



Submitted via Regulations.gov

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Office of Policy
Executive Office for Immigration Review
Department of Justice
5107 Leesburg Pike, Ste. 1800
Falls Church, VA 22041

RE: EOIR DOCKET NO. 021-0410; Public Comment in Response to the NPRM on Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure

Dear Ms. Horowitz,

Our organization, Catholic Legal Immigration Network, Inc. (CLINIC),¹ submits these comments in response to the Notice of Proposed Rulemaking (NPRM) published in the Federal Register on September 8, 2023, titled Appellate Procedures and Decisional Finality in Immigration Proceedings, Administrative Closure. CLINIC applauds the administration for withdrawing the adverse final rule issued by the prior administration, referred to as the AA96 Final Rule. While generally supporting this new rule, CLINIC opposes the application of *Matter of Thomas & Thompson* retroactively, and we urge the Executive Office for Immigration Review (EOIR) to ensure that the implications of administrative closure or termination are fully explained to *pro se* respondents prior to the Immigration Judge's issuance of such orders.

Embracing the Gospel value of welcoming the stranger, CLINIC has promoted the dignity and protected the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs since its founding in 1988. CLINIC's network, originally comprised of 17 programs, has now increased to more than 450 diocesan and community-based programs in 48 states and the District of Columbia. CLINIC is the largest nationwide network of nonprofit immigration programs. Through its Affiliates, CLINIC advocates for the just and humane treatment of noncitizens. Many of CLINIC's Affiliates offer legal services to individuals who are in removal proceedings, or provide assistance in navigating the process *pro se*. Due to our work with noncitizens around the country, we welcome the proposed change with the exception of some aspects detailed below.

I. CLINIC SUPPORTS THE WITHDRAWAL OF THE PRIOR ADMINISTRATION'S AA96 RULE

CLINIC thanks the administration for withdrawing the adverse final rule issued by the prior administration, RIN 1125-AA96 or EOIR Docket No. 19-0022; A.G. Order No. 4800-2020 (hereinafter referred to as the "AA96 Final Rule" or the "AA96 rule"). The AA96 rule, which has been enjoined by a federal court since 2021, proposed to

¹ Elizabeth Carlson, Supervising Senior Attorney; Joanna Mexicano Furmanska, Senior Attorney; Corrie Hansen, Senior Attorney; Rebekah Niblock, Supervising Senior Attorney; and Carolina Rivera, Federal Advocate & Liaison Attorney, authored these comments.

eviscerate the due process rights of noncitizens in proceedings while simultaneously increasing inefficiencies and backlogs in the immigration courts and the Board of Immigration Appeals (BIA).

At the time that AA96 was proposed, CLINIC opposed it via public comment, noting that the proposed rule would render immigration courts less efficient while allowing the Department of Homeland Security (DHS) to pursue any resolved removal case at will, thus upending the finality principles to which EOIR is supposed to adhere. CLINIC also noted at that time that the rule would have further politicized EOIR, reducing its credibility and distancing it from its stated mission of independently and fairly administering the nation's immigration laws. CLINIC served as an organizational plaintiff along with other immigrant justice groups that challenged the unlawful and harmful nature of the AA96 rule, which was ultimately enjoined. CLINIC, therefore, applauds common-sense measures the current administration is taking with the current notice of proposed rulemaking to protect noncitizens' rights in proceedings and allow EOIR to manage its large caseload more effectively.

II. CLINIC STRONGLY SUPPORTS THE USE OF ADMINISTRATIVE CLOSURE AS A DOCKET-MANAGEMENT TOOL BY IMMIGRATION JUDGES BUT URGES THAT THE DUE PROCESS RIGHTS OF NONCITIZENS BE CONSIDERED IN ALL ADMINISTRATIVE CLOSURE MOTIONS

Our organization supports the use of administrative closure by immigration judges. As the NPRM explains, administrative closure is a docket-management tool with a long history of use at the agency and the AA96 rule's attempt to limit its use was contrary to decades of agency precedent. Administrative closure is an effective tool that allows for increased efficiency before the immigration courts. It does not make sense for the overburdened immigration courts to expend resources scheduling a case for multiple master calendar hearings for status updates on an ancillary matter, such as an I-130 petition, U visa, or T visa, that is pending before another agency, usually U.S. Citizenship and Immigration Services (USCIS). The proposed rule would free up time for the immigration courts to focus on more complex matters that can only be litigated before EOIR. While strongly supporting the use of administrative closure by the courts, CLINIC urges EOIR to incorporate protections for noncitizens who wish to have their claims heard on the merits and to not allow DHS to have veto power over the administrative closure process.

A. Protections for Parties Who Wish to Have their Claims Adjudicated before EOIR

In response to the Department of Justice's request for further comment on the topic, CLINIC urges the incorporation of further protections for noncitizens who wish to have their cases adjudicated despite DHS's desire to seek administrative closure. It is important to recognize that some forms of relief can only be sought before the immigration judge and many noncitizens have been waiting for years to have their claims heard on the merits. For example, non-LPR cancellation of removal² is a form of relief that allows certain noncitizens to obtain green cards in the United States. While the eligibility criteria are strict, this provision allows certain noncitizens with at least 10 years of physical presence in the U.S. the opportunity to obtain permanent residency if they can meet the statutory criteria for this relief. However, cancellation of removal for nonpermanent residents can only be obtained before the immigration court—it is not a form of relief that can be sought affirmatively before USCIS. Thus, a noncitizen in proceedings who establishes *prima facie* eligibility for cancellation of removal should generally be allowed to pursue this application if they desire to do so.

Certain asylum applicants may also wish to pursue their applications for relief, and, in some instances, it may be more efficient to allow them to do so before the court. For example, some asylum applicants may have already presented their claims to asylum before the asylum office and thus have a right to review of their referred claims by the immigration judge. Still, other asylum applicants may be applying for asylum before EOIR in the first instance, and administrative closure would leave these individuals stuck in limbo, unable to either file affirmatively while

² Immigration and Nationality Act § 240A(b)(1).

they remain in proceedings or to be heard by the immigration court. Thus, a noncitizen in proceedings who wishes to pursue their asylum case on the merits before the court should generally be permitted to do so.

CLINIC also urges the DOJ to consider the impact that a last-minute, unwanted administrative closure of a case can have on legal services providers. CLINIC knows from its work with hundreds of legal services providers nationwide that there are significant barriers to smaller programs undertaking immigration court representation. A significant barrier for many legal services providers in providing immigration court representation is the amount of time such representation can take—with many legal services providers reporting that representation in an asylum merits hearing can take 50-100 hours of attorney/representative time. The cases often stretch on for several years and prevent organizations from taking on additional cases while others remain pending. Thus, for administrative closure to be granted over a respondent's and representative's objection after years of work and hours of prep time is demoralizing and will discourage legal services providers from accepting cases in immigration court in the future.

There are many instances when the parties will be in agreement as to administrative closure. However, CLINIC urges that a noncitizen's desire to have their case heard in immigration court be given due weight when an immigration judge is considering an administrative closure request. The Department of Homeland Security (DHS) should not be permitted to unilaterally control the immigration court process by moving to administratively close proceedings where the noncitizen has a strong case for asylum or cancellation of removal. Particularly if there is no other sufficient forum for a noncitizen to seek relief, they should be allowed to proceed with their case on the merits before the court. If DHS moves for administrative closure over a noncitizen's objection, the immigration judge should consider the noncitizen's desire for their claim to be heard on the merits to generally be a persuasive reason that would militate in favor of denying a unilateral request by DHS to administratively close proceedings.

CLINIC also urges special protections for pro se respondents in proceedings who will not understand the immigration judge's use of the term "administrative closure." CLINIC recommends the creation of *pro se* fliers in multiple languages that address what "administrative closure" is and its possible impact on the noncitizen's case (such as its impact on stopping the clock for pending asylum claims). CLINIC also urges that judges offer at least one continuance to a *pro se* respondent to seek counsel as to the impact of administrative closure before they accept it.

B. Factors Adjudicators Should Consider in Motions to Administratively Close and Motions to Re-calendar.

CLINIC generally supports the enumerated factors in the proposed rule, which are generally those factors outlined in the BIA's precedential decision in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012). These factors include: 1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is re-calendared before the Immigration Judge or the appeal is reinstated before the BIA. The rule sets forth an additional factor for consideration: whether the grant of administrative closure is a prerequisite to a petition, application, or other action being filed with, or granted by, DHS.

CLINIC generally views these factors as setting forth a common-sense framework for immigration judges to consider such requests. CLINIC would suggest, however, that the anticipated duration of the closure be removed from consideration as a factor, or at the very least, it be made clear that a lengthy closure can be a reason to *support* administrative closure rather than to disfavor it. For example, many forms of collateral relief sought by noncitizens before USCIS remain pending for years. There is currently a multi-year wait list for U visa eligibility, for example, and for a visa number to become available to Special Immigrant Juvenile Status (SIJS) petitioners. A request for administrative closure should not be disfavored simply because the wait time may be lengthy.

CLINIC also suggests two modifications to the regulations that would address two of the most common scenarios that its Affiliates have reported for wishing for cases to be administratively closed rather than terminated or dismissed. First, CLINIC proposes the insertion of the following language in proposed 8 CFR 1003.1(l)(3)(i)(A): The reason administrative closure is sought, **with recognition that a noncitizen's maintenance of work authorization is a valid consideration for the adjudicator.**

Second, CLINIC proposes the following language be included in 8 CFR 1003.1(l)(3)(i)(D): The likelihood the noncitizen will succeed on any petition, application, or other action that the noncitizen is pursuing or, **in the case of the Central American Minors program, has filed on behalf of another individual**, or that the noncitizen states in writing or on the record at a hearing that they plan to pursue, outside of proceedings before the immigration judge.

For the reasons outlined in more detail in Section D below, CLINIC believes that a noncitizen's ability to maintain valid work authorization and to petition for family members through the Central American Minors (CAM) program are valid reasons that should be outlined in the regulations governing motions for administrative closure.

C. Motions to Administratively Close to Seek Collateral Relief Should Generally Be Granted, and Where Joint or Unopposed Motions Are Denied, Judges Should List Their Reasons on the Record

Given CLINIC's general support of the proposed rule's incorporation of the *Avetisyan* factors, CLINIC likewise supports the proposed rule specifying that a motion for administrative closure should generally be granted in cases where a respondent demonstrates a reasonable likelihood of success on the merits and that the respondent has been reasonably diligent in pursuing that relief. This relief should include CAM relief being submitted on behalf of a qualifying family member. Although, as discussed in Section A above, CLINIC urges the Department to incorporate protections for those respondents who seek to pursue relief to its merits in immigration court rather than administratively close a case, CLINIC also appreciates that, where a respondent makes a motion for administrative closure affirmatively, this indicates a desire on the part of the respondent for the removal proceedings to be paused rather than be forced to the merits. In those circumstances, for the myriad of reasons pointed out by the Department in the proposed rule, administrative closure allows a respondent time to pursue relief outside of immigration court while also ensuring judicial efficiency by limiting the number of cases on the court's docket. In particular, CLINIC is aware through its collaborative work on issues faced by unaccompanied minors (UCs) that there remain numerous outstanding removal orders against UCs entered by immigration judges refusing to continue or administratively close cases while those UCs wait for their priority dates to become current in SIJ-based adjustment cases. Forcing UCs to pursue motions to reconsider, Board of Immigration Appeals (BIA) review, or motions to reopen not only places an undue burden on the youth and their mostly nonprofit counsel but also *negatively* impacts judicial efficiency by placing *more* actions and motions on the calendars of the court and BIA.

Moreover, CLINIC appreciates the rule's framework that requires immigration judges (except in very rare circumstances) to grant a jointly filed or unopposed motion for administrative closure. CLINIC Affiliates have reported that certain immigration judges (IJs) have rejected joint motions for administrative closure without providing any reasoning or basis for doing so. CLINIC appreciates that this rule makes clear that (except in very rare cases) this should not be happening and provides that judges must articulate, on the record, "unusual, clearly identified, and supported reasons for not [administratively closing a case]," as adopted from *Matter of Hashmi*, 24 I&N Dec. 785, 791 (BIA 2009). This provides a clear legal basis for appeal should an IJ not follow the regulations.

D. Specific Scenarios in Which Administrative Closure Is Appropriate Where No Petition, Application, or Other Action Is Pending Outside EOIR Proceedings

As discussed in Section B above, there are a few common scenarios in which CLINIC Affiliates have reported seeking administrative closure in place of termination or dismissal. The first scenario is where an application for

relief, such as asylum or cancellation of removal, is pending before EOIR, causing the respondent to be eligible for employment authorization based on that pending application. Under its current enforcement priorities, DHS proposes for many non-priority respondents that these cases be dismissed in their entirety. However, dismissing these cases obviously terminates the pending applications on which the noncitizens' employment eligibility is based.

A noncitizen's ability to remain employed is not only clearly invaluable to that noncitizen, it serves the interests of the United States on the whole. Noncitizens are employed at high rates and comprise more than a third of the workforce in some industries. They help local economies by responding to worker shortages, filling gaps caused by an aging native-born population, and supporting their United States citizen children in their upward mobility. A noncitizen's ability to stay employed reduces their families' reliance on public benefits. They are also less likely to be exploited by employers, who might otherwise take advantage of their lack of employment authorization and subject them to harmful labor practices. Workers with employment authorization are also more productive than those without. Finally, more noncitizens authorized to work in the United States economy means more eligible taxpayers contributing to the country's revenue.

CLINIC is also aware that there are respondents in removal proceedings who may not have a petition pending outside removal proceedings but have a qualifying child for whom a CAM application is pending. Typically, the respondents are eligible as "qualifying parents" because they have an asylum application pending in EOIR. Dismissal or termination of such a case would cause a respondent's asylum case to be withdrawn, thus causing the respondent to no longer meet the "qualifying parent" definition for purposes of the CAM Program. Although the respondent may successfully avoid a removal order in such circumstances, dismissal kills the possibility of stateside family reunification, a hugely important goal for the parent and a lifesaving benefit for the child. One of this administration's priorities in immigration policy has been to shift migration away from dangerous and risky irregular channels to safe, legal, and orderly alternatives. One such alternative has included the CAM Program since its restarting in 2021. This priority will be better met by allowing qualifying parents with pending asylum applications to administratively close their cases rather than terminate them.

Case Example: Sonia is a citizen of El Salvador who filed an Affidavit of Relationship on behalf of her son Antonio through the Central American Minors program based on her pending defensive asylum application. Sonia and Antonio have been separated from each other for nearly ten years, and Sonia was thrilled with the reopening of the CAM program to allow her to be reunited with her minor son. Sonia filed a motion for administrative closure with the immigration court, asking that her case be administratively closed rather than dismissed as she had been offered by DHS. Sonia noted that the difference in these procedures meant the difference between her son's ability to continue with the parole program through CAM versus being removed from the CAM parole program. The Immigration Judge denied the administrative closure request, finding participation in the CAM program to be "speculative" and not a valid basis for administrative closure.

Such a denial should not occur under CLINIC's recommended additional language, providing that cases should generally be granted where a respondent shows a reasonable likelihood of success on a CAM application for a qualifying relative and diligence in pursuing that application.

A third potential scenario in which administrative closure can benefit a respondent who does not have a petition pending outside removal proceedings is one in which a respondent is likely to qualify for cancellation of removal in the near future, once they meet the continuous physical presence requirement. Many noncitizens in removal proceedings have continued to accrue physical presence in the U.S. because they were served with defective Notices to Appear that did not stop the time for non LPR cancellation of removal. Because cancellation of removal is a benefit only available to those in removal proceedings, dismissal of a case ends a respondent's eligibility for the benefit before it even accrues. Were respondents able to request administrative closure in cases where cancellation is foreseeable but for the need to accrue additional physical presence, this would not only increase the number of individuals with legal status in the United States (along with all the concomitant benefits of legalizing noncitizens), it would also allow for more efficient resolution of those cases - administrative closure and re-calendarling is a more

efficient use of judicial resources than is the refiling or reopening of a terminated case.

E. Immigration Judges and the BIA Should Have Only Limited Authority to Administratively Close Cases Where No Motions Have Been Filed by the Parties

CLINIC does not foresee any circumstances in which both parties are available and participating in the case and *sua sponte* administrative closure would be appropriate. As discussed in Section A above, there are many situations in which a respondent desires and intends to pursue relief before the immigration judge and is kept from doing so by the entry of administrative closure. CLINIC reiterates the need to protect respondents from such limbo by limiting the instances in which the court or BIA may, on its own motion, administratively close a case. CLINIC urges the Department to include strict notice requirements and response time allowances for those adjudicators who have determined administrative closure is necessary or appropriate. Respondents need an opportunity to be apprised of and respond to any risk of administrative closure, whether that motion comes from DHS or *sua sponte* from the adjudicator.

Heightened notice protections are especially necessary in cases where respondents are proceeding *pro se*. As discussed above in Section A, the complex language used in immigration orders, notices, and alerts often confuses *pro se* respondents. This confusion would only be made worse by the entry of an order without any opportunity for the respondent to seek the assistance of counsel or to understand and respond to any such order before its entry.

CLINIC does understand that there are some very limited situations in which administrative closure may be necessary or appropriate without motion of the parties, primarily in situations in which respondents might otherwise be ordered removed *in absentia*. Administrative closure may protect an otherwise vulnerable noncitizen for whom an *in absentia* removal order would be an additional challenge adding to their vulnerability. Some examples include an unaccompanied minor who has fled from an exploitative caretaker, a victim of domestic violence whose partner controls their every movement, or a respondent who suffers from a mental health disorder or cognitive disability. Administrative closure may be appropriate if any such facts or details of vulnerability, abuse, or exploitation are known to DHS, the IJ, or the BIA.

III. CLINIC SUPPORTS IMMIGRATION JUDGES' AUTHORITY TO TERMINATE OR DISMISS REMOVAL PROCEEDINGS AFTER THE COMMENCEMENT OF PROCEEDINGS IN CERTAIN CIRCUMSTANCES.

A. The proposed amendments to the Department's regulations on termination and dismissal are warranted.

CLINIC supports the proposed termination and dismissal standards that clearly provide immigration judges and Appellate Immigration Judges with explicit authority to terminate or dismiss removal proceedings after the commencement of proceedings where appropriate and in accordance with their statutory authority and duties. CLINIC agrees with the Department's proposed delineation of circumstances warranting an order of dismissal versus termination and supports the Department's proposal to expand the immigration judge's authority to terminate proceedings in circumstances outside of those explicitly identified in existing regulations to promote efficiency and fairness.

Furthermore, CLINIC supports the Department's proposal to distinguish between mandatory and discretionary termination and the circumstances outlined for each. For instance, CLINIC supports the proposition that mandatory termination is warranted where the noncitizen has obtained lawful permanent resident status, refugee status, asylee status, or nonimmigrant status under INA 101(a)(15)(S), (T), or (U) that has not been revoked or terminated. CLINIC also welcomes the Department's proposal for mandatory termination where motions to terminate are filed jointly by both parties or by one party to which the other has affirmatively indicated its non-opposition, unless the judge articulates unusual, clearly identified, supported reasons for denying the motion. CLINIC also strongly agrees

with the Department's proposal for discretionary termination where the respondent can demonstrate *prima facie* eligibility for relief, such as an unaccompanied child's intent to file for asylum affirmatively with USCIS.

B. Evidence to Support Grounds for Termination.

In response to the Department's request for further comment on the evidence required to support certain proposed grounds of termination, such as a pending application with USCIS, CLINIC recommends that a demonstration of the respondent's USCIS receipt notice is sufficient evidence of *prima facie* eligibility for relief. If the respondent has yet to file their application with USCIS but can still demonstrate a showing of *prima facie* eligibility, the Immigration Judge should also be permitted to consider termination in certain circumstances. For instance, if a respondent is eligible for SIJS, a predicate order with the requisite findings should be sufficient for termination if there are no other concerning factors and DHS does not oppose. Also, if the respondent obtained a signed U Visa certification within six months of a motion to terminate, such evidence should be considered *prima facie* eligibility for a U visa and grounds for termination by the Immigration Judge.

C. Delineation of Dismissal versus Termination.

CLINIC generally supports the Department's proposal to delineate the circumstances more clearly in which the immigration judge's order disposing of a case should be an order of dismissal compared to circumstances in which the immigration judge's order disposing of a case should be an order of termination.³ However, CLINIC expresses concern regarding the common practice wherein the immigration judge grants DHS's unilateral motion to dismiss proceedings over the opposition of the respondent's counsel. In such circumstances, the immigration judge *should not* be permitted to grant a unilateral motion to dismiss if the respondent opposes dismissal and wishes to proceed on the merits of their claim.

CLINIC receives an increasing number of reports from Affiliates across the country documenting instances where shortly before or on the day of the merits hearing, OPLA files a unilateral request to dismiss, including where the respondent and counsel are fully prepared to proceed on the merits of the claim, and the IJ grants the motion over respondent's objection. In one report from Charlotte, North Carolina, counsel arrived at the respondent's VAWA Cancellation merits hearing after filing an extensive pre-hearing brief and preparing the respondent to testify. At the commencement of the hearing, the DHS attorney submitted a unilateral request to dismiss without providing opposing counsel advance notice nor attempting to ascertain their position on the case. The respondent's counsel strenuously objected to the unilateral dismissal, as VAWA Cancellation was the only available relief for the respondent because two years had passed since her divorce from her U.S. citizen husband, she was permanently barred from admission, and she had no potential U visa eligibility. Over counsel's objections, the immigration judge granted the unilateral dismissal and advised counsel that she could appeal the decision.

Another report from an attorney of a small non-profit organization in Adrian, Michigan, describes a similar experience where the IJ granted DHS's unilateral motion to dismiss despite her objection. The attorney devoted weeks (hundreds of hours) preparing the respondent for his non-LPR cancellation of removal hearing, including representing him during a successful bond hearing and subsequent master calendar hearings, and multiple individual hearings due to sudden cancellations. The attorney and respondent drove two hours each way to these hearings, at a significant expense to the respondent and the non-profit organization. Shortly before the individual merits hearing, DHS moved to dismiss proceedings. The attorney and the respondent opposed, providing a multi-page brief arguing against dismissal. Despite these efforts, the attorney received a phone call from the court's clerk indicating that the IJ granted dismissal. The respondent was devastated, as he will no longer be able to work legally in the United States nor have an opportunity to gain lawful immigration status. The attorney is equally devastated after dedicating hours of time and energy to preparing the case only to have her work undone at the very last minute.

For both of these respondents, their only form of relief, cancellation of removal, is available only in removal

³ See 8 CFR 1239.2(b) (proposed).

proceedings, and both hired counsel to prepare for their hearings before the IJs. Both respondents lost their ability to work legally in the United States and their only chance at regularizing their immigration status. These are only two reports that CLINIC has received in recent months. An IJ's grant of a unilateral motion to dismiss over the respondent's objection violates the respondent's due process rights, namely the right to a full and fair hearing.⁴ Furthermore, Congress also conferred certain rights on noncitizens in removal proceedings, including "a reasonable opportunity to examine the evidence against the [noncitizen], to present evidence on the [noncitizen's] own behalf, and to cross-examine witnesses presented by the Government."⁵ These rights would cease to exist if DHS could unilaterally dismiss removal proceedings. Regarding asylum claims in proceedings, a respondent has a statutory right to seek asylum. "[A noncitizen] who is physically present in the United States or who arrives in the United States . . . irrespective of such [noncitizen's] status, may apply for asylum . . ."⁶ In the asylum statute, Congress directed the Department of Justice to provide an avenue for asylum seekers to present their claims, directing the attorney general to "establish a procedure for the consideration of asylum applications filed under subsection (a)."⁷ Granting DHS's motion to dismiss where the respondent wishes to present their asylum claim would subvert Congress's clearly articulated intent. Even if the respondent can file affirmatively for asylum, USCIS typically does not afford the same rights in asylum interviews for the asylum seeker to examine government evidence or cross-examine witnesses.

Unilateral dismissals of meritorious claims are also an inefficient use of limited government resources. DHS's prosecutorial discretion guidance stresses that one key purpose is to conserve government resources for priority cases. The memorandum from Kerry E. Doyle, ICE Principal Legal Advisor states, "Sound prioritization of our litigation efforts through the appropriate use of prosecutorial discretion can preserve limited government resources, achieve just and fair outcomes in individual cases, [and] reduce government redundancies. . . ."⁸ The proposed rules and EOIR internal memos also stress the importance of judicial efficiency and careful allocation of limited resources. In granting DHS's unilateral motion to dismiss over a respondent's objection, the Immigration Judge is not accomplishing DHS's and DOJ's stated goal of efficiently using resources and reducing redundancies.

Finally, in DOJ's recent memorandum⁹ issued on September 28th, 2023, EOIR Director David L. Neal instructs immigration judges to consider *any* objection to dismissal by the respondent when a DHS attorney moves to dismiss a particular case. CLINIC urges the Department to add this similar language to the proposed rule to safeguard the rights of respondents in removal proceedings.

D. Termination Authority Should Be Limited in Certain Circumstances

CLINIC generally agrees with the Department that immigration judges and appellate immigration judges should have a separate and distinct authority to terminate proceedings in circumstances outside of those explicitly identified in existing regulations, which do not expressly capture all situations where EOIR adjudicators' exercise of that authority may be necessary or appropriate for the disposition of a case.¹⁰

While the Department makes clear that it is not in any way limiting already-existing termination authority,¹¹ CLINIC recommends that termination authority should be constrained in certain circumstances to protect the due process rights of respondents in removal proceedings. As such, the Rule should delineate circumstances where termination is not warranted. First, the regulations should make clear that one party must not have veto power over

⁴ See *Matter of M-A-M-*, 25 I&N Dec. 474, 479 (BIA 2011) ("Included in the rights that the Due Process Clause requires in removal proceedings is the right to a full and fair hearing."). See also 8 C.F.R. 8 CFR § 1240.11(a)(2).

⁵ See Immigration & Nationality Act § 240(b)(4)(B).

⁶ INA § 208(a)(1).

⁷ INA § 208(d)(1).

⁸ See Memorandum from Kerry E. Doyle, ICE Principal Legal Advisor, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion, at 9.

⁹ See DM-23-04.

¹⁰ See *Matter of Coronado Acevedo*, 28 I&N Dec. at 651–52.

¹¹ See 8 CFR 1003.1(m)(1)(i)(E)–(F) (proposed), 1003.18(d)(1)(i)(E)–(F) (proposed).

removal proceedings. The respondent must have the right to oppose a unilateral motion to terminate or dismiss, and the adjudicator should not be able to affirm dismissal or grant termination over the respondent's objection. Second, there must be protections for *pro se* respondents. CLINIC also urges special protections for *pro se* respondents in proceedings who will not understand the immigration judge's use of the terms "dismissal" or "termination." CLINIC urges the creation of *pro se* fliers in multiple languages that address what "termination" and "dismissal" are and their impact on the noncitizen's case. CLINIC also urges that judges offer at least one continuance to a *pro se* respondent to seek counsel on the impact of termination or dismissal before they accept it.

E. Immigration Judges and the BIA Should Have Only Limited Authority to Terminate Cases Where No Motions Have Been Filed by the Parties

CLINIC generally advocates that immigration judges or Appellate Immigration Judges should only terminate a case on a party's motion. An exception to this would be in cases where mandatory termination is warranted under the regulations. CLINIC concurs that *sua sponte* termination is permissible as a time-saving measure for IJs and because there would be almost no circumstances when an asylee or lawful permanent resident would object to termination of proceedings. However, in cases governed by the permissive termination standard of the regulations, adjudicators should not be permitted to *sua sponte* terminate cases. For example, where a respondent has a pending TPS application, but wishes to pursue their asylum case in proceedings, this would fall within the category of a permissive termination case and the respondent should, therefore, have the option to proceed with their case on the merits. Therefore, CLINIC would generally support *sua sponte* termination only in limited instances of cases involving mandatory terminations under the proposed regulations.

In addition, CLINIC does understand that there are some very limited situations in which termination may be necessary or appropriate without motion of the parties, primarily in situations in which respondents might otherwise be ordered removed *in absentia*. Termination may protect an otherwise vulnerable noncitizen for whom an *in absentia* removal order would be an additional challenge adding to their vulnerability, especially if it is clear to the IJ that the charge of removability cannot be sustained or that the Notice to Appear is defective. As described in Section II E above, some examples include an unaccompanied minor who has fled from an exploitative caretaker, a victim of domestic violence whose partner controls their every movement, or a respondent who suffers from a mental health disorder or cognitive disability.

IV. CLINIC URGES THAT *MATTER OF THOMAS & THOMPSON* NOT BE APPLIED RETROACTIVELY

In *Matter of Thomas & Thompson*,¹² Attorney General Barr overruled three precedential BIA decisions¹³ and held that state-court orders that modify a noncitizen's criminal sentence will be given effect for immigration purposes only when they are based on a substantive or procedural defect in the underlying criminal proceeding. In so doing, the former Attorney General disrupted decades of precedent and unsettled the expectations of noncitizens and their legal representatives. CLINIC urges the administration to withdraw the adverse decision in *Thomas & Thompson*, as it was contrary to eighteen years of precedent on this topic. However, understanding that this is not the issue before the agency at this moment, CLINIC urges that the damage from this decision be as limited as possible. CLINIC requests that the agency adopt the approach of the Seventh Circuit in its precedential decision in *Zaragoza v. Garland*,¹⁴ and hold that applying *Thomas & Thompson* to a preexisting sentence modification creates an impermissible retroactive application of a new rule. Therefore, CLINIC urges that any sentencing modification issued on or before October 25, 2019, be considered under the framework outlined in *Matter of Cota-Vargas*, *Matter*

¹² *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019).

¹³ *Matter of Cota-Vargas*, 37 I&N Dec. 849 (BIA 2005), *Matter of Song*, 23 I&N Dec. 173 (BIA 2001), and *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016).

¹⁴ *Zaragoza v. Garland*, 52 F.4th 1006, 1010 (7th Cir. 2022).

The reasoning of the Seventh Circuit in the *Zaragoza* case is the proper framework to apply. As the Seventh Circuit noted, “a postconviction event—*Zaragoza*’s sentence modification—gave her a right to relief from removal, only to be taken away by *Thomas*.”¹⁶ Thus, the decision had a retroactive impact as applied to the petitioner in that case. The Seventh Circuit then went on to consider whether the retroactive application is impermissible and determined that it was because it created a “manifest injustice” based on several retroactivity factors, nearly all of which weighed in favor of the petitioner in this case:

(1) Whether the particular case is one of first impression; (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of the party on the old standard.¹⁷

While the Eleventh Circuit reached the opposite conclusion, CLINIC respectfully notes that the Eleventh Circuit did not meaningfully wrestle with the impacts of the retroactivity problem in that case.¹⁸ The Eleventh Circuit stated conclusively that “[t]he BIA’s prior misinterpretation of the statute does not mean *Matter of Thomas* announced new law. It just correctly stated what the old law was.”¹⁹ However, this conclusory statement does not begin to grapple with the fact that thousands of noncitizens and their legal representatives relied on the prior governing framework for years before the issuance of *Thomas & Thompson*. Under the framework in effect from 2001 to 2019, a post-sentencing sentence modification was given full recognition by the agency without the need to establish an underlying procedural or substantive defect in the proceedings. In 2019, that legal framework abruptly changed. Individuals who were no longer deportable or who were eligible for relief from removal under the old framework suddenly faced very different immigration consequences as a result of a new legal decision by the Attorney General. As applied to this class of individuals, this new decision creates an impermissible retroactive effect.

CLINIC regularly trains its network of hundreds of legal services providers on the immigration consequences of criminal convictions. In trainings through 2018, including in an annual introductory webinar series on the immigration consequences of crimes, CLINIC attorneys explained that post-conviction sentencing modifications are generally recognized for immigration purposes based on the framework outlined in *Matter of Cota-Vargas*, *Matter of Song*, and *Matter of Estrada*.²⁰ CLINIC attorneys explained that in seeking sentencing modifications there was no need to point to a legal or procedural defect in the underlying proceedings, although these defects likely existed in many cases. Hundreds of legal representatives regularly attended (and continue to attend) this annual introductory course.

Beginning in its November 2019 training on the immigration consequences of crimes, CLINIC attorneys explained that under the new *Thomas & Thompson* decision, post-conviction sentencing modifications were generally not recognized unless there was an underlying legal or procedural defect in the proceedings. There is no question that attorneys and legal representatives viewed *Thomas & Thompson* as a major change in law directly impacting their practice and their clients.

¹⁵ *Matter of Cota-Vargas*, 37 I&N Dec. 849 (BIA 2005), *Matter of Song*, 23 I&N Dec. 173 (BIA 2001), and *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016).

¹⁶ *Zaragoza*, 52 F.4th at 1023.

¹⁷ *Zaragoza*, 52 F.4th at 1023 (citing *Velasquez-Garcia v. Holder*, 760 F.3d 571 (7th Cir. 2014)).

¹⁸ *Edwards v. U.S. Attorney General*, 56 F.4th 951 (11th Cir. 2022).

¹⁹ *Id.* at 962.

²⁰ *Matter of Cota-Vargas*, 37 I&N Dec. 849 (BIA 2005), *Matter of Song*, 23 I&N Dec. 173 (BIA 2001), and *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016).

Thomas & Thompson represents a dramatic shift from years of agency precedent. There is no question that legal services providers in CLINIC's network relied on the prior framework to their detriment. For example, many noncitizens received sentencing modifications that were based on legal or procedural defects in the underlying proceeding, but there was no cause for this to be stated explicitly on the record because that was not a requirement under the then-governing framework. Thus, these individuals are potentially left without any relief in immigration or state court, having relied on a framework that is no longer in existence. Applying *Thomas & Thompson* retroactively to those noncitizens that legal services providers counseled will thus create an impermissible retroactive effect on them, and CLINIC urges the Department not to do so.

V. CONCLUSION

CLINIC, while generally supporting this new rule, urges EOIR to ensure that the implications of administrative closure or termination are fully explained to pro se respondents prior to the Immigration Judge's issuance of such orders. Our organization recommends the creation of simple written resources explaining the terms "administrative closure" and "termination," which should be provided to pro se respondents in removal proceedings. For similar reasons, we generally oppose the use of an Immigration Judge's *sua sponte* authority with respect to administrative closure and termination. We instead believe that administrative closure and termination are tools to be utilized only when a motion for either or both is brought by one of the parties in proceedings (except in limited circumstances). Finally, CLINIC urges for *Matter of Thomas & Thompson* to not be applied retroactively. CLINIC applauds this effort by the administration to withdraw the previous rule and protect respondents' rights while allowing EOIR to more effectively manage their large caseloads.

Thank you for your consideration of these comments. Please do not hesitate to contact Karen Sullivan, Director of Advocacy, at ksullivan@cliniclegal.org, with any questions or concerns about our recommendations.

Sincerely,

A handwritten signature in blue ink that reads "Anna Gallagher". The signature is fluid and cursive, with the first name "Anna" and last name "Gallagher" clearly distinguishable.

Anna Gallagher
Executive Director