Practice Pointer: Opposing ICE Motions to Recalendar Administratively Closed Cases

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Recent reports indicate that the Office of the Principal Legal Advisor, Immigration Customs and Enforcement (ICE OPLA), is moving to recalendar administratively closed cases before the immigration court. This practice pointer provides background information on administrative closure and how to oppose ICE efforts to recalendar cases when doing so is in the best interests of your client. A sample opposition to an ICE Motion to Recalendar is also available on CLINIC's website.

What is administrative closure?

Administrative closure is a docket-management tool with a long history of use by the Executive Office for Immigration Review (EOIR) in which a case is removed from the active docket. While the noncitizen remains subject to removal, proceedings are effectively suspended, and either party may file a motion to recalendar at any time to return the case to the active docket.

Administrative closure has been used frequently throughout the years, including to allow people to pursue collateral relief outside of immigration court, such as T or U nonimmigrant status; Special Immigrant Juvenile Status (SIJS), particularly given the backlog in visa availability for SIJS applicants; adjustment of status with U.S. Citizenship and Immigration Services (USCIS) for those classified as "arriving aliens:" Temporary Protected Status; and I-601A provisional waivers for those who are seeking permanent residency through U.S. citizen or lawful permanent resident family members.[1] Administrative closure has also been used as a form of prosecutorial discretion, most commonly during the Obama administration.[2]

[1] The regulations governing provisional waivers require that removal proceedings be administratively closed or terminated for the noncitizen to pursue this process.

[2] While prosecutorial discretion was also common in the Biden administration, ICE OPLA under that administration more commonly sought dismissal of proceedings rather than administrative closure.

What is the legal basis for administrative closure?

In *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), the Board of Immigration Appeals (Board) held that an Immigration Judge (IJ) may administratively close proceedings over the objection of one of the parties, and it established a list of factors for the IJ to consider when making this decision. Although *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), overruled *Avetisyan* during the Trump administration, the Biden administration restored the decision in *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021). In July 2024, the Biden administration issued regulations codifying the ability of EOIR adjudicators (both IJs and Board members) to administratively close cases when certain criteria are met. *See* 8 CFR §§ 1003.1(l)(3)(ii); 1003.18(c)(3)(ii).

Under the Trump administration, the Acting Director of EOIR, Sirce Owen, recently issued a memo questioning the legal basis for these regulations and stated that the administration would not defend them were they challenged in court. However, this memo has little practical effect at this point, unless the agency goes through the formal rulemaking process to repeal them. While they may very well do so, this would be a lengthy process, and the regulations remain in effect for the time being.

More recently, the BIA issued a precedential decision holding that administrative closure is not generally appropriate when an application for Temporary Protected Status is pending. *Matter of B-N-K*, 29 I&N Dec. 96 (BIA 2025) (affirming the BIA's earlier decision in *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017)). Like the Owen memo, the *B-N-K-* decision exhibits hostility towards administrative closure throughout. The decision holds that "whether there are persuasive reasons for a case to proceed and be resolved on the merits is the primary consideration in determining whether administrative closure is appropriate under the totality of the circumstances." *Id.* The decision is problematic in that it purports to assign more weight to certain regulatory factors over others. This approach is not supported by the final rule, which, in commentary, called for an "unweighted, totality of the circumstances approach" and noted that *W-Y-U-* was superseded in that it purported to assign more importance to certain factors over others. To the extent that *B-N-K-* conflicts with the regulations, practitioners should argue that the regulations control. While the *B-N-K-* decision is not a positive one, practitioners can continue to make case specific arguments supporting administrative closure for their clients based on *all* the factors outlined in the regulations.

How do proceedings that are administratively closed get put back on the court's active docket?

Either party may file a motion to recalendar a case that is currently administratively closed. If the parties agree to recalendar the case, recalendaring should generally be granted. The Board and IJ *must* grant a joint motion to recalendar removal proceedings or a motion filed by one party where the other party has affirmatively indicated its non-opposition. The only exception to this is if the Board or IJ state "unusual, clearly identified, and supported

reasons" for denying a joint or affirmatively unopposed motion to recalendar. 8 CFR §§ 1003.1(l)(3), 1003.18(c)(3).

An attorney represented a client before EOIR/BIA and the case was administratively closed. Since then, no attorney or representative has submitted any motion to withdraw or substitute. Is the attorney still the representative of record on that case?

Assuming representation was not limited to bond-only proceedings or limited to document assistance (through Form EOIR-60/EOIR-61), yes, the attorney is still the representative of record.

How does an attorney or representative of record on an administratively closed case receive service of any ICE OPLA motion to recalendar?

It depends. If the case has a paper Record of Proceeding (ROP), all filings must be made on paper, meaning that ICE OPLA would generally serve the representative of record by mail. For cases where all parties used the EOIR Courts & Appeals System (ECAS), that allows for electronic filing of documents, ICE OPLA will electronically file any motion and the ECAS system will automatically send service notifications to both parties that a new document has been filed.

Practitioners should note that for cases that have paper ROPs there is generally no way of knowing if ICE OPLA has filed any pending motion to recalendar by looking at the EOIR Case Portal alone, as the portal generally contains only limited case details including information about future hearings. As such, practitioners are encouraged to check the EOIR Case Portal regularly to monitor if any hearings have been scheduled for cases that were previously administratively closed.

If an attorney's EOIR Account was deactivated due to inactivity, how can that attorney regain access to their deactivated EOIR Account?

An attorney who previously registered with EOIR and who was issued an EOIR ID number should not re-register for a new login. Instead, the attorney should contact customer support at ECAS.techsupport@usdoj.gov or 877-388-3842 for assistance with regaining access to their account. Customer support may assist with obtaining a DOJ Login ID or where an attorney has forgotten their EOIR ID number, and/or requires help regaining access to their deactivated account.

Note that if the attorney is at a new firm or organization, the attorney's old firm or organization will remain associated with any previously filed Form EOIR-27/Form-28 and EOIR/BIA will use that old address for any communication such as any future notice of hearing. As a result, updating contact information on the EOIR portal does not automatically change a representative's address on any individual case. To update or change an attorney's address for any individual respondent, the attorney is required to file a new Form EOIR-27/Form-28 with their current address.

What if one party opposes recalendaring?

Recalendaring is not automatic under the regulations once one of the parties files a motion. Rather, the IJ must consider an enumerated list of factors when deciding whether to grant recalendaring.

Adjudicators are to consider the following non-exhaustive list of factors based on the totality of circumstances:

- The reason recalendaring is sought.
- The basis for any opposition to recalendaring.
- The length of time elapsed since the case was administratively closed.
- If the case was administratively closed to allow the noncitizen to file a petition or application outside of proceedings, whether the noncitizen actually filed the petition or application and the length of time elapsed between when the petition or application was filed and the motion to recalendar.
- The result of adjudication (approval or denial) of the petition or application.
- If the petition or application is still pending, the likelihood of success.
- The anticipated outcome if the case is recalendared.
- The ICE detention status of the noncitizen.

See 8 CFR §§ 1003.1(l)(3)(ii) (motions before the Board); 1003.18(c)(3)(ii) (motions before the IJ).

What should a practitioner do if she receives a motion to recalendar for a current client?

A discussion with a client must ensue, and a discussion of the pros and cons of recalendaring must be discussed. If a client does oppose recalendaring, the practitioner must move quickly, as any opposition to a motion to recalendar must be filed within 10 days of ICE submitting the motion to the immigration court.

Note that under the immigration court practice manual, a party filing a motion is required "to make a good faith effort to ascertain the opposing party's position on the motion." If, as reports indicate, ICE OPLA is preparing to file motions to recalendar proceedings *en masse*, it is highly unlikely that they are going to contact counsel individually for each case. But failure to do so is a violation of the practice manual and should be pointed out by counsel in filing any opposition to recalendaring. Please see the sample motion on CLINIC's website.

How should a practitioner proceed if her client does not oppose recalendaring?

Not every client will oppose recalendaring, of course. For some, it may be advantageous to have their case back on the active docket, if they are now eligible for relief before the court. For example, the case may have been administratively closed to allow a visa number to become available, and that has now occurred in their case, allowing them to adjust before the court. If a practitioner's client does not oppose recalendaring, she can take no action in response to the motion and simply wait for a new court date to be scheduled.

Practitioners must also be sure to screen for other forms of relief when determining whether recalendaring is in the client's best interests. One form of relief that clients with administratively closed cases may now be eligible for is non-LPR cancellation of removal under INA § 240A(b)(1). Recall that under Supreme Court precedent, a Notice to Appear that lacks the date, time, and place of a removal proceeding does not stop the accrual of continuous physical presence for purposes of non-LPR cancellation of removal. *Niz-Chavez v. Garland*, 593 U.S. 155 (2021). Under this same precedential decision, a defective Notice to Appear is not cured by the subsequent service of a hearing notice with the proper information.

What this means practically speaking is that many individuals with administratively closed cases have continued to accrue continuous physical presence in the United States and may now be eligible for non-LPR cancellation of removal if they have a qualifying relative and meet the other statutory requirements. Ten years ago, when many cases were administratively closed under the Obama administration as a form of prosecutorial discretion, it was common for Notices to Appear to lack the date, time, and place of the hearing. Thus, it is likely that noncitizens in this situation have continued to accrue continuous physical presence over the past decade. While cancellation of removal has a burden of proof that can be difficult to meet, particularly with respect to the heightened hardship standard, at least this option may provide a potential path forward for clients in removal proceedings to pursue.

What should a practitioner do if she receives a motion to recalendar for a *former* client?

As noted above, many noncitizens had cases that were administratively closed as a form of prosecutorial discretion. This may have led practitioners to internally close cases within their office, as the client had no active proceedings and no work being performed by the office. However, if the practitioner did not withdraw or was not substituted as counsel with the immigration court after the grant of administrative closure, the practitioner remains counsel of record and thus has an ethical duty to contact that client and inform them of the government's motion. If recalendaring is granted, the practitioner also must inform clients of any upcoming court date scheduled by the immigration court to avoid the

issuance of *in absentia* order of removal. This is especially important because noncitizens who are represented in immigration court typically do not receive communication directly from the immigration court; all communication is sent to the attorney or representative of record. Practitioners must also appear at any scheduled hearing with their clients until such time as a motion to withdraw or substitute is granted.

What makes matters even more complicated is that the attorney or representative of record may no longer be at their old firm or organization. EOIR's position is that the matter remains with the attorney, even if she has switched organizations, until such time as a motion to withdraw or substitute is granted. However, many organizations and firms consider that the case remains with *them* per their representation agreement, not the departing attorney or representative, until such time as a new contract for representation is filed. Thus, organizations may find themselves in the difficult position of trying to quickly file responses or oppositions to motions for cases that they personally have no familiarity with.

In addition, communicating with clients after so many years may be tricky, as contact information for clients may have changed. However, practitioners must make efforts to contact their former clients to inform them of any government motion or communication from the court. Practitioners should reach out to former clients via their last known contact information, including by phone, email, mail, or via social media platforms.

Where a practitioner is not able to make any contact with a former client, and the practitioner discovers that a ICE OPLA filed a motion to recalendar or that the immigration court has scheduled a new hearing on a case where the practitioner is considered the representative of record, that practitioner may need to file a motion to withdraw. Practitioners are reminded that filing a motion to withdraw involves complying with any necessary steps required by the Immigration Court Practice Manual (ICPM), Board of Immigration Appeals Manual, and any applicable ethical rules in the appropriate jurisdiction.

If a licensed attorney is uncertain about ethical responsibilities that apply in a situation concerning a former client, the attorney may consider consulting with the applicable state bar attorney ethics hotline or consulting with ethics counsel in the appropriate jurisdiction.

Conclusion:

The government's effort to recalendar hundreds of thousands of formerly closed cases has the potential to create massive problems for practitioners and clients alike. Remember, however, that the immigration court does not need to grant a motion to recalendar simply because DHS files it. The regulations provide that the court must consider various factors

in determining whether to grant a motion. Do not make this process easy for DHS — make them work for it!