CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Advisory[1]

Status Dockets in Immigration Courts

September 30, 2019

The Trump administration has taken numerous steps to limit the ability of noncitizens facing removal to meaningfully seek immigration relief, including restricting immigration judges' (IJs) ability to manage their own cases and provide time to respondents to pursue immigration relief that would resolve their removal case. One recent example of these efforts is an August 2019 memorandum issued to all immigration court personnel from James R. McHenry III, the Director of the Executive Office for Immigration Review (EOIR), a component of the Department of Justice, which oversees the immigration courts.[2] The memo, titled "Use of Status Dockets" [hereinafter "Status Docket Memo"], limits the types of cases that IJs may place on a status docket while a noncitizen is waiting for some event to occur that will impact the removal proceedings. The policy may make it more difficult for some respondents to seek immigration relief while in removal proceedings, especially relief before U.S. Citizenship and Immigration Services (USCIS). This practice advisory provides background on status dockets, describes the new policy, and provides tips for practitioners with clients whose cases are currently on a status docket or who would otherwise have pursued status docket placement but may now be found ineligible for status docket placement.

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[2] Memorandum from James R. McHenry, III, Dir., EOIR, Use of Status Dockets (Aug. 16, 2019), https://www.justice.gov/eoir/page/file/1196336/download [hereinafter "Status Docket Memo"]. The memo is designated as "OOD PM 19-13," which appears to stand for "Office of the Director," and follows November 2018 EOIR guidance revising the way EOIR memoranda are to be issued. *See* James R. McHenry, III, Dir., EOIR, New Format for Memoranda and Cancellation of OPPMs (Nov. 7, 2018), https://www.justice.gov/eoir/page/file/1109416/download.

What Is a Status Docket?

A status docket is a docket management tool used in many immigration courts. The term "status" appears in a January 2018 EOIR memo establishing immigration court "performance measures," which imposes case completion quotas and deadlines and exempts "status" cases from these performance mandates.[3] A status docket is an inactive docket for cases that IJs are not ready to resolve because of some pending event. Often the event is the adjudication of a petition or application with USCIS. While a case is on the status docket, the respondent is required to provide periodic updates to the court about progress with the relevant issue. If the respondent provides updates by the court's deadline and the relevant issue remains unresolved, the court typically will continue the case on the status docket and not require the respondent to attend a hearing in the meantime. If the respondent does not provide a timely update, he or she is required to attend a hearing date specified by the court. Once the relevant event concludes, typically the court will return the case to the regular docket for further proceedings.

Prior to the August 16, 2019 Status Docket Memo, many, but not all, immigration courts had established a status docket. At courts that had a status docket, some IJs preferred continuances because status docket cases were assigned to the Assistant Chief Immigration Judge (ACIJ) thus ending the IJ's management over the cases, many of which were cases involving noncitizen children. Concerns over EOIR policy memoranda, Board of Immigration Appeals (BIA) and attorney general decisions, and performance quotas suggested to some IJs that EOIR would eventually change its position on status dockets in a manner that could prejudice those respondents. Some IJs also wanted to retain jurisdiction on these cases so they would be counted towards their performance goals once the case was completed.[4]

Many of the immigration courts with status dockets established them after the issuance of *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), a 2018 attorney general opinion that removed IJs' general authority to administratively close cases.[5] In courts that have established a status docket, the status docket seems to have become an alternative to administrative closure.

How Have Immigration Courts Used Status Dockets in the Past?

Status docket use has varied by immigration court and IJ. Often, IJs would place cases on a status docket if the respondent had a pending application or petition with USCIS. Pending applications or petitions could include Form I-130 relative petitions, U nonimmigrant status petitions, T nonimmigrant status applications, asylum applications of unaccompanied children filed affirmatively with USCIS, and Special Immigrant Juvenile Status (SIJS) petitions. Many IJs also placed on the status docket cases of youth who had an approved SIJS petition but were awaiting a current priority date.

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[3] Memorandum from James R. McHenry III, Dir., EOIR, Case Priorities and Immigration Court Performance Measures App'x A n.7 (Jan. 17, 2018), https://www.justice.gov/eoir/page/file/1026721/download.

[4] The information contained in the last three sentences of this paragraph was provided by retired Immigration Judge Denise Noonan Slavin.

[5] At the June 2018 national American Immigration Lawyers Association conference, EOIR Director James McHenry promoted the use of the status docket as a docket management tool after *Castro-Tum*.

Before the Status Docket Memo, status docket procedures varied from court to court. With the Status Docket Memo, it appears that some of the procedures for status docket placement will be uniform nationwide, at the immigration courts that choose to have a status docket. The Status Docket Memo also purports to limit the types of cases that can be put on a status docket.

How Does the Status Docket Differ from Administrative Closure?

Status dockets and administrative closure have a similar purpose: to provide an inactive docket through which to pause a case for the main purpose of allowing an event outside of the control of either party to take place, such as USCIS's adjudication of an immigration application or petition. Similar to the status docket, a noncitizen with an administratively closed case is still in removal proceedings, but the case is inactive. However, while IJs and the BIA have used administrative closure as a docket management tool to prioritize their caseloads since at least the 1980s, many IJs began using status dockets in 2018 after *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

The regulations specifically mention administrative closure authority, whereas the status docket is not mentioned in any regulation. Regulations recognize specific categories of noncitizens who are eligible for administrative closure.[6] Before *Castro-Tum*, the BIA had concluded in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), that IJs and the BIA had general administrative closure authority through the broad powers conferred by 8 CFR §§ 1003.10(b) and 1003.1(d)(1)(ii). The attorney general in *Castro-Tum* overruled *Avetisyan* and concluded that those regulations in fact did not confer general administrative closure authority on IJs.

On August 29, 2019, the U.S. Court of Appeals for the Fourth Circuit held that those regulations unambiguously confer upon IJs and the BIA the general authority to administratively close cases. *Zuniga Romero v. Barr*, No. 18-1850, --- F.3d ---, 2019 WL 4065596, at *5 (4th Cir. Aug. 29, 2019). As a result of this decision, IJs at the Arlington, Baltimore, and Charlotte immigration courts may now administratively close cases in addition to considering a continuance or status docket placement.

Administrative closure and status dockets function differently. While a case is administratively closed, no further action is typically required from the respondent until there is some progress or change in the pending event and so long as the Department of Homeland Security (DHS) does not move to re-calendar the case. In contrast, a respondent whose case is on the status docket must comply with important requirements that, if not met, could lead to an *in absentia* order of removal. For example, on the status docket, a respondent must provide the IJ periodic updates on the progress of the pending event that was the basis for status docket placement. Typically, the respondent must submit documents about the status of the pending application before a date set by the IJ or else appear at a master calendar hearing that serves as a control date. If the respondent provides the written update by the deadline, and the relevant issue that served as the

[6] *See, e.g.*, 8 CFR § 1214.2(a) (authorizing administrative closure for noncitizens who appear eligible for T nonimmigrant status).

basis for status docket placement remains unresolved, typically the case will remain on the status docket with no need to appear for an immigration court hearing in the meantime. If, however, the respondent does not provide a timely update, the respondent must attend a hearing on the date and time specified by the court.[7]

Is the Status Docket the Same as a Continuance?

No. Regulations direct that IJs may grant continuances for "good cause shown."[8] A number of BIA and U.S. courts of appeals decisions provide further authority developing the standard for granting a continuance.[9] In 2018, the attorney general issued a decision articulating the standard for continuances while a respondent pursues a "collateral" matter, such as an adjudication with USCIS, in *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018). For more information about continuances and the *L-A-B-R-* decision, see CLINIC's practice advisory on this subject.[10] In contrast to continuances, which are recognized by regulation, status dockets appear to be a creation of EOIR and are not codified by regulation. In fact, the August 2019 Status Docket Memo is the only official acknowledgement or explanation of the status docket that the authors are aware of.

While the two concepts—status docket and continuances—are distinct, they intersect significantly. The Status Docket Memo states that a court may only place a case on the status docket after an IJ determines that a continuance is warranted (and certain other requirements, discussed below, are met).[11] In other words, all cases placed on the status docket must meet the good cause standard for a continuance. However, not all cases that meet the continuance standard and are granted a continuance will qualify for status docket placement under the Status Docket Memo, because making a good cause showing is a necessary but not sufficient condition for status docket placement. The Status Docket Memo states, "[t]he decision of an immigration judge to grant or deny a motion for continuance and a determination made by an immigration court regarding the placement of a case on a status docket are independent and distinct actions

[7] This paragraph provides a summary of general status docket procedures as the authors understand them to work across various immigration courts. Practitioners must investigate and follow the specific status docket procedures of the particular immigration court and IJ, which may differ from the description here.
[8] 8 CFR §§ 1003.29, 1240.6.
[9] *See, e.g.*, *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012) (describing continuance standard in the context of seeking U nonimmigrant status with USCIS); *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) (discussing continuances in the context of pending family-based visa petitions); *Matter of Stowers*, 22 I&N Dec. 605 (BIA 1999) (discussing continuances in the context of pending waiver of joint filing requirement for Form I-751); *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983) (discussing continuances for attorney preparation); *Ferreira v. U.S. Att'y Gen.*, 714 F.3d 1240 (11th Cir. 2013) (discussing continuance to await availability of employment-based visa); *Simon v. Holder*, 654 F.3d 440 (3d Cir. 2011); *Wu v. Holder*, 571 F.3d 467 (5th Cir. 2009) (discussing continuance to await adjudication of family-based visa petition).
[10] CLINIC, *Practice Advisory: Seeking Continuances in Immigration Court in the Wake of the Attorney General's Decision in* Matter of L-A-B-R- (Dec. 6, 2018), https://cliniclegal.org/resources/practice-advisory-matter-l-b-r-27-dec-405-ag-2018 [hereinafter "CLINIC *L-A-B-R-* Practice Advisory"].
[11] Status Docket Memo, *supra* note 2, at 3.

that should not be conflated," and the memo "applies only to the latter process."[12] Thus, even if the immigration court determines that a case does not meet the status docket criteria, practitioners may still argue that respondents are entitled to a continuance under the good cause framework.[13]

What Are the Pros and Cons of Status Docket Placement Versus a Regular Continuance?

There are pros and cons to the status docket and these pros and cons will depend on the immigration court, the IJ, the client, and the practitioner.

The main advantage of the status docket is that it potentially reduces the number of court appearances by practitioners and their clients. This is especially helpful if the client attends school, works, has transportation problems, battles medical issues, or must appear before another court (*e.g.*, a state court proceeding to establish eligibility for SIJS) or before USCIS for an interview. However, practitioners should assess if the client will be a good candidate for the status docket as some clients may tend to only to keep in touch with counsel when they are faced with an imminent court hearing.

In some courts the timing of the status docket may not be advantageous. For example, the status docket may be set for every three months whereas the IJ's regular docket would provide a longer continuance. However, the status docket may be advantageous if the IJ rarely rules on motions to continue before the master hearing date or has stringent standards for granting a motion to continue.

Another potential disadvantage of the status docket is that in some immigration courts the status docket requires a transfer to another IJ who is monitoring the status docket. While the case should be sent back to the original IJ when the case comes off the status docket, if the practitioner believes it is in the best interests of the client to remain with the original IJ, it may be better not to seek placement on the status docket because there is no guarantee the case will be returned to the original IJ.

For cases where a parent and child's cases are consolidated, achieving status docket placement for the child's case may require the practitioner to first move to sever the child's case from that of the parent. For example, if the parent and child are pursuing asylum before the immigration court but the child is also eligible for SIJS, the child may be able to seek status docket placement to await the outcome of the SIJS petition, but the parent may have no basis for status docket placement since the parent's only relief is before the court. If the practitioner successfully severs the cases and attains status docket placement for the child's case, the parent's removal case could

[12] *Id.* at 3 n.3.
[13] *See id*. ("[N]othing in this [memo] should be construed as limiting an immigration judge's discretion, in accordance with applicable law, to adjudicate a motion for a continuance.").

be decided before there is a final outcome for the child. If the child's case is returned to the active docket before the parent's case reaches an individual hearing (for example, because USCIS completes adjudication of the SIJS petition), the child's case could then be assigned to a different IJ from the parent, and the practitioner would need to move to consolidate the cases.

Placement on the status docket will likely stop the clock for employment authorization purposes if the client has a pending asylum application, and the client should understand this potential outcome before seeking placement on the status docket.

To assess these pros and cons, practitioners should consult with colleagues regarding how the status docket works at the immigration court in question.

What Types of Cases Qualify for Status Docket Placement Under the Status Docket Memo?

The Status Docket Memo notes that immigration courts are not required to have status dockets and provides guidance for those immigration courts that do have status dockets.[14] The Status Docket Memo states that only "status" cases can be placed on a status docket, and defines status cases as those "in which an immigration judge must delay final adjudication of the case pursuant to law."[15] According to the Status Docket Memo, there are three types of status cases:

1. Cases in which an IJ is "required to continue the case pursuant to binding authority in order to await the adjudication of an application or petition" by USCIS
2. Cases where the IJ is "required to reserve a decision rather than completing the case pursuant to law or policy," and
3. Cases that are "subject to a deadline established by a federal court order."[16]

For the **first category**, the Status Docket Memo notes that there is a "body of binding circuit court precedents" that "have effectively made continuances mandatory" in certain circumstances.[17] The Status Docket Memo provides a non-exhaustive list of examples of such cases, as follows:

- Cases in which the respondent is the first-time beneficiary of *prima facie* approvable Form I-130 relative petition based on a *bona fide* marriage to a U.S. citizen that was entered into before removal proceedings began, and who is also *prima facie* eligible for adjustment of status including as a matter of discretion[18]

[14] *See* Status Docket Memo, *supra* note 2, at 1.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 2.
[18] *Id.*

- Cases in which the respondent is the first-time beneficiary of a *prima facie* approvable Form I-130 relative petition based on a *bona fide* marriage to a U.S. citizen that was entered into while in removal proceedings, and who is *prima facie* eligible for adjustment of status including as a matter of discretion, if the respondent shows by clear and convincing evidence that the marriage was entered into in good faith[19]

- Cases where precedent requires a continuance based on a first-time employment-based petition, Form I-140, pending with USCIS, if the petition is *prima facie* approvable, the underlying labor certification has already been approved or is not required, a visa will be immediately available at the time the respondent files for adjustment if the petition is approved, and where the respondent is also *prima facie* eligible for adjustment including as a matter of discretion[20]

- Cases where Form I-751, Petition to Remove Conditions on Residence, with a request to waive the joint filing requirement, is pending with USCIS, if the respondent is *prima facie* eligible for the waiver including as a matter of discretion,[21] and

- Cases where a "confirmed unaccompanied alien child" has filed for asylum with USCIS.[22]

Regarding the last category, practitioners should argue that in cases where an individual has been previously determined to be a "unaccompanied alien child" (UAC) and/or where USCIS has accepted jurisdiction over the asylum application based on the UAC determination, such individuals qualify for status docket placement under the Status Docket Memo's first category while they await adjudication of their asylum application in the first instance by USCIS.[23]

The Status Docket Memo states that the above list is non-exhaustive, "as case law among the federal circuits may vary."[24] This language suggests that status docket placement is only appropriate under the first category when there is a pending petition or application with USCIS *and* binding circuit or BIA authority that requires a continuance for that type of petition or application. However, practitioners should argue that "binding authority" must also encompass statutes and regulations. For further ideas about arguments for why continuances are required as a matter of law to pursue specific forms of immigration relief, see CLINIC's practice advisory on *L-A-B-R-*.[25]

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[19] *Id.* (citing INA § 245(e)(3); *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002)).
[20] Status Docket Memo, *supra* note 2, at 2.
[21] *Id.*
[22] *Id.*
[23] *Cf. J.O.P. v. DHS*, No. 19-1944, 2019 WL 3536786 (D. Md. Aug. 2, 2019) (granting temporary restraining order enjoining USCIS from rejecting jurisdiction of a UAC whose application would have been accepted under the previous USCIS policy). The court's order can be viewed on the CLINIC webpage, https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-popluations/Litigation/TRO-Order-JOP-DHS.pdf.
[24] Status Docket Memo, *supra* note 2, at 2.
[25] CLINIC *L-A-B-R-* Practice Advisory, *supra* note 10.

The Status Docket Memo states that only two types of categories currently fall within the **second category**: (1) cases where the IJ intends to grant non-permanent resident cancellation of removal under INA § 240A(b) but the annual cap of 4,000 cases has already been reached for a given year, and (2) cases where the respondent is *prima facie* eligible for adjustment and had an immediately available visa at the time of filing the adjustment application with the court but the visa category subsequently retrogressed by the time of the hearing.[26] The court may automatically return a case falling within the second category to the active docket once a visa is available.[27]

The Status Docket Memo provides no information on the **third category**—cases subject to a deadline established by a federal court order—other than to state that EOIR will advise immigration courts of cases that may fall within the third category.[28]

What Procedures Does the Status Docket Memo Establish?

The Status Docket Memo outlines the procedures for placement on and removal from a status docket. An immigration court can place a case on the status docket automatically after an IJ rules that a continuance is warranted and the court determines that the case falls within one of the three categories.[29] If the court places a case on the status docket, it sends the parties a notice that contains the following information:

- Notification that the case is being placed on the status docket
- When appropriate, a "call-up date" by which the party who made the initial motion for a continuance must provide an update about the issue that served as the basis for the continuance, and
- A next hearing date if an update is not submitted by the deadline.[30]

If the party timely submits an update, the IJ may treat it as another continuance motion and grant it, in which case the immigration court will maintain the case on the status docket and issue another notice with a new call-up date and hearing date.[31] Or the IJ can decline to continue the case further and can proceed with the case at the scheduled hearing date.[32] If the status update

[26] Status Docket Memo, *supra* note 2, at 2.
[27] *Id.* at 4.
[28] *Id.* at 3.
[29] *Id.* It is unclear who will be in charge of the status docket—whether it will be the individual IJ or the ACIJ. Practitioners should contact the court administrator for the particular immigration court to find out about court-specific status docket procedures.
[30] *Id.* at 4.
[31] *Id.*
[32] *Id.*

indicates that USCIS has adjudicated the underlying petition or application, the IJ would typically return the case to the regular docket for further proceedings or termination.[33]

Respondents must appear at the hearing date listed on the status docket notice unless they receive a new hearing notice from the court, or the removal case concludes, before the hearing date.[34]

The Status Docket Memo also provides that courts can move cases from the status docket to the active docket if they were "not appropriately placed on the docket initially" or upon motion by either party.[35] When returning cases from the status docket to the active docket, the court will send the parties hearing notices following normal procedures.[36]

What About Cases That Are Currently on the Status Docket But Are Found Not to Qualify Under the Status Docket Memo?

It is unclear how immigration courts will handle cases that are already on a status docket but are determined to no longer qualify under the Status Docket Memo. Courts may *sua sponte* remove the case from the status docket and set the case for a hearing, or, at the time of the next status docket update, the court could decline to continue the case on the status docket and instead move forward with the scheduled hearing. *Sua sponte* transfers to the active docket could result *in absentia* orders of removal if the immigration court fails to provide proper notice of the new hearing date or the attorney fails to notify the client of the new hearing date. It is also possible that DHS could move to return the case to the active docket or advance the hearing.

In situations where DHS files a motion to remove the case from the status docket or advance the case, practitioners should file an opposition to the DHS motion where it is in the client's interest to do so. According to the Immigration Court Practice Manual, responses in non-detained cases are due 10 days after a motion is filed.[37] The IJ should thus wait at least 10 days before ruling on the DHS motion. Practitioners could make an alternative request for a continuance along with the opposition to the DHS motion.

Where possible, practitioners should argue in the next status docket update that the case should remain on the status docket, assuming it is in the client's interest to do so.

Practitioners should review their cases currently on the status docket and communicate with any client affected by the Status Docket Memo about how it could impact the client's case. Practitioners should ensure they are in contact with each client and can reach them quickly if a

[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 4-5.
[37] EOIR, Immigration Court Practice Manual ch. 3.1(b) (Aug. 9, 2019), https://www.justice.gov/eoir/file/1192636/download/ [hereinafter "Immigration Court Practice Manual"].

new hearing notice is issued, to avoid any *in absentia* order due to the client not receiving notice about transfer from the status docket and new hearing date. It is important to ensure that the client's address is current with the court and to file Form EOIR-33 if there has been any change in address. Practitioners should come up with a plan for litigating the case if it is moved back to the active docket. See the discussion below on this subject.

What Kinds of Cases Do Not Appear to Qualify for Status Docket Placement Under the Status Docket Memo?

The Status Docket Memo states that no cases other than those that fit into one of the three categories are status cases, and that "it is not appropriate for an immigration court to place other, non-status cases on a status docket."[38] The Status Docket Memo also states that cases where USCIS has already adjudicated the application or petition, such as where the respondent has an approved petition and is waiting for a visa number to become current, should not be placed on the status docket. In such cases, the Status Docket Memo states, DHS "retains authority to grant parole, deferred action, or a stay of removal."[39] Practitioners should investigate practices at the particular immigration court and before the specific IJ to find out how the Status Docket Memo is being implemented and what kinds of cases are considered eligible for status docket placement.

What Options Exist for Cases That Are Not Ripe for Adjudication But Do Not Clearly Fall Within One of the Three Status Docket Memo Categories?

First, practitioners can argue that a case merits status docket placement even if the Status Docket Memo is ambiguous as to whether that type of case falls within the parameters set forth in the memo. For example, in the case of children with approved SIJS petitions who are awaiting a current priority date, some practitioners have suggested arguing that such cases fall within the second category because they are cases in which the IJ is "required to reserve a decision rather than completing the case pursuant to law or policy."[40] Practitioners could also argue that a case (such as the case of a child with an approved SIJS petition awaiting a priority date) falls within the definition of a "status" case as defined in the Status Docket Memo because it is one "in

[38] Status Docket Memo, *supra* note 2, at 3.
[39] *Id*.
[40] Status Docket Memo, *supra* note 2, at 1; *see* Safe Passage Project, *EOIR Policy Memo 19-13, "Use of Status Dockets" How the Court Administration Is Constraining Local Control* (Sept. 4, 2019), https://www.safepassageproject.org/2019/09/eoir-policy-memo-19-13-use-of-status-dockets-how-the-court-administration-is-constraining-local-control/. Practitioners who make this argument should be aware, however, that the Status Docket Memo states that only two types of cases fall within the second category and states that "[c]ases in which a collateral application subject to a cap not administered by EOIR or over which immigration judges lack jurisdiction do not fall within this category and are not appropriate for a status docket." Status Docket Memo, *supra* note 2, at 2-3.

which an immigration judge must delay final adjudication of the case pursuant to law"[41] and thus status docket placement should be permitted.

Even if the court concludes that status docket placement is not permitted or otherwise appropriate, the case can still qualify for a continuance. In the alternative to or instead of seeking status docket placement, practitioners should request continuances of sufficient length, accompanied by arguments about why the circumstances meet the good cause standard as well as supporting evidence. CLINIC's *L-A-B-R-* practice advisory has tips for making these arguments to pursue continuances for various reasons.[42] If the court grants a continuance but not of sufficient length, practitioners should renew the motion for a continuance at the continued hearing, or in advance of the continued hearing through a written motion. Multiple hearings can of course be burdensome both for counsel and for respondents who may have to travel long distances to get to court. Practitioners should consider filing a motion to appear telephonically and/or moving to waive the respondent's appearance at the continued hearing, particularly if the hearing will be brief and merely involve a status update from the representative about the pending matter.[43] Unless and until the court grants the continuance motion or motion to appear telephonically or waive the respondent's appearance, the practitioner and the respondent must appear at all scheduled hearings.[44]

If the IJ is unwilling to further continue the case and insists on moving it forward, practitioners should consider all available options the respondent might have and pursue them if in the client's interest. These options might include:

- **Moving to administratively close the case**. As a result of the Fourth Circuit's decision in *Zuniga Romero* holding that 8 CFR §§ 1003.10(b) and 1003.1(d)(1)(ii) unambiguously confer upon IJs and the BIA the general authority to administratively close cases,[45] IJs at the Arlington, Baltimore, and Charlotte immigration courts may now administratively close cases. Outside of the Fourth Circuit, practitioners should move for administrative closure relying on the reasoning in *Zuniga Romero* to preserve the issue for appeal to the BIA and the court of appeals. However, practitioners have an ethical duty to acknowledge *Castro-Tum* and must understand that IJs and the BIA will likely conclude that they are bound to follow the decision.

[41] Status Docket Memo, *supra* note 2, at 1; *see, e.g.*, CLINIC *L-A-B-R-* Practice Advisory, *supra* note 10, at 18-24 (providing arguments about why law requires requiring delay of final adjudication in SIJS cases); CLINIC's Sample Brief Seeking Termination of Removal Proceedings Based on SIJS Approval, available by request to attorneys and fully accredited representatives who do not work for the federal government at https://cliniclegal.org/sample-brief-seeking-termination-removal-proceedings-based-sijs-approval.
[42] CLINIC *L-A-B-R-* Practice Advisory, *supra* note 10.
[43] *See* 8 CFR § 1003.25(a) (discussing waiver of appearances), Immigration Court Practice Manual, *supra* note 37, ch. 4.15(m) (same); *id.* ch. 4.15(n) (discussing telephonic appearances).
[44] Immigration Court Practice Manual, *supra* note 37, ch. 4.15(m)(iii)(B) & (n)(iv).
[45] *Zuniga Romero v. Barr*, No. 18-1850, --- F.3d ---, 2019 WL 4065596, at *5 (4th Cir. Aug. 29, 2019).

- **Seeking termination of removal proceedings**. Termination grounds may include regulatory violations,[46] DHS failure to meets its burden of proof including via suppression of DHS's evidence,[47] improper service, and defects in the Notice to Appear.[48] Practitioners can also ask DHS to join in a motion to terminate, however this may be unlikely to achieve. Some theories of termination will require that the respondent have denied the allegations and charge(s) at the pleadings stage and denied proper service of the Notice to Appear. Practitioners should carefully consider at the outset of every case how to plead in a way that best serves the client's interests.

- **Making relief-specific arguments for termination.** Some types of USCIS-based immigration relief may provide relief-specific arguments for termination, or at a minimum for sufficient continuances. For example, individuals with approved SIJS petitions are deemed to have been "paroled" into the United States for purposes of adjustment of status,[49] and the common Notice to Appear charge of inadmissibility for being present without admission or parole does not apply to certain VAWA self-petitioners.[50] CLINIC's *L-A-B-R-* practice advisory discusses these arguments in more detail,[51] and CLINIC also has a sample brief arguing for termination and a continuance in the alternative for individuals with approved SIJS petitions who are awaiting a current priority date.[52]

- **Filing for relief before the immigration court**, such as asylum or cancellation of removal. It is a good idea to periodically re-assess clients' eligibility for relief as an individual may become eligible for new relief as removal proceedings progress.

- If the IJ denies the continuance and any relief requested and orders removal, **appealing the removal order** (the continuance denial, the denial of administrative closure or termination if sought, and the denial of any relief) to the BIA, and later, to the relevant U.S. court of appeals, if necessary. If the client is not eligible for any relief before the immigration court, the practitioner can appeal the removal order based solely on the denial of the continuance and/or request for administrative closure or termination. Practitioners should be sure to preserve due process arguments before the immigration court. If the USCIS relief is granted while a BIA appeal is pending, the practitioner can file a motion to remand in light of the changed facts.[53] Or, if the new relief is granted

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[46] *See Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980).
[47] *See INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).
[48] *See, e.g., Ortiz-Santiago v. Barr*, 924 F.3d 956 (7th Cir. 2019).
[49] *See* INA § 245(h)(1).
[50] *See* INA § 212(a)(6)(A)(ii).
[51] CLINIC *L-A-B-R-* Practice Advisory, *supra* note 10.
[52] CLINIC's sample brief can be requested by attorneys and fully accredited representatives who do not work for the federal government at the following link: https://cliniclegal.org/sample-brief-seeking-termination-removal-proceedings-based-sijs-approval.
[53] *See* 8 CFR § 1003.2(c)(4); EOIR, BIA Practice Manual ch. 5.8 (revised Sept. 23, 2019), https://www.justice.gov/eoir/file/1205211/download.

after the removal order becomes final, the practitioner can file a motion to reopen, as necessary and assuming all requirements for a motion to reopen are satisfied.[54]

What Are the Broader Implications of This New Policy?

The Status Docket Memo continues a pattern of Trump administration directives that make it harder for noncitizens to pursue immigration relief while in removal proceedings and take away power from IJs to control their own cases. Previous directives include[55]:

- The attorney general's decision in *Castro-Tum* removing authority from IJs to grant administrative closure in most cases[56]
- The attorney general's decision in *L-A-B-R-* purporting to restrict the standard for granting a continuance to pursue a "collateral" matter such as an adjudication with USCIS[57]
- The attorney general's decision in *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018), restricting IJs' authority to terminate removal proceedings unless DHS is the party seeking termination, and
- The imposition of immigration court and IJ-specific "performance measures" that require IJs to complete a certain number of cases per year and impose other quotas and deadlines in order to achieve a satisfactory job performance evaluation.[58]

Taken together, these policies and others make it harder for respondents to avoid a removal order while they are pursuing relief to which they are entitled under immigration laws. Such respondents may be forced to pursue a form of relief in immigration court, such as asylum, for which they are eligible but which may be a more difficult claim, rather than their strongest form of relief. This will lead to already backlogged courts devoting valuable resources to hearings that could be postponed or never happen.

The efforts to remove authority from IJs effectively put more power into the hands of DHS to control cases in immigration court. Indeed, the Status Docket Memo notes that for respondents

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[54] A discussion of motions to remand and the requirements, including time and number limitations, for motions to reopen is beyond the scope of this practice advisory. For further information on motions to reopen, see, for example, CLINIC, *Practice Advisory: Motions to Reopen for DACA Recipients with Removal Orders* (Mar. 13, 2018), https://cliniclegal.org/resources/motions-reopen-daca-recipients-removal-orders; American Immigration Council, *The Basics of Motions to Reopen EOIR-Issued Removal Orders* (Feb. 7, 2018), https://www.americanimmigrationcouncil.org/practice_advisory/basics-motions-reopen-eoir-issued-removal-orders.

[55] This list is not exhaustive and covers only procedural directives. There have also been a number of measures, not included here, aimed at restricting immigration relief substantively.

[56] 27 I&N Dec. 271 (A.G. 2018).

[57] 27 I&N Dec. 405 (A.G. 2018).

[58] *See* EOIR, Performance Plan: Adjudicative Employees (Mar. 30, 2018), AILA Doc. No. 18040301, www.aila.org/infonet; Memorandum from James R. McHenry III, Dir., EOIR, Case Priorities and Immigration Court Performance Measures (Jan. 17, 2018), https://www.justice.gov/eoir/page/file/1026721/download.

who have approved petitions but are awaiting a priority date and do not qualify for status docket placement, DHS "retains authority to grant parole, deferred action, or a stay of removal."[59] Of course, DHS does not have a role of neutral arbiter but is instead an immigration law enforcement agency, which under the Trump administration has been increasingly enforcement-focused and less willing to consider requests for the types of discretionary action noted in the Status Docket Memo. The expedited removal framework, which the Trump administration is expanding to the interior of the United States, demonstrates that DHS replacing a neutral arbiter in a removal system leads to due process violations and increased removal numbers with little to no willingness to exercise discretion.[60] It is thus all the more important that practitioners work zealously to protect the rights of noncitizen clients.

[59] Status Docket Memo, *supra* note 2, at 3.

[60] *Cf. Centro Presente, Inc. v. McAleenan*, No. 19-2840 (D.D.C. filed Sept. 20, 2019), http://lawyersforcivilrights.org/wp-content/uploads/2019/09/Centro-Presente-v.-McAleenan-Acting-DHS-Secretary-filed-complaint.pdf (challenging expedited removal expansion including raising due process challenges); *Make the Road New York v. McAleenan*, No. 19-2369 (D.D.C. filed Aug. 6, 2019), https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/challenging_the_expansion_of_expedited_removal_complaint.pdf (same).

The Catholic Legal Immigration Network, or CLINIC, advocates for humane and just immigration policy. Its network of nonprofit immigration programs—over 370 affiliates in 49 states and the District of Columbia—is the largest in the nation.

Building on the foundation of CLINIC's BIA Pro Bono Project, CLINIC launched the Defending Vulnerable Populations (DVP) Program in response to growing anti-immigrant sentiment and policy measures that hurt immigrants. DVP's primary objective is to increase the number of fully accredited representatives and attorneys who are qualified to represent immigrants in immigration court proceedings. To accomplish this, DVP conducts court skills trainings for both nonprofit agency staff (accredited representatives and attorneys) and pro bono attorneys; develops practice materials to assist legal representatives; advocates against repressive policy changes; and expands public awareness on issues faced by vulnerable immigrants. By increasing access to competent, affordable representation, the program's initiatives focus on protecting the most vulnerable immigrants—those at immediate risk of deportation.

DVP offers a variety of written resources including timely practice advisories and guides on removal defense strategies, amicus briefs before the BIA and U.S. courts of appeals, pro se materials to empower the immigrant community, and reports. Examples of these include a series of practice advisories specific to DACA recipients, a practice advisory on strategies and considerations in light of the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), a guide on how to obtain a client's release from immigration detention, amicus briefs on the "serious nonpolitical crime" bar to asylum as it relates to youth and on the definition of a minor for purposes of the asylum one-year filing deadline, an article in Spanish and English on how to get back one's immigration bond money, and a report entitled "Denied a Day in Court: In Absentia Removals and Families Fleeing Persecution."

These resources and others are available on the DVP webpage.