SEEKING ADMINISTRATIVE CLOSURE AND TERMINATION

Using New EOIR Regulations in a Hostile Enforcement Environment

By Kate Mahoney

I. Introduction

On May 29, 2024, the Executive Office for Immigration Review (EOIR) published a New Rule, *Efficient Case and Docket Management in Immigration Proceedings*[1] ("the Rule" or "the New Rule"). Among other changes, the New Rule codifies administrative closure and termination as lawful docketing tools for the Board of Immigration Appeals (BIA) and immigration judges (IJ), at 8 CFR §§ 1003.1(l),(m); §§ 1003.18(c), (d).[2] These regulations took effect on July 29, 2024.

IMPORTANT! Administrative closure and termination under the New Rule are separate and distinct from the ICE Office of the Principal Legal Advisor's (OPLA) authority to exercise prosecutorial discretion. While the Trump administration has effectively ended favorable prosecutorial discretion policies by rescinding previous guidance on immigration enforcement priorities, the New Rule remains in force. To rescind the New Rule, EOIR would have to promulgate a new rulemaking that would be subject to the notice and comment procedures required under the Administrative Procedures Act, a process which typically takes many months and would likely be subject to litigation. Under the rule, the IJ and BIA have authority to grant administrative closure and termination over the opposition of OPLA.

This practice advisory details the New Rule's provisions on administrative closure and termination of removal proceedings, with advice on risk assessment, and practice tips on presenting these motions in the current, hostile enforcement environment.

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[1] 89 Fed. Reg. 46742 (May 29, 2024).

[2] Other provisions of the New Rule rescinded a prior rule promulgated in 2020, known as the "AA96 Final Rule," during the last weeks of the first Trump administration, which attempted to gut procedural and Due Process protections in removal proceedings, largely restoring EOIR docketing and appellate procedures to their pre-AA96 Final Rule status quo. *See* EOIR, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81588 (Dec. 16, 2020). The New Rule also addresses the applicability of a 2019 BIA case, *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (BIA 2019), to criminal pleas and sentencing modifications entered prior to that case's publication. These parts of the New Rule are not addressed in this practice advisory.

II. Administrative Closure

A. What is administrative closure?

Administrative closure is the temporary suspension of a case before the IJ or the BIA. While a case is administratively closed, it is removed from the court's active docket, no hearings take place, and the adjudicator does not make any substantive decisions on the merits of the case. Once administratively closed, the case remains "paused" unless a party to the case files a motion to recalendar and the adjudicator grants it.

B. What does the New Rule do?

The New Rule establishes regulations at 8 CFR §§ 1003.18(c) and 1003.1(l) giving immigration judges and the BIA, respectively, clear authority to administratively close any case, upon motion of one or both parties, by applying a factor-based test that largely adopts the factors set forth in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012).[3] The New Rule does not authorize adjudicators to administratively close proceedings sua sponte—that is, the IJ or BIA may only administratively close the case when one party has filed a motion requesting it.[4] **Neither party can summarily block administrative closure. This is critical:** administrative closure does not require ICE's agreement. Instead, the judge must consider arguments of both parties and rule accordingly.

C. Judges must administratively close where the parties agree

When both parties jointly request administrative closure, or where the nonmoving party has "affirmatively indicated" its non-opposition, then administrative closure is *mandatory*, unless the IJ "articulates unusual, clearly identified, and supported reasons for denying the motion."[5] "Affirmatively indicated its non-opposition" means that the nonmoving party has stated that they do not oppose administrative closure; this standard will not be met if the nonmoving party simply fails to file an opposition within the 10-day response period. In other words, where both parties explicitly agree to administrative closure, the IJ must administratively close the case unless they state and explain a specific reason to not do so.

Even where the nonmoving party does not agree to administrative closure, the IJ may still administratively close the case if the regulatory factors weigh in favor of administrative closure. OPLA does not have the authority to block or veto administrative closure; their opposition is but one of several relevant factors to decide whether administrative closure is appropriate.

D. Judges may grant motions over opposition or silence

When the nonmoving party opposes or fails to respond to a motion for administrative closure, adjudicators must weigh various factors to determine whether to grant administrative closure. As noted above, the factors for administrative closure in the New Rule largely mirror the factors

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[3] Other sections of the regulations allow or require administrative closure in specific circumstances. The New Regulation does not disturb those provisions. *See* 8 CFR §§ 1003.1(l)(1), 1003.18(c)(1).
[4] *See* 89 Fed. Reg. at 46754.
[5] 8 CFR §§ 1003.1(l)(3), 1003.18(c)(3).

in *Avetisyan*. The IJ must consider these factors under a "totality of the circumstances" analysis, and no single factor is dispositive.[6] In each case, the adjudicator has discretion to assign appropriate weight to each factor based on the circumstances; no single factor is by default entitled to more weight than the others. These factors are:

(A) The reason administrative closure is sought. The most common reason for administrative closure is when the respondent has filed a petition or application for relief with USCIS, or while some other action is pending outside of proceedings that will impact the removal case. But the New Rule makes clear that a collateral application is not necessary for administrative closure: for example, it acknowledges that a noncitizen's employment authorization may be considered if the adjudicator believes it is relevant.[7] Thus, strong motions for administrative closure will articulate a unique and compelling reason for the request, even where no collateral application is pending.

(B) The basis for any opposition to administrative closure. The New Rule supersedes *Matter of W-Y-U-*, which had held that the "primary consideration … is whether the party opposing administrative closure has provided a persuasive reason" to proceed to merits.[8] Under the New Rule, the basis for any opposition by the non-moving party is a relevant factor in the totality-of-the-circumstances analysis, but the IJ has discretion to assign weight to this factor relative to the other applicable factors. This is an important change that advocates should highlight for EOIR adjudicators: OPLA's opposition is no longer the "primary consideration" when determining whether to grant administrative closure, and the IJ must consider all factors when deciding whether to administratively close.

(C) Any requirement that a case be administratively closed in order for a petition, application, or other action to be filed with, or granted by, the Department of Homeland Security (DHS). This factor is primarily designed to protect individuals seeking a Provisional Waiver of Unlawful Presence ("I-601A waiver). The I-601A regulation, 8 CFR § 212.7 requires that any pending removal proceedings be administratively closed at the time of adjudication.[9] To the extent that other regulations might require administrative closure for approval of a benefit or action, this factor ensures that the adjudicator consider that requirement.

(D) The likelihood the noncitizen will succeed on any petition, application, or other action that the noncitizen is pursuing, or that the noncitizen states in writing or on the record at a hearing that they plan to pursue, outside of the proceedings before the IJ. This factor assesses whether there is "a realistic possibility of relief outside of EOIR," and can be "used to distinguish cases where potential relief is clearly unavailable or so speculative that administrative closure is unwarranted."[10] As in *Avetisyan*, IJs considering this factor must look at whether the reason for administrative closure is too "speculative," for example, a possible change in law or regulation that may impact the respondent's case but is not certain to occur.[11]

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[6] 8 CFR §§ 1003.1(l)(3), 1003.18(c)(3); 89 Fed. Reg. at 46753.
[7] *Id.* at 46750.
[8] 89 Fed. Reg. at 46753 (discussing *Matter of W-Y-U-*, 27 I&N Dec. 17, 20 (BIA 2017)).
[9] *See* 8 CFR § 212.7(e)(4)(iii).
[10] 89 Fed. Reg. at 46751.
[11] *See Avetisyan*, 25 I&N Dec. at 696.

(E) The anticipated duration of the administrative closure. This factor allows the IJ to consider the length of time necessary for the stated reason for administrative closure to materialize or resolve. This factor may cut for or against noncitizens depending on the circumstances: for example, remote visa availability—such as a preference category immigrant visa that will not become current for many years—might weigh against administrative closure. In contrast, a U visa application that is filed and complete but "merely waiting on USCIS processing" might weigh in favor of administrative closure, even for a long period of time.[12]

(F) The responsibility of either party, if any, in contributing to any current or anticipated delay. The adjudicator may also consider whether one party has contributed to past or potential future delays in either the removal proceedings, a collateral process, or both. Accordingly, where a case has been delayed for a reason that may be attributed to the noncitizen—for example, delays finding an attorney or preparing a complex application—it is important to explain and show why that delay was beyond the noncitizen's control. Conversely, where delays are due purely to government inaction—such as adjudication delays at USCIS or repeated rescheduling by EOIR—the noncitizen should point those out.

(G) The ultimate anticipated outcome of the case. According to the New Rule, this factor is intended to "help adjudicators determine wither administrative closure would ultimately assist in efficiently concluding removal proceedings."[13] Even where administrative closure itself is the desired "outcome" of the case, advocates should show and explain why administrative closure will promote fairness while preserving judicial resources.

(H) The ICE detention status of the noncitizen. *Matter of Avetisyan* did not instruct adjudicators to consider detention status when deciding whether to administratively close proceedings, but the New Rule adds this factor. Although no single factor is dispositive, the New Rule's preamble notes that "the fact that a noncitizen is detained in ICE custody will generally weigh against the appropriateness of administrative closure."[14]

This list of factors is not exhaustive, meaning the adjudicator may consider other relevant factors where appropriate. Accordingly, advocates can and should argue that other facts are also relevant, where appropriate, and provide evidence in support of these arguments. Federal litigation and settlement agreements may provide additional support for administrative closure in certain cases, as well.[15]

E. Recalendaring administratively closed proceedings

Adjudicators may not recalendar closed proceedings sua sponte—they may only do so upon motion of one or both parties. Recalendaring is mandatory where the parties file a joint motion, or where the nonmoving party "affirmatively indicates" their nonopposition; otherwise, the adjudicator has discretion whether to recalendar or not based on a weighing of the relevant

[12] 89 Fed. Reg. at 46751.
[13] *Id.* at 46752.
[14] *Id.* at 46749.
[15] For instance, under the settlement agreement in *JOP v. DHS*, No. 8:19-CV-01944-SAG (D.Md. Nov. 25, 2024), DHS may not oppose class members' requests for postponements in court, including administrative closure. The settlement agreement in *Ms. L v. ICE*, No. 18-CV-00428 (S.D. Cal. Dec. 11, 2023), also includes provisions about administrative closure in class members' cases.

factors. The New Rule provides a non-exhaustive list of factors to be considered when one party files a motion to recalendar proceedings.[16] The recalendaring factors mirror the factors for administrative closure. In cases where ICE moves to recalendar a case against the respondent's wishes, it is important to file an opposition addressing how the factors weigh in favor of keeping the case closed.

NOTE: Withdrawing as counsel in administratively closed cases. The New Rule clarifies that IJs and the BIA may adjudicate motions to substitute counsel or withdraw from representation in administratively closed cases without recalendaring proceedings.[17] In fact, adjudicators may not sua sponte recalendar proceedings for the purpose of adjudicating a motion to withdraw or substitute counsel, as the rule only permits recalendaring upon motion of one or both parties.[18]

Of course, in an aggressive enforcement climate, advocates must still consider whether filing a motion to withdraw or substitute counsel could potentially bring the case back to OPLA's attention, prompting an unwelcome motion to recalendar proceedings. Advocates will need to consider the relative risks to their client, as well as the ethical obligation to avoid causing adverse effects on a client's interests.[19]

III. Termination of Removal, Deportation, and Exclusion Proceedings

Termination of proceedings is a mechanism that ends removal proceedings without either a grant of relief by the IJ or a final order of removal. The case is closed, and the noncitizen cannot be called back into court unless they are issued a new Notice to Appear (NTA) or other charging document. The New Rule codifies that adjudicators have the power to terminate cases and sets out certain situations where doing so is required. The New Rule explicitly grants the judge or board power to terminate a case over the objection of either party; ICE cannot unilaterally block termination.

WARNING: It is always important to assess risk and discuss with your client before filing any motion in removal proceedings, and this is especially critical in the current enforcement environment. In certain cases, termination of removal proceedings may actually increase the risk of enforcement action, and in these cases it may be safer to seek administrative closure or proceed with the court case. Risk assessment is always a case-by-case analysis, and this practice advisory does not address every potential risk factor. Below are some red flags that may weigh against seeking termination:

- The noncitizen may be vulnerable to expedited removal under INA § 235(b) if Section 240 removal proceedings are terminated. Advocates should consider the recent expansion of expedited removal that includes noncitizens within the United States with

[16] 8 CFR §§ 1003.1(l)(3)(ii), 1003.18(c)(3)(ii).
[17] 89 Fed. Reg. at 46748.
[18] *Id.*
[19] *See, e.g.*, Model Rules of Prof'l Conduct R. 1.16(b)(1).

less than two years of residence. How ICE interprets this expansion remains to be seen, so advocates should stay informed of policy developments;

- The noncitizen was previously removed from the United States, and thus may be vulnerable to reinstatement of removal under INA § 241(a)(5) if Section 240 removal proceedings are terminated;
- The noncitizen has employment authorization based on an application pending in court (such as Non-LPR Cancellation of Removal), and loss of that employment authorization will endanger the family's financial stability;
- The noncitizen has been released from ICE custody on bond and may be vulnerable to detention if ICE re-evaluates the case and issues a new NTA.

Relatedly, practitioners should be wary of motions to dismiss or terminate filed by OPLA: in the current environment, such a motion likely indicates that the government believes there is a faster way to remove your client. If OPLA files a motion to dismiss or terminate, it is important to reassess your client's risk and likely file an opposition as soon as possible.

The New Rule introduces explicit categories of cases where adjudicators are either required to terminate proceedings ("Mandatory Termination") or are permitted to terminate proceedings in their discretion ("Discretionary Termination"). These categories apply to removal, deportation, or exclusion proceedings; the regulations provide separate guidance for EOIR court proceedings other than those categories.[20] This section will refer to "removal proceedings" throughout, but note that the rules for mandatory and discretionary termination also apply to deportation and exclusion proceedings under pre-IIRIRA law.

NOTE: The regulations distinguish between termination and dismissal of proceedings. Although both termination and dismissal result in the same outcome—removal proceedings are ended and the noncitizen is no longer at imminent risk of removal—*dismissal* can only be requested by OPLA, and only in certain enumerated circumstances.[21] The New Rule clarifies that any motion to dismiss for a reason other than those listed in the dismissal regulations will be treated as a motion to terminate and adjudicated under the standards set forth in 8 CFR § 1003.1(m) or § 1003.18(d). Although the regulations only permit OPLA to move for dismissal, they do not give OPLA unilateral ability to dismiss proceedings; only the adjudicator can decide whether to grant or deny a motion to dismiss by OPLA.

[20] 8 CFR §§ 1003.1(m)(2), 1003.18(d)(2).

[21] *See* 8 CFR §§ 239.2(a), 1239.2(c). These regulations permit OPLA to seek dismissal where (1) the respondent is a national of the United States; (2) the respondent is not deportable or inadmissible; (3) the respondent is deceased; (4) the respondent is not in the United States; (5) the NTA was issued for the respondent's failure to file a timely petition to remove conditions on permanent residence, but that failure was excused in accordance with INA § 216(d)(2)(B); (6) the NTA was improvidently issued, or (7) circumstances of the case have changed after the NTA was issued to such an extent that continuation is no longer in the best interest of the government.

A. When is termination mandatory?

The New Rule sets out seven categories of cases in which termination of removal proceedings is mandatory.[22] If the record contains sufficient evidence to place the case in one of these categories, the IJ does not have discretion to deny a motion to terminate, even when it is opposed by the nonmoving party. Indeed, the adjudicator should terminate regardless of whether a motion is filed.

(A) No charge of deportability, inadmissibility, or excludability can be sustained. This basis codifies the most common reason that removal proceedings have historically been terminated: when the charges in the NTA cannot be sustained. This may arise at the beginning of proceedings, if OPLA cannot meet their burden of establishing removability; or later, if the noncitizen's circumstances change such that they are no longer removable as charged.

(B) Fundamentally fair proceedings are not possible because the noncitizen is mentally incompetent and adequate safeguards are unavailable. In *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), the BIA laid out the standard for mental incompetency in removal proceedings and held that, in most cases, removal proceedings against such individuals may proceed as long as procedural safeguards can ensure fairness.[23] That decision also acknowledges that in some cases, safeguards may be insufficient and "concerns may remain."[24] This category of mandatory termination is reserved for cases in which no safeguards are adequate to ensure that an incompetent noncitizen receives a full and fair hearing consistent with due process.

Motions to terminate under this category should be supported by robust evidence of the noncitizen's incompetency, if not already established in a previous hearing, and show why no adequate safeguards are available to ensure a fair hearing. Advocates should be detailed and specific, addressing potential safeguards individually and collectively. Compelling evidence may include medical records, forensic psychological evaluations, incompetency findings from other tribunals, and/or testimonials from family and community members.

(C) The noncitizen has obtained US citizenship. This category is rooted in the jurisdictional rule that EOIR only has jurisdiction over non-US citizens.[25] So if the respondent is already a citizen by derivation or acquisition, or if they have obtained citizenship since being placed in removal proceedings, then proceedings must be terminated.[26]

(D) The noncitizen has obtained status as a lawful permanent resident; refugee; asylee; or S, T, or U nonimmigrant. Once a person has obtained one of these forms of statutory immigration relief, they have lawful status in the United States and should not be subject to removal. This category includes the important caveat, however, that the person's status has "not been revoked or terminated, and the noncitizen would not have been deportable,

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[22] 8 CFR §§ 1003.1(m)(1)(i), 1003.18(d)(1)(i).
[23] 25 I&N Dec. at 477.
[24] *Id.*
[25] INA § 240(a)(1); 8 CFR § 1240.8(c) (placing the burden of proof in removal proceedings first on DHS to establish the respondent's alienage); *U.S. ex rel. Bilokumsky* v. *Tod,* 263 U.S. 149, 153 (1923) (explaining that alienage is a "jurisdictional fact").
[26] For guidance on acquisition and derivation of citizenship, see ILRC, *Acquisition & Derivation Quick Reference Charts* (Jan. 9, 2025), https://www.ilrc.org/resources/acquisition-derivation-quick-reference-charts.

inadmissible, or excludable as charged if the noncitizen had obtained such status before the initiation of proceedings."[27] Nonetheless, that caveat applies to the adjudicator's *mandatory* obligation to terminate on this basis. Respondents should seek termination in all cases where status has been granted to avoid removal. Often, such a motion will also argue that OPLA can no longer prove removability as charged (see **Category (A)** above).

(E) Termination is required under 8 CFR § 1245.13(l). This basis requires termination for recipients of NACARA adjustment of status, effective as of the date of adjustment.

(F) Termination is otherwise required by law. This is essentially a catch-all provision that confirms termination is necessary when a binding legal authority requires it. This might come up where there are defects in service of the NTA, or where termination is required by federal litigation.

(G) The parties jointly filed a motion to terminate, or one party filed a motion to terminate and the other party affirmatively indicated its non-opposition. Like the corresponding provision for administrative closure, this category of mandatory termination is designed to promote efficiency by mandating termination when the record is clear that both parties agree. Again, the nonmoving party must "affirmatively indicate" its non-opposition; simply failing to file a response within the 10-day period is not sufficient. Although this category is included in the list of "mandatory" scenarios, IJs may still deny termination if they articulate "unusual, clearly identified, and supported reasons for denying the motion." Thus, a summary denial of termination without explanation would be improper under this regulation.

B. When is termination discretionary?

The New Rule likewise sets out six categories of cases in which termination is discretionary, meaning the IJ is permitted *but not required* to terminate proceedings, upon motion of one of the parties, in their exercise of discretion.[28] For these categories, the IJ is permitted to terminate proceedings **even if OPLA opposes termination**. Under the Trump administration, it is possible EOIR will issue guidance to limit adjudicators' ability to terminate proceedings in these contexts. Advocates should argue that the regulation requires the adjudicator to "consider the reason termination is sought and the basis for any opposition to termination when adjudicating the motion to terminate."[29] In other words, the adjudicator must provide a reasoned decision that grapples with the specifics of the case, and not deny the motion based purely on agency-wide policy guidance.

(A) The noncitizen is an Unaccompanied Child and has filed an asylum application with USCIS under the Trafficking Victims Protection and Reauthorization Act (TVPRA). The TVPRA established special procedures for unaccompanied children (UCs) seeking asylum, including the right to file their asylum application directly with USCIS even if they are in removal proceedings.[30] This category allows the IJ to terminate removal proceedings upon proof that a UC has filed an asylum application with USCIS. Practitioners seeking termination

[27] 8 CFR §§ 1003.1(m)(1)(i)(D), 1003.18(d)(1)(i)(D).
[28] 8 CFR §§ 1003.1(m)(1)(ii), 1003.18(d)(1)(ii).
[29] 8 CFR §§1003.1(m)(1)(ii), 1003.18(d)(1)(ii).
[30] Pub. L. No. 110-457, tit. II, § 235(d)(7)(B); 122 Stat. 5044, (2008), codified at 22 USC § 7101.

under this category will want to provide proof of their client's UC status, usually an "ORR Verification of Release" form, as well as proof that the I-589 has been filed with USCIS.[31]

(B) The noncitizen is prima facie eligible for naturalization, relief from removal, or lawful status before USCIS, with accompanying criteria. This category allows for termination when the noncitizen is prima facie eligible for relief before USCIS and, in most cases, has filed that application with USCIS. No filing is required, however, where the noncitizen is prima facie eligible for adjustment of status or naturalization. Thus, where the noncitizen will apply for lawful permanent residency or U.S. citizenship before USCIS, a motion to terminate should be accompanied by proof that they meet the basic eligibility requirements for that status. Importantly, the IJ *may not* terminate for naturalization where DHS opposes termination.[32] (Note this provision does away with the practice of requiring ICE consent to terminate to pursue naturalization. For instance, where DHS fails to respond to a motion, the judge may still terminate.)

For all other applicants (U visas, T visas, VAWA, SIJS, etc.), a receipt notice from USCIS will be the best evidence that an application has been submitted. But if a receipt notice is unavailable, proof of delivery to USCIS, along with a copy of the application, might also suffice.

Finally, this category does not allow for termination where the noncitizen wishes to apply for asylum before USCIS. As noted above, Category (A) addresses termination for UC asylum applicants, but all other asylum applicants in removal proceedings are subject to EOIR's sole jurisdiction for that application.[33] This does not mean that noncitizens whose removal proceedings are terminated *may not* apply for asylum before USCIS; it simply means that asylum may not be the stated basis for a motion to terminate.

(C) The noncitizen has Temporary Protected Status (TPS), deferred action, or Deferred Enforced Departure. This category allows termination for noncitizens who have been granted these statuses, which are typically temporary, subject to frequent renewal, and do not necessarily offer a path to permanent status. At the time of writing, noncitizens may obtain deferred action through various programs, including Deferred Action for Childhood Arrivals; the U and T bona fide determination processes; Deferred Action for Labor Enforcement (DALE); and deferred action for Special Immigrant Juveniles.[34] Deferred Enforced Departure is similar

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[31] This subsection includes noncitizens who have been previously designated as UCs but have already reached the age of 18 or reunited with a parent in the United States when they file their asylum application with USCIS. Some of these young people may be covered under the settlement agreement in *JOP v. DHS*, No. 8:19-CV-01944-SAG (D.Md. Nov. 25, 2024). Under the *JOP* settlement, DHS generally should join or non-oppose class members' motions to terminate. While the settlement does not require DHS to agree to termination, it should not oppose termination based purely on the UC's having reached 18 or reunited with a parent. The provisions of this settlement agreement will remain in place pursuant to court order until at least May 27, 2026. For more information, see NIP-NLG, *Practice Alert: JOP v. DHS Settlement* (Nov. 25, 2024), https://nipnlg.org/sites/default/files/2024-11/JOP-DHS_Settlement-Agreement-Alert-Nov2024.pdf.

[32] 8 CFR §§ 1003.1(m)(1)(ii)(B), 1003.18(d)(1)(ii)(B).

[33] 8 CFR § 1208.2(b).

[34] USCIS, *Consideration of Deferred Action for Childhood Arrivals (DACA)* (Jan. 24, 2025), https://www.uscis.gov/DACA; 3 USCIS-PM C.5 (U visa bona fide determinations); 8 CFR § 214.205 (T visa bona fide determinations); USCIS, *DHS Support of the Enforcement of Labor and Employment Laws* (Jan.

to TPS but is not enshrined in statute or regulation, and is currently available to certain noncitizens from Lebanon, Libera, Hong Kong, and Palestine.[35]

(D) USCIS has granted the noncitizen's application for a provisional unlawful presence waiver (Form I-601A). As described above, the I-601A provisional waiver process already requires that any removal proceedings at least be administratively closed for USCIS to adjudicate the waiver.[36] Historically, once the provisional waiver is granted, IJs have generally agreed to terminate proceedings so that the noncitizen could attend their consular interview abroad. This category codifies that practice and makes clear that this is a permissible basis to terminate removal proceedings.

(E) Termination is authorized by 8 CFR § 1216.4(a)(6) or § 1238.1(e). Section 1214.6(a)(6) permits termination specifically when a conditional permanent resident failed to timely file Form I-751, Petition to Remove Conditions, is placed in removal proceedings, and then subsequently files and is granted the removal of conditions. Section 1238.1(e) allows for termination when a noncitizen who has been charged as deportable under INA § 237 can alternatively be processed for an "Administrative Removal Order" ("ARO") under INA § 238 because they have been convicted of an aggravated felony. The ARO process is a form of expedited removal carried out unilaterally by ICE, outside of EOIR. If OPLA moves to terminate on this basis and the noncitizen desires to fight their case before an IJ, advocates must timely file an opposition explaining why the ARO process is inappropriate.

(F) Termination is "similarly necessary or appropriate" due to "circumstances comparable to" the other categories of discretionary termination. This last category serves as a "catch all" provision, giving IJs discretion to terminate proceedings in other scenarios. An important caveat to this category is that the IJ may not terminate a case for "purely humanitarian reasons, unless DHS expressly consents to such termination" by either joining the motion or affirmatively indicating its non-opposition. Again, should policy directives attempt to limit a judge's ability to terminate a case, advocates should argue that any such blanket directive contravenes these regulations. This subcategory (F) indicates that the adjudicator, by regulation, may consider termination in the enumerated scenarios as well as comparable circumstances.

C. How must IJs exercise this discretion?

The New Rule does not specify what factors IJs should consider when exercising this discretion, but agency discretion in other contexts provides some guidance. Discretionary determinations generally involve the weighing of positive and negative equities in a given case; it is an assessment of what is fair and what a party deserves, rather than what they are legally

24, 2025), https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/dhs-support-of-the-enforcement-of-labor-and-employment-laws; 6 USCIS-PM J.4.G (SIJS deferred action).

[35] USCIS, *Deferred Enforced Departure* (Jan. 16, 2025), https://www.uscis.gov/humanitarian/deferred-enforced-departure.

[36] 8 CFR § 212.7(e)(4)(iii).

entitled to.[37] Below are some examples of discretionary factors IJs have traditionally considered that are likely to be relevant in termination decisions. Advocates should highlight any facts that might show the noncitizen merits a favorable exercise of discretion, particularly where any negative factors are present.

Positive Factors	Negative Factors
• Absence of criminal or immigration violations • Family & community ties • Hardship • Length of presence in the US • Likelihood of success (if seeking collateral relief) • Preserving court resources	• History and severity of criminal and/or immigration violations • Collateral relief is too speculative or unlikely to succeed • Opposing party's interest in not terminating proceedings

NOTE: Termination in Other Types of EOIR Proceedings. The New Rule sets a different standard for termination in EOIR proceedings other than removal, deportation, or exclusion proceedings.[38] These more limited categories include:

- Proceedings to rescind status as a lawful permanent resident under INA § 246(a);
- "Credible Fear" review hearings for noncitizens facing expedited removal under INA § 235(b)(1) or INA § 238(b), respectively;
- "Reasonable Fear" review hearings for noncitizens facing administrative removal under INA § 238(b) or reinstatement of removal under INA § 241(a)(5);
- "Withholding-Only" proceedings for noncitizens who are subject to reinstatement of removal under INA § 241(a)(5), who have passed a "reasonable fear interview" and are now applying for withholding of removal and CAT protection before the IJ;
- "Asylum-Only" proceedings for certain categories of noncitizens who may only seek asylum, withholding of removal, and CAT protection due to their status at entry.

In these proceedings, termination is only mandatory where both parties agree to termination, unless the adjudicator articulates "unusual, clearly identified, and supported reasons for denying the motion," or where termination is "required by law."[39] Discretionary termination is permitted "upon the motion of a party where terminating the case is necessary or appropriate for the disposition or alternative resolution of the case."[40] Interestingly, unlike in removal proceedings, the prohibition on termination for "purely humanitarian reasons" in these settings is less absolute: IJs may terminate these types of proceedings for purely humanitarian reasons if "DHS expressly consents to such termination, joins in a motion to terminate, or affirmatively indicates its non-opposition" to the motion.[41]

[37] *See generally Matter of Patel*, 17 &N Dec. 597 (BIA 1980); *Matter of Marques*, 16 I&N Dec. 314 (BIA 1977) (both discussing discretion as a "matter of administrative grace").
[38] 8 CFR § 1003.1(m)(2).
[39] 8 CFR §§ 1003.1(m)(2)(i), 1003.18(d)(2)(i).
[40] 8 CFR §§ 1003.1(m)(2)(ii), 1003.18(d)(2)(ii).
[41] 8 CFR §§ 1003.1(m)(2)(ii), 1003.18(d)(2)(ii).

IV. Conclusion

In the current hostile enforcement environment, the regulations clearly articulate that ICE does not control these important tools to stop removal proceedings. While these processes used to be governed by case law and policies, the New Rule enshrines administrative closure and termination of proceedings in regulation, even in cases where OPLA opposes. Advocates should cite this rule and boldly pursue administrative closure and termination particularly where the regulation provides a mandatory basis to do so. Ultimately, the regulation vests power over these decisions with IJs and the Board, creating a powerful tool for representatives to advocate for their clients.

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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.

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