No. 20-2196

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NUELSON GOMES

Petitioner,

v.

MERRICK GARLAND
Attorney General of the United States,

Respondent.

PETITIONER'S OPENING BRIEF

ON PETITION FOR REVIEW OF THE ORDER OF THE BOARD OF IMMIGRATION APPEALS

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INTRODUCTION

Petitioner Nuelson Gomes has requested to the agency to administratively close his removal proceedings until the completion of his direct appeal of his criminal conviction in Massachusetts state court. Yet, the agency elected not to entertain this request, presumably because of *Matter of Castro-Tum*, 27 I. & N. Dec. 187 (A.G. 2018).

Until recently, administrative closure was a widely-used and long-accepted docket control mechanism employed by Immigration Judges and the Board of Immigration Appeals to address the need to efficiently handle matters requiring input or decisions from actors not appearing before these bodies. *See Romero v. Barr*, 937 F.3d 282, 287 (4th Cir. 2019). Administrative closure is a tool "used to temporarily remove a case from an Immigration Judge's calendar or from the [BIA's] docket" without the entry of a final order. *See Matter of Gutierrez*, 21 I. & N. Dec. 479, 480 (BIA 1996); *see also Matter of Avetisyan*, 25 I. & N. Dec. 688, 694 (BIA 2012) (same). This procedural mechanism does not afford any immigration status or relief. Instead, it merely pauses the proceedings without resolution "to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time." *Avetisyan*, 25 I. & N. Dec. at 692. As relevant to the present petition for review, the BIA previously held that

administrative closure can be used to temporarily pause removal proceedings "pending the adjudication of a direct appeal of a criminal conviction." *Matter of Montiel*, 26 I. & N. Dec. 555 (BIA 2015).

Notwithstanding this historical background, on January 4, 2018, the Attorney General issued *Matter of Castro-Tum*, 27 I. & N. Dec. 187 (A.G. 2018) to overturn *Avetisyan* and other cases permitting the use of administrative closure. Prior to 2018, the BIA and IJs were allowed to decide requests for administrative closure based on factors identified in *Avetisyan*, 25 I. & N. Dec. at 688 and *Matter of W-Y-U*, 27 I. & N. Dec. 17 (BIA 2017). However, according to the Attorney General, immigration courts in this Circuit are no longer permitted to consider these factors due to *Castro-Tum*. As the Seventh Circuit explained the change brought about by *Castro-Tum*:

> [B]efore *Castro-Tum*, the state of law and practice was that an immigration judge had the authority and discretion to grant administrative closure guided by these factors established in the Board's precedential decisions. In 2018, however, the Attorney General's *Castro-Tum* directive said that immigration judges did not have such authority, regardless of the reasons offered for administrative closure: "immigration judges and the Board do not have the general authority to suspend indefinitely immigration proceedings by administrative closure." 27 I. & N. Dec. at 272. *Castro-Tum* clearly overruled *Avetisyan* and *W-Y-U* to the extent they recognized and then guided immigration judges' discretionary power to close administratively.

Diaz v. Rosen, 986 F.3d 687, 691 (7th Cir. 2021). In 2018, the Attorney General also curtailed immigration judges' authority to grant continuances, *see Matter of L-*

A-B-R-, 27 I. & N. Dec. 405 (AG 2018) and established strict case completion metrics. *See, e.g.*, Memorandum from James R. McHenry III, Director of EOIR to The Office of the Chief Immigration Judge et al., Case Priorities and Immigration Court Performance Measures (Jan. 17, 2018).[1]

This appeal presents two questions. The first question is whether the BIA fulfilled its obligation when it declined to address Petitioner's request that his removal proceedings be administratively closed until the direct appeal of his criminal conviction was resolved in Massachusetts state court. Instead, the BIA—without addressing this administrative closure request—affirmed the IJ's decision denying his adjustment of status and voluntary departure due to Petitioner's *non-final* criminal conviction. As a result of the BIA's decision to affirm the IJ's decision—as opposed to administratively closing the case—the BIA made Petitioner vulnerable to deportation despite the lack of finality to the criminal proceeding that would ultimately dictate the agency's discretionary decision. The BIA's failure to consider Petitioner's request for administrative closure of his removal proceedings was in error because the agency must "offer more explanation where the record suggests strong arguments for the petitioner that the [agency] has not considered." *See Enwonwu v. Gonzales*, 438 F.3d 22, 35 (1st Cir. 2006).

The second question in this appeal is whether *Matter of Castro-Tum*, 27 I. &

[1] *Available at* www.justice.gov/eoir/page/file/1026721/download.

N. Dec. 187 (A.G. 2018), which stripped the agency's administrative closure authority, is inconsistent with the relevant agency regulations. This question "can have enormous practical importance for a person like [Petitioner], who is enmeshed in our complex system of immigration, simultaneously engaged in a removal proceeding and a parallel proceeding seeking lawful status." *Diaz*, 986 F.3d at 691. There is currently a circuit split on this important question of whether *Castro-Tum* is consistent with agency regulations. The Fourth and Seventh Circuit Courts of Appeals have correctly held that *Castro-Tum* is inconsistent with agency regulations. *See Morales v. Barr*, 973 F.3d 656, 664 (7th Cir. 2020) (holding, in an opinion authored by now-Justice Barrett, that the relevant regulations authorize administrative closure and declining to give deference to *Castro-Tum*'s contrary conclusion); *Romero v. Barr*, 937 F.3d 282, 287 (4th Cir. 2019) (reaching same conclusion). However, the Sixth Circuit Court of Appeals has held that *Castro-Tum* is consistent with agency regulations. *See Hernandez-Serrano v. Barr*, 981 F.3d 459, 464 (6th Cir. 2020) ("We respectfully disagree, therefore, with the Fourth Circuit's conclusion in *Romero* that these same regulations delegate broad authority to close cases administratively."). In this case, the First Circuit must resolve this important legal question, and should join the Fourth and Seventh

Circuits.[2]

STATEMENT OF JURISDICTION

This Court has jurisdiction to review all claims Petitioner is raising in this opening brief. *See* 8 U.S.C. § 1252. 8 U.S.C. § 1252(a)(2)(B) provides that this Court does not have jurisdiction to review the agency's discretionary determination. *See Jaquez v. Holder*, 758 F.3d 434, 435 (1st Cir. 2014) ("As a general matter, this court lacks jurisdiction to review the agency's discretionary denial of petitioner's application for adjustment of his immigration status."). However, there are exceptions to this rule for questions of law. *See* 8 U.S.C. § 1252(a)(2)(D); *Jaquez*, 758 F.3d at 435; *see also Thompson v. Barr*, 959 F.3d 476, 481-82 (1st Cir. 2020) (the Court can review a denial of discretionary relief when "the BIA departed from its settled course of adjudication" under Section

[2] The current administration has not issued guidance on *Castro-Tum*. The prior administration amended 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii) on January 15, 2021, which included language stating that no administrative closure is authorized by IJs and the BIA. *See* EOIR, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 81588, 81597-81602. (Dec. 16, 2020); 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii) (Jan. 15, 2021). None of these January 15, 2021 changes apply to Petitioner's case. *See* 85 FR 81588 at 81646 (the new rules "apply only to appeals filed, motions to reopen or reconsider filed, or cases remanded to the Board by a Federal court on or after the effective date of the final rule"); *cf.* AR 3 (November 25, 2020 – BIA decision). Further, these amended regulations were enjoined. *See Centro Legal de la Raza v. Exec. Office for Immigration Review*, No. 21-cv-463-SI, 2021 U.S. Dist. LEXIS 46050 (N.D. Cal. Mar. 10, 2021).

1252(a)(2)(D)); *Ayeni v. Holder*, 617 F.3d 67, 71 (1st Cir. 2010) ("choice and shape of an applicable legal standard is quintessentially a question of law"); *Billeke-Tolosa v. Ashcroft*, 385 F.3d 708, 711-12 (6th Cir. 2004) (finding jurisdiction over a claim that the agency failed to follow its own precedent because it is a legal question, even where the underlying relief is discretionary); *Figueroa v. Mukasey*, 543 F.3d 487, 493-98 (9th Cir. 2008) (same). As set forth below, the claims Petitioner advances before this Court are legal in nature.

STATEMENT OF THE ISSUES

1. Whether the BIA acted legally when it declined to address Petitioner's request that his removal proceedings be administratively closed until the direct appeal of his criminal conviction was resolved in Massachusetts state court.

2. Whether the Attorney General's *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018) is inconsistent with the relevant regulations and thus is unlawful.

STATEMENT OF THE CASE AND FACTS

Petitioner Nuelson Gomes is a citizen and native of Cape Verde. He was admitted to the United States on August 3, 2012 with permission to remain for a period not to exceed February 2, 2013. AR 528. In 2013, he met his spouse, Gisela Gomes, who is a U.S. citizen. They were married two years later in 2015 and remain married. AR 297. They have one U.S. citizen child together and two

stepchildren. AR 295, 367, 371.

In February 2017, Mr. Gomes was charged with assault and battery with a dangerous weapon, and with assault and battery on a child with injury, for having allegedly assaulted his stepson with a phone charging cord. AR 361. On November 6, 2018, Mr. Gomes was convicted of both offenses by a jury in Massachusetts and sentenced to two and one half years in prison to be followed by two years' probation. AR 394, 396. Mr. Gomes timely appealed his convictions on multiple grounds.[3] AR 356-357. Further, the appeal has not yet been proceeded "because the appellate record was inadequate to present a potential appellate issue" involving the portions that "occurred at the sidebars, which were unrecorded." AR 357-358. Thus, a

[3] The issues on appeal are the following: (i) whether the trial judge erred in determining that the prosecution complaining witness, a child of seven years old, whose allegations formed the sole basis for the criminal charge, was competent to testify where the judge's colloquy with the child did not establish that the child could distinguish the difference between the truth and a lie; (ii) whether the prosecutor improperly bolstered the complaining witness' credibility by arguing in his closing argument that the young child should be believed because he testified in court about an embarrassing incident; (iii) where the trial judge allowed Petitioner's motion in limine to redact inadmissible statements in medical records shown to the jury as an exhibit, whether trial counsel was deficient in failing to ensure that all such statements were redacted and also in failing to request the redaction other similarly inadmissible statements in the medical records, especially those statements which bore on the ultimate issue to be decided by the jury, thereby influencing the jury's verdict, creating a substantial risk of a miscarriage of justice and requiring a new trial; and (iv) whether the trial judge erred in denying Petitioner one of his two peremptory challenges, provided to him by rules, and consequently a juror served on the jury who was objectionable to the defense. AR 356-357.

motion to reconstruct the record is pending before the trial court. AR 358. Should his appeal be successful, he would be granted a new trial. AR 358. Because of this pending appeal, his convictions are not final.

On March 6, 2020, the Department of Homeland Security ("DHS") placed Mr. Gomes in removal proceedings with a charge under 8 U.S.C. § 1227(a)(1)(B), which addresses removal of an admitted noncitizen who remained in the United States beyond the authorized period of time. AR 528. After conceding the legal charge of deportability, Mr. Gomes asked the IJ to terminate or otherwise close his removal proceedings because the direct appeal of his criminal convictions was pending. AR 94-95, 104-105. The IJ denied Mr. Gomes' request. AR 105. As for immigration relief, Mr. Gomes pursued adjustment of status based on his marriage with his U.S. citizen spouse. AR 235-54, 352. On July 13, 2020, Mr. Gomes and his spouse testified at a hearing for the adjustment application and voluntary departure. AR 134-217. At the end of the hearing, the IJ denied his relief applications. AR 46-56.

Although the IJ found that Mr. Gomes and his spouse were credible witnesses, the IJ did not, because of Petitioner's criminal conviction, credit their claim that their children were not abused. AR 47. Instead, the IJ placed "greater weight on the police reports and the court documents and the jury findings" arising out of Petitioner's non-final convictions. AR 47. Despite positive equities weighing in Petitioner's favor, such as Mr. Gomes' lengthy residence in the country, his marriage

to a U.S. citizen, steady employment, and payment of taxes, the IJ ultimately considered his 2017 non-final conviction by a jury for assault and battery by means of a dangerous weapon as a significant negative factor to deny his adjustment of status. AR 53 ("the seriousness and nature of [the respondent's] conviction… significantly outweighs the limited positive equities that the respondent has in this case"), 54 ("the jury trial conviction and the police reports indicate a serious incident of abuse of a child").

Mr. Gomes appealed the IJ's decision to the BIA. AR 8-9, 40-42. In addition to requesting the BIA to reverse the IJ's decision denying his adjustment of status, Mr. Gomes again advanced the argument that his removal proceedings should be administratively closed until his criminal case's direct appeal is completed. AR 16-17. More specifically, Mr. Gomes argued that "[a]s this B[IA] observed in *Matter of Montiel*, 26 I & N 555, 556 (BIA 2015), '[a]dministrative closure is used to temporarily remove a case from an Immigration Judge's active calendar or from the Board's docket. . . . In *Montiel*, this Board also observed that the pendency of a direct appeal, could, in a case by case determination, warrant the temporary abeyance of pending removal proceedings." AR 16-17. Based on this reasoning and *Montiel*, Mr. Gomes requested that the BIA "award [him] an Adjustment of Status, or in the alternative, order that Removal proceedings be [closed], until such time as a definitive resolution of [Mr. Gomes'] pending

criminal appeal is definitively resolve." AR 17.

Despite this request, the BIA's decision is silent on this request and merely affirmed the IJ's decision of denying his adjustment of status and voluntary departure. AR 4. In reviewing the IJ's reasoning, the BIA also emphasized Petitioner's "conviction by jury." AR 4.

SUMMARY OF ARGUMENT

This Court should vacate the BIA's decision and Petitioner's removal order, and remand the case to the BIA to consider whether his removal proceedings should be administratively closed until the direct appeal of his criminal case is completed. This relief is warranted for two reasons.

First, the BIA committed an error of law when it ignored Petitioner's argument that his removal proceedings should be administratively closed until the direct appeal of his criminal case is completed. The BIA had an obligation to address Mr. Gomes' meritorious claim. Instead, the BIA—without addressing this administrative closure request—affirmed the IJ's decision denying his adjustment of status and voluntary departure due to his non-final criminal conviction. The BIA's failure to address the administrative closure claim advanced by Petitioner was an error of law.

Second, the Court should find that the IJs and BIA have the authority to consider administrative closure and reject *Matter of Castro-Tum*, 27 I. & N. Dec.

187 (A.G. 2018). *Castro-Tum*, which has stripped the IJs and BIA of administrative closure authority, is inconsistent with the relevant regulations. The applicable regulations broadly provide IJs and the BIA the authority to "exercise their independent judgment and discretion and may take *any action*" that is "appropriate and necessary for the disposition of . . . cases." 8 C.F.R. §§ 1003.10(b) (IJ) (emphasis added); 1003.1(d)(1)(ii) (same for the BIA); *see also Morales*, 973 F.3d at 664; *Romero*, 937 F.3d at 294 ("In sum, these regulations unambiguously confer upon IJs and the BIA the general authority to administratively close case."). This "action" that is "appropriate and necessary" includes administrative closure. Thus, this Court should overturn *Castro-Tum*.

ARGUMENT

I. STANDARD OF REVIEW

Questions of law are reviewed *de novo*, with deference to the agency's reasonable interpretation of statutes and regulation within its purview. *See Pan v. Gonzales*, 489 F.3d 80, 85 (1st Cir. 2007).

In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Supreme Court articulated the standard for when deference to an agency's interpretation is appropriate under *Auer v. Robbins*, 519 U.S. 452 (1997). The *Kisor* Court explained that this Court must first find that "the regulation [in question] is genuinely ambiguous." *See Kisor*, 139 S. Ct. at 2415. In other words, "if there is only one reasonable

construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense." *Id*. Moreover, "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id*. This tool includes careful consideration of "the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Id*. Lastly, even if the Court finds that the regulations in question are genuinely ambiguous, "the agency's reading must still be 'reasonable.'" *Id*. This reasonableness requirement is rigid, in which the agency's interpretation "must reflect fair and considered judgment" and warrants only after "an independent inquiry into . . . [its] character and context." *Id*. at 2416-18.

II. THE BIA COMMITTED AN ERROR OF LAW WHEN IT DECLINED TO ADDRESS PETITIONER'S REQUEST THAT HIS REMOVAL PROCEEDINGS BE ADMINISTRATIVELY CLOSED

The BIA committed an error of law when it failed to address Petitioner's request for administrative closure. The BIA is obligated to entertain and address noncitizens' claims. While there is no obligation for the agency to "spell out every last detail of its reasoning where the logical underpinnings are clear from the record[,]" the agency must "offer more explanation where the record suggests strong arguments for the petitioner that the [agency] has not considered." *See Enwonwu*, 438 F.3d at 35; *Sok v. Mukasey*, 526 F.3d 48, 54 (1st Cir. 2008);

Sulaiman v. Gonzales, 429 F.3d 347, 350 (1st Cir.2005); *Gailius v. INS*, 147 F.3d 34, 47 (1st Cir. 1998) (the BIA must "state [its reasons] with particularity and clarity"); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947) ("'We must know what [an agency] decision means before the duty becomes ours to say whether it is right or wrong.'"). That is because "the absence of specific findings [is] problematic in cases in which such a void hampers [the Court's] ability meaningfully to review the issues raised on judicial review." *See Renaut v. Lynch*, 791 F.3d 163, 169 (1st Cir. 2015) (quoting *Rotinsulu v. Mukasey*, 515 F.3d 68, 73 n.1 (1st Cir. 2008)). Similarly, the BIA itself requires IJs to clearly identify and sufficiently explain the reasons for its decision. *See, e.g.*, *Matter of M-P-*, 20 I&N Dec. 786, 787-88 (BIA 1994) ("When a motion is denied and the reasons for such denial are either unidentified or not fully explained, an alien is deprived of a fair opportunity to contest that determination on appeal."); *Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002).

Here, Mr. Gomes clearly advanced an argument that his removal proceedings should be administratively closed until the direct appeal of his criminal conviction is resolved in Massachusetts state court. AR 17 ("in the alternative, order that Removal proceedings be terminated, until such time as a definitive resolution of the Appellant's pending criminal appeal definitively resolve"). In support of this argument, Mr. Gomes cited *Montiel*, 26 I. & N. Dec.

at 556, in which the BIA noted that "[a]dministrative closure is used to temporarily remove a case from an Immigration Judge's active calendar or from the Board's docket." In *Montiel*, the BIA specifically found that "[r]emoval proceedings may be delayed, where warranted, pending the adjudication of a direct appeal of a criminal conviction." *Id*. at 555; *see also Matter of Avetisyan*, 25 I. & N. Dec. 688 (BIA 2012). Based on the BIA's case law, Mr. Gomes moved the BIA to administratively close his removal proceedings until his criminal appeal is completed. AR 16-17. Despite this request, the BIA ignored Petitioner's administrative closure claim. AR 3-4. The absence of any adjudication or explanation on the issue of administrative closure is an error of law given the BIA's obligation to "offer more explanation where the record suggests strong arguments for the petitioner that the [agency] has not considered." *See Enwonwu*, 438 F.3d at 35.

III. THE IJ AND BIA HAVE THE AUTHORITY TO ADMINISTRATIVELY CLOSE REMOVAL PROCEEDINGS

A. Legal Background of Administrative Closure

Administrative closure was a longstanding authority for IJs and the BIA to control their dockets when cases may require input from actors who are not part of removal proceedings. *See Romero*, 937 F.3d at 287. This procedural mechanism has been employed in removal proceedings for more than three decades, beginning in 1988 or earlier. *See Avetisyan*, 25 I. & N. Dec. at 692; *Matter of Lopez-Barrios*,

20 I. & N. Dec. 203 (BIA 1990). In considering whether administrative closure was appropriate, the BIA carefully articulated the factors that circumscribe its use. *See Avetisyan*, 25 I. & N. Dec. at 696. Indeed, the utilization of administrative closure "can have enormous practical importance for a person like [Petitioner], who is enmeshed in our complex system of immigration, simultaneously engaged in a removal proceeding and a parallel proceeding seeking lawful status [or other dispositive collateral matters]." *Diaz*, 986 F.3d at 691.

Administrative closure is an important tool that recognizes that several agencies or non-agency players may be involved in decision-making that plays a dispositive role in removal proceedings. Where IJs and the BIA do not always have the authority to tie the hands of others, administrative closure allows removal proceedings to effectively be paused—without prejudice to the noncitizen—while these other entities engage in their own decision-making that may, in effect, dictate or provide relief from removal. For instance, Congress has given the United States Citizenship and Immigration Services ("USCIS") the authority to adjudicate immigrant visa petitions, naturalization petitions, refugee applications, and other cases. *See* 6 U.S.C. § 271(b). Congress has also given USCIS exclusive authority over certain types of matters such as visas for victims of crime and human trafficking and adjustment of status for certain arriving aliens. *See* 8 C.F.R. §§ 214.14(c)(1) ("USCIS has sole jurisdiction over all petitions for U nonimmigrant

status."), 214.11(b)-(d) (noting that only USCIS may classify a noncitizen as a T-1 nonimmigrant), 245.2(a)(1) (USCIS jurisdiction over adjustment of status), 1245.2(a)(1)(ii) (no general IJ jurisdiction over arriving aliens' adjustment of status). Similarly, abused, neglected, or abandoned children who qualify for Special Immigrant Juvenile Status ("SIJS") must obtain a state court dependency order and a petition adjudicated by USCIS before IJs and the BIA can make any decision that takes their right to relief into account. *See* 8 C.F.R. § 204.11. Lastly, and relevant to this case, the BIA previously held that "[r]emoval proceedings may be delayed, where warranted, pending the adjudication of a direct appeal of a criminal conviction." *Montiel*, 26 I. & N. Dec. at 555. Indeed, the BIA noted that "[w]hether the pendency of a direct appeal warrants administrative closure will depend on the particular circumstances of each case." *Id*. at 557.

In sum, administrative closure served as an important procedural mechanism in removal proceedings because "it is a reality in any court system that fundamental fairness and due process require that legal proceedings be postponed in appropriate circumstances." *See* EOIR, Operating Policies and Procedures Memorandum 13-01: Continuances & Admin. Closure, 2013 WL 1091734 (Mar. 7, 2013).

Notwithstanding this historical context, the Attorney General disregarded decades of precedent and issued *Castro-Tum* in 2018 to abruptly foreclose the use

of administrative closure, thereby subjecting individuals to possible removal even where they may ultimately be entitled to relief from removal based on a forthcoming decision of a body or entity that falls outside the jurisdiction of the IJ or BIA. *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018). *Castro-Tum* held that IJs and the BIA "do not have the general authority to suspend indefinitely immigration proceedings by administrative closure" because 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii) do not permit IJs and the BIA to close removal proceedings administratively. *See id*. at 271. In support of this conclusion, *Castro-Tum* emphasized that such administrative closure is inconsistent with the regulations that direct IJs and the BIA to complete removal proceedings "timely" and "expeditiously." *See id*. at 284-85, 288-90, 293-94. As set forth below, that argument fails because the plain and ordinary meaning of the regulations permits IJs and the BIA to consider administrative closure.

B. *Matter of Castro-Tum* is Inconsistent with the Relevant Regulations and thus Must be Rejected

This Court can and should find that *Castro-Tum* is inconsistent with the relevant regulations. Here, the relevant regulations are 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii). Section 1003.10(b) provides that IJs "may take *any* action," which is "appropriate and necessary for the disposition of such cases." *Id*. (emphasis added). Similarly, Section 1003.1(d)(1)(ii) permits that the BIA "may take *any* action" when such action "is appropriate and necessary for the disposition

of the case." *Id*. (emphasis added). These regulations support the use of administrative closure.

First, the plain and ordinary meaning of "any action" provides IJs and the BIA "broad authority" to take actions to control their dockets. *See Morales*, 973 F.3d at 665; *Romero*, 937 F.3d at 292. In *Kisor*, the Supreme Court emphasized that this Court must "exhaust all the 'traditional tools' of construction" including "the test, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on" before it reaches a conclusion that the regulation in question is "genuinely ambiguous." 139 S. Ct. at 2415. In applying these traditional tools, canons of statutory construction are "fully transferable to the construction of regulations." *See Morales v. Sociedad Espanola de Auxilio Mutuo y Beneficiencia*, 524 F.3d 54, 59 (1st Cir. 2008); *United States v. Lachman*, 387 F.3d 42, 50-52 (1st Cir. 2004) (same). As part of this analysis, this Court first considers "a plain and ordinary meaning" of a regulation. *See Lachman*, 387 F.3d at 50. Under this canon, this Court should "interpret a regulation so that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *See Sociedad Espanola*, 524 F.3d at 59 (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)) (internal quotation marks omitted). In other words, "[a] well-established canon of construction requires that courts give all language in a [regulation] operative effect." *See id*.; *see also Narragansett Indian*

Tribe v. Rhode Island, 449 F.3d 16, 26 (1st Cir. 2006) (en banc) (the Court "must read [regulations], whenever possible, to give effect to every word and phrase."); *City of Providence v. Barr*, 954 F.3d 23, 37 (1st Cir. 2020) ("Courts generally ought not to interpret [regulations] in a way that renders words or phrases either meaningless or superfluous.").

Reading naturally, "the word 'any' has an expansive meaning, that is, 'one of some indiscriminately of whatever kind.'" *Romero*, 937 F.3d at 292 (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). Because the plain and ordinary meaning of "any" is expansive, "this would plainly include docket management actions such as administrative closure, which often facilitate . . . case resolution." *See id*. This conclusion is consistent with the Supreme Court's approach and this Court's interpretation of "any" in other contexts. *See, e.g., id*. at 292-93 (collecting cases from the Supreme Court); *Utica Mut. Ins. Co. v. Herbert H. Landy Ins. Agency, Inc.*, 820 F.3d 36, 45 (1st Cir. 2016) ("Read naturally, the phrase 'any type' refers to every kind of the noun that it modifies"; unfair competition civil lawsuit); *Mass. Dep't of Telecomms. & Cable v. FCC*, 983 F.3d 28, 33 (1st Cir. 2020) ("by any means" carries an expansive meaning; APA claim). In fact, *Castro-Tum* confirms that administrative closure is a type of "action" under Sections 1003.10(b) and 1003.1(d)(1)(ii). *See Romero*, 937 F.3d at 293 ("*Castro-Tum* itself acknowledged as much by describing administrative closure as an

'action.'"); *Castro-Tum*, 27 I. & N. Dec. at 271 ("immigration judges and the Board may only *administratively close* a case where a previous regulation or a previous judicially approved settlement expressly authorizes *such an action*") (emphasis added).

Second, the historical context and actual practice support the conclusion that administrative closure is an "action" that is "appropriate and necessary." This Court may review "regulatory history or exogenous agency statements" to find the correct interpretation of a regulation. *Sociedad Espanola*, 524 F.3d at 60. Relatedly, this Court may also consider "actual practice under a regulation" as an important aspect "to determin[e] its meaning." *See Wojciechowicz v. United States*, 582 F.3d 57, 68-69 (1st Cir. 2009).

For decades, administrative closure was encouraged and continuously used by the agency. *See Castro-Tum*, 27 I. & N. Dec. at 273 (Administrative closure in removal proceedings has been employed "since at least the early 1980s."). In fact, administrative closure predates the inclusion of "any action" in these regulations. *See* 8 C.F.R. § 1003.10(b) (IJ) (2008); EOIR, Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge 72 FR 53673, 53678 (Sept. 20, 2007); 8 C.F.R. § 3.1(d)(1)(ii) (predecessor of 8 C.F.R. § 1003.1(d)(1)(ii)) (BIA) (2003); EOIR, Board of Immigration Appeals: Procedural Reforms To Improve Case Management 67 FR 54878-01, 54902 (Aug.

26, 2002).[4] In 2013, the Chief Immigration Judge[5] issued a memorandum that encouraged IJs to employ administrative closure. *See* EOIR, *Operating Policies and Procedures Memorandum 13-01: Continuances & Admin. Closure*, 2013 WL 1091734 (Mar. 7, 2013) at 2. The memorandum described administrative closure as "a docketing tool that has existed for decades," and the Chief Immigration Judge "strongly encouraged" its use in appropriate cases to "focus resources on those matters that are ripe for resolution." *Id*. at 3-4. This guidance and its basis in case law "provide[] judges with a powerful tool to help them manage their dockets." *Id*. at 4.

Moreover, the BIA's precedents demonstrate that the BIA historically found that administrative procedure was appropriate and necessary in various circumstances. 8 C.F.R. §§ 1003.10(b), 1003.1(d)(1)(ii). The BIA first "published jurisprudence on the issue of administrative closure . . . in the context of in absentia cases." *See Avetisyan*, 25 I. & N. Dec. at 692 (citing *Matter of Amico*, 19

[4] *Cf.* 8 C.F.R. § 1003.10 (2007) ("shall exercise the powers and duties regarding the conduct of . . . proceedings which the Attorney General may assign them to conduct."); 8 C.F.R. § 3.1(d)(1) (2002) ("[T]he Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case.")

[5] The Chief Immigration Judge has the power to "direct the conduct of all employees assigned to the [Office of the Chief Immigration Judge ("OCIJ")] to ensure the efficient disposition of all pending cases," and the discretion "to set priorities or time frames for the resolution of cases, to direct that the adjudication of certain cases be deferred," and "otherwise to manage the docket of matters to be decided by the immigration judges." *See* 8 C.F.R. § 1003.9(b)(3).

I. & N. Dec. 652, 653 (BIA 1988), *Matter of Lopez-Barrios*, 20 I. & N. Dec. 203, 204 (BIA 1990), *Matter of Rosales*, 19 I. & N. Dec. 655, 656 (BIA 1988)). In 2012, the BIA "determined for the first time that [IJs] and the [BIA] have the authority to administratively close a case when appropriate, even if a party opposes it." *See W-Y-U-*, 27 I. & N. Dec. at 18. In the context of pending appeal of criminal case, the BIA also held that removal proceedings may be administratively closed during the pendency of a noncitizen's direct criminal appeal. *See Montiel*, 26 I. & N. Dec. at 557-58. Under these precedents, IJs and the BIA routinely entertained administrative closure requests. *See, e.g., Matter of Gilberto Aguilera*, A093 006 263 (BIA Aug. 13, 2013) (unpublished) (declining to consider interlocutory DHS appeal challenging administrative closure for a detained noncitizen awaiting adjudication of an immigration application based on his marriage to a U.S. citizen spouse) (attached as Add. 18); *Matter of Safraz Khan*, A043 452 893 (BIA Aug. 14, 2013) (unpublished) (same) (attached as Add. 19); *Matter of Mitchell Augustus Archer*, A037 775 438 (BIA Feb. 22, 2018) (unpublished) (reaffirming that *Montiel* "allows the [IJ] to consider whether removal proceedings may be delayed through a continuance or administrative closure pending the adjudication of a direct appeal of a criminal conviction) (attached as Add. 20-21); *Matter of Terrance Daniel Bailey*, A089 010 106 (BIA June 13, 2012) (unpublished) (administratively closing the case in light of the

noncitizen's removal from the United States) (attached as Add. 22-23). In sum, "the position that the Attorney General takes in the[se] . . . regulations[s] is inconsistent with the agency's long-standing previous practice." *See Succar v. Ashcroft*, 394 F.3d 8, 36 (1st Cir. 2005).

Third, other regulations mandating administrative closure support the conclusion that *Castro-Tum*'s interpretation on the general authority of administrative closure is incorrect. *Castro-Tum*, 27 I. & N. Dec. at 275-77 (citing 8 C.F.R. §§ 1240.62(b)(1)(i), 1240.62(b)(2)(iii) (administrative closure of certain Guatemalan and Salvadoran nationals), 1240.70(f)-(h) (same), 1245.13(d)(3)(i) (same for certain Nicaraguan and Cuban nationals), 1245.15(p)(4)(i) (same for certain Haitian nationals), 1245.21(c) (same for certain nationals of Vietnam, Cambodia, and Laos), 1214.3 (same for the spouses and children of permanent residents, who were waiting for V immigration status), 1214.2(a) (Trafficking victims who are waiting for T immigration status)). As the Seventh Circuit explained:

> These provisions mandate administrative closure in specific circumstances with "shall" language, while 8 C.F.R. § 1003.10(b) uses "may" language to grant immigration judges the general power to use administrative closure where appropriate. If anything, the directives in these other provisions that immigration judges "shall" administratively close certain cases imply a preexisting general authority to do so.

Morales, 973 F.3d at 666. The Seventh Circuit further (and correctly) explained

that other regulations such as 8 C.F.R. § 1214.2(a)—which allows administrative closure for T visa (trafficking victims)—confirm that "it makes little sense to read [8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii)] as implicitly assuming that administrative closure is disallowed in" circumstances other than T visa applications. *Morales*, 973 F.3d at 666. This is because, when Section 1214.2(a) was promulgated in 2003, the BIA had already "permitted [IJs] to administratively close case if both parties agreed to the closure." *Id*. at 666 (citing *Matter of Gutierrez*, 21 I. & N. Dec. 479, 480 (BIA 1996)). As the Seventh Circuit explained:

> Against that backdrop, it makes little sense to read the regulation as implicitly assuming that administrative closure is disallowed in other circumstances. Instead, 8 C.F.R. § 1214.2(a) appears to identify a particular class of cases—those involving T visas—in which administrative closure is especially appropriate.

Id. at 666-67. Thus, *Castro-Tum*'s assertion that "[i]nterpreting the existing regulations to provide a general authority to grant administrative closure would . . . make the specific delegations that Attorneys General have made in this area largely superfluous" is unpersuasive. 27 I. & N. Dec. at 287.

Another erroneous reasoning of *Castro-Tum* is its attempt to rely on the "timely resolution" language in 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1) to foreclose administrative closure. *Castro-Tum* explained that IJs and the BIA do not have the authority to "suspend [] cases indefinitely." 27 I. & N. Dec. at 284.

Castro-Tum further emphasized that IJs and the BIA must "resolve matters in a timely fashion." *Id*. (internal quotation marks omitted). Accordingly, *Castro-Tum* argues that the general authority of administrative closure is in conflict with the mandate that IJs and the BIA must timely resolve cases. However, the Seventh Circuit and the Fourth Circuit correctly disagreed on this "timeliness" explanation. *See Morales*, 973 F.3d at 665-66; *Romero*, 937 F.3d at 294. A "timely" fashion "does not foreclose administrative closure" because some cases "simply take longer to resolve." *Morales*, 973 F.3d at 665. In fact, administrative closure may "facilitate the timely resolution of an issue or case." *Romero*, 937 F.3d at 294. As explained above, in many cases involving administrative closure, the procedural stage in removal proceedings is premature to be completed because dispositive collateral matters are pending in another agency or court and thus renders IJs or the BIA powerless to resolve the pending relief. Moreover, contrary to *Castro-Tum*'s point on the issue of *indefinite* suspension of removal proceedings, what noncitizens (including Petitioner) seek is not *indefinite* suspension. *See Castro-Tum*, 27 I. & N. Dec. at 271, 272, 274, 284, 285, 286, 289. Rather, these noncitizens merely seek a temporary halt of the removal proceedings while another agency or adjudicating body's rules on matters that cannot be adjudicated by the IJ or the BIA.

Similarly, the Sixth Circuit's *Hernandez-Serrano v. Barr*, 981 F.3d 459 (6th

Cir. 2020) is both unpersuasive and erroneous. As the dissent in *Hernandez-Serrano* points out, the majority in that case focuses on "a purported overuse of administrative closure by the immigration courts." *Id*. at 471 (Clay, J., dissenting). However, this apparent policy question is not relevant to the legal question of whether the regulations allow administrative closure or not. Moreover, the majority erroneously emphasized that the regulations' "necessary for the disposition of … cases" language supports the conclusion that no such administrative closure is permitted. This reasoning is unpersuasive because it is contrary to the well-established consensus on the necessity and appropriateness of administrative closure to resolve removal proceedings. *Hernandez-Serrano*, 981 F.3d at 464. As mentioned above, IJs and the BIA do not have the authority to adjudicate collateral matters which are necessary to dictate the outcome of removal proceedings. *See supra* Section III.A. Thus, it cannot be said that administrative closure is not needed for the proper disposition of removal proceedings.[6]

[6] The majority also erroneously notes that continuances should be used instead of administrative closure because there is another regulation that "expressly delegated to IJs authority" for continuances. *See Hernandez-Serrano*, 981 F.3d at 464. However, the availability of continuance by another regulation is not germane to the legal question of whether the relevant regulations permit IJs and the BIA to administratively close certain cases. *See also Romero*, 937 F.3d at 294 n.12 (4th Cir. 2019) ("*Avetisyan* also illustrates why, contrary to *Castro-Tum*, a continuation is not always the appropriate mechanism to resolve a proceeding. Continuances are a far more rigid procedural tool: as *Castro-Tum* itself noted, 'continuances are for a fixed but potentially renewable period of time, and are granted upon a

For these reasons, *Castro-Tum* should be rejected.

C. The Court Should Find that the BIA Should Consider Administrative Closure for Petitioner

Against this backdrop, this Court should find that the regulations permit IJs and the BIA to consider Petitioner's request for administrative closure under *Matter of Avetisyan*, 25 I. & N. Dec. 688 (BIA 2012). Petitioner requested to the IJ and BIA that they administratively close his removal proceedings until the completion of his criminal appeal. AR 16-17. Such consideration was critical to his adjustment of status application. While the IJ recognized the positive equities of Petitioner's case—including his employment, history of paying taxes, his high school diploma, and relationship to a U.S. citizen child—the IJ denied Petitioner's adjustment of status because of his criminal conviction, despite the fact that the conviction was not final and was being appealed. AR 49-50.

Petitioner does not dispute that the IJ was permitted to consider a non-final conviction in assessing whether his application for adjustment of status should be granted. *See Matter of Thomas*, 21 I. & N. Dec. 20, 23 (BIA 1995) (It is "appropriate to consider evidence of unfavorable conduct, including criminal

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showing of good cause. 27 I. & N. Dec. at 291 (quoting 8 C.F.R. § 1003.29). Thus, expecting IJs and the BIA to employ continuances in the stead of administrative closure would further remove the discretion of these adjudicators to fashion the most flexible and appropriate resolution for a case.") (internal quotations omitted).

conduct which has not culminated in a final conviction for purposes of the Act."). Nor does Petitioner contest that "a [non-final] conviction entered following a trial by a jury is entitled to substantial weight" either. *Id*. at 25. However, because such a non-final jury conviction was critical to the IJ's discretionary analysis, administrative closure during the pendency of his criminal appeal was especially appropriate. Here, the IJ heavily relied on this non-final conviction and gave it significant weight in its decision. For example, the IJ effectively failed to give Mr. Gomes a reasonable opportunity to challenge the veracity of the allegations against him by instead making the blanket statement that "the respondent's denial that he hit his son should not be credited," solely on account of his non-final conviction. AR 50. The IJ emphasized that Petitioner "went to trial and was convicted" by a jury. AR 52; *see also* AR 54 (focusing on the jury trial conviction). The BIA likewise emphasized the "conviction by jury," and this conviction was thus "sufficiently adverse to outweigh the favorable factors in this case." AR 4. Because the IJ and BIA gave significant consideration to this non-final conviction, these bodies' failure to consider administrative closure was highly prejudicial, as it opened Petitioner up to deportation before he had exhausted all his appellate rights in his criminal case.

Petitioner's criminal appeal is meritorious. AR 356-357. The arguments in appeal include the trial judge's errors in denying Petitioner's peremptory challenge

to an objectionable juror and the competency of the complaining witness. AR 356-357. Further, Petitioner is pursuing an ineffective assistance of counsel claim. AR 356-357. Should Petitioner prevail in his criminal appeal, the jury conviction in question would be vacated and Petitioner will be afforded a new trial. Thus, the outcome of his criminal appeal would likely affect the IJ and BIA's consideration of his adjustment of status, notably because the IJ and BIA heavily relied on the conviction by a jury.

For these reasons, the agency should have considered whether administrative closure was warranted in this case.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant his petition. This Court should vacate the removal order and remand for the BIA to consider whether administrative closure is warranted during the pendency of Petitioner's direct appeal in his criminal case.

Dated: April 28, 2021

Respectfully submitted,

NUELSON GOMES

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) [no more than 13,000 words] and the typeface requirement of Fed. R. App. P. 32(a)(5)(A) [proportionally spaced face 14-point or larger]. The Brief, containing 7,737 words, exclusive of those items that, under Fed. R. App. P. 32(f), are excluded from the word count, was prepared in proportionally spaced Times New Roman 14-point type.

/s/ SangYeob Kim
SangYeob Kim (No. 1183553)

Dated: April 28, 2021

CERTIFICATE OF SERVICE

I certify that this Opening Brief and Addendum are served to all counsel of record registered in ECF on April 28, 2021.

/s/ SangYeob Kim
SangYeob Kim (No. 1183553)

Dated: April 28, 2021

ADDENDUM

Page

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A207-879-562 – Boston, MA

Date: NOV 25 2020

In re: Nuelson GOMES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Joseph F. Botelho, Esquire

APPLICATION: Adjustment of status; voluntary departure

The respondent, a native and citizen of Cape Verde, appeals from the Immigration Judge's July 13, 2020, decision. In that decision, the Immigration Judge denied as a matter of discretion the respondent's applications for adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, and voluntary departure under section 240B, 8 U.S.C. § 1229c. The respondent's appeal will be dismissed.

We review the findings of fact, including the finding of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent argues that the Immigration Judge erred in determining that he did not warrant adjustment of status or voluntary departure as a matter of discretion. Specifically, the respondent argues that the Immigration Judge erred by relying on his convictions for assault and battery on a child causing injury and assault and battery with a dangerous weapon even though he has filed a direct appeal from these convictions.

We agree with the Immigration Judge's determination that the respondent does not warrant relief as a matter of discretion. Before adjustment of status may be granted, an applicant bears the burden of demonstrating that he merits relief as a matter of discretion. *See Matter of Arai*, 13 I&N Dec. 494 (BIA 1970); *Matter of Blas*, 15 I&N Dec. 626 (BIA 1974; A.G. 1976), *aff'd*, 556 F.2d 586 (9th Cir. 1997). The "extraordinary discretionary relief" of adjustment "can only be granted in meritorious cases." *Matter of Blas*, 15 I&N Dec at 630. Generally, the existence of favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting a favorable exercise of administrative discretion. *Matter of Arai*, 13 I&N Dec. at 496. However, where adverse factors are present, it may be necessary for the alien to present evidence of unusual or even outstanding equities to outweigh the negative factors.

In balancing the adverse and positive factors in this case, we agree with the Immigration Judge's determination that sufficient negative factors exist in this case to deny the respondent's application for adjustment of status as a matter of discretion. In particular, we agree with the Immigration Judge's determination that the respondent's 2017 incident involving the abuse of his

step-child, which resulted in a conviction by jury, is sufficiently adverse to outweigh the favorable factors in this case (IJ at 3-8; Tr. at 81-86; Exhs. 5-6). As found by the Immigration Judge, the criminal record reveals that the victim went to the emergency room following the incident, and that the respondent was given the maximum sentence and prevented from seeing all of his children (IJ at 8; Tr. at 82-83; Exhs. 5-6). The respondent argues on appeal that the Immigration Judge erred by relying on his convictions because a direct criminal appeal is pending. However, even if the respondent's conviction cannot be used to render him removable because a direct appeal is pending, the Immigration Judge properly considered the convictions in the discretionary analysis. *See Matter of Thomas*, 21 I&N Dec. 20 (BIA 1995) (holding that an arrest can be considered as a negative discretionary factor).

Because we have concluded that the respondent does not warrant adjustment of status as a matter of discretion, we also conclude for the same reasons that he does not warrant voluntary departure as a matter of discretion.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $813 for each day the respondent is in violation. *See* section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BOSTON, MASSACHUSETTS

File: A207-879-562

July 13, 2020

In the Matter of

NUELSON GOMES	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES:

APPLICATIONS:

ON BEHALF OF RESPONDENT: JOSEPH BOTELHO

ON BEHALF OF DHS: YUL-MI-LI CHO

ORAL DECISION OF THE IMMIGRATION JUDGE

I have familiarized myself with the record of proceedings in this case. Removability was previously established through the filing of written pleadings at Exhibit 2. The Court will find removability has been established based on the written pleadings by evidence that is clear and convincing. Cape Verde was designated as the country of removal. The respondent sought relief in the form of two applications, voluntary departure under safeguards, post-conclusion, and adjustment of status. The evidence in this case consists of the following: There were six numbered exhibits, as well as the testimony of the respondent and the testimony of the respondent's spouse. The Court

considered the exhibits, the testimony of both witnesses, and all the other evidence in the record, whether mentioned in this decision or not. An addendum of law is being entered into the record of proceeding. The addendum of law will be provided with the Court's order to each of the parties. The addendum of law will be incorporated into this decision by reference.

STATUTORY BARS

The Court finds that there are no statutory bars to the respondent's application. Indeed, the parties agreed at the outset of the hearing that, with respect to the adjustment of status application, there were two issues in dispute for the Court to decide; one was the sufficiency of the medical examination, and the second was discretion. The Court held the issue of the medical examination in abeyance, as the respondent had not conducted his medical examination. However, the Court held a hearing with respect to the sole remaining issue, which is discretion. With respect to voluntary departure, the sole issue in dispute was whether respondent was entitled to voluntary departure as a matter of discretion.

With respect to credibility, the Court will find that respondent and his wife testified credibly about their background information concerning their life in the United States, their finances, their education, their marriage, and other biographical information. With respect to the respondent's testimony and the wife's testimony regarding the abuse of their two children, Josiela and OJ, the Court will not credit their testimony with respect to the abuse of their children, to include their criminal charges and convictions. Rather, the Court places greater weight on the police reports and the court documents and the jury trial findings, and places greater weight on those documents rather than the testimony provided by the respondent and his wife.

LEGAL ANALYSIS AND BURDEN OF PROOF

On this case, the respondent bears the burden to show that he is entitled to relief, in this case, a favorable exercise of discretion. With respect to discretion, the Court will address both the discretionary positive and negative factors for both adjustment of status and voluntary departure concurrently. Thus, the below analysis will pertain to the discretionary analysis for both adjustment of status and voluntary departure.

With respect to the positive equities in the respondent's life, the respondent is married to a United States citizen. Her name is Gisela Gomes, and she testified today on the respondent's behalf. They met in 2013, about seven years ago, and were married in 2015. They have been married for about five years. The respondent has been in the United States for eight years. He entered as a non-immigrant visa holder, and he overstayed his visa. He has a high school diploma. He was employed with work authorization while he had a pending 485. He has paid taxes while he was working. He does have a United States citizen child. However, this child is currently in the custody of the Department of Children, Youth, and Families, so that is DCYF, here in the Commonwealth of Massachusetts. As a result of the respondent's conviction for assault and battery on a child with injury, he was placed on probation, so he can have no contact with his United States citizen child until his probation has been completed. He also has two stepchildren, who are the children of his United States citizen spouse. The respondent also cannot have any contact with his two stepchildren. As mentioned before, the respondent's United States citizen spouse works, and she makes about $70,000 as a supervisor at a fisheries company.

On the negative side, the respondent has a serious, recent criminal conviction that was a result of a jury trial. These charges arise from an incident which occurred in February of 2017, so very recent, within three years. The respondent was

arrested after the reports were made to the police. The respondent went to jury trial. He was convicted by a jury. He has filed a direct appeal of that jury verdict. The respondent was convicted of assault and battery by means of a dangerous weapon and sentenced to two-and-a-half years committed in the house of corrections. He was also convicted of assault and battery on a child with injury and was sentenced to two years' probation, to be served from and after the completion of his criminal sentence. At the completion of the respondent's criminal sentence, he was transferred directly into ICE custody. In other words, he has been incarcerated since approximately 2017 based on either the state criminal charges or his ICE detention. The respondent does have a criminal history, but most of the charges on his criminal record are minor charges which have been dismissed. Respondent's first 485 was denied due to an open criminal case in which he failed to respond to an RFE with the court documents.

I'M INC. 2017 2018 WAS OUT IN FULL AND LIVE WITH MY WIFE AND MY KIDS

In essence, the Court finds that the respondent's most severe and most extreme negative equity is the fact that he was convicted of assault and battery by means of a dangerous weapon and assault and battery on a child with injury out of an incident in which he used a phone charger cord to beat his son OJ. The respondent testified that his son goes by the name of OJ. His actual name is Jose Olivio Rodriguez. He was convicted of injuring OJ, is who the respondent testified that he goes by the name of. At the respondent's trial, there were four witnesses who testified. The victim testified at the trial, and testified that the respondent hit him with the phone cord. The respondent's wife testified at the trial that it was indeed she who hit OJ with the phone cord. The Court will note that the two days after the respondent was convicted at trial, the wife pled guilty to assaulting her daughter Josiela. She had previously been charged with assaulting OJ. However, that charge was dismissed. The respondent's wife's court documents can be found at Exhibit 6, tab 20. Essentially, she

was charged with ABDW on Jose Rodriguez, that is, OJ. That charge was dismissed after the respondent's trial. However, she pleaded guilty of assault and battery, dangerous weapon, on her daughter Josiela. Returning back to the respondent, the respondent's wife testified at the respondent's trial that she hit the kids. As noted before, she pled guilty two days later to just battering her daughter. The respondent's wife was sentenced to six months committed in the house of corrections based on her pleading guilty to assault and battery by means of a dangerous weapon on her daughter.

The Court finds that the respondent's denial that he hit his son should not be credited. Respondent's son, the victim OJ, testified at the respondent's trial that the respondent hit him with a phone charger cord. As a result of that testimony and the testimony of other witnesses, the jury convicted the respondent beyond a reasonable doubt. Additionally, the victim OJ told police officers that the respondent had hit him with a phone charger cord. Finally, the victim OJ had told his aunt that the respondent hit him with a phone charger cord. In essence, the victim in this case testified or gave statements on three different occasions that it was the respondent who hit him with the phone cord. Those three occasions are as follows. First, the respondent has acknowledged that the victim OJ testified at his trial that his father hit him with a phone cord. Additionally, at Exhibit 6, tab 20, there is a Taunton police department report. Specifically, that police report says that sometime after 6:30 p.m., the aunt got the child ready to take a shower. The child in this case is OJ, the victim. Returning to the police report, when the aunt took the clothing off the child, she noticed numerous injuries on the child's body. The aunt asked the child how he got the injuries, to which the child stated that he was beaten with a cell phone charging cord. The child identified his mother's boyfriend/husband as the person who hit him with the cord. That person is, of

course, the respondent. After seeing the injuries, the police were contacted. It should be noted that the police reports indicate that the respondent's son OJ had to be taken to the emergency room due to his injuries. For clarification, OJ is the respondent's stepson, and his biological father is the respondent's wife's former partner.

Returning back to the police report found at Exhibit 20, this report is the report that the Court credits over the testimony of the respondent and his spouse. Essentially, this incident started on February 18, 2017, when a detective had to respond to the Morton Hospital to investigate possible child abuse. This is again found at Exhibit 6, tab 20. The detective went into an examination room where he met with Officer Joiner. While he was in the examination room, the detective was introduced to Jose Rodriguez. That is OJ. That is the victim. In addition, the victim OJ's biological father, Ileon Rodriguez, and his aunt were there. While the officer was speaking with the aunt and the biological father of the victim, he learned that the aunt had picked up the child from Taunton at about 4:00 p.m. That is when the aunt disclosed to the officer about the injuries she witnessed on the victim's body. That is also when the aunt told the respondingent detective that she asked the child how he got his injuries, and that the child told her, that is, the aunt, that he received them by being beaten from a cell phone charging cord from the respondent.

There is a follow-on police report contained at Exhibit 5, page 14. This is on the following day, February 19, 2017. At that point, an officer was dispatched to the police station. He went to speak with two DCF case workers. The case workers had said they conducted interviews at the emergency room, and the case workers told the officer that the victim had said that without a doubt that the stepfather, that is, the respondent, had struck him with a phone charging cord. This is Exhibit 20, page 15. Finally, returning back to Exhibit 6, tab 20, a follow-up police report was conducted on

February 21, 2017. At this point, the detective received a phone call from a case worker, DCF, saying that the 10-year-old female, that is, the respondent's stepdaughter Josiela, had also reported being abused. The case worker interviewed Josiela. This is the respondent's stepdaughter. She had injuries on her body. The injuries looked similar to the injuries that were found on the body of the victim, OJ. The case worker asked Josiela, the respondent's stepdaughter, how she got the injuries. She responded that her mother caused the injuries. She stated that her mother hits her with a leather belt with no buckle on it. She stated that her mother hits her and OJ with the belt. She stated that her mother refers to these beatings as powwows. She also told the case worker that her boyfriend/husband Nuelson Gomes, that is, the respondent, knows about the beatings and tells the mother to stop. However, she does not listen to her husband/boyfriend, and beatings continued.

In essence, the police reports indicate that the victim OJ told the DCF caseworker and told his aunt that the respondent hit him with a phone charger cord. This beating was severe enough to cause visible injuries that were noticed by the aunt when she took OJ's clothes off to bathe him, and required actual transportation of the victim, the minor child, to the emergency room for treatment of the injuries. This incident occurred just three years ago, and the Court finds that the act of beating a child with a phone charger cord to the extent that the child has to be treated in an emergency room is of such a severe nature that it must be given significant weight by this Court, and the Court will indeed give it significant negative weight. The respondent denied the charges, and has never admitted the charges. He went to trial and was convicted after the victim testified at trial that it was indeed his stepfather who beat him with the white phone charger cord. The respondent's wife attempted to take the blame or deflect the blame from her husband at the trial by saying that it was indeed she who hit the kids.

However, shortly after the respondent's conviction after a jury trial, she pleaded guilty only to hitting her daughter, as the prosecuting authority had dismissed the charge against her for beating her son. In essence, these are very serious charges which resulted in a jury trial conviction against the respondent and ultimately a plea of guilty by his wife. As a result of these convictions, all of the children were removed from the house. The respondent's biological child and one of the stepchildren were taken out of the house and put in foster care. The other stepchild, that is OJ, the victim, was placed in the custody of his father, Ileon Rodriguez. In essence, these convictions were so serious that the respondent's children were taken away from him, and furthermore, he is on probation until 2023, in which he cannot have any contact with any children under the ages of 16. It should be noted that the respondent received a sentence of two-and-a-half years on the assault and battery dangerous weapon, which is the maximum sentence allowable for a district court conviction in Massachusetts, and then he received two years' probation from and after the serving of his sentence.

The Court has considered all of the facts and circumstances surrounding the respondent's jury trial convictions for assault and battery dangerous weapon and assault and battery on a child with injury, and finds that the recency, the seriousness, and the nature of this conviction, notwithstanding the respondent and his wife's denials, significantly outweighs the limited positive equities that the respondent has in this case, and for those reasons, the Court will find the respondent has failed to meet his burden to show that he is entitled to a favorable exercise of discretion for either adjustment of status or voluntary departure under safeguards. In essence, the respondent and his wife were cohabitating with their biological child they shared in common and two children from the respondent's wife's previous partners. During the period of this cohabitation, there was abuse reported by both of the stepchildren. OJ's abuse was

reported to his aunt, and the daughter Josiela's abuse was reported to a DCF case worker. For those reasons, the Court will find that the jury trial conviction and the police reports indicate a serious incident of abuse of a child, to the extent of sending that child to the emergency room, and the use of a dangerous weapon to abuse the child, and thus the Court will find that the negative equities in this case outweigh the positive equities.

With respect to the respondent's future, it appears even if the Court were to grant relief, he would be unable to live with any of his children. Furthermore, the respondent's wife is now working and making $70,000 a year. Therefore, she is not reliant on the respondent. And the Court just notes that to the extent that the respondent would start another life with his family, he is unable to currently be around any of his children, and his wife is not relying on him financially for her survival. Based on the foregoing, the Court will find the respondent has failed to meet his burden of proof to show that he is entitled to a favorable exercise of discretion for adjustment of status or voluntary departure, and for that reason the following orders will issue.

ORDERS

IT IS HEREBY ORDERED the respondent's application for adjustment of status is hereby denied.

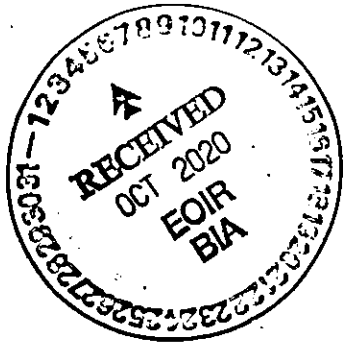
IT IS FURTHER ORDERED the respondent's application for voluntary departure at the conclusion of proceedings is hereby denied, and the respondent is ordered removed to the country of Cape Verde.

Please see the next page for electronic signature

//s//

Immigration Judge MASTERS, TODD A.

i:0e.t|eoir federation services|todd.a.masters@usdoj.gov on September 3, 2020 at 10:30 AM GMT



2020 8 CFR 1003.10

2020 Code of Federal Regulations Archive

LEXISNEXIS' CODE OF FEDERAL REGULATIONS > Title 8 Aliens and Nationality > Chapter V — Executive Office for Immigration Review, Department of Justice > Subchapter A — General Provisions > Part 1003 — Executive Office for Immigration Review > Subpart B — Office of the Chief Immigration Judge > § 1003.10 Immigration judges. [Effective until January 15, 2021]

§ 1003.10 Immigration judges. [Effective until January 15, 2021]

(a) Appointment. The immigration judges are attorneys whom the Attorney General appoints as administrative judges within the Office of the Chief Immigration Judge to conduct specified classes of proceedings, including hearings under section 240 of the Act. Immigration judges shall act as the Attorney General's delegates in the cases that come before them.

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

(c) Review. Decisions of immigration judges are subject to review by the Board of Immigration Appeals in any case in which the Board has jurisdiction as provided in *8 CFR 1003.1*.

(d) Governing standards. Immigration judges shall be governed by the provisions and limitations prescribed by the Act and this chapter, by the decisions of the Board, and by the Attorney General (through review of a decision of the Board, by written order, or by determination and ruling pursuant to section 103 of the Act).

(e) Temporary immigration judges. (1) Designation. The Director is authorized to designate or select temporary immigration judges as provided in this paragraph (e).

> **(i)** The Director may designate or select, with the approval of the Attorney General, former Board members, former immigration judges, administrative law judges employed within or retired from EOIR, and administrative law judges from other Executive Branch agencies to serve as temporary immigration judges for renewable terms not to exceed six months. Administrative law judges from other Executive Branch agencies must have the consent of their agencies to be designated as temporary immigration judges.
>
> **(ii)** In addition, the Director may designate, with the approval of the Attorney General, Department of Justice attorneys with at least 10 years of legal experience in the field of immigration law to serve as temporary immigration judges for renewable terms not to exceed six months.
>
> **(2)** Authority. A temporary immigration judge shall have the authority of an immigration judge to adjudicate assigned cases and administer immigration court matters, as provided in the immigration laws and regulations, subject to paragraph (e)(3) of this section.

2020 8 CFR 1003.10

(3) Assignment of temporary immigration judges. The Chief Immigration Judge is responsible for the overall oversight and management of the utilization of temporary immigration judges and for evaluating the results of the process. The Chief Immigration Judge shall ensure that each temporary immigration judge has received a suitable level of training to enable the temporary immigration judge to carry out the duties assigned.

Statutory Authority

Authority Note Applicable to Title 8, Ch. V, Subch. A, Pt. 1003

History

[*48 FR 8040*, Feb. 25, 1983; *62 FR 10312*, 10331, Mar. 6, 1997; redesignated at *68 FR 9824*, 9830, Feb. 28, 2003; *72 FR 53673*, 53677, Sept. 20, 2007; *79 FR 39953*, 39956, July 11, 2014; *85 FR 81588*, 81655, Dec. 16, 2020; *85 FR 81698*, 81750, Dec. 16, 2020]

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2020 8 CFR 1003.1

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LEXISNEXIS' CODE OF FEDERAL REGULATIONS > Title 8 Aliens and Nationality > Chapter V — Executive Office for Immigration Review, Department of Justice > Subchapter A — General Provisions > Part 1003 — Executive Office for Immigration Review > Subpart A — Board of Immigration Appeals > § 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals. [Effective January 11, 2021; Effective until January 15, 2021]

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals. [Effective January 11, 2021; Effective until January 15, 2021]

(a)

(1) Organization. There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review (EOIR). The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them. The Board shall consist of 23 members. A vacancy, or the absence or unavailability of a Board member, shall not impair the right of the remaining members to exercise all the powers of the Board. The Board members shall also be known as Appellate Immigration Judges.

(2) Chairman. The Attorney General shall designate one of the Board members to serve as Chairman. The Attorney General may designate one or two Vice Chairmen to assist the Chairman in the performance of his duties and to exercise all of the powers and duties of the Chairman in the absence or unavailability of the Chairman. The Chairman of the Board of Immigration Appeals shall also be known as the Chief Appellate Immigration Judge, and a Vice Chairman of the Board of Immigration Appeals shall also be known as a Deputy Chief Appellate Immigration Judge.

(i) The Chairman, subject to the supervision of the Director, shall direct, supervise, and establish internal operating procedures and policies of the Board. The Chairman shall have authority to:

(A) Issue operational instructions and policy, including procedural instructions regarding the implementation of new statutory or regulatory authorities;

(B) Provide for appropriate training of Board members and staff on the conduct of their powers and duties;

(C) Direct the conduct of all employees assigned to the Board to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases; to direct that the adjudication of certain cases be deferred, to regulate the assignment of Board members to cases, and otherwise to manage the docket of matters to be decided by the Board;

(D) Evaluate the performance of the Board by making appropriate reports and inspections, and take corrective action where needed;

(E) Adjudicate cases as a Board member; and

(F) Exercise such other authorities as the Director may provide.

(ii) The Chairman shall have no authority to direct the result of an adjudication assigned to another Board member or to a panel; provided, however, that nothing in this section shall be construed to limit the management authority of the Chairman under paragraph (a)(2)(i) of this section.

(3) Panels. The Chairman shall divide the Board into three-member panels and designate a presiding member of each panel if the Chairman or Vice Chairman is not assigned to the panel. The Chairman may from time to time make changes in the composition of such panels and of presiding members. Each three-member panel shall be empowered to decide cases by majority vote, and a majority of the Board members assigned to the panel shall constitute a quorum for such panel. In addition, the Chairman shall assign any number of Board members, as needed, to serve on the screening panel to implement the case management process as provided in paragraph (e) of this section.

(4) Temporary Board members. The Director may in his discretion designate immigration judges, retired Board members, retired immigration judges, and administrative law judges employed within, or retired from, EOIR to act as temporary Board members for terms not to exceed six months. In addition, with the approval of the Deputy Attorney General, the Director may designate one or more senior EOIR attorneys with at least ten years of experience in the field of immigration law to act as temporary Board members for terms not to exceed six months. A temporary Board member shall have the authority of a Board member to adjudicate assigned cases, except that temporary Board members shall not have the authority to vote on any matter decided by the Board en banc. Temporary Board members shall also be known as temporary Appellate Immigration Judges.

(5) En banc process. A majority of the permanent Board members shall constitute a quorum for purposes of convening the Board en banc. The Board may on its own motion by a majority vote of the permanent Board members, or by direction of the Chairman, consider any case en banc, or reconsider as the Board en banc any case that has been considered or decided by a three-member panel. En banc proceedings are not favored, and shall ordinarily be ordered only where necessary to address an issue of particular importance or to secure or maintain consistency of the Board's decisions.

(6) Board staff. There shall also be attached to the Board such number of attorneys and other employees as the Deputy Attorney General, upon recommendation of the Director, shall from time to time direct.

(7) [Reserved]

(b) Appellate jurisdiction. Appeals may be filed with the Board of Immigration Appeals from the following:

(1) Decisions of Immigration Judges in exclusion cases, as provided in 8 CFR part 240, subpart D.

(2) Decisions of Immigration Judges in deportation cases, as provided in 8 CFR part 1240, Subpart E, except that no appeal shall lie seeking review of a length of a period of voluntary departure granted by an Immigration Judge under section 244E of the Act as it existed prior to April 1, 1997.

(3) Decisions of Immigration Judges in removal proceedings, as provided in 8 CFR part 1240, except that no appeal shall lie seeking review of the length of a period of voluntary departure granted by an immigration judge under section 240B of the Act or part 1240 of this chapter.

(4) Decisions involving administrative fines and penalties, including mitigation thereof, as provided in part 280 of this chapter.

(5) Decisions on petitions filed in accordance with section 204 of the act (except petitions to accord preference classifications under section 203(a)(3) or section 203(a)(6) of the act, or a petition on behalf of a child described in section 101(b)(1)(F) of the act), and decisions on requests for revalidation and decisions revoking the approval of such petitions, in accordance with section 205 of the act, as provided in parts 204 and 205, respectively, of 8 CFR chapter I or parts 1204 and 1205, respectively, of this chapter.

(6) Decisions on applications for the exercise of the discretionary authority contained in section 212(d)(3) of the act as provided in part 1212 of this chapter.

(7) Determinations relating to bond, parole, or detention of an alien as provided in 8 CFR part 1236, subpart A.

(8) Decisions of Immigration Judges in rescission of adjustment of status cases, as provided in part 1246 of this chapter.

(9) Decisions of Immigration Judges in asylum proceedings pursuant to §1208.2(b) and (c) of this chapter.

(10) Decisions of Immigration Judges relating to Temporary Protected Status as provided in 8 CFR part 1244.

(11) [Reserved]

(12) Decisions of Immigration Judges on applications for adjustment of status referred on a Notice of Certification (Form I-290C) to the Immigration Court in accordance with §§ 1245.13(n)(2) and 1245.15(n)(3) of this chapter or remanded to the Immigration Court in accordance with §§ 1245.13(d)(2) and 1245.15(e)(2) of this chapter.

(13) Decisions of adjudicating officials in disciplinary proceedings involving practitioners or recognized organizations as provided in subpart G of this part.

(14) Decisions of immigration judges regarding custody of aliens subject to a final order of removal made pursuant to § 1241.14 of this chapter.

(c) Jurisdiction by certification. The Commissioner, or any other duly authorized officer of the Service, any Immigration Judge, or the Board may in any case arising under paragraph (b) of this section certify such case to the Board. The Board in its discretion may review any such case by certification without regard to the provisions of § 1003.7 if it determines that the parties have already been given a fair opportunity to make representations before the Board regarding the case, including the opportunity request oral argument and to submit a brief.

(d) Powers of the Board —

(1) Generally. The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.

(i) The Board shall be governed by the provisions and limitations prescribed by applicable law, regulations, and procedures, and by decisions of the Attorney General (through review of a decision of the Board, by written order, or by determination and ruling pursuant to section 103 of the Act).

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

(2) Summary dismissal of appeals —

(i) Standards. A single Board member or panel may summarily dismiss any appeal or portion of any appeal in any case in which:

(A) The party concerned fails to specify the reasons for the appeal on Form EOIR-26 or Form EOIR-29 (Notices of Appeal) or other document filed therewith;

(B) The only reason for the appeal specified by the party concerned involves a finding of fact or a conclusion of law that was conceded by that party at a prior proceeding;

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A093 006 263 – York, PA

Date: AUG 14 2013

In re: GILBERTO AGUILERA

IN REMOVAL PROCEEDINGS

INTERLOCUTORY APPEAL

ON BEHALF OF RESPONDENT: Kimberly A. Tomczak, Esquire

ON BEHALF OF DHS: Richard S. O'Brien
Assistant Chief Counsel

The Department of Homeland Security (DHS) has filed an interlocutory appeal from the Immigration Judge's March 7, 2013, decision administratively closing the case awaiting adjudication of an I-130 application filed on behalf of the respondent. The DHS argues that administrative closure in this case was inappropriate because the respondent is detained at government expense, he has already been responsible for significant delays in his removal proceedings and the likelihood that he will succeed on his petition is highly speculative. The respondent has filed a brief in support of the Immigration Judge's decision.

To avoid piecemeal review of the multiple queries that may arise during the course of removal proceedings, ordinarily the Board does not entertain interlocutory appeals. *See Matter of M-D-*, 24 I&N Dec. 138, 139 (BIA 2007), and cases cited therein. We have on occasion accepted interlocutory appeals to address significant jurisdictional questions about the administration of the immigration laws, or to correct recurring problems in the handling of cases by Immigration Judges. *See, e.g., Matter of Guevara*, 20 I&N Dec. 238 (BIA 1990, 1991); *Matter of Dobere*, 20 I&N Dec. 188 (BIA 1990). The issue of whether the Immigration Judge properly administratively closed this case does not present a significant jurisdictional question about the administration of the immigration laws. Nor does it involve a recurring problem in Immigration Judges' handling of cases. Thus, the question raised in this interlocutory appeal does not fall within the limited ambit of cases where we deem it appropriate to exercise our jurisdiction.

IT IS THEREFORE ORDERED that the record be returned to the Immigration Court without further action.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A043 452 893 – Miami, FL

Date: AUG 14 2013

In re: SAFRAZ KHAN

IN REMOVAL PROCEEDINGS

INTERLOCUTORY APPEAL

ON BEHALF OF RESPONDENT: Antonio Bugge, Esquire

ON BEHALF OF DHS: Christian M. Pressman
Assistant Chief Counsel

The Department of Homeland Security (DHS) has filed an interlocutory appeal from the Immigration Judge's June 4, 2013, decision administratively closing the case awaiting adjudication of a U visa application filed with the U.S. Citizenship and Immigration Services. The DHS argues that the Immigration Judge abused her discretion in administratively closing this case because the respondent is detained at government expense, and the nature of his criminal history severely compromises the likelihood that he will succeed in being granted relief from removal.

To avoid piecemeal review of the multiple queries that may arise during the course of removal proceedings, ordinarily the Board does not entertain interlocutory appeals. *See Matter of M-D-*, 24 I&N Dec. 138, 139 (BIA 2007), and cases cited therein. We have on occasion accepted interlocutory appeals to address significant jurisdictional questions about the administration of the immigration laws, or to correct recurring problems in the handling of cases by Immigration Judges. *See, e.g., Matter of Guevara*, 20 I&N Dec. 238 (BIA 1990, 1991); *Matter of Dobere*, 20 I&N Dec. 188 (BIA 1990). The issue of whether the Immigration Judge properly administratively closed this case does not present a significant jurisdictional question about the administration of the immigration laws. Nor does it involve a recurring problem in Immigration Judges' handling of cases. Thus, the question raised in this interlocutory appeal does not fall within the limited ambit of cases where we deem it appropriate to exercise our jurisdiction.

IT IS THEREFORE ORDERED that the record be returned to the Immigration Court without further action.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A037 775 438 – New York, NY

Date: FEB 22 2018

In re: Mitchell Augustus ARCHER

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carmen I. Rodriguez-Arroyo, Esquire

ON BEHALF OF DHS: Kamephis Perez
Assistant Chief Counsel

APPLICATION: Termination; administrative closure; cancellation of removal

The respondent, a native and citizen of Jamaica, is a lawful permanent resident of the United States. The respondent appeals an August 28, 2017, decision in which an Immigration Judge ordered his removal to Jamaica. The appeal will be sustained and the record will be remanded.

The Board reviews findings of fact, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i) (2017); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On July 7, 2011, the respondent was convicted of sexual abuse in the first degree in violation of section 130.65(3) of the New York Penal Law ("NYPL") (IJ at 2; Exh. 2, Tab B). The Department of Homeland Security ("DHS") charged the respondent with removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), asserting that his conviction was for an aggravated felony, as defined in section 101(a)(43)(A) of the Act, 8 U.S.C. § 1101(a)(43)(A) (Exh. 1). In addition, the DHS charged the respondent with removability pursuant to section 237(a)(2)(E)(i) of the Act (Exh. 11).

It is undisputed that at the time of the hearing below, the respondent's conviction was on direct appeal pursuant to section 460.10(1)(a) of the New York Criminal Procedure Law (Tr. at 12, 22-23, 34-35; Exh. 3, Tabs A-B; DHS's Br. at 3). *See Matter of Cardenas Abreu*, 24 I&N Dec. 795 (BIA 2009), vacated on other grounds by *Abreu v. Holder*, 378 F. App'x 59 (2d Cir. 2010). The Immigration Judge interpreted our decision in *Matter of Montiel*, 26 I&N Dec. 555 (BIA 2015), to hold that there is no requirement that all direct appeals be exhausted or waived before a conviction is considered final for immigration purposes under section 101(a)(48)(A) of the Act (IJ at 4).

However, *Montiel* does not purport to resolve "the issue whether a conviction must be "final" to support removability." *Id.* at 555 n.1. Rather, *Montiel* allows the Immigration Judge to consider

whether removal proceedings may be delayed through a continuance or administrative closure pending the adjudication of a direct appeal of a criminal conviction.[1]

On remand, the parties may submit additional evidence and argument regarding the status of the respondent's appeal. Pending the remand, we hold in abeyance the respondent's alternative argument that the Immigration Judge erroneously determined that NYPL § 130.65(3) is categorically an aggravated felony, as defined in section 101(a)(43)(A) of the Act (IJ at 5; Respondent's Br. at 18-24).

Accordingly, the following order is entered.

ORDER: The appeal is sustained, the Immigration Judge's decision is vacated, and the record is remanded for further proceedings and the entry of a new decision consistent with this opinion.

FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents and would hold that a conviction pending on direct appeal is a conviction for immigration purposes, for the reasons set forth in my separate opinion in *Matter of Cardenas Abreu*, 24 I&N Dec. 795, 803 et seq. (BIA 2009).

[1] Although the respondent requested termination because of his pending direct appeal, *Montiel* did not provide termination as an outcome in this situation.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A089 010 106 - Batavia, NY Date: JUN 13 2012

In re: TERRANCE DANIEL BAILEY a.k.a. Terrence Daniel Bailey a.k.a. Terrence Daniel

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Robert P. Levy
Assistant Chief Counsel

In an interim order entered on March 30, 2012, this Board reopened these removal proceedings, vacated the Board's earlier September 14, 2011, decision that dismissed the respondent's appeal from the Immigration Judge's decision, and directed that a new briefing schedule be set. That interim order was entered when it became clear subsequent to the entry of the Board's September 14, 2011, decision that the then-detained respondent, who was under the custody of the Department of Homeland Security (DHS), had been transferred to a detention facility in Georgia at some unspecified date while his case was pending appeal before the Board. The Board was not advised of the transfer. As a result, the respondent was never effectively served with a copy of the Immigration Judge's July 14, 2011, decision, the Board's July 27, 2011, briefing schedule, or the Board's September 14, 2011, decision dismissing his appeal, all of which were unsuccessfully mailed to the respondent at the detention facility in Batavia, New York, where he had been previously detained.

In response to the current briefing schedule, the DHS has filed a "Motion for Termination of Appeal." The DHS now advises the Board that the respondent was removed from the United States on November 29, 2011. The DHS argues that the Board lacked jurisdiction to enter the March 30, 2012, interim order, and moves that the Board "terminate the appeal . . . and summarily affirm the decision of the Immigration Judge." The DHS "served" this filing on the respondent at the Georgia detention facility from which he was removed in November 2011. The DHS motion is denied.

Given the unusual procedural history of this case, we are not persuaded that we lacked jurisdiction to enter the March 30, 2012, interim order. It appears uncontested that the then-detained respondent filed a timely appeal from the Immigration Judge's decision ordering his removal, but was never effectively served a copy of the ultimate decision of the Immigration Judge, the appellate briefing schedule, or the Board's decision in his case because of his transfer by the DHS from one detention facility to another. Under these circumstances, reinstating the proceedings on appeal was appropriate and, as such, the respondent's removal did not deprive the Board of jurisdiction over these proceedings. *See Matter of Diaz-Garcia*, 25 I&N Dec. 794 (BIA 2012). Thus, we are left with

A089 010 106

a pending appeal involving an unrepresented respondent who was removed to an apparently unknown address and who can not longer effectively pursue his appeal.

Consequently, we find it necessary to administratively close these proceedings until the respondent is able to pursue his appeal. At that time a written request to reinstate the proceedings may be made to the Board. The Board will take no further action in the case unless a request is received from one of the parties. The request must be submitted directly to the Board at the above address, without fee, but with certification of service on the opposing party. If the request establishes that the respondent is in a position to be served with the pertinent documents and pursue his appeal, the Board shall reinstate these proceedings.

Accordingly, the following order will be entered.

ORDER: Proceedings before the Board in this case are administratively closed.

FOR THE BOARD