Administrative Closure Post-*Castro-Tum*

Practice Advisory[1]

June 14, 2018

I. Introduction

Administrative closure is a docket-management mechanism that immigration judges (IJs) and the Board of Immigration Appeals (BIA) have used for more than three decades to suspend removal proceedings in appropriate cases. Under the BIA's legal standard as set forth in *Matter of Avetisyan* and *Matter of W-Y-U-*, cases have been administratively closed in a variety of situations, frequently with the Department of Homeland Security's (DHS) consent during the Obama administration.[2] For example, noncitizens have obtained administrative closure to await the adjudication of a relevant collateral matter, such as an application with U.S. Citizenship and Immigration Services (USCIS), or when they have received a grant of deferred action. Under the Trump administration, however, the number of joint motions for administrative closure has decreased significantly and DHS has moved to recalendar many administratively closed cases.

In January 2018, the Attorney General referred a case to himself to review the authority to administratively close cases. The Attorney General issued his decision in *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) on May 17, 2018, ruling that IJs and the BIA lack general authority to administratively close cases and restricting administrative closure to circumstances where it is explicitly provided for by regulation or settlement agreement.

This practice advisory provides a brief overview of administrative closure and explains the impact of the Attorney General's decision on the future availability of administrative closure, as well as on cases that are currently administratively closed. The advisory suggests arguments challenging *Matter of Castro-Tum* that noncitizens may consider making in support of administrative closure of their cases. Finally, it discusses alternative mechanisms to dispose of or hold in abeyance proceedings in appropriate cases.

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[1] This practice advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. Questions regarding this practice advisory should be directed to clearinghouse@immcouncil.org.

[2] *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012); *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017).

II. What is administrative closure and in what circumstances has it been employed?

Administrative closure is an important tool long-used by IJs and the BIA "to temporarily pause removal proceedings" in appropriate circumstances.[3] When a case is administratively closed, the proceedings are halted, the case is removed from the active docket, and the respondent has no future hearing dates scheduled.[4] Removal proceedings remain suspended unless one party (either the noncitizen or DHS) successfully moves to recalendar it. Administrative closure does not terminate or dismiss the case and it "does not provide [a noncitizen] with any immigration status";[5] the individual remains "in" removal proceedings.[6] Either party may seek administrative closure at any point during the pendency of a case, until a final removal order is entered.

Until 2012, BIA case law prevented IJs from granting administrative closure if either party opposed,[7] which frequently resulted in DHS having "veto power" over such decisions.[8] However, in *Matter of Avetisyan*, the BIA expressly overruled its prior precedent and held that authority to administratively close a case rests entirely with the IJ or the BIA.[9]

Prior to *Castro-Tum*, administrative closure had been used in a variety of circumstances:

- To allow noncitizens adequate time to pursue action outside of immigration court that could lead to relief from removal, such as an application with USCIS or a state court.[10]

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[3] *Matter of W-Y-U-*, 27 I&N Dec. at 18.
[4] *Id.*
[5] *Id*.
[6] Immigration Court Practice Manual, Glossary 1 (2017) ("Once a case has been administratively closed, the court will not take any action on the case until a request to recalendar is filed by one of the parties.").
[7] *See Matter of Gutierrez-Lopez*, 21 I&N Dec. 479, 480 (BIA 1996) ("A case may not be administratively closed if opposed by either of the parties.").
[8] *Matter of Avetisyan*, 25 I&N Dec. at 692.
[9] *Id.* at 694.
[10] For example, administrative closure was frequently granted to allow USCIS to adjudicate a pending petition or application that could lead to relief from removal, including, but not limited to: Petitions for Alien Relative (Form I-130); Petitions for Amerasian, Widow(er), or Special Immigrant, for those who are seeking adjustment under the Violence Against Women Act or Special Immigrant Juvenile Status provisions (Form I-360); Applications to Register Permanent Residence or Adjust Status filed by "arriving aliens" where USCIS had sole jurisdiction (Form I-485); Refugee/Asylee Relative Petitions (Form I-730); Petitions to Remove Conditions on Residence (Form I-751); Applications for Temporary Protected Status (Form I-821); Applications for T Nonimmigrant Status (Form I-914); Petitions for U Nonimmigrant Status (Form I-918); and Applications for Naturalization pursued by a family member/spouse of a noncitizen in removal proceedings (Form N-400). In addition, administrative closure previously could be granted to await the results of a family court proceeding necessary for an award of

- Where DHS has chosen to exercise prosecutorial discretion in a particular case, including where the individual has received a grant of deferred action.[11]
- To allow certain respondents with approved immigrant visa petitions to submit an I-601A application to "provisionally waive" the unlawful presence ground of inadmissibility prior to leaving the country to process their visas at a consulate.[12]
- To ensure a fair hearing for noncitizens with significant mental competency issues; for example, to allow time for treatment before proceeding.[13]

III. How does the Attorney General's *Matter of Castro-Tum* decision change the availability of administrative closure?

In *Matter of Castro-Tum*, the Attorney General ruled that IJs and the BIA do not have the general authority to suspend immigration proceedings through administrative closure.[14] Accordingly, the decision holds, IJs and the BIA may only administratively close cases where an existing Department of Justice (DOJ) regulation or judicially approved settlement expressly authorizes such closure.[15] The decision overrules *Matter of Avetisyan*, *Matter of W-Y-U-*, and any other BIA precedent, "to the extent those decisions are inconsistent with" the Attorney General's opinion.[16]

Under the Attorney General's decision, many categories of noncitizens that previously were able to obtain administrative closure may now have difficulty securing closure of their cases, including, for example, noncitizens who are awaiting adjudication of a relevant collateral matter such as an application with USCIS, who have deferred action, who have mental competency issues, or who are seeking an I-601A provisional waiver. Rather, *unless* the decision is overturned by the court of appeals in the circuit in which the noncitizen's removal proceedings take place, IJs and the BIA may only grant administrative closure under the narrow circumstances described below in Section IV.

Matter of Castro-Tum also impacts cases that are currently administratively closed and do not fall within one of the exceptions described in Section IV; in these cases, the decision directs

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Special Immigrant Juvenile Status or the results of a criminal court processing, including a direct appeal or post-conviction relief.

[11] Under the Obama administration, DHS routinely consented to administratively close removal proceedings in low priority cases by means of a joint motion for administrative closure. This included cases where USCIS had granted the respondent's application for Deferred Action for Childhood Arrivals (DACA).

[12] *See* 8 C.F.R. § 212.7(e). DHS regulations require that noncitizens in removal proceedings have closed cases at the time of filing. *See* 8 C.F.R. § 212.7(e)(4)(iii) (noncitizens in removal proceedings are ineligible for an I-601A waiver "unless the removal proceedings are administratively closed and have not been recalendared at the time of filing the application for a provisional unlawful presence waiver").

[13] *Matter of M-A-M-*, 25 I&N Dec. 474, 483 (BIA 2011).

[14] *Matter of Castro-Tum*, 27 I&N Dec. at 272, 292-93.

[15] *Id.* at 272.

[16] *Id.*

that IJs and the BIA "shall" recalendar the case on the motion of either party.[17] Not all currently closed cases will be recalendared immediately.[18] DHS likely will prioritize cases for recalendaring based on resource constraints and other factors and may issue guidance. Until more information is available, however, practitioners should assume that every administratively closed case is vulnerable to recalendaring.

IV. Which individuals in removal proceedings may still be eligible for administrative closure under *Matter of Castro-Tum*?

Matter of Castro-Tum holds that administrative closure is authorized only where a DOJ regulation or court-approved settlement expressly provides for it. IJs and the BIA may continue to grant administrative closure in these cases and DHS should not move to recalendar removal proceedings that were previously closed under these circumstances. The Attorney General instructed that these cases "should continue to proceed in the manner directed by the relevant regulations or settlement agreements."[19]

Matter of Castro-Tum specifically refers to a handful of such DOJ regulations and settlements "authorizing administrative closure in particular cases."[20] Many of these provisions relate to qualifying nationals of specific countries and, for the most part, affect a dwindling universe of noncitizens.

Individuals for whom administrative closure still is available after *Castro-Tum* include:

1. Individuals eligible for a T visa pursuant to the Victims of Trafficking and Violence Prevention Act. *See* 8 C.F.R. § 1214.2(a).[21]
2. Spouses and children of lawful permanent residents eligible for a V visa pursuant to the Legal Immigration Family Equity Act. *See* 8 C.F.R. § 1214.3.[22]

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[17] *Id.* at 294 (stating the Attorney General's expectation that "the recalendaring process will proceed in a measured but deliberate fashion that will ensure that cases ripe for resolution are swiftly returned to active dockets").

[18] *Id.*

[19] *Id.* at 293.

[20] *Id.*

[21] Section 1214.2(a) instructs individuals in removal proceedings eligible for a T Visa to "request that the [immigration] proceedings be administratively closed (or that a motion to reopen or motion to reconsider be indefinitely continued)." 8 C.F.R. § 1214.2(a). If the noncitizen appears eligible for the visa, the IJ or BIA "may grant such a request to administratively close the proceeding or continue a motion to reopen or motion to reconsider indefinitely." *Id.*

[22] Section 1214.3 instructs individuals in immigration proceedings eligible for a V Visa to "request before the immigration judge or the Board of Immigration Appeals, as appropriate, that the proceedings be administratively closed (or before the Board that a previously-filed motion for reopening or reconsideration be indefinitely continued)" to allow the individual to pursue the visa application with USCIS. 8 C.F.R. § 1214.3. If the noncitizen appears eligible for the visa, the IJ or BIA "shall administratively close the proceedings or continue the motion indefinitely." *Id.*

3. Certain nationals of Vietnam, Cambodia, and Laos eligible for adjustment of status under Section 586 of Public Law No. 106-429. *See* 8 C.F.R. § 1245.21(c).[23]
4. Certain nationals of Guatemala and El Salvador covered by the settlement agreement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 805-06 (N.D. Cal. 1991). *See* 8 C.F.R. §§ 1240.62(b)(1)(i), (2)(iii) and 1240.70(f)-(h).[24]
5. Certain nationals of Nicaragua and Cuba eligible for adjustment of status under Section 202 of the Nicaraguan Adjustment and Central American Relief Act (NACARA). *See* 8 C.F.R. § 1245.13(d)(3)(i).[25]
6. Certain nationals of Haiti eligible for adjustment of status under the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA). *See* 8 C.F.R. § 1245.15(p)(4)(i).[26]
7. Class members covered by the settlement in *Barahona-Gomez v. Ashcroft*, 243 F. Supp. 2d 1029, 1035-36 (N.D. Cal. 2002), which includes certain individuals who applied for suspension of deportation in the Ninth Circuit in the 1990s.[27]
8. Any other DOJ regulations or court-approved settlements expressly authorizing administrative closure.

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[23] Section 1245.21(c) instructs qualifying individuals in immigration proceedings to "contact [DHS] counsel after filing an application to request the consent of [DHS] to the filing of a joint motion for administrative closure." If DHS does not consent, the IJ or the BIA may not administratively close the case. *Id.* ("Unless [DHS] consents to such a motion, the immigration judge or the Board may not defer or dismiss the proceeding . . . .").

[24] This set of regulations incorporates the requirements of the settlement agreement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (*ABC*), which covers certain Salvadoran and Guatemalan nationals who have been in the United States since before certain dates in 1990. Under the *ABC* settlement, *ABC* class members with pending asylum claims could have their cases administratively closed. *Id.* at 805-06. Section 1240.62(b)(1)(i) refers to *ABC* class members "for whom proceedings before the Immigration Court or the Board have been administratively closed or continued." Section 1240.62(b)(2)(iii) refers to non-class member spouses, unmarried sons, and unmarried daughters who have had their immigration proceedings administratively closed.

[25] Section 1245.13(d)(3)(i) requires the IJ or BIA to administratively close (or "continue indefinitely" a motion to reopen or reconsider) cases involving Nicaraguan and Cuban individuals who appeared eligible for adjustment of status pursuant to NACARA, "upon request of the alien and with the concurrence of [DHS]."

[26] Section 1245.15(p)(4)(i) requires that the IJ or BIA administratively close (or "continue indefinitely" a motion to reopen or reconsider) cases involving certain Haitian nationals who appeared eligible to file an application for adjustment of status under HRIFA.

[27] The *Barahona-Gomez* settlement provided for *sua sponte* reopening of certain proceedings to allow class members an opportunity to apply for suspension of deportation. If the class member subsequently failed to appear for a noticed hearing, the case was to be ordered administratively closed for a period of time after which the case could be recalendared under certain circumstances and an appropriate order issued, including an *in absentia* order that could be subject to reopening for lack of notice. *See Barahona-Gomez*, 243 F. Supp. 2d at 1035. Unlike the *ABC* settlement, no DOJ regulations address the *Barahona-Gomez* settlement.

V. After *Castro-Tum*, which categories of individuals can no longer benefit from administrative closure?

The Attorney General ruled in *Matter of Castro-Tum* that IJs and the BIA do not have the authority to administratively close cases in any circumstances other than those described above in Section IV. Under the Attorney General's decision, noncitizens who are, for example, awaiting adjudication of a relevant collateral matter such as an application with USCIS, who have deferred action, who have mental competency issues, or who are seeking an I-601A provisional waiver, may have difficulty securing administrative closure.

VI. Are individuals eligible for provisional unlawful presence waivers (Form I-601A) able to obtain administrative closure?

The Attorney General ruled in *Matter of Castro-Tum* that IJs and the BIA do not have authority to close cases in order to permit a noncitizen to apply for a provisional unlawful presence waiver (Form I-601A). The Attorney General reasoned that the DHS regulation requiring noncitizens to administratively close their cases before applying for the provisional waiver, 8 C.F.R. § 212.7(e)(4)(iii), does not provide authority for IJs and the BIA to close proceedings under these circumstances absent a corollary DOJ regulation.[28] Nonetheless, practitioners may argue that this conclusion is incorrect and that, consistent with the DHS regulation's express reference to administrative closure for provisional unlawful presence waiver applicants, IJs have discretion to administratively close their cases for purposes of pursuing the waiver.

Notably, the Attorney General's decision does not affect those who already have applied for a provisional unlawful presence waiver after having their cases administratively closed, as the relevant point in time is when the noncitizen filed the application with USCIS.[29] Individuals whose cases are currently administratively closed and who are eligible for a provisional waiver should file an application with USCIS as soon as possible before DHS moves to recalendar the proceedings.[30]

VII. Should noncitizens in removal proceedings oppose recalendaring and continue to seek administrative closure?

Noncitizens who do not fall into the categories discussed in Section IV above and who wish to challenge *Matter of Castro-Tum*, should oppose recalendaring and continue to seek administrative closure. Individuals challenging *Matter of Castro-Tum* on a petition for review

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[28] *Matter of Castro-Tum*, 27 I&N Dec. at 278 n.3 ("Regulations that apply only to DHS do not provide authorization for an immigration judge or the Board to administratively close or terminate an immigration proceeding.") & 287 n.9 ("Because only the Attorney General may expand the authority of immigration judges or the Board, that regulation cannot be an independent source of authority for administrative closure.").

[29] *See* 8 C.F.R. § 212.7(e)(4)(iii).

[30] Individuals with a prior order of removal can apply for an I-601A waiver, if they have an approved I-212 Application for Permission to Reapply for Admission to waive inadmissibility for a prior order, but there may be risks to pursuing this strategy.

may contact clearinghouse@immcouncil.org for possible amicus support, ideally, as soon as they receive a decision from the BIA.

To fully preserve such a challenge, individuals should present arguments to the IJ orally at hearings and in writing in the form of a written motion for administrative closure (for cases that are currently on the active docket) or an opposition to a DHS motion to recalendar (for currently closed cases). Practitioners should also brief the issue to the BIA on appeal. Doing so fully preserves the individual's ability to challenge the legality of the Attorney General's decision in *Matter of Castro-Tum* at the conclusion of removal proceedings, i.e., on petition for review in the courts of appeal.

In deciding which arguments to make, individuals may wish to review and consider the applicability of the arguments presented in several of the amici briefs submitted to the Attorney General in *Matter of Castro-Tum*.[31]

Noncitizens may wish to challenge *Matter of Castro-Tum* on the basis that:

- The Attorney General incorrectly concluded that IJs and the BIA lack the general power to administratively close cases—rather, the broad delegations of authority to IJs and the immigration courts have long been recognized to encompass the power to administratively close cases;[32]
- The decision presents due process concerns, particularly where noncitizens are unable to secure necessary continuances or other alternatives,[33] and/or because the Attorney General is not an impartial adjudicator;[34] and/or
- The decision is procedurally flawed in that the Attorney General should not have reversed the agency's longstanding position in the context of an individual case, particularly given that it was widely known that the respondent was unrepresented throughout his proceedings, had been unreachable for some time, and likely would be unable to appeal the decision to the circuit court.[35]

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[31] The authors are aware of seven briefs filed in support of the respondent by amici curiae the American Bar Association, the American Immigration Council, et al., the Catholic Legal Immigration Network, Inc., the Immigrants' Rights and Human Trafficking Program at the Boston University School of Law et al., the Legal Aid Justice Center, a group of retired Immigration Judges and former members of the Board of Immigration Appeals, and the Tahirih Justice Center et al.

[32] *See* Brief for the American Bar Association as Amicus Curiae Supporting Respondent at 4-5 (Feb. 16, 2018); Brief for the Catholic Legal Immigration Network, Inc. as Amicus Curiae Supporting Respondent at 14-16 (Feb. 16, 2018).

[33] *See* Brief for the Immigrants' Rights and Human Trafficking Program at Boston University Law School et al. as Amici Curiae Supporting Respondent at 22 (Feb. 16, 2018).

[34] Brief for the American Immigration Council et al. as Amici Curiae Supporting Respondent (Feb. 16, 2018).

[35] *Matter of Castro-Tum*, 27 I&N Dec. at 273-74, 278-81; *see also* Brief for the Catholic Legal Immigration Network, Inc. at 18-19.

Individuals seeking I-601A provisional unlawful presence waivers may also argue that, consistent with the DHS regulation requiring administrative closure of such cases, IJs and the BIA have power to close proceedings under those circumstances, as discussed above in Section VI.

Individuals with pending applications or petitions outside of immigration court may also consider arguing that their situations do not fall within the concerns the Attorney General expressed about the use of administrative closure—i.e., that administratively closed cases are indefinitely removed from the immigration court calendar with little chance of resuming.[36] Indeed, administrative closure is not indefinite for individuals whose cases were closed based on a pending application with another agency, particularly for noncitizens like Special Immigrant Juvenile Status applicants who are merely waiting for a visa number to become current. Such cases are not "ripe for resolution" and therefore should not be "swiftly returned to active dockets."[37] Such cases that are returned to the active dockets notwithstanding their unfitness for resolution could instead merit a continuance, as explained in Section VIII.

VIII. What options remain for those situations in which administrative closure is unavailable under *Matter of Castro-Tum*?

Various alternatives to administrative closure remain for individuals whose cases are not eligible for closure under *Matter of Castro-Tum* or whose cases are recalendared, including scheduling hearings based on the timing of relevant events, continuances, motions to terminate, and dismissal. Each of these tools has distinct requirements and benefits. Decisions about which option(s) to pursue depend on the noncitizen's individual circumstances.

- Hearing Scheduling and the IJ's Calendar: Although the immigration court typically sets the initial master calendar hearing, the IJ assigned to the case generally sets subsequent master calendar hearings and merits hearings based on the court's and the parties' schedules and the case's readiness for resolution. IJs have latitude to set an appropriate hearing date in light of anticipated future events that will likely impact the proceedings—e.g., an expected decision from USCIS or the expiration of deferred action. Accordingly, noncitizens who are, for example, awaiting the adjudication of an application by USCIS, or who have a deferred action grant, should ask the court to schedule a hearing after the date that the relevant event is reasonably expected to occur. Practitioners should support the request with any relevant documentation, including, e.g., proof of a current application and processing times, evidence of a forthcoming court date, a DACA approval notice, etc.

- Motions to Continue:[38] Like administrative closure, a motion to continue[39] for good cause may be appropriate for a variety of reasons. Because continuances are generally shorter

[36] *See, e.g.*, *Matter of Castro-Tum*, 27 I&N at 272-73.
[37] *Id.* at 294.
[38] For more information on continuances, see the American Immigration Council's practice advisory *Motions for a Continuance*.
[39] *See* 8 C.F.R. § 1003.29 ("The Immigration Judge may grant a motion for continuance for good cause shown.").

and require the respondent to return to court, a noncitizen may need to seek several continuances. *Matter of Castro-Tum* ruled that continuances under the good cause standard "give judges sufficient discretion to pause proceedings in individual cases while also preventing undue delays."[40] Practitioners should consider filing a written motion for a continuance, laying out the reasons for good cause and providing evidence to support the basis for the motion. In general, the more concrete the evidence of a specific need for a delay, the better. As with arguments supporting the authority to administratively close proceedings, practitioners should make sure to properly preserve their arguments for a continuance orally and in writing. *See* Section VII.

- Await the adjudication of a collateral matter: *Matter of Castro-Tum* held that continuances were a superior alternative to administrative closure in certain cases involving vulnerable respondents, including to "allow an immigration judge to oversee an alien minor's progress in obtaining appropriate alternative forms of relief."[41] Notably, however, the Attorney General has also certified to himself the BIA case *Matter of L-A-B-R- et al.*, 27 I&N Dec. 245 (A.G. 2018), to review the circumstances under which "good cause" exists for an IJ to grant a continuance for an outside matter to be adjudicated, which could result in changes to the relevant standards. The most common types of collateral matters include:

  - Await a USCIS adjudication: A continuance can be used to secure additional time to await the adjudication of a petition or application pending before USCIS, such as a U visa or an I-130 petition. *See* n.10, *supra*. The BIA has endorsed the use of continuances while awaiting adjudication of a pending family-based visa petition,[42] an employment-based visa petition,[43] adjustment of status application filed by an "arriving alien,"[44] and a prima facie eligible U-visa.[45]

  - Await the outcome of a collateral proceeding: Continuances may also allow an individual time to pursue a family court order when seeking Special Immigrant Juvenile Status, or to await the outcome of a pending direct appeal of a criminal conviction[46] or pending post-conviction relief.

- Deferred action: Individuals with valid DACA (or other deferred action grant) may also consider requesting a continuance to a hearing date sometime after the individual's deferred action is set to expire. Given the individual's deferred action grant and the possibility of renewal, it may be an inefficient use of the parties' and the court's resources to proceed with a merits hearing prior to the

[40] *Matter of Castro-Tum*, 27 I&N at 293 n.13.
[41] *Matter of Castro-Tum*, 27 I&N at 293 n.13.
[42] *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009).
[43] *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009).
[44] *Matter of Yauri*, 25 I&N Dec. 103, 111 n.8 (BIA 2009).
[45] *Matter of Sanchez-Sosa*, 25 I&N Dec. 807 (BIA 2012).
[46] *Matter of Montiel*, 26 I&N Dec. 555, 557 n.3 (BIA 2015).

expiration of deferred action, particularly where the individual's circumstances could change considerably in the interim. If the individual's deferred action is renewed, then a further continuance may be sought.[47]

- To find counsel, await FOIA results, and/or to prepare a relief application: Noncitizens may also seek continuances to find counsel, as well as for counsel to prepare applications for relief; to gather necessary evidence, identify an expert, or arrange for a witness to testify; to await the results of a Freedom of Information Act (FOIA) request for an A-File; or to determine whether to challenge any allegations in the Notice to Appear. Practitioners should be prepared to submit evidence to support the request; for example, an attorney awaiting a FOIA request might provide evidence of the request's submission and its position in the processing queue.

- Mental competency: *Matter of Castro-Tum* also endorses the use of continuances in circumstances involving mental competency issues.[48]

- Motions to terminate: Unlike administrative closure or continuances, termination formally ends removal proceedings but allows USCIS to exercise its jurisdiction over applications that would otherwise be within the jurisdiction of the immigration courts.[49] Noncitizens should consider moving to terminate wherever possible. In some cases, DACA recipients have reported success in securing termination based on DHS's decision to defer action in their cases.

- Dismissal: Although DHS has been far less likely to exercise prosecutorial discretion under the Trump administration, individuals with sympathetic cases, including DACA recipients who may have been placed in proceedings based on incorrect information, may consider asking DHS to seek dismissal under 8 C.F.R. § 1239.2(c).[50]

[47] Note that Immigration and Customs Enforcement (ICE) sometimes has taken the position that the issuance of a Notice to Appear automatically terminates a recipient's DACA; however, this is legally incorrect. *See Inland Empire-Immigrant Youth Collective v. Nielsen*, No. 17-cv-2048, 2018 WL 1061408, at *17 (C.D. Cal. Feb. 26, 2018) (preliminarily enjoining DHS practice of automatically "terminating DACA based solely on the issuance of a[] [document] charging the DACA recipient with presence without admission or overstaying a visa").
[48] *Matter of Castro-Tum*, 27 I&N Dec. at 293 n.13.
[49] Termination would be without prejudice because there would be no fundamental error which would merit termination with prejudice, and would be solely to vest jurisdiction elsewhere.
[50] *See also* 8 C.F.R. § 239.2(a) (listing grounds for dismissal and providing for DHS cancellation of a Notice to Appear before jurisdiction vests with the immigration court).