AMERICAN BAR ASSOCIATION
CILA Children's Immigration Law Academy

Procedural Options in Removal Proceedings for Youth

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Children's Immigration Law Academy (CILA)
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****This is not legal advice. This resource is for informational purposes only and should not substitute your own research and analysis.****

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Table of Abbreviations

Term	Definition
BIA	Board of Immigration Appeals
CBP	Customs and Border Protection
DHS	Department of Homeland Security
DM	Director's Memorandum (EOIR)
DOJ	Department of Justice
EOIR	Executive Office for Immigration Review
HHS	Health and Human Services
ICE	Immigration and Customs Enforcement
IJ	Immigration judge
INA	Immigration and Nationality Act
NTA	Notice to Appear
OPLA	Office of the Principal Legal Advisor
ORR	Office of Refugee Resettlement
PD	Prosecutorial Discretion
PM	Policy Memorandum (EOIR)
SIJS	Special Immigrant Juvenile Status
TVPRA	William Wilberforce Trafficking Victims Protection Reauthorization Act
USCIS	United States Citizenship and Immigration Services
VAWA	Violence Against Women Act

I. Introduction

A. About CILA

The Children's Immigration Law Academy (CILA) is an expert legal resource center created by the American Bar Association (ABA). CILA's mission is to empower advocates who guide immigrant youth through complex legal procedures, to do so with courage, competency, compassion, and creativity. CILA builds capacity for those working to advance the rights of immigrant youth seeking protection through trainings, technical assistance, resource development, and collaboration.

CILA serves nonprofit, pro bono, and private sector legal advocates who work with children in immigration-related proceedings. CILA began operations in Houston, Texas in late 2015 in response to the thousands of children from Central America who entered the United States at our Southern border. Many children were fleeing prolific violence and abuse in their home countries and seeking humanitarian protections offered under U.S. law. Through our work, we hope to ensure that more immigrant youth are represented and to provide the resources and expertise needed to support those who endeavor to represent them. In furtherance of this goal, in 2022, CILA expanded its technical assistance program nationwide and now offers more trainings and working groups to a national audience.

Complementary and critical to our capacity-building efforts for legal advocates, CILA's social services program aims to increase capacity for social workers and social services providers serving immigrant youth at legal services organizations in Texas and beyond, thereby ensuring stability in the lives of youth so that they may meaningfully participate in their immigration cases.

Should you or someone you know wish to make a donation to further our work, please visit: https://www.americanbar.org/groups/departments_offices/fund_justice_education/donate/com-imm-cila/.

B. About this Resource

This resource is intended to assist attorneys, legal staff, and pro bono attorneys assisting youth in their immigration cases. CILA created this resource knowing that many unaccompanied children's immigration cases involve navigating removal proceedings in immigration court.[1] Moreover, many times, unaccompanied children are seeking forms of

[1] An "unaccompanied child" is defined by the Homeland Security Act of 2002 and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) as an individual (a) under eighteen years of age; (b) without lawful immigration status; and (c) with no parent or legal guardian in the United States available to provide care and physical custody. Homeland Security Act of 2002, Pub. L. 107–296, 116 Stat. 2135 (Nov. 25, 2002); 6 U.S.C. § 279. TVPRA, Pub. L. 110-457, 122 Stat. 5044, 5080 (Dec. 23, 2008); 8 U.S.C. § 1232.

relief that involve advocacy before multiple forums (court(s) and immigration agencies) and different timelines are involved for each. As a result, it is essential to be aware of the various procedural options available in removal proceedings. This resource provides an overview of several key procedural options in removal proceedings to feature different options to be aware of and to consider in each case. While the resource is divided into various sections for ease and to provide specific information on different procedural mechanisms, there is much overlap and interplay amongst the various sections. Generally, advocates will want to consider each of these options when determining the appropriate strategy for a case.

Most sections contain a summary, key cases and policy, and considerations and frequent arguments in youth's cases. Additional resources are highlighted in each section and more resources are included at the end of the resource for additional exploration and learning. Overall, determining which procedural option to take will be a strategic decision that depends on the unique facts involved in a case and the client's goals and wishes. This resource serves as a starting point to assist you in your research when reviewing information about procedural options in removal proceedings.

II. Nuts & Bolts of Immigration Court

A. Overview

i. Immigration Court Basics

This section contains a brief overview of the immigration court to provide some background information. If you are new to practicing in immigration court, keep in mind that it is important to further familiarize yourself with immigration court processes generally as well as guidance for representing someone before an immigration judge. Additional resources are provided at the end of this resource for a deeper dive into the different aspects of practicing in immigration court.

The main statute governing immigration law is the Immigration and Nationality Act (INA), codified in Title 8 of the U.S. Code.[2] Other titles contain immigration-related provisions as well. Title 8 of the Code of Federal Regulations (CFR), as well as several other titles, contain provisions relating to immigration.

Immigration courts are part of the Executive Office for Immigration Review (EOIR), within the U.S. Department of Justice (DOJ).[3] Immigration courts are Article II courts under the Executive Branch. Immigration judges (frequently referred to as IJs) are hired by the DOJ,

[2] The U.S. Citizenship and Immigration Services (USCIS) has a helpful webpage that lists the Immigration and Nationality Act (INA) sections and their corresponding section in the U.S. Code. "Immigration and Nationality Act," Department of Homeland Security (DHS) USCIS, https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act (last updated July 10, 2019).
[3] "About the Office," Department of Justice (DOJ) Executive Office for Immigration Review (EOIR), https://www.justice.gov/eoir/about-office (last updated Mar. 15, 2024).

and the DOJ operates under the authority and supervision of the Attorney General.[4] EOIR is considered an administrative tribunal.

Immigration court proceedings are conducted to determine whether a person is subject to removal or deportation from the United States.[5] Jurisdiction for removal proceedings vests with the immigration court when the charging document is filed.[6] The most common charging document in an immigration case is the Notice to Appear (NTA). For jurisdiction to properly vest, the NTA must be filed with the immigration court by the Department of Homeland Security (DHS) after service on the individual respondent.[7]

The individual in proceedings is considered the "respondent." Immigration cases are typically styled or captioned as: "In the Matter of: [Respondent's Name]." The opposing party is DHS, represented by attorneys for the Immigration and Customs Enforcement (ICE) Office of the Principal Legal Advisor (OPLA). A respondent has the right to be represented by counsel, but at no expense to the government.[8] A respondent is not guaranteed to have a legal representative in immigration court, and many individuals cannot afford to hire an attorney and cannot find pro bono representation.[9] This is also true for unaccompanied children and other children and youth in immigration court proceedings. A respondent may request relief from removal, depending on their circumstances, to prove that they should be permitted to stay in the United States rather than be removed or deported.

ii. Unaccompanied Children in Removal Proceedings

Most unaccompanied children must have the opportunity to go before an immigration judge in immigration court to seek legal relief because of protections provided for in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).

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[4] 8 C.F.R. § 1003.10.
[5] INA § 240; 8 U.S.C. § 1229a. *See also* 8 C.F.R. §§ 1240.10, 1240.15.
[6] 8 C.F.R. § 1003.14.
[7] INA § 239; 8 U.S.C. § 1229(a)(1); 8 C.F.R. §§ 1003.13, 1003.14, 1003.15.
[8] INA § 240(b)(4)(A); 8 U.S.C. § 1229a(b)(4)(A). "There are limited government-funded legal services for unaccompanied children, such as providing legal orientations and screenings for children who are in the custody of the Office of Refugee Resettlement (ORR), and representation while children are detained. You can learn more about the services provided on ORR's website. "Services Provided," U.S. Department of Health & Human Services (HHS) ORR, https://www.acf.hhs.gov/orr/about/ucs/services-provided (last updated May 16, 2019). Additionally, there is some government-funded services for the National Qualified Representative Program (NQRP) to provide counsel for those who are deemed incompetent. Learn more about this program on EOIR's website. "National Qualified Representative Program (NQRP)," EOIR, https://www.justice.gov/eoir/national-qualified-representative-program-nqrp (last updated Feb. 18, 2020).
[9] Learn more about access to counsel in immigration court. *U.S. Immigration Courts: Access to Counsel in Removal Proceedings and Legal Access Programs*, Congressional Research Service (CRS) (July 6, 2022), https://crsreports.congress.gov/product/pdf/IF/IF12158.

The TVPRA states that unaccompanied children (other than those from a contiguous country) "shall be placed in removal proceedings."[10]

iii. Common Forms of Relief for Unaccompanied Children

Some common forms of legal relief unaccompanied children seek either before an immigration judge or United States Citizenship and Immigration Services (USCIS), include asylum, Special Immigrant Juvenile Status (SIJS), adjustment of status for Special Immigrant Juveniles, Violence Against Women Act (VAWA), U visa, and/or a T visa.[11] Voluntary departure is also considered a form of relief that can be pursued in immigration court. As previously mentioned, when an unaccompanied child is in removal proceedings, they may be seeking legal relief that the immigration judge will decide, or they may be seeking relief before USCIS, and oftentimes there are multiple processes happening simultaneously. For a child seeking SIJS, they oftentimes will have a pending matter before a state court that is relevant to their immigration relief, so they may also be preparing their case in a state court forum in addition to immigration court and/or USCIS.

The chart below details, with citations, whether USCIS or EOIR has authority to decide those applications commonly filed by unaccompanied children in removal proceedings:

Application	Jurisdiction Over Application if in Removal Proceedings	Citation
I-360 Petition for SIJS	USCIS only	INA 101(a)(27)(J)(iii)/8 U.S.C. § 1101(a)(27)(J)(iii); 8 C.F.R. § 204.11(g)(1)
Asylum as Unaccompanied Child	USCIS only	INA 208(b)(3)(C)/8 U.S.C. § 1158(b)(3)(C)
U Visa	USCIS only	8 C.F.R. § 214.14(c)(1)
T Visa	USCIS only	8 C.F.R. § 214.11(d)
I-360 VAWA Self-Petition	USCIS only	8 C.F.R. § 204.1(a)(3); USCIS Policy Manual, Vol. 3, Part D, Ch. 1, Part A
I-485 Adjustment of Status	EOIR or USCIS (for USCIS to have jurisdiction, removal proceedings must be terminated or dismissed)	8 C.F.R. § 1245.2

[10] *See* TVPRA, *supra* note 1.

[11] Eligibility requirements for the primary forms of legal relief that unaccompanied children seek is beyond the scope of this resource. For more information on these forms of relief and more, read CILA's Pro Bono Guide. *CILA Pro Bono Guide: Working with Children and Youth in Immigration Cases*, CILA (Oct. 2023), https://cilacademy.org/wp-content/uploads/2023/10/2023.10-CILA-Pro-Bono-Guide-2023.pdf.

For cases resolved at an individual calendar hearing (commonly referred to as a merits hearing) in immigration court, immigration judges issue decisions in each specific matter, and the decisions are not publicly available. Appeals from immigration judges' decisions go to the Board of Immigration Appeals (BIA), the highest administrative tribunal adjudicating immigration and nationality matters, also within the DOJ EOIR.[12] Decisions issued by the BIA are designated as either precedent, indexed, or unpublished.[13] BIA decisions may be appealed to the appropriate federal courts of appeals.[14] The Attorney General can also certify BIA decisions to themself for review and issue new decisions that are binding on the BIA and immigration judges.

iv. USCIS's Initial Jurisdiction in Unaccompanied Children's Asylum Claims

Typically, asylum applications are decided by the immigration judge for individuals in removal proceedings, but that is not the case for unaccompanied children's asylum cases. There are additional procedural protections for unaccompanied children including that the Asylum Office should have initial jurisdiction to review an asylum application from an unaccompanied child rather than the immigration court.[15] As a result, an unaccompanied child will typically go through removal proceedings and must appear before an immigration judge in immigration court, and if they are seeking asylum, their asylum application will be filed with USCIS to be adjudicated by an asylum officer at an Asylum Office. Some unaccompanied children have confronted challenges before immigration judges in maintaining that the appropriate forum to review their asylum application is the Asylum Office, and litigation has resulted in relation to this issue.

As of publication, USCIS follows the "Kim Memo" from May 2013 regarding procedures for asylum applications filed by unaccompanied children. USCIS issued the "Lafferty Memo" in May 2019 reversing the Kim Memo; however, USCIS was enjoined from applying the Lafferty Memo as result of litigation in *J.O.P. v. DHS*, No. 19-1944. Therefore, the Kim Memo is still in effect. Essentially, under the Kim Memo, if a child was already designated an unaccompanied child and that designation is still in place when the asylum application is filed, then the Asylum Office will adopt that decision without further

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[12] "Board of Immigration Appeals," DOJ EOIR, https://www.justice.gov/eoir/board-of-immigration-appeals (last updated Mar. 11, 2024).
[13] Published and indexed decisions can be found on the BIA's website. "Agency Decisions," DOJ EOIR, https://www.justice.gov/eoir/ag-bia-decisions#menu4 (last updated Feb. 15, 2024). The Immigrant & Refugee Appellate Center also creates an Index of unpublished BIA decisions. Practitioners can also view unpublished BIA decisions on EOIR's Reading Room. "FOIA Public Access Link (PAL) Reading Room," DOJ EOIR, https://foia.eoir.justice.gov/app/ReadingRoom.aspx (last visited Mar. 25, 2024).
[14] "The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." INA § 242(b)(2), 8 U.S.C. § 1252(b)(2).
[15] TVPRA; INA § 208(b)(3)(C); 8 U.S.C. § 1232(b)(3)(C).

inquiry.[16] The Kim Memo specifically states, "Unless there was an affirmative act by HHS, ICE or CBP to terminate the [unaccompanied non-citizen child] finding before the applicant filed the initial application for asylum, Asylum Offices will adopt the previous DHS determination that the applicant was an [unaccompanied non-citizen child.]"[17] However, advocates have reported that some judges indicate that they have jurisdiction over a case when the child turned age 18 prior to filing for asylum or once the child reunified with a parent.

Immigration judges may look to *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018). According to *Matter of M-A-C-O-*, "[a]n Immigration Judge has initial jurisdiction over an asylum application filed by a respondent who was previously determined to be an unaccompanied [noncitizen] child but who turned 18 before filing the application." The case makes no determination regarding a child who has been reunified with a parent. The National Immigration Project (NIPNLG) created a Fact Sheet on the *J.O.P.* litigation, which is a helpful resource for practitioners to consult regarding USCIS's initial jurisdiction of unaccompanied children's asylum cases, situations where an immigrant judge tries to re-determine jurisdiction over an unaccompanied child's asylum case, and/or if there is an issue regarding designation/determination of the "unaccompanied child" status.[18] Additionally, practitioners may direct related questions to the Fact Sheet's authors. In December 2020, the District Court for the District of Maryland issued an amended preliminary injunction and granted a class certification in the *J.O.P.* case.[19] Notably, "[t]he

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[16] *See also* "Designation as an 'Unaccompanied [non-citizen] Child (JAC),'" CILA (Aug. 13, 2020), https://cilacademy.org/resource-file/overview-of-designation-as-an-unaccompanied-non-citizen-child-uac/; "UAC Designation Flow Chart," CILA (Aug. 13, 2020), https://cilacademy.org/resource-file/uac-designation-flow-chart/.

[17] Ted Kim, "Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied [Non-Citizen] Children," DHS USCIS, https://www.uscis.gov/sites/default/files/document/memos/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf (May 28, 2013).

[18] "Fact Sheet: Immigration Court Considerations for Unaccompanied Children Who File for Asylum with USCIS While in Removal Proceedings, in Light of *J.O.P. v. DHS*, No. 19-01944 (D. Md. filed July 1, 2019)," NIPNLG (July 22, 2022), https://nipnlg.org/work/resources/fact-sheet-immigration-court-considerations-unaccompanied-children-who-file-asylum.

[19] In December 2020, the district court granted the *J.O.P.* plaintiff's motions for class certification and defined the class as:

> All individuals nationwide who prior to the effective date of a lawfully promulgated policy prospectively altering the policy set forth in the 2013 Kim Memorandum (1) were determined to be an Unaccompanied [Non-Citizen] Child ("UAC"); and (2) who filed an asylum application that was pending with the United States Citizenship and Immigration Services ("USCIS"); and (3) on the date they filed their asylum application with USCIS, were 18 years of age or older, or had a parent or legal guardian in the United States who is available to provide care and physical custody; and (4) for whom USCIS has not adjudicated the individual's asylum application on the merits.

"J.O.P. v. U.S. Dept. of Homeland Security, et. al., Information," DHS USCIS, https://www.uscis.gov/laws-and-policy/other-resources/class-action-settlement-notices-and-agreements/jop-v-us-dept-of-homeland-security-et-al-information (last updated Mar. 23, 2021).

amended injunction also enjoins ICE from opposing continuances or other postponements of a class member's removal proceedings, or taking the position that USCIS does not have initial jurisdiction of the class member's asylum application, while the class member's asylum application is pending with USCIS."[20] This helps afford practitioners supportive arguments if faced with this situation in immigration court and beforehand while seeking OPLA to join in with respondent on various procedural strategies.

v. *Current Climate*

It is important to be aware of all potential procedural options in removal proceedings since preferences and trends change over time. Additionally, knowing the best course of action in a typical matter depends on several factors including norms in your local area, individual OPLA attorneys' practices, individual immigration judges' preferences, particularities of your client's case, and your client's wishes. Strategy will vary depending on the case. That said, it is also helpful to know the current climate in immigration court and which strategies are generally favored. Currently, OPLA is actively exercising prosecutorial discretion in many instances, and dismissal, as discussed below in Sections III. and VII., is their preference for exercising prosecutorial discretion. In situations where OPLA does not or will not dismiss a case, seeking termination from an immigration judge is an option for advocates. Frequently, seeking dismissal or termination of removal proceedings is the first point of analysis for advocates considering procedural options in removal proceedings.

B. Sources of Rules & Policy

If you are working with a client in removal proceedings, you should also familiarize yourself with the *Immigration Court Practice Manual* (ICPM), which contains material about procedures, recommendations, and requirements for practicing before the immigration courts. According to the manual, "[t]he requirements set forth in this manual are binding on the parties who appear before the immigration courts, unless the immigration judge directs otherwise in a particular case."[21] The ICPM and other materials are available on EOIR's "Manuals and Memoranda" webpage.

The ICPM covers important topics such as appearing before the immigration court, hearings before immigration judges, deadlines, forms used in immigration court, and other information relevant to filing and removal proceedings. Many procedural options may be pursued by an oral or written motion. ICPM Chapter 5 covers rules and processes regarding "Motions before the Immigration Court." The manual includes appendices covering a variety of issues such as citations, deadlines, and information on filing motions. The appendices also contain several examples including a cover letter, pleadings, table of

[20] *Id.*
[21] *Immigration Court Practice Manual* (ICPM) Ch. 1.1(b).

contents, and more.[22] A Table of Changes is provided by EOIR, which is helpful for advocates to easily see updates in the ICPM over time.

EOIR's policy and director's memoranda can be found under Chapter 10 of the "Additional Reference Materials" of EOIR's website. The memoranda are important to review to understand the directives immigration judges are receiving. Moreover, you can incorporate relevant portions of the memoranda in oral and written advocacy when working with a client in removal proceedings. Specific memoranda relevant to various procedural options in removal proceedings are addressed throughout this resource. Additionally, EOIR has issued several memoranda that are particularly important to review and be aware of when working on children's cases including but not limited to the following:

- Director's Memorandum (DM) 24-01, *Children's Cases in Immigration Court*
- DM 23-03, *The Role of Child Advocates in Immigration Court*
- DM 22-06, *Friend of the Court*
- DM 22-01, *Encouraging and Facilitating Pro Bono Legal Services*

The specifics of a particular matter will dictate which memoranda is applicable. Therefore, it is best to review the full list of memoranda on EOIR's website to see what issues are covered.

Key Immigration Court Policy, Manuals, & Resources

- EOIR, "Manuals and Memoranda"
- EOIR, *Immigration Court Practice Manual*
- EOIR, *BIA Practice Manual*
- EOIR, "Additional Reference Materials"
- EOIR, Additional Reference Materials, "Chapter 10 - Memoranda"
- EOIR, "Model Hearing Program"

Additional Resources

- CILA, "EOIR Updates Guidance on Children's Cases in Immigration Court & Creates Specialized Juvenile Dockets," January 2024
- CILA, *Pro Bono Guide: Working with Children and Youth in Immigration Cases*, October 2023
- CILA webinar, "Introduction to Removal Proceedings for Unaccompanied Children," March 2022

[22] "Shared Practice Manual Appendices," DOJ EOIR, https://www.justice.gov/eoir/reference-materials/general/shared-appendices (last visited Mar. 19, 2024).

- ABA Commission on Immigration (COI), Mechanics of Immigration Court webinar series, 2022
  - "Part 1: The Master Calendar Hearing & Filing Applications for Relief"
  - "Part 2: Corroboration, Preparing Witnesses, and Working with Experts"
  - "Part 3: The Individual Calendar/Merits Hearing"
- Safe Passage Project, "Representing Noncitizen Youth in Removal Proceedings," 2021

III. Prosecutorial Discretion

A. Overview

According to ICE, prosecutorial discretion is the "longstanding authority of an agency charged with enforcing the law to decide where to focus its resources and whether and how to enforce the law against an individual."[23] Overall, prosecutorial discretion can help the agency "reduc[e] redundancies across DHS, achiev[e] just and fair outcomes in individual cases, and advanc[e] the DHS mission of administering and enforcing the immigration laws." Generally, prosecutorial discretion is used to limit or resolve issues in a respondent's case. DHS can exercise prosecutorial discretion independently or because of a request. Respondents and advocates can seek prosecutorial discretion at various points in a case, and the requests can range from seeking DHS to join in a motion to continue, administratively close a case, or dismiss proceedings, as examples.[24]

B. Key Cases and Policy

The September 2021 DHS memo, "Guidelines for the Enforcement of Civil Immigration Law" (Mayorkas Memorandum), set forth immigration enforcement priorities to prioritize those who are a threat to the United States' national security, public safety, and border security for DHS's apprehension and removal.[25] DHS's civil immigration enforcement priorities were enjoined in June 2022 by the decision in *Texas v. United States*, No. 6:21-00016 (S.D. Tex. June 10, 2022). However, the case was appealed and heard by the

[23] "Doyle Memorandum: Frequently Asked Questions and Additional Instructions," DHS U.S. Immigration and Customs Enforcement (ICE), https://www.ice.gov/about-ice/opla/prosecutorial-discretion (last updated Dec. 21, 2023).

[24] The Doyle Memorandum provides specific examples of when OPLA attorneys can exercise prosecutorial discretion, indicating "OPLA attorneys are empowered and expected to use their professional judgment to do justice in each case, whether the decision relates to: filing an NTA; moving to dismiss, administratively close, or continue proceedings; stipulating to issues, relief, or bond; or pursuing an appeal." Kerry E. Doyle, "Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion" (Doyle Memorandum), DHS ICE (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.

[25] Alejandro N. Mayorkas, "Guidelines for the Enforcement of Civil Immigration Law," DHS (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf.

Supreme Court. On June 23, 2023, the Supreme Court held that Texas and Louisiana lacked Article III standing to challenge the guidelines.[26] Following the decision, DHS reinstated the Mayorkas Memorandum, and in July 2023, ICE reinstated its "Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion" (Doyle Memorandum). In September 2023, EOIR issued DM 23-04, *Department of Homeland Security Enforcement Priorities and Prosecutorial Discretion Initiatives*, to provide guidance to immigration judges on the topic.

The Doyle Memorandum reviews the three enforcement priorities included in the Mayorkas Memorandum and elaborates on them to provide more guidance to OPLA attorneys. According to the guidance, prosecutorial discretion—not filing a NTA, dismissing or terminating a case, or administrative closure—are not available for cases that are considered priorities, and instead, generally, these cases should be litigated.[27] Notably, the Doyle Memorandum references an August 2021 ICE Directive: 1105.3 "Using a Victim-Centered Approach with Noncitizen Crime Victims" which provides policy guidance for immigration enforcement toward noncitizen crime victims, including youth with pending or approved SIJS petitions. The Doyle Memorandum directs OPLA attorneys to consider the Directive and whether an individual is a crime victim when considering whether they are a threat to public safety or a priority for enforcement.[28]

OPLA attorneys may exercise prosecutorial discretion on a case-by-case basis for non-priority cases, and they may do so in a variety of ways and at all stages of enforcement.[29] Additionally, OPLA's preference for prosecutorial discretion is either not filing the NTA or dismissal to reduce strain on immigration court dockets and focus resources.[30] OPLA attorneys may move to dismiss a case, join in on a motion to dismiss filed by a respondent, or non-oppose a motion to dismiss.[31] Moreover, OPLA attorneys may join a motion to reopen for the purpose of then dismissing proceedings to allow for an individual to seek relief outside of immigration court, for example before USCIS.[32] Also, keep in mind that the Doyle Memorandum states that OPLA attorneys do not need concurrence from

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[26] *United States, et al. v. Texas, et al.*, 143 S. Ct. 1964 (2023).
[27] Doyle Memorandum at 10.
[28] The Doyle Memorandum states:

> In general, if a noncitizen has a pending application or a petition for any of the following victim-based immigration benefits and appears prima facie eligible for such relief, OPLA should treat the case as a nonpriority matter until U.S. Citizenship and Immigration Services (USCIS) adjudicates the application or petition: T visas; U visas; Violence Against Women Act relief for qualifying domestic violence victims; and Special Immigrant Juvenile classification for qualifying children who have been abused, neglected, or abandoned by one or both parent.

Doyle Memorandum at 5 n.8.
[29] Doyle Memorandum at 10.
[30] *Id.* However, individuals and their counsel, may request to re-assess priority determinations. *Id.* at 8, 10.
[31] *Id.* at 10-11.
[32] *Id.* at 14.

respondents in OPLA's motions to dismiss.[33] Therefore, at times, OPLA may seek to dismiss a matter and remove the case from the immigration court's docket when a respondent does not wish to do so.

EOIR's guidance to adjudicators in DM 23-04 acknowledges that EOIR too has limited resources and a large caseload. To this point, the DM states that "[g]enerally speaking, efficiency and fairness are served where EOIR adjudicators focus on resolving disputes between the parties" rather than focusing on issues that are already agreed upon.[34] Moreover, EOIR's focus is on those who are enforcement priorities and those who seek adjudication of a claim for legal relief, and it is up to OPLA to determine who is an enforcement priority or not.[35] According to DM 23-04, immigration judges should ask OPLA whether a case is an enforcement priority, and if not, the immigration judge should ask the parties how the case should be resolved.[36] The DM provides some information on timing for requests, noting that the sooner issues are resolved, the better it is for docket management. The DM also covers the potential benefits of prosecutorial discretion in the forms of dismissal, stipulations to relief, narrowing of the issues and, administrative closure to EOIR to aid in efficiency efforts.[37] While the DM is largely supportive of OPLA's prosecutorial discretion efforts, the DM also ends with a footnote that cites to immigration judges' general authority to exercise their independent judgment and discretion in their adjudications.[38]

C. Considerations and Frequent Arguments for Youth's Cases

i. General Guidance for Prosecutorial Discretion Requests

When preparing to make a request for prosecutorial discretion, it is best to familiarize yourself with both the Mayorkas and Doyle Memoranda, EOIR's guidance, and OPLA's webpage on prosecutorial discretion, "Doyle Memorandum: Frequently Asked Questions and Additional Instructions." Additionally, you should seek guidance from other practitioners in your local area regarding any specific, localized instructions for prosecutorial discretion requests to your OPLA Field Location (OFL). OPLA's webpage provides some information regarding the format and process for seeking prosecutorial discretion and refers practitioners to contact their local OFL for specific guidance and with any questions.[39]

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[33] Doyle Memorandum at 11-12 n24.
[34] EOIR, Director's Memorandum (DM) 23-04, *Department of Homeland Security Enforcement Priorities and Prosecutorial Discretion Initiatives* (Sept. 28, 2023), at 3 n.4.
[35] *Id.* at 3-4.
[36] *Id.* at 4-5.
[37] *Id.*
[38] *Id.* at 6 n.9.
[39] "Doyle Memorandum: Frequently Asked Questions and Additional Instructions," DHS ICE, https://www.ice.gov/about-ice/opla/prosecutorial-discretion (last updated Dec. 21, 2023).

When making a request for prosecutorial discretion, you should draft a letter that includes what type of prosecutorial discretion you are seeking, in other words, your "ask" from OPLA, and include any circumstances that you would like for OPLA to consider. You should also highlight factors such as qualifying for alternative forms of legal relief, the client's age, being a victim of criminal activity, and having a medical condition including seeking medical treatment in the United States. Other important factors may include length of time your client has resided in the United States, family and community ties in the United States, why your client came to the United States and how they entered (if lawful), prior immigration history, work and education history, and tax history. Be prepared to mitigate any negative factors, such as a criminal history. You may need to supply supporting evidence, such as receipt notices for pending relief, community letters, school certificates, and/or medical records to support the request. If biometrics or fingerprints have not previously been taken, your client will have to undergo a background check.[40] The American Bar Association's Commission on Immigration created a helpful "Prosecutorial Discretion Quick Guide" that gives tips and suggestions for supporting evidence when preparing a request for prosecutorial discretion.

ii. Prosecutorial Discretion Requests for SIJS Cases

ICE's webpage on prosecutorial discretion specifically provides information regarding seeking prosecutorial discretion in the form of a dismissal in SIJS cases. The FAQ states for youth with an approved or pending SIJS petition with USCIS, "OPLA attorneys should treat the pending or approved petition as a strong mitigating factor in determining whether the juvenile noncitizen is an enforcement priority and eligible for PD, regardless of their entry date."[41] This provides advocates, working with youth seeking SIJS, a supportive reference to cite when seeking prosecutorial discretion. The FAQ goes on to note that for youth ages 14 and older, they must have completed a fingerprint-based FBI background check before OPLA can dismiss the matter.[42]

As previously stated, prosecutorial discretion can be sought for a variety of reasons—several of which are covered in this resource—including a continuance, request for case to

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[40] According to ICE's webpage on prosecutorial discretion,

> Noncitizens who have previously had biometrics collected by DHS in relation to any application for relief will not be required to submit information documenting their criminal histories (or lack thereof). Additionally, in some instances, noncitizens who have had their fingerprint taken in conjunction with an immigration enforcement action will also not need to submit information documenting their criminal histories. Noncitizens who have never had their biometrics collected by DHS or had their fingerprints taken in relation to an immigration enforcement action will be required to submit a Federal Bureau of Investigations (FBI) fingerprint-based background check with their PD request or at the request of the reviewing OPLA attorney before a final PD decision can be made. . . .

"Doyle Memorandum: Frequently Asked Questions and Additional Instructions," DHS ICE, https://www.ice.gov/about-ice/opla/prosecutorial-discretion (last updated Dec. 21, 2023).

[41] *Id.*

[42] *Id.*

be placed on the status docket, administrative closure, or dismissal. This resource covers each of these topics in more detail in the sections below.

Key ICE & Immigration Court Policy

- ICE OPLA, "Doyle Memorandum: Frequently Asked Questions and Additional Instructions," Updated December 2023
- EOIR, DM 23-04, *Department of Homeland Security Enforcement Priorities and Prosecutorial Discretion Initiatives*, September 2023
- ICE OPLA, "Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion ('Doyle Memorandum')," April 2022
- DHS, "Guidelines for the Enforcement of Civil Immigration Law," September 2021
- ICE, Directive 11005.3: "Using a Victim-Centered Approach with Noncitizen Crime Victims," August 2021

Additional Resources

- CILA webinar, "Children's Immigration Law: 2023 Roundup," December 2023
- CILA-National Immigration Litigation Alliance (NILA) webinar, "Litigation for Unaccompanied Children: Updates and Foundational Cases" and associated handout that covers *United States v. Texas*, October 2023
- NIPNLG, "Practice Advisory: Advocating for Prosecutorial Discretion Under the Biden Administration's Prosecutorial Discretion Guidance," September 2023
- National Immigrant Justice Center (NIJC), "NIJC's Explainer: DHS OPLA Offers of Prosecutorial Discretion and Motions to Dismiss," August 2023
- ABA COI, "Prosecutorial Discretion Quick Guide," February 2023

IV. Continuances

A. Overview

A request for continuance is a request to postpone a scheduled hearing until a later date. In cases involving unaccompanied children, a continuance might be sought for any number of reasons, including but not limited to the following: (1) to allow the respondent time to find counsel; (2) for new counsel to prepare; (3) to obtain a state court order with SIJS determinations; (4) to allow the respondent time to file a petition with USCIS and have it adjudicated; (5) to allow either party time to gather evidence (and in the case of DHS, background investigations and security checks) or review documents submitted by the opposing party; or (6) to resolve a scheduling conflict for counsel, the respondent, or a witness.

B. Key Cases and Policy

EOIR's PM 21-13, *Continuances*, provides a helpful list of relevant legal and policy principles for immigration judges considering continuance requests. Practitioners should be aware that motions for continuance are not automatically granted.[43] In addition, oral motions are discouraged, so the best practice is to file a written motion if circumstances allow for that.[44] As with motions to change venue, according to the ICPM Ch. 5.10(a) "[t]he filing of a motion to continue does not excuse the appearance of a [non-citizen] or representative at any scheduled hearing. Therefore, until the motion is granted, parties must appear at all hearings as originally scheduled."

Regulations provide that an immigration judge may grant a motion for a continuance for "good cause shown" and that a respondent entitled to a continuance receives one for a reasonable time.[45] Several cases elaborate on what factors are to be considered in finding good cause or a lack thereof. In *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983), the BIA held that: (1) a motion for continuance based upon an asserted lack of preparation and a request for opportunity to obtain and present additional evidence must be supported, at a minimum, by a reasonable showing that the lack of preparation occurred despite a diligent good faith effort to be ready to proceed and that any additional evidence is probative, noncumulative, and significantly favorable to the respondent, and (2) a motion for continuance is within the sound discretion of the immigration judge, and a decision denying such a motion will not be reversed on appeal unless it is established—by a full and specific articulation of the particular facts involved or evidence which would have been presented—that the denial caused the individual actual prejudice and harm, and materially affected the outcome of their case.

Subsequently, in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), the BIA held that an individual's unopposed motion to continue ongoing removal proceedings to await the adjudication of a pending family-based visa petition should generally be granted if approval of the visa petition would render them prima facie eligible for adjustment of status.[46] The BIA further held that in determining whether good cause exists to continue such proceedings, a variety of factors may be considered, including, but not limited to: (1) the DHS's response to the motion to continue; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent's statutory eligibility for adjustment of status; (4) whether the respondent's application for adjustment merits a favorable exercise of

[43] ICPM Ch. 5.10(a).
[44] *Id.*
[45] 8 C.F.R. § 1003.29 and 8 C.F.R. § 1240.6.
[46] *Matter of Hashmi*, 24 I&N Dec. 785, 790 (BIA 2009).

discretion; and (5) the reason for the continuance and any other relevant procedural factors.[47]

More recently, then Attorney General Jeff Sessions referred a case to himself in 2018 and issued *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018), in which he indicated that the good cause standard limits the discretion of immigration judges and prohibits them from granting continuances for any reason or no reason at all. He went on to consider the good cause standard and held that it requires consideration and balancing of multiple factors when a respondent requests a continuance to pursue collateral relief. The decision addresses the factors that an immigration judge must consider in such cases, holding that the primary factors to be considered are the likelihood that the relief will be granted and whether the relief will materially affect the outcome of the proceedings. Secondary factors should also be considered by the immigration judge per *Matter of L-A-B-R-*, which include the respondent's diligence in seeking collateral relief, DHS's position on the motion for continuance, concerns of administrative efficiency, the length of the continuance requested, the number of hearings held and continuances granted previously, and the timing of the continuance motion.

C. Considerations and Frequent Arguments for Youth's Cases

i. Due Process/Child Friendliness

A continuance may be sought to postpone a child client's master calendar or merits hearing. In arguing for a continuance at any stage, it can be helpful to point out that due process requires that individuals in removal proceedings are entitled to a full and fair hearing.[48] Accordingly, advocates can argue that without the additional time a continuance will afford, or without the ability to pursue relief before USCIS, their due process rights are violated.

It may be important to raise other considerations as most unaccompanied children are seeking humanitarian forms of relief, and supporting their claims may require delving into traumatic events. It often takes more time to develop a child's claim when you are striving to employ trauma-informed and child friendly interviewing skills. There may be qualities specific to the child or their history or present situation that also emphasize the need for more time. Consider, for example, the child's age, capacities, best language, and custody status (detained or released), and how each of these may affect your ability to develop rapport, gather facts and documents, work with experts, and otherwise prepare the case.

Each of the common forms of humanitarian protection for unaccompanied children are addressed separately below. Note that in some cases, a child may be pursuing more than one form of relief.

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[47] *Id.* at 794.
[48] *See* *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987).

ii. Continuances in SIJS Cases

With respect to SIJS cases, there are no published BIA decisions that specifically address a continuance sought solely for a potential or pending SIJS case, but there are unpublished BIA cases that support continuances for SIJS petitions at all phases of the process, including diligent pursuit of a state court order.[49] Some circuits have considered the denial of continuances in SIJS cases, and although these decisions may be unpublished, practitioners may wish to become familiar with them.[50]

Matter of L-A-B-R- makes clear that a continuance may be warranted for a pending collateral matter, like a SIJS petition. Once the SIJS petition has been approved, however, there is currently a backlog of visa availability. In other words, there is a years-long wait for a youth's priority date to become current and have a visa immediately available, allowing them to adjust status. Language in PM 21-13 provides that "[p]otential visa availability that is 'too remote' does not establish good cause for a continuance," and cites to *Matter of L-A-B-R*.

Given the years-long wait potentially involved, it may be best to pursue a different procedural option once a youth's I-360 has been approved to conclude the removal proceedings altogether, such as dismissal or termination, or long-term postponement of the case through administrative closure. The youth can then adjust status before USCIS or EOIR when a visa becomes available.

iii. Continuances in Asylum Cases

Unaccompanied children may also pursue asylum as a form of relief. These youth may require a continuance to allow time for USCIS to conduct the asylum interview and adjudicate the claim. The Asylum Office will grant the asylum application or refer the claim to the immigration judge. PM 21-13, provides that, "Cases in which a confirmed unaccompanied [non-citizen] child (UAC) has filed an asylum application with DHS must be continued while that application is pending adjudication with DHS because DHS has initial jurisdiction over such applications. INA § 208(b)(3)." (footnote omitted) Note that the footnote for this language indicates that immigration judges "retain authority, however, to determine their own jurisdiction in this context, *i.e.*, whether [a non-citizen] in

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[49] *See, e.g.*, *K-Z-P-, AXXX XXX 965 (BIA Feb. 16, 2018).* The Immigrant & Refugee Appellate Center creates an Index of unpublished BIA decisions that can be purchased to aid your research.
[50] *See, e.g.*, *Hernandez v. Garland, No. 21-6340, 2024 WL 443374 (2d Cir. Feb. 6, 2024), Amides-Galdamez v. Barr*, 810 Fed. Appx. 52 (2d Cir. 2020).

immigration proceedings met or meets the legal definition of UAC, 6 U.S.C. § 279(g)(2) at the time the asylum application was filed."

Practitioners should keep in mind, however, that the *J.O.P.* litigation offers protections for the class, comprised of all individuals who (1) were determined to be an unaccompanied [non-citizen] child; (2) filed an asylum application that was pending with USCIS and have not received a merits adjudication of their asylum application by USCIS; and (3) on the date they filed they asylum application with USICS, were 18 years of age or older, or had a parent or legal guardian in the United States who is available to provide care and physical custody.[51] As previously noted, the December 2020 amended preliminary injunction in the *J.O.P.* litigation enjoins ICE from opposing continuances or other postponements of a class member's removal proceedings, or taking the position that USCIS does not have initial jurisdiction of the class member's asylum application, while the class member's asylum application is pending with USCIS."[52]

iv. Continuances in U visa Cases

There is currently a backlog for U visas. There is a cap of 10,000 per year which has been reached every year since 2010.[53] PM 21-23 indicates that "[c]ontinuance requests related to applications for a U nonimmigrant visa involve a recent and developing area of law," and encouraging adjudicators to review applicable precedents, including *Matter of L-A-B-R-* and new circuit court decisions. The PM cites to two BIA decisions, *Matter of Sanchez Sosa*, 25 I &N Dec. 807 (BIA 2012) and the more recent *Matter of L-N-Y-*, 27 I&N Dec. 755 (BIA 2020). In the latter case, the BIA concluded that the respondent was prima facie eligible for U status and that approval of U status would materially affect the outcome of his removal proceedings, but also found that those factors were not dispositive and ultimately upheld the immigration judge's decision that a continuance was not warranted in light of other secondary factors, including the uncertainty as to when the U visa would be approved or become available. The practice advisories, linked below, provide best practices for requesting continuances for U visa applicants given this BIA precedent.

v. Continuances in T visa Cases

T visa applicants are not specifically mentioned in PM 21-13. For those youth with a pending T visa application, however, the factors set forth in *Matter of L-A-B-R-* should be helpful. The cap on the number of T visas, though smaller than that for U visas, has never

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[51] *Supra* note 19.
[52] *Supra* note 18.
[53] "Number of Form I-918 Petitions for U Nonimmigrant Status y Fiscal Year, Quarter, and Case Status," DHS USCIS, https://www.uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data?topic_id%5B%5D=33695&ddt_mon=&ddt_yr=&query=&items_per_page=10 (last visited March 26, 2024).

been reached and thus, the backlog issue faced by SIJ youth and U visa youth is not present for those seeking T visas.

vi. Continuances in VAWA Self-Petition Cases

VAWA self-petitioners are not specifically mentioned in the PM. For those youth with a pending VAWA petition (filed on Form I-360 just as the SIJS petition is), the factors set forth in *Matter of L-A-B-R-* are helpful. There is no visa backlog issue for a VAWA self-petitioner whose application is based on an abusive citizen parent, spouse, or child because they are considered "immediate relatives" and can apply for adjustment of status immediately. However, in cases of an abusive lawful permanent resident relative, they will have to wait for visa availability like other preference classifications.

Key Immigration Court Policy

- EOIR, PM 21-13, *Continuances*, January 2021

Additional Resources

- ASISTA, "Practice Advisory: The Impact of *Matter of L-N-Y*, 27 I & N Dec. 755 (BIA 2020)," Updated April 2022
- Catholic Legal Immigration Network (CLINIC), "Seeking U Nonimmigrant Status While in Removal Proceedings: New Challenges from the BIA," February 2020
- CLINIC, "Practice Advisory: Matter of L-A-B-R-, 27 I&N Dec. 405 (A.G. 2018)," December 2018
- American Immigration Council (AIC), "Practice Advisory: Motions for a Continuance," September 2018

V. Status Docket

A. Overview

Status dockets are a case management tool allowing immigration judges to pause removal proceedings by holding certain cases in abeyance. In October 2022, EOIR issued guidelines in DM 23-01, *The Status Docket*, for the use of status dockets and stated that a case may qualify for placement on the docket if the immigration judge granted a continuance to wait (1) for another agency (such as USCIS) or another court to adjudicate an application/petition or to take another action related to the respondent or (2) for visa availability. Cases may also qualify if placement is necessary for EOIR to comply with a federal court order.

B. Key Cases and Policy

EOIR's DM 23-01 is the key source to consult when planning to request that an immigration judge move a case to the status docket. The Director's Memorandum makes clear that immigration judges have discretion when granting or denying a motion to continue and whether to place a case on the status docket. The memorandum also encourages immigration judges to place cases that qualify on the status docket and provides several helpful examples of when a case may qualify.

The DM on status dockets also details how they work and what parties can expect. As a summary, if a judge chooses to put a case on the status docket, then instead of scheduling a future hearing, the court will send a notice stating that the case has been placed on the status docket. From there, the court will send the parties a request for updated information on the case at six-month intervals. If the party that sought the continuance does not timely respond and provide the court with an update, the case will be moved back to the active docket. If the party timely responds to the request for an update, the immigration judge will determine whether to keep the case on the status docket or to move the case to the active docket.

C. Considerations and Frequent Arguments for Youth's Cases

You may request that a case be placed on the status docket after a motion to continue has been granted or concurrently with a motion to continue. There are several situations when the case may qualify for placement on the status docket after the immigration judge has granted a motion to continue, and EOIR DM 23-01 provides a non-exhaustive list of examples of when a case is a good fit for the status docket. Many of these examples come up frequently in children's immigration matters. The DM includes the following situations as examples:

- SIJS:
    - A youth is seeking SIJS, and the immigration judge granted a continuance to wait for a state court to issue an order that will relate to the SIJS petition. *See* DM-23-01 at 2.
    - A youth is seeking SIJS, and the immigration judge granted a continuance to wait for USCIS to adjudicate a Form I-360, *Petition for Amerasian, Widow(er), or Special Immigrant*. *See* DM-23-01 at 2.
    - A youth has been approved for SIJS, and the IJ granted a continuance to wait for a visa to become available. *See* DM-23-01 at 2.
- U visa:
    - A youth is seeking a U visa, and the immigration judge granted a continuance to wait for USCIS to adjudicate a Form I-918, *Petition for U Nonimmigrant Status* or the law enforcement certification at Form I-918 Supplement B. *See* DM 23-01 at 2.

- A youth has been approved for a U visa, and the immigration judge granted a continuance to wait for a visa to become available. *See* DM 23-01 at 2.
- Family-based petition: A youth is seeking adjustment of status, and the immigration judge granted a continuance to wait on USCIS to adjudicate a Form I-130, *Petition for Alien Relative* filed on their behalf. *See* DM 23-01 at 1.

Depending on the facts involved, the case may fit neatly into one of the above examples. If so, then you can use the DM as support for the argument to move the case to the status docket. Also, keep in mind that this list is non-exhaustive, and thus, you can also make this argument in similar and/or analogous situations that otherwise meet the considerations laid out in the memorandum.

Additionally, when considering asking an immigration judge to move a case to the status docket, know that, historically, not all immigration courts have used status dockets. Therefore, this may not be a realistic option for all cases. It is important to consult other practitioners locally to see if your local immigration court and/or assigned immigration judge uses status dockets and information about their norms and practices. Nonetheless, it is still important to present the argument to protect the record because use of the status docket can be helpful in children's immigration cases.

Key Immigration Court Policy

- EOIR, DM 23-01, *The Status Docket*, October 2022

VI. Administrative Closure

A. Overview

Administrative closure is a tool for docket management which removes a case from an immigration judge's active calendar, thereby temporarily pausing the proceedings.[54] The case is still on the court's docket, but no future hearings will be set until either party moves to re-activate the case by filing a motion to recalendar.[55] An immigration judge can administratively close a case even if one of the party's objects.[56] In children's cases, administrative closure may be sought to allow time for USCIS to adjudicate petitions, especially in cases where adjudication may take years. Note that USCIS also has the ability to administratively close applications before it, but in this resource, all references to administrative closure are related to the tool as utilized by immigration courts.

[54] *Matter of W-Y-U-*, 27 I&N Dec. 17, 18 (BIA 2017).
[55] *Id.*
[56] *Id.*

The ICPM offers little guidance with respect to administrative closure but does provide in Chapter 5.10(u) that "[w]hen proceedings have been administratively closed and a party wishes to reopen the proceedings, the proper motion is a motion to recalendar, not a motion to reopen." *See also* Chapter 5.7(i).

B. Key Cases and Policy

Key guidance on administrative closure can be found in EOIR DM 22-03, *Administrative Closure*, which addresses how the tool should be utilized, after Attorney General Garland restored the authority of immigration judges and the BIA to administratively close cases.

In 2018, then Attorney General Sessions referred a case to himself and issued *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), which foreclosed a grant of administrative closure except in limited cases in which administrative closure is authorized by statute. Subsequently, however, Attorney General Garland overruled that decision in its entirety in *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021). The BIA accordingly directed immigration judges and the BIA to apply the standard for administrative closure set out in prior cases *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) and *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017) while rulemaking proceeds[57] and except when a court of appeals has held otherwise.[58] Thus, administrative closure is an option in most jurisdictions.

In *Matter of Avetisyan*, the BIA held that an immigration judge and the BIA may administratively close proceedings, even if a party opposes, if it is otherwise appropriate under the circumstances.[59] The BIA further held that in determining whether administrative closure is appropriate, all relevant factors should be weighed, including but not limited to: (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action they are pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is recalendared before the immigration judge or the appeal is reinstated before the BIA.[60]

Five years later, in *Matter of W-Y-U-*, the BIA clarified *Matter of Avetisyan* and held that the primary consideration in evaluating whether to administratively close or recalendar

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[57] As previously mentioned, in September 2023, the DOJ and the EOIR issued a proposed rule on "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," but as of the date of publication of this resource, no final rule has yet been issued.
[58] For discussion of the circuit split and the Sixth Circuit's holding that adjudicators have authority to administratively close cases only in limited circumstances, *see* DM-22-03 at 1-2.
[59] *Matter of Avetisyan*, 25 I&N Dec. 688, 697 (BIA 2012).
[60] *Id.* at 696.

proceedings is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and get resolved on the merits.[61] The BIA further held that in considering administrative closure, an immigration judge cannot review whether the respondent falls within the enforcement priorities or will actually be removed from the United States, as DHS has exclusive jurisdiction over matters of prosecutorial discretion.[62]

DM 22-03 notes that EOIR has finite resources and a daunting caseload and indicates that it is important that adjudicators focus on two categories of cases: those in which DHS deems the respondent to be an enforcement priority, and those in which the respondent desires a full adjudication of their claim(s). Pursuant to the DM, administrative closure of low priority cases will allow adjudicators to focus accordingly. The DM at 3 also provides a helpful list of situations in which it can be appropriate to administratively close a case, including, but not limited to:

- where DHS requests administrative closure because a respondent is not an immigration enforcement priority, and respondent does not object (in such cases, the DM indicates the request should generally be granted);
- to allow a respondent to file an application or petition with an agency other than EOIR;
- while an agency adjudicates a previously filed application or petition, or, if a visa petition has been approved, while waiting for the visa to become available; and
- where a respondent has been granted temporary protected status.

The DM further indicates that where a respondent requests administrative closure, whether in one of these scenarios or another where administrative closure is appropriate, and DHS does not object, the request should generally be granted. And where the request is opposed, "the primary consideration . . . is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits."[63] The DM also encourages resolution of issues involving administrative closure in advance of individual calendar hearings and not at hearing.

C. Considerations and Frequent Arguments for Youth's Cases

It is important to understand the effect of administrative closure by an immigration judge on the authority of USCIS to adjudicate an application pending before the agency. In the past, advocates have sought to administratively close removal proceedings so that USCIS might adjudicate applications for SIJS, asylum, a U Visa, a T Visa, or VAWA. Issues have arisen where a case was administratively closed by the immigration judge, and the youth is

[61] *Matter of W-Y-U-*, 27 I&N Dec. at 20.
[62] *Id.* at 19.
[63] *Citing Matter of W-Y-U-*, 27 I&N Dec. at 20.

now eligible to adjust status. USCIS will not adjudicate the application to adjust status until the case has been dismissed or terminated altogether; it is not enough for the case to be administratively closed.

i. Administrative Closure in SIJS Cases

You may pursue administrative closure while an I-360 for SIJS is pending or once the I-360 has been approved and the petitioner must await visa availability. This procedural option can be considered with others, such as a continuance or placement on the status docket, when dismissal or termination is not available or preferred. After I-360 approval and once a visa becomes available, practitioners will need to recalendar the case. and weigh various factors with their client to determine whether adjustment of status should be pursued before the immigration court or USCIS. A CILA webinar and detailed written resource on this subject is linked to below.

ii. Administrative Closure in Asylum Cases

A request for administrative closure is relatively straightforward for an unaccompanied child client pursuing asylum. Administrative closure in immigration court does not affect USCIS jurisdiction to adjudicate an unaccompanied child's asylum application given the initial jurisdiction provision in the TVPRA.[64]

For a client whose status as an unaccompanied child at the time of filing the application is being questioned by the immigration judge, a request for administrative closure may entail offering arguments regarding why the child should still be considered an unaccompanied child with the right to seek asylum before the Asylum Office pursuant to the TVPRA.[65]

PRACTICE TIP: Note that guidance from members of the counsel team for plaintiffs in the *J.O.P.* litigation provides that class members should reach out to OPLA with proof that the asylum application is pending with USCIS, seeking OPLA's joinder of or non-opposition to the class member's proposed motion for administrative closure, placement on the status docket, or a continuance. Practitioners may bring to OPLA's attention the December 2020 injunction. Practitioners could ask OPLA to exercise prosecutorial discretion to move to dismiss the class member's removal proceedings given the pending USCIS asylum application and any other relevant factors.

NIPNLG, "Fact Sheet: Immigration Court Considerations for Unaccompanied Children Who File for Asylum with USCIS While in Removal Proceedings, in Light of *J.O.P. v. DHS*, No. 19-01944 (D. Md. Filed July 1, 2019)," (July 2022)

[64] *See* TVPRA, *supra* note 1.
[65] For helpful guidance on steps to take if an immigration judge indicates an intent to re-determine jurisdiction, *see* NIPNLG Fact Sheet at 6, *supra* note 18.

Key Immigration Court Policy

- EOIR, DM 22-03, *Administrative Closure*, November 2021

Additional Resources

- AIC & American Civil Liberties Union (ACLU), "Practice Advisory: Administrative Closure After Matter of Cruz-Valdez," January 2022
- CILA, "Frequently Asked Questions – Overcoming Analysis Paralysis: Practical Considerations for Adjusting Status Based on Special Immigration Status," August 2021
- CILA webinar, "Overcoming Analysis Paralysis: Practical Considerations for Adjusting Status Based on Special Immigration Status," January 2021

VII. Dismissal & Termination

A. Overview

Dismissal or termination of removal proceedings ends removal proceedings altogether. OPLA or another government officer, on their own accord, may seek to dismiss immigration proceedings and not pursue charges against an individual.[66] Alternatively, a respondent may ask DHS to move to dismiss a case. An immigration judge may terminate proceedings on their own accord, or a respondent may ask an immigration judge to terminate proceedings. The reasons for a dismissal or termination can also vary depending on the case and specific issues involved.

B. Key Cases and Policy

Many advocates and judges alike have used the terms dismissal and termination interchangeably, but a 2018 case *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018) highlighted the distinction between "a dismissal under 8 C.F.R. § 1239.2(c) and a termination under 8 C.F.R. § 1239.2(f)." Significantly, *Matter of S-O-G- & F-D-B-* limited an immigration judge's ability to terminate and dismiss proceedings, with this decision holding that immigration judges lacked the "inherent authority" to do so unless expressly allowed. The decision relied heavily on *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) regarding administrative closure, which was overturned in 2021 by *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021). *See* Section VI. of this resource for more details on administrative closure.

[66] According to 8 C.F.R. § 1239.2(c) government counsel or another government officer as listed out in 8 C.F.R. § 239.1(a) may move for dismissal. The list of potential individuals included in 8 C.F.R. § 239.1(a) is long and includes individuals who have authority to issue a Notice to Appear (NTA).

In December 2022, *Matter of Coronado Acevedo*, 28 I&N Dec. 648 (A.G. 2022) overruled *Matter of S-O-G- & F-D-B-* and reinstated immigration judges' authority to terminate and dismiss removal proceedings. In explaining the rationale, *Matter of Coronado Acevedo* says, "*S-O-G- & F-D-B-* has imposed 'rigid procedural requirements that would undermine . . . fair and efficient adjudication' in certain immigration cases. *Matter of A-C-A-A-*, 28 I&N Dec. 351, 351 (A.G. 2021)."[67] There is also support in the regulations that immigration judges and the Board have authority to dismiss and terminate proceedings as a part of their overall role as EOIR adjudicators. For example, 8 C.F.R. § 1003.10(b) includes the general powers and duties of immigration judges and says, "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." Additionally, 8 C.F.R. § 1240.12(c) covers orders by immigration judges and says, "The order of the immigration judge shall direct the respondent's removal from the United States, or the termination of the proceedings, or other such disposition of the case as may be appropriate."

Matter of Coronado Acevedo found that immigration judges have authority to dismiss or terminate cases where expressly permitted and in certain circumstances. The holding states:

> Pending the outcome of the rulemaking process, immigration judges and the Board of Immigration of Appeals may consider and, where appropriate, grant termination or dismissal of removal proceedings in certain types of limited circumstances, such as where a noncitizen has obtained lawful permanent residence after being placed in removal proceedings, where the pendency of removal proceedings causes adverse immigration consequences for a respondent who must travel abroad to obtain a visa, or where termination is necessary for the respondent to be eligible to seek immigration relief before United States Citizenship and Immigration Services.

28 I&N Dec. 648 (A.G. 2022).[68] This is significant for many unaccompanied children's cases. For example, *Matter of Coronado Acevedo* specifically raises the situation where a respondent in removal proceedings with approved SIJS must have their removal proceedings dismissed or terminated to seek adjustment of status before USCIS.[69]

Matter of Coronado Acevedo included in footnote one that the label/term distinction between "dismissal" and "termination" is not material except where there is a distinction in

[67] *Matter of Coronado Acevedo*, 28 I&N Dec. 648, 651 (A.G. 2022).
[68] *Id.* at 652.
[69] *Id.* at 649.

the regulations.[70] For example, the regulations reference dismissal and termination in these instances:[71]

- Dismissal:
  - 8 C.F.R. § 1239.2(c): "*Motion to dismiss.* After commencement of proceedings pursuant to 8 CFR 1003.14, government counsel or an officer enumerated in 8 CFR 239.1(a) may move for dismissal of the matter on the grounds set out under 8 CFR 239.2(a). Dismissal of the matter shall be without prejudice to the [non-citizen] or the Department of Homeland Security."
  - The regulation referenced in the bullet point immediately above mentions grounds as set forth in 8 C.F.R § 239.2(a): "Cancellation of notice to appear. (a) Any officer authorized by § 239.1(a) to issue a notice to appear may cancel such notice prior to jurisdiction vesting with the immigration judge pursuant to § 3.14 of this chapter provided the officer is satisfied that:

    (1) The respondent is a national of the United States;
    (2) The respondent is not deportable or inadmissible under immigration laws;
    (3) The respondent is deceased;
    (4) The respondent is not in the United States;
    (5) The notice was issued for the respondent's failure to file a timely petition as required by section 216(c) of the Act, but his or her failure to file a timely petition was excused in accordance with section 216(d)(2)(B) of the Act;
    (6) The notice to appear was improvidently issued; or
    (7) Circumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government."

- Termination:
  - 8 C.F.R. § 1239.2(f): "*Termination of removal proceedings by immigration judge.* An immigration judge may terminate removal proceedings to permit the [non-citizen] to proceed to a final hearing on a pending application or

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[70] In *S-O-G- & F-D-B-*, Attorney General Sessions noted that the concepts of 'dismissal' and 'termination' are 'similar,' but explained that the labeling distinction can be relevant when a movant seeks to invoke a specific regulatory provision that authorizes 'dismissal' as opposed to 'termination.' 27 I&N Dec. at 467. This labeling distinction is not material when a movant asks an immigration judge or the Board to end a case pursuant to a provision that does not use one of those labels. Except where a distinction between the two terms exists in regulations, this opinion refers to 'termination' and 'dismissal' interchangeably.
28 I&N at 648 n.1.

[71] *See also* 8 C.F.R. § 1238.1(e).

petition for naturalization when the [non-citizen] has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors; in every other case, the removal hearing shall be completed as promptly as possible notwithstanding the pendency of an application for naturalization during any state of the proceedings."

- 8 C.F.R. § 214.14(c)(1)(i): "U.S. Immigration and Customs Enforcement (ICE) counsel may agree, as a matter of discretion, to file, at the request of the [non-citizen] petitioner, a joint motion to terminate proceedings without prejudice with the immigration judge or Board of Immigration Appeals, whichever is appropriate, while a petition for U nonimmigrant status is being adjudicated by USCIS."
- 8 C.F.R. § 214.11(d)(1)(i): "In its discretion, DHS may agree to the [non-citizen's] request to file with the immigration judge or the Board a joint motion to administratively close or terminate proceedings without prejudice, whichever is appropriate, while an application for T nonimmigrant status is adjudicated by USCIS."
- 8 C.F.R. § 1216.4(a)(6): "If the joint petition is not filed until after jurisdiction vests with the immigration judge, the immigration judge may terminate the matter upon joint motion by the [non-citizen] and the Service" when Form I-751, *Petition to Remove the Conditions on Residence* is not properly filed.
- 8 C.F.R. § 1245.13(l): "If the [non-citizen] had been in exclusion, deportation, or removal proceedings that were administratively closed, such proceedings shall be deemed terminated as of the date of approval of the application for adjustment of status by the director" for certain Nicaraguan and Cuban nationals.

Also, note that termination and dismissal may be granted with or without prejudice, and DHS may file the same charges at a later time if the grant is without prejudice.

Matter of Coronado Acevedo referenced forthcoming rulemaking, and in September 2023, the DOJ and the EOIR issued a proposed rule on "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure" that covers many issues including dismissals and termination before EOIR. The purpose of this rule is "to restore longstanding procedures, including administrative closure, and to clarify and codify other established practices."[72] The comment period closed in November 2023.[73] The proposed rule includes amendments to make clear that immigration judges have authority to dismiss or terminate proceedings and to clarify the terminology and type of order the judge

[72] 88 FR 62242, Sept. 2023.
[73] The ABA submitted a comment on the proposed rule to provide recommendations.

should issue, whether dismissal or termination. No final rule has been issued as of the publication of this resource.

C. Considerations and Frequent Arguments for Youth's Cases

i. Dismissal

As stated above, OPLA may move to dismiss a case on their own accord. Additionally, a respondent may seek dismissal as a form of prosecutorial discretion from DHS. According to guidance from DHS, dismissal is the preferred form of prosecutorial discretion in cases where a NTA has already been filed.[74] *See* Section III. of this resource for more details on dismissal as a form of prosecutorial discretion.

In addition to the reasons stated above in Section VII.B. based on the regulations, there are a variety of reasons why an advocate may wish to ask OPLA to dismiss proceedings. The following scenarios demonstrate case examples that commonly arise in youth's cases as examples of when an advocate may wish to seek dismissal.

- SIJS:
    - A youth is seeking SIJS, and the petition is pending with USCIS. They may want to request OPLA to dismiss the case while they pursue their claim since USCIS will adjudicate the I-360 petition.[75]
    - A youth has been approved SIJS, and they are now waiting for their priority date to become current. They may decide to request OPLA to dismiss the case while they wait for a visa to become available.[76]
    - A youth has been approved SIJS, and their case was administratively closed while they waited for a priority date to become current. A visa is available, and they are now able to apply for adjustment of status. The youth wishes to seek adjustment of status before USCIS rather than in immigration court. It is necessary for the youth's removal proceedings to be recalendared and dismissed before they can seek adjustment before USCIS; otherwise, the immigration court has jurisdiction over the adjustment of status application.[77]

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[74] *See* Doyle Memorandum at 10.
[75] 8 C.F.R. § 204.11(g)(1). "Doyle Memorandum: Frequently Asked Questions and Additional Instructions," DHS ICE, https://www.ice.gov/about-ice/opla/prosecutorial-discretion (last updated Dec. 21, 2023).
[76] "Doyle Memorandum: Frequently Asked Questions and Additional Instructions," DHS ICE, https://www.ice.gov/about-ice/opla/prosecutorial-discretion (last updated Dec. 21, 2023).
[77] 8 C.F.R. § 204.11(g)(1); *Coronado Acevedo*, 28 I&N Dec. at 649. *See also* "Overcoming Analysis Paralysis: Practical Considerations for Adjusting Status Based on SIJS," CILA (Jan. 2021), https://cilacademy.org/advanced-training/overcoming-analysis-paralysis-practical-considerations-for-adjusting-status-based-on-sijs/; "Frequently Asked Questions – Overcoming Analysis Paralysis: Practical Considerations for Adjusting Status Based on Special Immigrant Juvenile Status (SIJS)," CILA (Aug. 2021), https://cilacademy.org/resource-file/faqs-overcoming-analysis-paralysis-practical-considerations-for-adjusting-status-based-on-special-immigrant-juvenile-status-sijs/.

- Asylum:
  - An unaccompanied child is seeking asylum, and their application is pending before USCIS. They may want to request OPLA to dismiss their proceedings while they pursue their claim since the Asylum Office has initial jurisdiction to adjudicate their asylum application.[78]

ii. Termination

Proceedings may be terminated by an immigration judge on their own accord or upon the motion of the respondent. Termination can be sought for many reasons. A few examples of when an advocate should consider seeking termination in a child's immigration case, in addition to the citations noted above in Section VII.B., include when DHS issues a defective NTA, fails to properly serve the NTA, does not meet its burden, or fails to properly issue Form I-770.

- Defective NTA: If a NTA does not include all of the necessary information required by law such as the time and place of a hearing, then you should consider raising arguments related to the defective NTA and potentially seek termination of proceedings.[79] CILA created a resource focused on this topic that covers defective NTAs, reviews relevant case law over time on the issue, and addresses how to challenge defective NTAs, amongst other issues. Read CILA's resource, "Challenging a Defective Notice to Appear (NTA) in Children's Removal Proceedings" for a thorough discussion of these issues including how to seek termination of proceedings when this situation arises. The CILA Symposium presentation "Putting up a Fight with NTAs" is also a helpful resource to view to learn from practitioners' experience on how to raise issues related to a defective NTA.

- Proper service of the NTA: Generally, a NTA must be served on the respondent in person or, if not practicable, served by mail to the respondent or respondent's counsel of record.[80] The charging document must be properly served prior to being filed with the court.[81] Notably, there are special notice requirements for children and youth.[82] When the respondent is a youth under the age of 14, service should be upon the person with whom the youth resides at the time of service, as well as,

[78] INA § 1158(b)(3)(C); 8 U.S.C. § 1158(b)(3)(C).
[79] INA § 239(a)(1); 8 U.S.C. § 1229(a)(1).
[80] *Id.*
[81] 8 C.F.R. § 1003.14(a).
[82] *See* EOIR, DM 24-01, *Children's Cases in Immigration Court* (Dec. 21, 2023), at 5 ("Immigration judges should also be aware that there are special notice requirements that apply to some child respondents.")

"whenever possible . . . the near relative, guardian, committee, or friend."[83] If the youth is detained by the Office of Refugee Resettlement (ORR), service on the head of the institution satisfies the regulation.[84] If DHS failed to properly serve a respondent, the immigration judge may terminate proceedings or grant a continuance to give DHS an opportunity to effectuate proper service. The issues of service and notice are addressed in CILA's resource, "Challenging a Defective Notice to Appear (NTA) in Children's Removal Proceedings" and the CILA-NILA practice advisory "In Absentia Orders" in more detail.

- DHS fails to meet their burden: The government bears the burden to establish alienage of the respondent.[85] BIA decisions support that termination of proceedings is appropriate when DHS cannot meet its burden.[86]

- DHS fails to issue I-770, Notice of Rights and Disposition: A Form I-770 must be provided to each child upon apprehension to inform the child of their rights during the initial processing interview typically conducted by U.S. Customs and Border Protection (CBP) or ICE. The regulation 8 C.F.R. § 1236.3(h) states that when a juvenile is apprehended, they must be given a Form I-770 and "[i]f the juvenile is less than 14 years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language he or she understands. . . ." Failure to comply with the regulation may be grounds for terminating proceedings.

Key Immigration Court & DHS Policy

- ICE OPLA, "Doyle Memorandum: Frequently Asked Questions and Additional Instructions," Updated December 2023
- USCIS, "USCIS Issues New Instructions for Filing Asylum Applications with USCIS After EOIR Dismissal or Termination of Removal Proceedings," October 2023
- EOIR, DM 23-04, *Department of Homeland Security Enforcement Priorities and Prosecutorial Discretion Initiatives*, September 2023
- DOJ EOIR, Proposed Rule: "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," September 2023

[83] 8 C.F.R. § 103.8(c)(2)(ii).
[84] *See Matter of Amaya*, 21 I&N Dec. 583 (BIA 1996).
[85] 8 C.F.R. § 1240.8(c).
[86] *Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 45 (BIA 2012); *see also Matter of Lopez-Barrios*, 20 I&N Dec. 203 (BIA 1990).

- ICE OPLA, "Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion ('Doyle Memorandum')," April 2022
- ICE, Directive 11005.3: "Using a Victim-Centered Approach with Noncitizen Crime Victims," August 2021

Additional Resources

- CILA, "Termination v. Dismissal in Removal Proceedings," April 2024
- CILA, "Challenging a Defective Notice to Appear (NTA) in Children's Removal Proceedings," January 2024
- Asylum Seeker Advocacy Project (ASAP), "My immigration court case was 'dismissed.' What will happen now?," Updated November 2023
- NILA, "Template Rescission Motions," August 2023
- CILA-NILA webinar, "Motions to Rescind in Absentia Removal Orders Before the Immigration Judge and Appeals of Denials to the BIA and Circuit Courts" and associated practice advisory "In Absentia Orders," July 2023
- CILA-NILA webinar, "Litigation for Unaccompanied Children: Updates and Foundational Cases" and associated handout that covers *Matter of Coronado Acevedo* on page 9, January 2023
- CLINIC, "Attorney General Decision Restores Ability of Immigration Judges to Terminate Removal," December 2022
- CLINIC, "Attorney General Decision Restores Ability of Immigration Judges to Terminate Removal," December 2022

VIII. Off Calendar

A. Overview

Off calendaring refers to a tool used by EOIR by which cases are identified for removal from the court's active docket. The cases are not terminated or administratively closed, but rather held in abeyance. According to the American Immigration Lawyers Association (AILA), in 2022 EOIR began piloting its "Off Calendar" initiative to address the backlogs, and in February 2023, the initiative was expanded to 60 immigration courts.[87]

Practitioners serving unaccompanied children have reported inclusion of some of their cases in the initiative. The child or youth's attorney has received a notice entitled "Notice of Intent to Take Case Off the Court's Calendar," and listing seven possible reasons for

[87] "AILA EOIR Liaison Committee Meeting with EOIR, February 15, 2023 Liaison Minutes," AILA Doc. No. 23030304, (Apr. 5, 2023), https://www.aila.org/legal-resources/liaison-meetings/eoir-liaison-committee-meets-with-eoir-2-15-23.

removing the case from the court's active docket. For example, some of the reasons occur frequently in unaccompanied children's cases and include: that the respondent has a pending application or petition with USCIS; that the respondent has a collateral petition with another government agency or court (*e.g.*, a court matter that would impact eligibility for SIJS); that the respondent is seeking asylum before USCIS; or that they have an approved petition and are waiting for a visa to become available.

For some clients, receipt of the notice is a welcome development in the case, and no response or filing is needed so long as the respondent wants the case to be off the active docket. If no response is received, the court will automatically remove the case from the docket as of the date indicated on the notice.

In some cases, practitioners have reported that the reasoning provided was incorrect, and the case, given the criteria listed, should not have been identified for off-calendaring. For example, one attorney received a notice in a case where the child's only relief was asylum, and the case had already been referred by USCIS to EOIR. In such situations, it may be important to consult local rules governing attorney conduct, including those that relate to the duty of candor to the court, about whether EOIR's error needs correction.

According to AILA, although the EOIR Director's Office is the entity reviewing cases and issuing the notices, the notices contain information for the local immigration court with jurisdiction to the case and any responses should thus be filed locally.

CILA is unaware of any process by which a party can request that a case be off-calendared. However, the initiative does not preclude a respondent from utilizing other options, including administrative closure, which places the case in a similar posture.

B. Key Cases and Policy

On April 26, 2022, Chief Immigration Judge Tracy Short sent an email EOIR-wide with details about the criteria used to select cases for off-calendaring. The email is available at the AILA Practice Alert linked below. The regulation referenced (8 C.F.R. § 1003.9(b)) speaks to the powers of the Chief Immigration Judge, including to direct the conduct of all employees to ensure the efficient disposition of all pending cases.

Additional Resources

- Lexis Nexis, Tracy Short Email "Taking Cases Off Calendar Pursuant to 8 C.F.R. § 1003.9(b)," August 3, 2022
- AILA, "Practice Alert: EOIR Taking Select Cases Off Docket Pursuant to Chief Immigration Judge Memo," July 2022 (AILA login required)

IX. Hypothetical Examples

The hypotheticals below offer practitioners the opportunity to think through common scenarios that arise in the representation of unaccompanied children in removal proceedings. After each hypothetical are non-exhaustive considerations to reflect on. An "answer" to each hypothetical is not offered, as choosing the best procedural option will necessarily involve further exploration of a client's circumstances, consultation with the client as to how they would like to proceed, information gathering with respect to OPLA's local practice, and an understanding of the immigration judge's preferences with respect to docket management tools.

HYPOTHETICAL #1:

Eduardo is your client, and he is in removal proceedings. His I-360 petition for SIJS was approved eight months ago, but his priority date is not current. You cannot file his adjustment of status application any time soon because of this, and Eduardo's next master calendar hearing is scheduled to take place in just four months.

You just called Eduardo to discuss his procedural options. When you did, Eduardo, who is now 19, informed you that he was recently arrested and charged with driving while intoxicated. He has no other criminal record apart from minor traffic violations. You do not believe the crime makes him inadmissible, but you know that it may factor into any exercise of discretion by OPLA, USCIS, and/or the immigration judge. What do you do?

CONSIDERATIONS:

Consider the various procedural options available one by one and discuss the pros and cons with Eduardo so that he can make an informed decision. Should you request prosecutorial discretion? Because OPLA may request fingerprinting or refresh his biometrics, the arrest will likely come up. Has your local OPLA office granted prosecutorial discretion to youth with similar circumstances? What if OPLA denies the request or simply does not respond? How long will you wait? Will you file a motion for a continuance in advance of the upcoming hearing? Are Eduardo's proceedings before a judge who is inclined to grant administrative closure or termination in such a case, or to move the case to the status docket? This information can be helpful as you determine whether to request any of the above (and possibly, request more than one in the alternative). Consider whether you will disclose Eduardo's charge in any such motion. He has no conviction (yet), and even if he pleas or is found guilty, driving while intoxicated in his case does not render him inadmissible. As you work through management of his case in immigration proceedings, you can encourage Eduardo to see his criminal case through to resolution and comply with any resulting court order including payment of fines and terms of probation.

HYPOTHETICAL #2:

Raymundo is your client, and he is in removal proceedings. His application for asylum is currently pending with USCIS. You filed his asylum application as an unaccompanied child 6 months ago, and he has yet to receive notice of an interview. Raymundo may also be eligible for SIJS. You have filed a petition in state court in which you are seeking the required determinations, but there have been issues with service that have delayed your ability to move the case forward. Raymundo's third master calendar hearing is scheduled for a month later. What do you do?

CONSIDERATIONS:

You must consider each procedural option and discuss them all with Raymundo so that he can decide how he would like to proceed. Some factors to keep in mind are the immigration judge's preferred method(s) of managing their docket for children in similar situations, and OPLA's willingness to agree to your request, whether it be for prosecutorial discretion, administrative closure, a continuance, or moving your case to the status docket. How long is OPLA taking to respond to requests for prosecutorial discretion? Does it make sense to file a request even if you are unlikely to hear back before the hearing and have an opportunity to discuss it with OPLA just before the hearing? Consider documents as well that you may need to support your request, including proof of filing for the asylum application and proof that the state court petition is pending.

HYPOTHETICAL #3:

Cristina is your client, and she is in removal proceedings. You assisted her in filing an application for asylum with USCIS as an unaccompanied child and appeared with her at the asylum interview. Several months ago, you received notice from the Asylum Office that Cristina's claim was being referred to an immigration judge. This week, OPLA filed a motion to dismiss the case with the immigration judge. You are contemplating whether to oppose the motion or not. What do you do?

CONSIDERATIONS:

Consider the pros and cons of each option—dismissal or proceeding to an individual calendar hearing before the immigration judge—and discuss them with Cristina so that she can best decide. Factors you will need to consider include: (1) the strength of Cristina's claim for asylum, including the basis for the referral by the Asylum Office; (2) the likelihood that the particular immigration judge who will hear Cristina's case will grant it, to the extent you can gather information to make that assessment, and the likely success of any appeal (by Cristina or OPLA); and (3) how dismissal will impact

Cristina's ability to study, work, and otherwise live in the United States assuming she does not qualify for any other relief at this time. Importantly, she will not be able to renew her work authorization once removal proceedings are dismissed. Therefore, how will she obtain a driver's license and/or continue or begin working? You should keep in mind that OPLA is not required to seek your agreement to pursue dismissal, and the judge can dismiss the case without your response to OPLA's motion.

X. Conclusion

Zealously representing unaccompanied children in removal proceedings entails strategically weighing various procedural options. Each child's unique circumstances, local OPLA practice, and the immigration judge's preferences must all be considered alongside applicable law, regulation, and policy. The chart below offers a quick reference point for beginning your research, noting key authorities guiding EOIR and OPLA's ability to utilize these tools in managing the daunting backlog of cases in immigration court.

Quick Reference Chart

Current Authority	Prosecutorial Discretion	Continuance	Status Docket	Administrative Closure	Dismissal & Termination
EOIR Policy	PM 21-25	PM 21-13	DM 23-01	DM 22-03	See policy referenced for prosecutorial discretion.
Immigration Court Practice Manual	N/A	Chapter 5.10(a)	N/A	Chapter 5.7(i) Chapter 5.10(u)	N/A
DHS Policy	Doyle Memorandum Mayorkas Memorandum ICE Directive 11005.3	ICE Directive 11005.3 at 2.1	N/A	ICE Directive 11005.3 at 2.1	See policy referenced for prosecutorial discretion.
Recent Key BIA Precedent	N/A	*Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018)	N/A	*Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021)	*Matter of Coronado Acevedo*, 28 I&N Dec. 648 (A.G. 2022)
Regulation	See regulations in this row based on which form of prosecutorial discretion you are seeking.	8 C.F.R. § 1003.29 8 C.F.R. § 1240.6	N/A	8 C.F.R. § 1003.10(b)	8 C.F.R. § 1239.2(c), (f) 8 C.F.R. § 239.2(a), (c) 8 C.F.R. § 1003.10(b) 8 C.F.R. § 1240.12(c) *See* Section VII.B. above for additional regulations.

XI. Additional Resources

As you further analyze the specifics related to your client's circumstances and your jurisdiction of practice, the following resources may be helpful to you. Keep in mind that there is relevant rulemaking pending and that change is constant.

- General:
  - CILA, "EOIR Updates Guidance on Children's Cases in Immigration Court & Creates Specialized Juvenile Dockets," January 2024
  - CILA, *Pro Bono Guide: Working with Children and Youth in Immigration Cases*, October 2023
  - CILA, 101 webinar "Introduction to Removal Proceedings for Unaccompanied Children," March 2022
  - ABA COI, Mechanics of Immigration Court webinar series, 2022
    - "Part 1: The Master Calendar Hearing & Filing Applications for Relief"
    - "Part 2: Corroboration, Preparing Witnesses, and Working with Experts"
    - "Part 3: The Individual Calendar/Merits Hearing"
  - Safe Passage Project, "Representing Noncitizen Youth in Removal Proceedings," 2021
  - ABA, *Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States,* August 2018
  - U.S. DOJ, EOIR, "Fact Sheet: Executive Office for Immigration Review: An Agency Guide," December 2017
  - Appleseed Network Immigration Collaborative, *Getting Off the Assembly Line: Overcoming Immigration Court Obstacles in Individual Cases,* 2016
  - KIND, "The Immigration Court System," 2015
- Court Practice:
  - CILA, "Challenging a Defective Notice to Appear (NTA) in Children's Removal Proceedings," January 2024
  - CILA, "Trauma-Informed Representation in Asylum Cases: Asylum Interview & Asylum Merits Hearing Checklists," December 2023
  - CILA-NILA, "In Absentia Orders," July 2023
  - CILA Symposium, DMRS presentation: "Putting up a Fight with NTAs," May 2023
  - CILA, "How to Prepare for an Individual Hearing: Different Practitioners' Perspectives," December 2022
  - ABA COI, "Practice Guide Statements as Evidence: Drafting and Editing Declarations, Affidavits, and Letters," June 2022
  - ILRC, "Notice to Appear," June 2020

- National Institute for Trial Advocacy (NITA), "Do's and Don'ts for Demonstrative Evidence in Immigration Court," presented by Judge Denise Slavin, March 2020
- NITA, "Be a Better Conductor: Common Ways Immigration Individual Hearings Go Off the Rails," February 2019
- AIC, "Notices to Appear: Legal Challenges and Strategies," February 2019
- ILRC, "Practice Advisory Representing Clients at the Master Calendar Hearing," December 2018
- ABA COI, Teachable, an online platform hosting a curriculum of courses, has courses about practicing in immigration court

- Motions & Drafting:
  - NIP, "Practice Advisory: Post-Departure Motions to Reopen and Reconsider," September 2023
  - CILA-NILA webinar, "Motions to Rescind In Absentia Removal Orders Before the IJ & Appeals of Denials to BIA & Circuit Courts," July 2023
  - ILRC, "Practice Advisory: Post-Conviction Relief Motions to Reopen," June 2022
  - NILA & AIC, Practice Advisory: The Basics of Motions to Reopen EOIR-Issued Removal Orders, April 2022
  - CILA-NILA webinar, "Advanced Immigration Legal Research," March 2021
  - CILA-NILA webinar, "Legal Writing," December 2020
  - IJC, "Motions to Reopen," last visited April 1, 2024
  - CLINIC, "Resources on Motions to Reopen," last visited April 1, 2024
- Prosecutorial Discretion:
  - CILA webinar, "Children's Immigration Law: 2023 Roundup," December 2023
  - CILA-NILA webinar, "Litigation for Unaccompanied Children: Updates and Foundational Cases (7)" and associated handout that covers *United States v. Texas*, October 2023
  - NIPNLG, "Practice Advisory: Advocating for Prosecutorial Discretion Under the Biden Administration's Prosecutorial Discretion Guidance," September 2023
  - NIJC, "NIJC's Explainer: DHS OPLA Offers of Prosecutorial Discretion and Motions to Dismiss," August 2023
  - ABA COI, "Prosecutorial Discretion Quick Guide," February 2023
- Continuances:
  - ASISTA, "Practice Advisory: The Impact of *Matter of L-N-Y*, 27 I & N Dec. 755 (BIA 2020)," Updated April 2022
  - CLINIC, "Seeking U Nonimmigrant Status While in Removal Proceedings: New Challenges from the BIA," February 2020

- CLINIC, "Practice Advisory: Matter of L-A-B-R-, 27 I&N Dec. 405 (A.G. 2018)," December 2018
- AIC, "Practice Advisory: Motions for a Continuance," September 2018

- Administrative Closure:
  - AIC & ACLU, "Practice Advisory: Administrative Closure After Matter of Cruz-Valdez," January 2022
  - CILA, "Frequently Asked Questions – Overcoming Analysis Paralysis: Practical Considerations for Adjusting Status Based on Special Immigration Status," August 2021
  - CLINIC, "Attorney General Garland Vacates Matter of Castro-Tum and Matter of A-C-A-A-," August 2021
  - CILA webinar, "Overcoming Analysis Paralysis: Practical Considerations for Adjusting Status Based on Special Immigration Status," January 2021
- Dismissals & Termination:
  - CILA, "Termination v. Dismissal in Removal Proceedings," April 2024
  - CILA, "Challenging a Defective Notice to Appear (NTA) in Children's Removal Proceedings," January 2024
  - ASAP, "My immigration court case was 'dismissed.' What will happen now?," Updated November 2023
  - CILA-NILA webinar, "Litigation for Unaccompanied Children: Updates and Foundational Cases (7)" and associated handout that covers *United States v. Texas*, October 2023
  - AIC & NIPNLG, "Practice Advisory: Strategies and Considerations in the Wake of *Niz Chavez v. Garland*," Updated October 2023
  - NILA, "Template Rescission Motions," August 2023
  - CILA-NILA webinar, "Motions to Rescind in Absentia Removal Orders Before the Immigration Judge and Appeals of Denials to the BIA and Circuit Courts" and associated practice advisory "In Absentia Orders," July 2023
  - LexisNexis, "Ethical Considerations When the Removal Case is Dismissed," April 2023 (some litigation facts are outdated but consider for ethical issues)
  - CILA-NILA webinar, "Litigation for Unaccompanied Children: Updates and Foundational Cases (5)" and associated handout that covers *Matter of Coronado Acevedo*, January 2023
  - CILA-NILA webinar, "Litigation for Unaccompanied Children: Updates and Foundational Cases (4)" and associated handout that covers *Matter of Fernandes* and *Matter of Nchifor*, October 2022
  - CLINIC, "Attorney General Decision Restores Ability of Immigration Judges to Terminate Removal," December 2022

    - CILA webinar, "Niz-Chavez, Pereira, and Notices to Appear," September 2021
- Off Calendar:
    - AILA, "Practice Alert: EOIR Taking Select Cases Off Docket Pursuant to Chief Immigration Judge Memo," July 2022 (AILA login required)