspend such cases *indefinitely*.") (Emphasis added); at 285-86 (when discussing 8 C.F.R. § 1240.1(c), finding the regulation does not "entail an authority to grant an *indefinite* suspension") (emphasis added); at 289-90 (discussing how an interpretation of the regulations to allow administrative closure "would conflict with the policies underlying the INA and its implementing regulations …" that require "immigration judges … [to] proceed 'expeditious[ly]' to resolve the case") (internal citations omitted); at 292 (distinguishing the practice of administrative closure by Article III courts by noting, "[i]mmigration judges and the Board halt proceedings *indefinitely*, cease tracking the proceedings, and allow proceedings to resume only if the party seeking recalendaring satisfies the burden of demonstrating a good reason to resume proceedings.") (Emphasis added); at 292 (contrasting administrative closure with termination or dismissal of a case, noting that the either of the latter actions "ensure finality, cutting down on the number of cases orphaned within the immigration courts. Further, such actions encourage more accountability, by resulting in a final, transparent order from the immigration judge who ends the case. By contrast, administrative closure has produced a backlog all its own, with far fewer cases being recalendared than closed and some cases suspended for decades."). In its opposition, the Department also does not respond to Respondent's argument that 8 C.F.R. § 1240.6 gives the Court the authority to briefly adjourn or close his proceedings as the most efficient way to resolve his case. *Compare* Respondent's Motion at 19-24 *with* DHS Opposition at 2.

Undeniably, as is apparent throughout the *Castro-Tum* decision, the thrust of the Attorney General's decision was to end the practice of indefinite closure of cases. *See generally Castro-Tum*, 27 I&N Dec. 271. Attorney General Sessions even underscores how continuances, where warranted, should be used in place of administrative closure so as not to indefinitely suspend removal proceedings. *See id.* at 288-89, 291, 293. Here, however, a continuance will not bring quicker resolution to Respondent's case, and proceeding without interruption to a final hearing will not bring the quickest resolution to Respondent's case. Instead, under the specific circumstances in this case, a short adjournment of Respondent's case, achieved through a finite period of administrative closure, opens the possibility of reaching finality in Respondent's case sooner than if proceedings continue without pause. This is why: Respondent was scheduled to have an individual hearing on his application for cancellation of removal on July 20, 2020. Unfortunately, due to the Court's unexpected closure on that date resulting from the coronavirus pandemic, the Court must reschedule his hearing. The undersigned has thousands of cases pending adjudication and is now scheduling cases for individual hearings in April of 2023, which is when Respondent's case will be scheduled. Yet, if Respondent is successful in applying for a provisional unlawful presence waiver after his case is briefly closed, he will request voluntary departure and leave the U.S. to consular process, all of which would occur in a far shorter time than waiting for a hearing on his application for cancellation of removal and for the Court to release the decision in his case if relief is granted[5] or pursuing an appeal if such relief is not granted. Respondent's Motion at 25-26.

[5] The Court also considers that it is a better use of resources to allow an individual who may be able to consular process the opportunity to seek a Form I-601A waiver than to have the case linger for years in proceedings and potentially use one of the limited cancellation of removal numbers, which he is entitled to request.

Thus, pursuant to the authority to adjourn the case at 8 C.F.R. § 1240.6, and following the guidance set forth in *Castro-Tum* that it cannot administratively close a removal case for an indefinite period, the Court grants Respondent's motion. To ensure the case is not left "in limbo," *Castro-Tum*, 27 I&N Dec. at 290, the Court enters the following order:

ORDER

The Court orders that Respondent's motion to administratively close for a finite period be **GRANTED**. The Court further orders that Respondent's removal proceedings be closed under its regulatory authority at 8 C.F.R. § 1240.6, until August 14, 2020, at which time, pursuant to Respondent's request in his motion, the matter will be recalendared to the Court's active docket.

The Court further orders that Respondent's removal proceedings be scheduled to an individual hearing on his application for cancellation of removal on April 6, 2023, at 8:30 a.m. If Respondent is successful in applying for the Form I-601A waiver, in accordance with the argument in his motion for administrative closure, Respondent should move the Court to vacate his individual hearing and advance his removal proceeding to grant his request for voluntary departure. The Court encourages Respondent to make such request for voluntary departure by motion, and in such request indicate that he is withdrawing his request for cancellation of removal and qualify himself for voluntary departure. As with any motion, the DHS would then have ten calendar days to respond.

It is so ordered.

Date: July 14, 2020

ALISON KANE
Digitally signed by ALISON KANE
Date: 2020.07.14 15:38:42 -04'00'

Alison R. Kane
Immigration Judge

Certificate of Service

THIS DOCUMENT WAS SERVED BY: Mail (M) Personal Service (P)

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Date: 7/15/2020 By: Court Staff: cl