



# CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

## Practice Pointer

*Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018)<sup>1</sup>

June 5, 2018

1. What is the holding of the Attorney General's May 17, 2018 decision in *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018)?

*Matter of Castro-Tum* revokes immigration judges' and the Board of Immigration Appeals' (BIA) general authority to administratively close cases, or temporarily close cases without deciding them, with some exceptions. These exceptions include situations where administrative closure is specifically authorized by regulations promulgated by the Department of Justice or judicial settlement agreements. For an in-depth description of the decision, please refer to CLINIC's article "[The End of Administrative Closure: Sessions Moves to Further Strip Immigration Judges of Independence.](#)"

2. What does administrative closure mean?

Administrative closure is a procedural mechanism to temporarily pause removal proceedings by removing the case from the active docket or scheduling calendar of the immigration judge or the BIA. A person with an administratively closed case is still in removal proceedings, but the case is inactive while proceedings are administratively closed.

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<sup>1</sup> CLINIC's Defending Vulnerable Populations Project issued this practice pointer. This practice pointer is intended to assist lawyers and fully accredited representatives. It does not constitute legal advice, nor is it a substitute for independent analysis of the law. Please note that the hyperlinks referenced in this practice pointer were last visited in June of 2018.

**3. Under what circumstances have immigration judges authorized administrative closure?**

Since at least 1984, immigration judges have used administrative closure as a “docket management tool” to prioritize their caseloads. The BIA issued a series of precedent decisions that have now been overturned by *Castro-Tum*. In those prior cases, the BIA recognized the importance of administrative closure as a docketing tool to ensure efficient management of court resources. In recent years, immigration judges administratively closed cases to allow an event outside the control of the parties to occur—particularly where an event was not expected to take place for years. For example, there are applications and petitions for immigration benefits over which the U.S. Citizenship and Immigration Services (USCIS) exercises exclusive jurisdiction, such as humanitarian relief for victims of domestic violence and other serious crimes (VAWA self-petitioners and U visa petitioners) and abused, abandoned, or neglected children (Special Immigrant Juvenile Status applicants). Immigration judges would commonly administratively close cases to allow USCIS to adjudicate such applications or to await the availability of visa numbers. Under the Obama Administration, DHS also used administrative closure as a tool to preserve government resources, by recommending or agreeing to the closure of non-priority cases. Frequently, DHS counsel would present respondents with a choice: accept administrative closure or move forward with the individual hearing during which DHS would strongly oppose relief. Sometimes, immigration judges encouraged both practitioners and unrepresented respondents to accept DHS’s administrative closure offer.

**4. What was the reason for ending administrative closure?**

Until the Trump Administration—and throughout different presidential administrations, including Republican administrations—administrative closure was an accepted docket management tool used by the immigration courts and prosecutorial discretion tool used by DHS. In fact, administrative closure has been expressly authorized by regulation in certain situations. Question 5 discusses these specific situations.

Over the years, various regulations have been interpreted as sources for administrative closure authority. However, Attorney General Sessions does not agree with this interpretation of the regulations. According to Sessions, this temporary closure “encumbers the fair and efficient administration of immigration cases” and such delays benefit the non-citizen, leaving DHS with the burden of seeking re-calendarings. Sessions notes that “the Board has made administrative closure easier to obtain” through *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), which he expressly overruled with this decision. That decision allowed immigration judges to grant administrative closure over a party’s objection.

Sessions cited to the DHS brief representing that *Castro-Tum* is one of nearly 200 decisions between April 2017 and December 2017 in which an immigration judge

granted administrative closure or refused to re-calendar over DHS's objection. According to [TRAC's Immigration Project](#), 204,686 cases were pending at immigration courts nationwide in 2017 and 35,897 cases received administrative closure. Given these numbers, 200 cases is a small fraction of cases that faced DHS opposition on administrative closure.

**5. What are the exceptions to the *Matter of Castro-Tum* holding that immigration judges and the BIA lack general authority to administratively close cases?**

In *Castro-Tum*, Sessions lays out several narrow circumstances under which administrative closure is expressly authorized by regulation or by a federal judicial settlement. Note that most of the categories listed below apply only to non-citizens who have been in the United States since the 1990s.

- Certain Salvadorans and Guatemalans covered by the settlement agreement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 805 (N.D. Cal. 1991). Implementing regulations at 8 CFR §§ 1240.62(b)(1)(i), (2)(iii), 1240.70(f)–(h).
- Class members covered by *Barahona–Gomez v. Ashcroft*, 243 F. Supp. 2d 1029 (N.D. Cal. 2002).
- Those seeking V nonimmigrant status pursuant to The Legal Immigration Family Equity (LIFE) Act. Implementing regulation at 8 CFR § 1214.3.
- Those seeking T nonimmigrant status pursuant to The Victims of Trafficking and Violence Prevention Act. Implementing regulation at 8 CFR § 1214.2(a).
- Certain Nicaraguan and Cuban nationals. Implementing regulation at 8 CFR § 1245.13(d)(3)(i).
- Certain Haitian nationals. Implementing regulation at 8 CFR § 1245.15(p)(4)(i).
- Certain nationals of Vietnam, Cambodia, and Laos. Implementing regulation at 8 CFR § 1245.21(c).
- Any other DOJ regulations or court-approved settlements expressly authorizing administrative closure.

**6. What were the facts of *Matter of Castro-Tum*?**

The respondent in this case was an unaccompanied and unrepresented minor. The minor was released to the care of a family member and subsequently did not appear at his scheduled court hearings. The immigration judge questioned whether DHS had met its burden of proof that the minor had received notice of the hearing. Instead of issuing an *in absentia* order of removal, the immigration judge ordered administrative closure. DHS appealed the decision. The BIA granted DHS's appeal and issued an order remanding the case for the judge to enter an *in absentia* order. Nonetheless, Sessions certified the case to himself to issue a broad decision on administrative closure. *Castro-Tum* is an uncommon

procedural posture for administrative closure because immigration judges do not typically invoke administrative closure in *in absentia* proceedings.

**7. What does *Matter of Castro-Tum* mean for individuals in removal proceedings wishing to apply for a provisional unlawful presence waiver?**

Immigrant visa applicants who have an approved petition may qualify to “provisionally waive” the unlawful presence ground of inadmissibility prior to departing the country to consular process. Persons in removal proceedings are only eligible to apply for a provisional unlawful presence waiver if proceedings are administratively closed. *See* 8 CFR § 212.7(e). After *Castro-Tum*, however, it appears that provisional unlawful presence waivers are unavailable to individuals in removal proceedings because immigration judges no longer have the authority to administratively close cases for that purpose. Nonetheless, practitioners should argue that the regulation’s express reference to administrative closure for provisional unlawful presence waiver applicants is tantamount to regulatory authority to administratively close the case for purposes of pursuing this remedy. Practitioners who propose this and other arguments on behalf of provisional unlawful presence waiver applicants may reach out to CLINIC’s Training and Legal Support Program, which will be monitoring this issue, by contacting Charles Wheeler at [cwheeler@cliniclegal.org](mailto:cwheeler@cliniclegal.org) using the subject line “Provisional Waiver and Administrative Closure.”

Note that *Castro-Tum* does not affect those who applied for the provisional unlawful presence waiver after having their cases administratively closed, since it is the status of the case at the time of filing that is determinative. Therefore practitioners with clients whose cases are currently administratively closed and are eligible for a provisional waiver should file an application as soon as possible before DHS moves to re-calendar.

**8. What are some strategies for practitioners who planned to seek administrative closure outside of an authorized regulation or federal judicial settlement?**

Where a person has future relief with USCIS available, such as through an SIJS petition, a VAWA self-petition, a U visa petition, or an I-130 petition, practitioners should seek continuances for good cause. Footnote 13 of *Castro-Tum* discusses continuances as a “superior alternative to administrative closure for cases involving particularly vulnerable respondents.” Practitioners should consider filing a written motion for a continuance, laying out the reasons good cause has been established and providing any supporting documentation. If the immigration judge denies the continuance, practitioners can file an interlocutory appeal to the BIA. However, the BIA does not normally entertain interlocutory appeals and generally limits interlocutory appeals to instances involving either important jurisdictional questions regarding the administration of the immigration laws or recurring questions in the handling of cases by immigration judges. *See Matter of K-*, 20 I&N Dec. 418 (BIA 1991). If the interlocutory strategy is

unsuccessful and the client receives an order of removal, practitioners may appeal to the BIA and then, if necessary, to the U.S. court of appeals with jurisdiction. At the court of appeals level, practitioners can ask for the case to be held in abeyance or placed in mediation while the adjudication of the pending application for benefits proceeds.

**9. What are best practices for practitioners with cases that are currently administratively closed?**

Practitioners would be wise to do a careful review of all of their administratively closed cases and connect with each client about this decision and what it might mean. For some clients, it may be advantageous to seek re-calendar. For example, some clients may now have stronger cases for non-LPR cancellation than when the case was administratively closed. In some cases, the client may have a qualifying relative now who would suffer “exceptional and extremely unusual hardship” if the respondent is removed. Likewise, if the only qualifying relative is a child who is close to “aging out” (turning 21), the practitioner should move to re-calendar quickly and request an expedited hearing. Practitioners should also re-evaluate cases with pending or potential asylum applications to see if there are changed circumstances in the home country or in the respondent’s personal situation that make the case stronger now.

Practitioners may have clients who were eligible for relief at the time of administrative closure and are now ineligible for relief. For such clients, practitioners should assess if the immigration judge warned the respondent that, in asking for or accepting administrative closure, the respondent would forego eligibility for future relief. *See* 8 CFR § 240.11(a)(2) (regarding immigration judge’s duty to notify respondents of “apparent eligibility to apply for any [relief]”); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1050 (9th Cir. 2004) (“The requirement that the [immigration judge] inform an alien of his or her ability to apply for relief from removal is ‘mandatory,’ and ‘[f]ailure to so inform the alien [of his or her eligibility for relief from removal] is a denial of due process that invalidates the underlying deportation proceeding.’” (internal citations omitted)). If the immigration judge failed to provide this mandatory advisal, practitioners should consider a motion to terminate pursuant to *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980). Please refer to question 14 discussing alternatives to administrative closure if the case is re-calendar.

In cases where it is in the client’s best interest for the case to remain administratively closed, practitioners should be prepared to respond to any DHS motion to re-calendar, and have a back-up plan if the case gets re-calendar. Please refer to question 12 for options if DHS moves to re-calendar.

**10. What should practitioners do in cases that were administratively closed and the respondent eventually obtained the benefit through USCIS, but the practitioner never re-calendared to terminate proceedings?**

Practitioners should file a motion to re-calendar and terminate and include proof of the relief obtained as soon as possible.

**11. How likely is it that DHS will move to re-calendar cases?**

On page 292 of the decision, Sessions writes: “I now order that all cases that are administratively closed may remain closed unless DHS or the respondent requests re-calendaring.” Sessions goes on to say: “I expect the re-calendaring process will proceed in a measured but deliberate fashion that will ensure that cases ripe for resolution are swiftly returned to active dockets.” However, Sessions, as the head of the Department of Justice, does not have authority to order DHS to act. Until DHS issues its own guidance, practitioners should assume that every administratively closed case is at risk of being re-calendared.

**12. What should practitioners do if DHS moves to re-calendar?**

Practitioners should submit a timely response to the motion, opposing re-calendaring if it is in the client’s interest to do so. According to chapter 3.1(b) of the Immigration Court Practice Manual (which chapter 5.12 references as applicable to motions), the response is due ten days after the motion to re-calendar is filed. The immigration judge should thus wait at least ten days before ruling on the DHS motion to re-calendar. Among other arguments, practitioners should cite specific authority that authorizes administrative closure in the particular case. If there is no specific authority, practitioners should argue violations of due process, offering arguments proposed by amici such as the [American Immigration Council](#), and impermissible retroactivity.

Although Sessions states, at footnote 14, that his decision does not raise due process or retroactivity concerns, practitioners should raise both issues in their opposition to motions to re-calendar to preserve these issues for appeal. Given that DHS aggressively encouraged administrative closure under the Obama administration, if the case for relief is now weaker than when it was previously in court, practitioners should make a “due process based on reasonable reliance” argument—the actions of DHS and the respondent’s reliance on the belief that the case would not be re-calendared has rendered the respondent less likely to obtain relief. *See, e.g., I.N.S. v. St. Cyr*, 533 U.S. 289 (2001) (noting that whether a particular statute has retroactive effect should be informed and guided by considerations of fair notice, reasonable reliance, and settled expectations). These arguments may be particularly strong in cases where an unrepresented respondent accepted administrative closure without having had a thorough assessment of his or her relief options by counsel and where the immigration judge failed to notify the respondent of eligibility for relief at the time of administrative closure, as required by 8 CFR § 1240.11(a)(2). In such cases, practitioners should consider

moving to restore the respondent to the position he or she would have been in prior to admin closure and permit him or her to seek previously available relief *nunc pro tunc* or, in the alternative, to terminate the case pursuant to *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980).

Practitioners could also argue that inherent in an immigration judge's authority to re-calendar a case is the power to control the timing and order of the re-calendaring of closed cases on the docket, by offering arguments proposed by amici such as the [American Bar Association](#) and [retired immigration judges and former members of the BIA](#). This ensures that the court's work can proceed efficiently and that closed cases return to the docket in an orderly and measured fashion. Under this reasoning, the mere filing of a motion to re-calendar should not require the immigration judge to immediately re-calendar a case. Practitioners should consider highlighting the number of cases pending with that particular immigration court to argue that re-calendaring of cases in addition to the others already on the active docket would "likely overwhelm immigration courts and undercut the efficient administration of law." *Matter of Castro-Tum*, 27 I&N Dec. at 293. In other words, the immigration court lacks the resources to add this case to the active docket.

Practitioners may also argue that Sessions lacked the authority to "withdraw" administrative closure through a certified Attorney General decision, by offering arguments proposed in [CLINIC's amicus brief](#), and that *Castro-Tum* was wrongly decided.

### **13. What arguments can practitioners representing children seeking Special Immigrant Juvenile Status use to oppose re-calendaring?**

For administratively closed cases where the respondent has an approved I-360 SIJS petition, practitioners should consider arguing, in response to any DHS motion to re-calendar, that administrative closure for these individuals complies with the spirit of *Castro-Tum*, and the Trafficking Victims Protection Reauthorization Act of 2008. The concern Sessions addressed in *Castro-Tum* was that many administratively closed cases have essentially been permanently removed from the immigration court calendar. Administrative closure is not permanent for this population as SIJS applicants are merely waiting for a visa number to become current, which is only a matter of time. Once a visa number becomes current and the Special Immigrant Juvenile becomes adjustment-eligible, it is to his or her benefit to seek re-calendaring and termination. Re-calendaring and termination not only clear the way for Special Immigrant Juveniles to adjust their status with USCIS, but also relieve the immigration court from the burden of adjudicating cases that USCIS can decide.

Practitioners can also argue that, consistent with *Castro-Tum*, a SIJS case is not "ripe for resolution" and therefore should not be "swiftly returned to active dockets." *Matter of Castro-Tum*, 27 I&N Dec. at 294. SIJS cases that are returned

to the active dockets and are not yet “ripe for resolution” would instead qualify for continuances. *Id.* As a result, re-calendaring SIJS cases would be a premature measure that would unnecessarily add cases to the immigration judges’ active dockets. Premature and indiscriminate re-calendaring SIJS cases would not proceed “in a measured but deliberate fashion” as Sessions requests. *Id.*

**14. How should practitioners proceed if the case is re-calendared?**

Practitioners should assess the merits of any relief currently available to the client and pursue such relief if it is in the client’s best interest. In cases where administrative closure is the client’s best option at this time, practitioners should seek long continuances or termination. On page 291 of the decision, Sessions states: “cases that should not go forward should be terminated....” When in the client’s best interests, practitioners should actively move for termination at every stage of the removal proceedings, which includes denying the factual allegations or charges of removability at the pleading stage, when DHS is not prepared to prove its case, or if there are any procedural defects in service of the NTA, etc. Practitioners should further argue for termination without prejudice in the interest of justice to allow the respondent to seek a benefit before USCIS.

If the immigration judge will not grant a long continuance or terminate the case over DHS objections, practitioners should zealously pursue any other potential relief. If such relief is denied, practitioners should appeal the decision, as well as the immigration judge’s grant of DHS’s motion to re-calendar and denial of the motion to continue or terminate.

**15. What if the immigration judge grants the motion to re-calendar and the practitioner cannot locate the client?**

Upon receiving the motion to re-calendar (and, as discussed in question 8 above, even before receiving such a motion), practitioners have a duty to make good faith efforts to contact the client to inform him or her of the re-calendared hearing and the next hearing date, even if the retainer agreement indicated that the client had a duty to remain in communication with counsel. Practitioners need not withdraw at this juncture just because they have not been able to reach their clients. The practitioner can instead remain counsel in the case and continue to make efforts to find the client.

If the immigration judge re-calendars the case, an appropriate response may vary depending whether the record reflects that the client was given adequate advisals regarding his or her continuing obligations to the court and whether local rules of professional responsibility permit a representative to act on behalf of an absent client. Depending on the circumstances, the practitioner may want to seek a continuance, seek leave to withdraw from the case, or argue that notice to the attorney is constitutionally deficient under the particular circumstances of the case. Care should be taken not to make representations that may prejudice clients

who later seek to rescind and reopen *in absentia* orders. For a discussion on motions to rescind and reopen *in absentia* orders, please refer to CLINIC’s [“Practice Advisory: Motions to Reopen for DACA Recipients with Removal Orders.”](#)

Before withdrawing from a case, practitioners should review the applicable ethical rules for their jurisdictions. Practitioners must balance ethical obligations to the client and the immigration court when determining what disclosures to make to the court about unsuccessful attempts to communicate with the client in the motion to withdraw.

Separate from the motion to withdraw, practitioners should document all their good faith efforts to locate the client to establish compliance with applicable ethical obligations—should an ineffective assistance of counsel issue arise in the future—and to create a record that the client has not received notice of the re-calendaring.

**16. What if the immigration judge issues an *in absentia* order after the hearing is re-calendared?**

Immigration judges did not have formal guidance on what instructions to provide respondents when their cases were administratively closed. As a result, their instructions were not consistent. Some immigration judges advised respondents to remain in touch with their attorneys, some noted a requirement to update their addresses with the court, and some told respondents when and how cases may be re-calendared. Therefore, respondents may have received inaccurate or incomplete advisals about their obligations while their cases were administratively closed. Consequently, there may be challenges to improper notice if DHS tries to re-calendar and the motion is not received or if the respondent does not receive the immigration court’s hearing notice due to a change of address. Practitioners should request the record of proceedings from the immigration court and listen to recording of the hearings to determine whether the immigration judge issued complete and accurate advisals.

Note also that Sessions discusses the *in absentia* standard on page 289. Specifically, Sessions writes that “so long as DHS adequately alleges that it provided legally sufficient written notice to an alien, the alien ‘shall be ordered removed *in absentia* if [DHS] establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable.”” To clarify the standard, DHS cannot merely “adequately allege” that it provided “legally sufficient written notice” to a noncitizen. Rather, under the current statute, an immigration judge may issue an *in absentia* order only “if the Service establishes by clear, unequivocal, and convincing evidence” that the respondent received written notice, as required by the INA, and is removable. INA § 240(b)(5). When reviewing the record of proceedings from the immigration court and listening to the recording of the hearings, practitioners should also confirm

that the immigration judge required DHS to meet its burden of proof. *See, e.g. Jordan Omar Nunez-Zepeda*, AXXX XXX 824 (BIA Sept. 29, 2017) (unpublished) (*in absentia* order for seven year old respondent not supported by clear, unequivocal, and convincing evidence because the Form I-213 contained unreliable information); *Felix Agbor Anyior Nkongho*, AXXX XXX 440 (BIA March 31, 2017) (remands record because IJ decision removing respondent *in absentia* was not based on evidence regarding respondent’s removability); *Leonel Hernandez-Medina*, AXXX XXX 042 (BIA March 14, 2016) (*in absentia* order not supported by clear, unequivocal, and convincing evidence because the Form I-213 contained unreliable information).

**17. Why do advocates believe that the Attorney General chose this case to revoke administrative closure?**

Given the unique facts of this case, advocates question why Sessions chose this case as the vehicle for revoking this policy. One reason may be that there is no opportunity for immigration advocates to appeal the decision directly in federal court. *Castro-Tum* was unrepresented throughout his proceedings and—while advocates submitted 14 amicus briefs—no one has been able to locate the litigant himself to offer to provide representation.

Additionally, the facts of this case discussed in question 6 highlight two important issues for this administration: unaccompanied minors and *in absentia* orders. Although not essential to the decision, Sessions opines in footnote 4 that the respondent, whom the government previously found to be an unaccompanied minor, should no longer be considered an unaccompanied minor because he had reached the age of 18 and may have had a legal guardian. This unaccompanied minor redetermination analysis is consistent with a February 20, 2017 memo from then-DHS Secretary John Kelly, entitled “[Implementing the President’s Border Security and Immigration Enforcement Improvements Policies](#).” That memo took issue with the alleged “exploitation of Department policy and practice” by allowing minors to maintain their status as unaccompanied minors after they were placed in the custody of a parent in the United States. However, what the Trump Administration calls “exploitation” and “[legal loopholes](#)” is actually what the TVPRA requires. This decision appears to be an example of how this Administration is [invoking executive power](#) to bypass Congress.