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Protecting Immigrant Women and Girls Fleeing Violence

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LEGAL ADVISORY: RECENT ATTORNEY GENERAL DECISION IN *Matter of Castro-Tum*

Early in 2017, the Attorney General decided to review several long-standing procedural practices at the Immigration Court and the BIA. As the BIA and immigration judges may do only what the AG delegates authority to them to do, he has authority to reverse and overrule any BIA ruling, so long as he acts lawfully in doing so. In *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) he reviewed the decades-long practice of administrative closure. As you all know, those were often entered when the parties were awaiting a decision from a third party not before the court, such as another agency.

The AG has now ruled that immigration judges lack the authority to administratively close cases, except in certain specific circumstances. He held that there was no regulatory grant of general authority to grant administrative closure, that no Attorney General had delegated that power to immigration judges, and that they lack any inherent power to do so. The result is that only where a regulation or a settlement agreement specifically references "administrative closure" can an immigration judge or the BIA grant administrative closure.

The AG has ordered that all cases currently administratively closed will stay closed unless and until either one of the parties moves to reopen. When that happens, the judge "shall" reopen the matter. Although the AG cautions in his decision that "I expect the re-calendaring process will proceed in a measured but deliberate fashion that will ensure that cases ripe for resolution are swiftly returned to active dockets," we have no indication of how many or which cases DHS will seek to re-calendar, or how it will proceed to do so.

For some respondents, this may be an opportunity to affirmatively get a case re-opened which OCC has not been responsive to before. We should take advantage of those opportunities.

For other respondents, DHS will seek to re-calendar and we expect aggressive use of this tool. At least for now, there is no argument we can make that an IJ *can* grant administrative closure contrary to the AG's decision. However, there are several arguments for attorneys to consider upon re-opening.

- First, whatever arguments justified the administrative closure may also justify a continuance. The AG recognized administrative closure was simply one type of continuance. Moreover, he specifically noted that because there is regulatory authority for a continuance, it is the

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"appropriate way to deal with exceptional circumstances that legitimately warrant an exception to the fair and efficient administration of immigration laws." Thus, if there was good cause for admin closure, and nothing has changed in the case, there should be good cause for a continuance. The AG has essentially collapsed the two. Make your record.

- Footnote 13 of the opinion states that a continuance is especially important in "cases involving *particularly vulnerable respondents*. The good-cause standard, when properly applied, gives judges sufficient discretion to pause proceedings in individual cases while also preventing undue delays. *For example, a continuance may allow an immigration judge to oversee an alien minor's progress in obtaining appropriate alternative forms of relief.*" (emphasis added) The same argument should hold true for a vulnerable survivor's progress in obtaining appropriate alternative forms of relief.
- *Sanchez-Sosa,* 25 I&N Dec. 807 (BIA 2012) is still (for now) binding law that creates a presumption in U-visa cases: "As a general rule, there is a rebuttable presumption that an alien who has filed a prima facie approvable application with the USCIS will warrant favorable exercise of discretion for a continuance for a reasonable period of time."
- A DHS guidance from 2009 provides that if an individual in removal proceedings submits proof of filing a U visa petition with USCIS, "…the OCC *shall* request a continuance to allow USCIS to make a prima facie determination."[1] While it is not entirely clear how much of the guidance is still effective, it may be worth bringing the request to the TA to see if they are willing to act as the guidance requires.

- Second, there are substantive arguments you can make for a continuance, which we included in our *Castro-Tum* amicus brief.[2]
  - A continuance may be necessary to ensure that one agency (DoJ) does not improperly interfere with the ability of another agency (USCIS) to make the determinations Congress has entrusted to it.
  - A continuance may be necessary in cases involving trauma to allow the victim to recover from trauma so as to be able to pursue the remedies Congress has put in place. Same argument for cases of mental competence that may or may not be trauma-related.
  - Finally, while judges may have previously used admin closure for long waits, and continuances for shorter ones, there is nothing in the regulations that limits or proscribes the length of a continuance. You have room to argue that in this new landscape, much longer continuances may now be "reasonable" since the AG has taken away the previously available longer option. The focus is what is required for efficiency and fairness in the particular case.

[1] "Guidance Regarding U Nonimmigrant Status (U Visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal." https://www.ice.gov/doclib/foia/dro_policy_memos/vincent_memo.pdf.
[2] Tahirih Amicus Brief at http://www.tahirih.org/wp-content/uploads/2018/04/Matter-of-Castro-Tum-Brief-by-Amici-Curiae-Tahirih-Justice-Center-et-al.pdf

- Third, the recent emphasis by EOIR on efficiency, including establishing benchmarks for courts and the upcoming-in-October performance metrics for individual judges may create a conflict of interest that you should consider getting on the record. The McHenry memo[3], the Keller Memo[4] and the Performance Metrics Memo[5] may all apply to cases re-calendared under this new decision. These memos establish benchmarks for the immigration courts for "completing" cases, such as the requirement that: "Eighty-five percent (85%) of all non-status non-detained removal cases should be completed within 365 days (1 year) of filing of the NTA, reopening or re-calendaring of the case, remand from the BIA, or notification of release from custody." You should consider getting this information on the record, and arguing that these policies violate due process because they create a conflict of interest – the court's or a particular judge's personal performance review (and financial compensation) appear to be tied to granting fewer continuances and completing cases more quickly but due process for your client may require more and longer continuances, *especially* since admin closure is no longer available.

- Fourth, there are still some bases recognized for admin closure, so investigate whether your client may still be eligible. We list below those mentioned in the *Castro-Tum* decision, but if there are settlement agreements that affect your client, please review the language to determine whether admin closure is a form of relief.
    - Applicants for T-visa may request and court may grant admin closure or indefinitely continue under 8 CFR 1214.2(a)
    - Others listed in decision are
        - 8 C.F.R. §§ 1240.62(b)(1)(i), (2)(iii), 1240.70(f)–(h) (regs implementing *Am. Baptist Churches v. Thornburgh* settlement)
        - 8 C.F.R. § 1245.13(d)(3)(i) (admin closure of removal proceedings for certain Nicaraguan or Cuban nationals)
        - 8 CFR § 1245.15(p)(4)(i) (mandating administrative closure re Haitian nationals' adjustment of status)
        - 8 CFR § 1245.21(c) (certain nationals of Vietnam, Cambodia, and Laos allowed to move for administrative closure pending their applications for adjustment of status)
        - 8 C.F.R. § 1214.3 (LIFE Act authorized admin closure for spouses and children of permanent residents to seek "V nonimmigrant" status.
        - *Barahona-Gomez v. Ashcroft*, 243 F. Supp. 2d 1029 (N.D. Cal. 2002) settlement (cases from 1996-97 denied suspension of deportation based on "Creppy memo")

- Fifth, if you have cases that are re-calendared, consider making a record to challenge *Castro-Tum*. As Mr. Castro-Tum lacked counsel, we don't know if the AG's decision in his case will be appealed. But if you have a case in which you can show that admin closure was granted, but an IJ refused to grant a continuance when nothing else has changed, there may be

[3] McHenry Memo: https://drive.google.com/file/d/0B_6gbFPjVDoxNlFrbmdqUDVkcENlSE9LdUxsVnh2bG5OOFZz/edit
[4] Keller Memo: https://www.justice.gov/eoir/file/oppm17-01/download
[5] Performance Memo: http://aila.org/infonet/eoir-memo-immigration-judge-performance-metrics

grounds to challenge the AG's decision by direct appeal of your case. Please contact Rena, Julie, or Archi, or, for Tahirih pro bono counsel, please discuss with your Tahirih co-counsel, if you think you have such a case; there may be good grounds to challenge the AG's decision on this issue in another case.

Take-aways:

- Except for when a specific regulation or settlement agreement refers to administrative closure, immigration judges have no authority to administratively close an immigration case.
- All cases currently administratively closed shall remain closed unless one of the parties moves to re-calendar. Upon such motion, the IJ or the Board "shall" re-calendar.
- Continuances are the "appropriate way to deal with exceptional circumstances that legitimately warrant an exception to the fair and efficient administration of immigration laws." See especially Footnote 13 about vulnerable respondents and rely on *Sanchez-Sosa* for U-visa applicants.
- If admin closure was appropriate originally, those same factors strongly counsel granting a continuance, and it should be for as long as reasonably necessary to accommodate the time needed for the other agency to make a decision.
- Consider making a record about the new requirements on judges re continuances and completion rates.