ADMINISTRATIVE CLOSURE SUMMARY

1. Up until 2018, administrative closure was a docket management tool used by IJs and the BIA to temporarily pause proceedings in a case and remove it from the active docket. It's sometimes a more appropriate tool than continuances, which are intended for only a short duration, pending the action of one or both parties. Administrative closure takes into account the indefinite delays caused by processes outside the control of either party (such as alternative pending immigration proceedings).
2. With *Castro-Tum*, this changed. A.G. Barr held that administrative closure inherently prevents IJs and the Board from resolving cases in a timely fashion, and that the relevant regulations did not confer this authority on adjudicators.
3. The Fourth Circuit's *Zuniga Romero v. Barr* (Aug. 29, 2019) held that *Matter of Castro-Tum* (A.G. 2018) was wrongly decided, first because the A.G. incorrectly concluded that the relevant regulations were ambiguous, and second because (even if they *were* ambiguous) the A.G.'s interpretations represented an abrupt departure from the longstanding practice of immigration courts and the BIA.
4. The Fourth Circuit affirmed previous BIA practice and opinions which held that administrative closure is among the "appropriate and necessary" actions that IJs or BIA members could take for the efficient disposition of a case, according to 8 C.F.R. § 1003.10(b) and 8 C.F.R. § 1003.1(d)(1)(ii), respectively.
5. The most significant of the BIA's previous cases on this topic is *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), which affirmed that administrative closure is (contrary to A.G. Barr's opinion) one of the ways judges may expeditiously resolve certain immigration matters.

6. In *Avetisyan*, we have a quintessential example of why administrative closure is at times a more appropriate tool than its counterpart, the continuance. While both essentially pause a case while an action is pending, a continuance is meant to grant a short respite while one or both parties accomplishes a required task. In contrast, administrative closure allows a case to be set aside indefinitely from the active docket, pending the resolution of actions that are outside either party's control, such as the adjudication of immigration applications apart from removal proceedings.
7. The respondent in *Avetisyan*, after *ten* continuances in immigration court made necessary by her husband's naturalization proceedings, requested and finally was granted administrative closure of her case. The DHS appealed to the BIA, and the BIA affirmed the IJ's decision.
8. Significantly, *Avetisyan* did not address the question of whether administrative closure was an *appropriate* tool for IJs or Board members to use. In fact, this decision emphasizes that IJs and the Board are authorized by statute to exercise discernment in dealing with cases, and administrative closure is simply *assumed* to be one of the tools that they have at their disposal.
9. In fact, in keeping with this theme of judicial autonomy in the immigration context, the *Avetisyan* panel overruled the BIA's previous holding in *Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996), which had allowed either party—typically the DHS—to unilaterally veto a judge's decision to administratively close a case. *Avetisyan* restored judicial independence in this area by holding that so long as administrative closure is the appropriate choice in a case, IJs and the Board may use it, even over a party's objection.

Immigration Court: BIA

Case: *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) **Date:** January 31, 2012

Adjudicated by: Panel: Miller, Adkins-Blanch, Guendelsberger

Opinion: Miller

Tags: Immigration, Administrative Closure, IJs, BIA, opposing party

Question Presented: Do IJs and BIA members have the authority to administratively close a case over one party's objection?

Holdings: Yes, IJs and the BIA may exercise authority to administratively close a case even over one party's objection, so long as their decision considers six factors:

1. The reason administrative closure is sought;
2. The basis for any opposition to it;
3. The likelihood that the respondent will succeed in any pending petition outside removal proceedings;
4. The anticipated duration of the closure;
5. The responsibility of either party for contributing to the delay;
6. The ultimate outcome of removal proceedings when the case gets taken up again.

Rationale: Sometimes administrative closure is the most expeditious way to handle a case when actions are pending indefinitely that are outside the control of either party.

Facts: Native and citizen of Armenia who overstayed a J-1 exchange visa married an LPR, who was in the process of naturalizing and had filed a visa petition on her behalf. EIGHT CONTINUANCES LATER, respondent sought administrative closure. DHS objected. After two more continuances, IJ finally granted administrative closure, and DHS appealed.

Appeals to Statute & Precedent:

- ***Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996):** a case may not be administratively closed if one party objects. **OVERRULED.** (". . . has been interpreted as investing a party, typically the DHS, with absolute veto power over administrative closure requests," at 692.)
- **8 C.F.R. § 1240.1(a)(1)(iv), (c):** IJs have authority and discretion to handle cases appropriately.

Quotes:

- "Administrative closure is a procedural tool created for the convenience of the Immigration Courts and the Board." *Matter of Avetisyan*, 25 I&N Dec. at 690.

- "We now find that it is improper to afford absolute deference to a party's objection, and we hold that an Immigration Judge or the Board has the authority to administratively close a case, even if a party opposes, if it is otherwise appropriate under the circumstances." *Matter of Avetisyan*, 25 I&N Dec. at 690.

- Interpreting **8 C.F.R. § 1240.1(a)(1)(iv), (c):** "An Immigration Judge has the authority to regulate the course of the hearing and to take any action consistent with applicable law and regulations as may be appropriate." *Matter of Avetisyan*, 25 I&N Dec. at 691.

- Interpreting **8 C.F.R. § 1003.10(b):** "In deciding individual cases, an Immigration Judge must exercise his or her independent judgment and discretion and may take any action consistent with the Act and regulations that is appropriate and necessary for the disposition of such cases." *Matter of Avetisyan*, 25 I&N Dec. at 691.

- Interpreting **8 C.F.R. § 1003.1(d)(1):** "Board Members must exercise independent judgment and discretion in considering and determining the cases coming before them, and they may take any action consistent with their authority under the Act and the regulations as is appropriate and necessary for the disposition of the case." *Matter of Avetisyan*, 25 I&N Dec. at 691.

- "During the course of proceedings, an Immigration Judge or the Board may find it necessary, or in the interests of justice and fairness to the parties, prudent to defer further action for some period of time." *Matter of Avetisyan*, 25 I&N Dec. at 691.

    - Continuances: "Because it keeps a case on the Immigration Judge's active calendar, a continuance may be appropriately utilized to await additional action required of the parties that will be, or is expected to be, completed within a reasonably certain and brief amount of time." *Matter of Avetisyan*, 25 I&N Dec. at 691.
    - Administrative Closure: "…used to temporarily remove a case from an Immigration Judge's active calendar or from the Board's docket. . . . **In general, administrative closure may be appropriate to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time."** *Matter of Avetisyan*, 25 I&N Dec. at 692.

- "More importantly, the rule stated in *Gutierrez* directly conflicts with the delegated authority of the Immigration Judges and the Board and their responsibility to exercise independent judgment and discretion in adjudicating cases and to take any action necessary and appropriate for the disposition of the case." *Matter of Avetisyan*, 25 I&N Dec. at 693.

- "The courts indicated that permitting the DHS to unilaterally block such a motion to reopen interfered with the Board's exercise of its independent judgment and discretion." *Matter of Avetisyan*, 25 I&N Dec. at 693.

Commentary:

- Note the presupposition here: IJs and the Board are statutorily authorized to exercise independent judgment and discretion in how they handle cases, and administrative closure is assumed to be one of the appropriate tools they can use.

ADMINISTRATIVE CLOSURE: RELEVANT STATUTES

Broad grant of authority to IJs:

8 C.F.R. § 1003.10(b) Powers and duties. In conducting hearings under section 240 of the Act and such other proceedings the Attorney General may assign to them, immigration judges shall exercise the powers and duties delegated to them by the Act and by the Attorney General through regulation. In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases. Immigration judges shall administer oaths, receive evidence, and interrogate, examine, and cross-examine aliens and any witnesses. Subject to §§1003.35 and 1287.4 of this chapter, they may issue administrative subpoenas for the attendance of witnesses and the presentation of evidence. In all cases, immigration judges shall seek to resolve the questions before them in a timely and impartial manner consistent with the Act and regulations.

Broad grant of authority to BIA members:

8 C.F.R. § 1003.1(d)(1)(ii) Subject to these governing standards, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.

Fourth Circuit Court

Case: *Zuniga Romero v. Barr*, No. 18-1850 (4th Cir. 8.29.19)
Date: August 29, 2019

Adjudicated by: Agee, Floyd, Thacker **Opinion:** Agee (unanimous)

Tags: Immigration, BIA, IJs, Attorney General, *Castro-Tum*, Administrative Closure

Question Presented: Do IJs and BIA members have the authority to administratively close cases?

Holdings:

- Yes, IJs and BIA members DO have general authority to act appropriately for the administration of cases, which extends to utilizing administrative closure.
- *Castro-Tum* does not merit either *Auer* or *Skidmore* deference.
- Zuniga Romero's case is vacated and remanded for a decision in keeping with this one.

Rationale:

- Administrative closure is included in the general authority granted in 8 C.F.R. § 1003.10(b) (re. IJs) and 8 C.F.R. § 1003.1(d)(1)(ii) (re. BIA members) to take any action that is appropriate and necessary for such cases.
- The IJs and BIA have done this consistently since the 1980s, and it's been affirmed in lots of opinions.
- The regulations are not ambiguous, and even if they were, the A.G.'s decision is so out of keeping with past practice as to be a "sudden surprise" procedurally for litigants.

Procedural History:

- **2013:** Removal proceedings against Zuniga Romero
- **IJ:** Respondent accepted voluntary departure.
- **Reopening:** Respondent is beneficiary of LPR wife's I-130
- **Motion for Admin Closure:** Wife now naturalized, respondent wants to file I-601A for a provisional unlawful presence waiver. Removal proceedings have to be administratively closed for this to happen.
- **IJ:** denied admin closure
- **Appeal to BIA:** sustained appeal, administratively closed case.
- **2017: DHS—Motion to Reconsider**
- **May 2018: A.G.'s *Castro-Tum*** outlaws administrative closure
- **June 2018: BIA** grants DHS motion, dismissed respondent's appeal & ordered him deported.
- **Petition to 4th Circuit**

Appeals to Statute & Precedent:

- ***Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012):** Administrative closure is necessary for the efficient processing of this case. Six-factor test for applying admin closure.
- ***Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009):** Administrative closure is necessary for the processing of a visa application.
- ***Matter of W-Y-U-*, 27 I&N Dec. 17, 18 (BIA 2017):** Purpose of & reasons for administrative closure
- ***In re. Gutierrez-Lopez*, 21 I&N Dec. 479, 480 (BIA 1996):** affirmed administrative closure
- ***Gonzalez-Caraveo v. Sessions*, 882 F.3d 885 (9th Cir. 2018):** cites statutes at 8 C.F.R. § 1003 as authority for admin closure.
- ***Kisor v. Wilkie*, 139 S. Ct. 2400 (2019):** *Auer* deference does not apply when a new interpretation creates an unfair surprise to regulated parties.
- ***Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944):** in absence of *Auer* criteria, deference is merited if agency's interpretation is well-thought-through and persuasive.
- ***Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012):** DOL interpretation of a regulation that departed abruptly from longstanding previous practice was not afforded deference by the Court.

Legal Background:

- "By administratively closing a case, an IJ or the BIA 'temporarily pause[s] removal proceedings' and places the case on hold, generally because there is an alternate form of case resolution pending, or because the case may be affected by events outside of the control of either party or that may not occur for some time. *Matter of W-Y-U-*, 27 I&N Dec. 17, 18 (BIA 2017)." *Zuniga Romero v. Barr* at 5.

- "General administrative closure is not specifically authorized by the INA or the regulations governing IJs or the BIA." *Zuniga Romero v. Barr* at 6.

- Administrative closure is specifically authorized by statute in these cases:
  - **8 C.F.R. § 1214.2(a):** T-immigrant status
  - **8 C.F.R. § 1214.3:** V-immigrant status
  - **8 C.F.R. § 1234.13(d)(3)(i):** in certain cases re. nationals of Cuba & Nicaragua who are eligible for LPR status
  - **8 C.F.R. § 1245.15(p)(4)(i):** Haitian nationals " "
  - **8 C.F.R. § 1245.21(c):** similar for nationals of Vietnam, Cambodia, & Laos

- "the BIA has referenced two regulations that confer broad powers to IJs and the BIA to manage their dockets as the authority for administrative closure." (*Zuniga Romero v. Barr* at 6-7.)
  - **8 C.F.R. § 1003.10(b):** powers & duties of IJs (see attached for full text)
  - **8 C.F.R. § 1003.1(d)(1)(ii):** powers of BIA members (" " ")

- *Matter of Avetisyan* (BIA 2012):
    - "[d]uring the course of proceedings, an Immigration Judge or the Board may find it necessary or, in the interests of justice and fairness to the parties, prudent to defer further action for some period of time." *Matter of Avetisyan*, 25 I&N Dec. 688, 691 (BIA 2012).

- "In this vein, the BIA has issued numerous decisions authorizing IJs to administratively close cases for a variety of reasons related to conservation of court resources." *Zuniga Romero v. Barr* at 8-9.

- *Matter of Castro-Tum* (A.G. 2018):
    - Those statutes don't confer the power to administratively close cases.
    - And anyway, administrative closure isn't timely or efficient.
    - So IJs & BIA can only administratively close if specifically authorized by statute.
    - "The Attorney General concluded that to the extent any existing regulations delegated the general authority to administratively close cases, he was exercising his 'discretion to revoke it because the practice of administrative closure thwarts the efficient and even-handed resolution of immigration proceedings.'" *Zuniga Romero v. Barr* at 10; *see Matter of Castro-Tum* at 288 n.10.

- Matters of Deference to BIA's Interpretation:
    - No *Auer* deference required, because the regulations are not ambiguous.
        - Even if the regulations *were* ambiguous, the agency's interpretation would have to be
            - Reasonable and
            - In keeping with the character and context of the agency's interpretation in the past
        - "Finally—and most important for this case—*Auer* deference does not apply 'to a new interpretation . . . that creates 'unfair surprise' to regulated parties.'" *Zuniga Romero v. Barr* at 12; *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019).

Analysis of *Castro-Tum*:

- "…we conclude that the plain language of 8 C.F.R. § 1003.10(b) and 8 C.F.R. § 1003.1(d)(1)(ii) unambiguously confers upon IJs and the BIA the general authority to administratively close cases such that an *Auer* deference assessment is not warranted. But even if the regulations were ambiguous, we alternatively conclude that deference under either *Auer* or *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), is not merited." *Zuniga Romero v. Barr* at 13.

- Do these regulations confer authority on IJs and the Board to administratively close cases?
    - Gov't says no.
    - "But Romero points to the expansive language in those regulations as conferring such authority."
    - **8 C.F.R. § 1003.10(b):** "In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases."
    - **8 C.F.R. § 1003.1(d)(1)(ii):** "Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case."

- "…we clearly discern from the text that the authority of IJs and the BIA to administratively close cases is conferred by the plain language" of these statutes. *Zuniga Romero v. Barr* at 14.
    - "any action" includes administrative closure: "this would plainly include docket management actions such as administrative closure, which often facilitate, as discussed above and below, case resolution." *Zuniga Romero v. Barr* at 14-15.

- Is administrative closure ever "appropriate and necessary"?
    - Yes: continuances are not always the most appropriate mechanism, because some delays cannot be resolved by the action of one of the parties (as would be expected with a short continuance). Where an indefinite delay can only be resolved by actions outside the parties' control, administrative closure is the most appropriate path.
    - **"…expecting IJs and the BIA to employ continuances in the stead of administrative closure would further remove the discretion of these adjudicators to fashion the most flexible and appropriate resolution of a case."** *Zuniga Romero v. Barr* at 15 n.12.

    - *"Avetisyan* demonstrates how suspension of the case may in fact expedite and result in a final disposition." *Zuniga Romero v. Barr* at 15 n.13.

- "In sum, these regulations unambiguously confer upon IJs and the BIA the general authority to administratively close cases. Accordingly, there is no *Auer* deference analysis to be conducted. ***Castro-Tum*'s interpretation of these regulations is therefore in error.**" *Zuniga Romero v. Barr* at 18.

- Even if the regulations *were* ambiguous, *Castro-Tum* represents such a departure from the A.G.'s interpretation that it amounts to unfair surprise:
    - "the Attorney General's reading of the regulations does not warrant deference because it amounts to an 'unfair surprise' disrupting the regulated parties' expectations." *Zuniga Romero v. Barr* at 19 (quoting *Kisor*, 139 S. Ct. at 2417-18, quoting in turn *Long Island Care at Home, Ltd. V. Coke*, 551 U.S. 158, 170 (2007)).

- **"…the new interpretation in *Castro-Tum* (1) breaks with decades of the agency's use and acceptance of administrative closure and (2) fails to give 'fair warning' to the regulated parties of a change in a longstanding procedure."** *Zuniga Romero v. Barr* at 21.

- "…administrative closure has been a procedural mechanism employed by IJs and the BIA since the late 1980s and consistently reaffirmed—even if its precise contours have changed—through the BIA's precedential decisions." *Zuniga Romero v. Barr* at 22.

- "Accordingly, numerous petitioners have relied on this long-established procedural mechanism to proceed through the immigration process. To suddenly change this interpretation of the regulation undermines the significant reliance interests such petitioners have developed. . . . **[S]uch a sudden shift in longstanding agency interpretation frustrates mechanisms for predictability that are supposed to be baked into the administrative process.**" *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012).

- *Castro-Tum* is "internally inconsistent":
    - "…it would in fact serve to lengthen and delay many of these proceedings by: (1) depriving IJs and the BIA of flexible docketing measures sometimes required for adjudication of an immigration proceeding, as illustrated by *Avetisyan*, and (2) leading to the reopening of over 330,000 cases upon the motion of either party, straining the burden on immigration courts that *Castro-Tum* purports to alleviate." *Zuniga Romero v. Barr* at 22.

- *Skidmore* deference is also unwarranted:
    - "And here, a court reviewing *Castro-Tum* for *Skidmore* deference would not be persuaded to adopt the agency's own interpretation of its regulation for substantially the same reasons it is not entitled to *Auer* deference: because it represents a stark departure, without notice, from long-used practice and thereby cannot be deemed consistent with earlier and later pronouncements." *Zuniga Romero v. Barr* at 23.

Related Cases & Quotable Quotes

***Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009):**

- This case laid out the criteria for *continuances* in immigration proceedings, but there's one awesome footnote on administrative closure:

- "In appropriate circumstances, such as where there is a pending prima facie approvable visa petition, we urge the DHS to consider agreeing to administrative closure. . . . Administrative closure is an attractive option in these situations, as it will assist in ensuring that only those cases that are likely to be resolved are before the Immigration Judge. This will avoid the repeated rescheduling of a case that is clearly not ready to be concluded." *Matter of Hashmi*, 24 I&N Dec. 785, 791 n4 (BIA 2009)

***Matter of W-Y-U-*, 27 I&N Dec. 17, 18 (BIA 2017):**

- IJ administratively closed case, though respondent wanted it recalendared so he could pursue his asylum application.

- "[Administrative closure] is a docket management tool that is used to temporarily pause removal proceedings." *Matter of W-Y-U-*, 27 I&N Dec. 17, 18 (BIA 2017).

- "this individualized evaluation prevents a party from keeping a case on an Immigration Court's active docket absent a reasoned explanation or justification." *Matter of W-Y-U-*, 27 I&N Dec. 17, 18 (BIA 2017).

- "In this case, the Immigration Judge explained that he denied the respondent's motion to recalendar and kept his case administratively closed to reserve the Immigration Court's 'limited adjudication resources to resolve actual cases in dispute.'" *Matter of W-Y-U-*, 27 I&N Dec. 17, 18 (BIA 2017).

- ". . . while we recognize the Immigration Judge's concerns regarding the most efficient use of limited resources, such matters are secondary to a party's interest in having a case resolved on the merits." *Matter of W-Y-U-*, 27 I&N Dec. 17, 18-19 (BIA 2017).

- "In fact, *Matter of Avetisyan* does not list court resources as a factor to consider in evaluating whether administrative closure is appropriate." *Matter of W-Y-U-*, 27 I&N Dec. 17, 19 (BIA 2017).

    - **NOTE THE IRONY:** both the IJ and the BIA see administrative closure here as "the most efficient use of limited resources"—exactly the opposite of the A.G.'s evaluation of it in *Castro-Tum*!

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