Before the
United States Department of Justice
Attorney General Jefferson Sessions

BRIEF OF *AMICI CURIAE* KIDS IN NEED OF DEFENSE, PUBLIC COUNSEL, AND FREEDOM NETWORK USA IN SUPPORT OF THE RESPONDENT REYNALDO CASTRO-TUM

Maria M. Odom
Vice President for Legal Services
Kids in Need of Defense (KIND)
1300 L Street NW, Suite 1100
Washington, DC 20005
(202) 824-8682

Joseph F. Yenouskas
GOODWIN PROCTER LLP
901 New York Avenue, N.W.
Washington, DC 20001-4432
(202) 346-4143

Aviv Zalcenstein
Cindy Chang
Mia Khatcherian
GOODWIN PROCTER LLP
620 Eighth Avenue
New York, NY 10018
(212) 813-8800

TABLE OF CONTENTS

STATEMENTS OF INTEREST 1

DISCUSSION 3

I. **Congress Delegated Authority That Supports Administrative Closure Directly to Immigration Judges, as Reflected in Regulation, Board Precedent, and EOIR Guidance**.... 3

A. Authority to Order Administrative Closure Is Implied in Immigration Judges' Statutory Powers to Conduct Removal Proceedings, and Reflected in Regulations 3

B. Regulations Applicable to Certain Relief Applications Reflect the Utility of Administrative Closure as a Docket Management Tool 4

C. The Board Has Used Its Authority to Order Administrative Closure and to Remand for Consideration of Administrative Closure 5

D. The Chief Immigration Judge Has Endorsed the Use of Administrative Closure Through Procedural Guidance 6

II. **The *Avetisyan* and *W-Y-U-* Standards for Administrative Closure Furnish Appropriate Guidance and May Benefit from Refinement** 7

III. **Authority for Administrative Closure Should Be Delegated if Lacking, and Should Not Be Withdrawn if Extant** 8

A. Administrative Closure Facilitates the Efficient Resolution of Immigration Cases........ 8

B. Administrative Closure Is Essential to Judges' Independent Discretion 9

C. The Withdrawal of Administrative Closure Authority Would Be Disruptive and Would Lack Clear Legal Basis 10

IV. **Cases Involving Unaccompanied Children Demonstrate the Value of Administrative Closure to the Fair and Efficient Processing of Removal Proceedings** 11

A. Administrative Closure Is Valuable in UAC Cases Where a History of Harm Supports Entitlement to Relief but Inhibits Navigation of Removal Proceedings 13

1. *Flexibility in the preliminary phase of special immigrant juvenile status* 15

2. *Alternatives to termination pending SIJS-based adjustment of status* 17

3. *Conserving court resources during asylum office adjudication* 19

4. *Published guidance supports administrative closure for USCIS adjudication of visas for victims of trafficking or other crimes* 20

B. Administrative Closure Mitigates Special Hardships Characteristic of UAC Cases 21

V. **If Administrative Closure Becomes Unavailable, Existing Orders of Administrative Closure Should Remain in Place for Reasons of Fairness and Judicial Economy**............ 24

A. The Fairness Considerations Behind the Presumption Against Retroactivity Are Particularly Important in the Context of Administrative Closure 24

B. The Considered Judgment of Immigration Judges Should Be Respected 26

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Cases

Abu-Khaliel v. Gonzales,
436 F.3d 627 (6th Cir. 2006) 10

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 25

Chew Heong v. United States,
112 U.S. 536 (1884) 25

I.N.S. v. St. Cyr,
533 U.S. 289 (2001) 25

In re Immigration Petitions,
702 F.3d 160 (2d Cir. 2012) 9

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 10, 11

Kaiser Aluminum & Chem. Corp. v. Bonjorno,
494 U.S. 827 (1990) 24

Landgraf v. USI Film Prod.,
511 U.S. 244 (1994) 24

Matter of Avetisyan,
25 I&N Dec. 688 (BIA 2012) ....*passim*

Matter of Hashmi,
24 I&N Dec. 785 (BIA 2009) 5, 7, 9

Matter of Montiel,
26 I&N Dec. 555 (BIA 2015) 5

Matter of N-R-R,
A XXX XXX 938 (BIA Dec. 14, 2015) 17, 18

Matter of Rajah,
25 I&N Dec. 127 (BIA 2009) 5

Matter of Sanchez Sosa,
25 I&N Dec. 807 (BIA 2012) 14, 20

Matter of W-Y-U,
27 I&N Dec. 17 .... 7, 8

Penn-America Ins. Co. v. Mapp,
521 F.3d 290 (4th Cir. 2008) 9

St. Marks Place Housing Co., Inc. v. U.S. Dep't of Housing & Urban Dev.,
610 F.3d 75 (D.C. Cir. 2010) 10

United States ex rel. Accardi v. Shaughnessy,
347 U.S. 260 (1954) 11

Statutes

6 U.S.C. § 279 12

8 U.S.C. § 1101; INA § 101 .... 3, 15, 23

8 U.S.C. § 1103; INA § 103 4

8 U.S.C. § 1158; INA § 208 19

8 U.S.C. § 1229a; INA § 240 .... 3, 10

Regulations

8 C.F.R. § 208.9 19

8 C.F.R. § 214.11 .... 5, 10, 20

8 C.F.R. § 214.14 20

8 C.F.R. § 1003.1 .... 4, 5

8 C.F.R. § 1003.9 6

8 C.F.R. § 1003.10 .... 4, 10

8 C.F.R. § 1003.29 11

8 C.F.R. § 1239.2 12

8 C.F.R. § 1240.1 4

8 C.F.R. §1240.6 .... 10, 11

8 C.F.R. §1240.11 19

8 C.F.R § 1245.13 5

8 C.F.R. § 1245.15 5

8 C.F.R. § 1245.21 5

58 Fed. Reg. 42843-01 15

67 Fed. Reg. 78667-01 5

Other Authorities

American Bar Ass'n, Ensuring Fairness and Due Process in Immigration Proceedings, available at: https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/immigration/2008dec_immigration.authcheckdam.pdf 22

Congressional Record, 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008) 21, 22

Jefferson Sessions, Attorney General, Memorandum for the Executive Office for Immigration Review, *Renewing our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest* EOIR (December 5, 2017) 8

Brian M. O'Leary, Chief Immigration Judge, Operating Policies and Procedures Memorandum 13-01: *Continuances and Administrative Closure* (March 7, 2013) 6, 9

Brian M. O'Leary, Chief Immigration Judge, Memorandum, *Docketing Practices Relating to Unaccompanied Children Cases and Adults With Children Released on Alternatives to Detention Cases in Light of the New Priorities* (Mar. 24, 2015) 16

Executive Office for Immigration Review, Immigration Court Practice Manual 7, 17

Facts and Data, Office of Refugee Resettlement (January 22, 2013), https://www.acf.hhs.gov/orr/about/ucs/facts-and-data 13

Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children 21

H. Comm. on the Judiciary, 109th Cong., Dep't of Justice Appropriation Authorization Act, Fiscal Years 2006-2009, H.R. Rep. No. 109-23 22

John F. Kelly, Central America drug war a dire threat to U.S. (Air Force Times, Jul. 8, 2014) 13

MaryBeth Keller, Chief Immigration Judge, *Operating Policies and Procedures Memorandum 17-01, Continuances,* EOIR (July 31, 2017) 6, 12, 23

Peter Vincent, Principal Legal Advisor, Memorandum, *Guidance Regarding U Nonimmigrant Status (U visa) Applications in Removal Proceedings or with Final Orders of Deportation or Removal.* (Sept. 25, 2009) 20

UNHCR, Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection (2016) 13

United States Conference of Catholic Bishops, *Care for Trafficked Children* (April 2006) 22

United States Dep't of State, Visa Bulletin, No. 92, Vol. 9 (May 2016) 18

United States Dep't of State, Visa Bulletin, No. 94, Vol. 9 (July 2016) 18

USCIS, Asylum Officer Basic Training Course, Children's Asylum Claims (Mar. 2009) 12, 21

USCIS, "Humanitarian" page at https://www.uscis.gov/humanitarian 14

USCIS, *Information for Law Enforcement Agencies and Judges* (June 28, 2016) 20

USCIS, Number of I-360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ) by Fiscal Year and Case Status July 1 - Sept 30, 2017 15

USCIS Policy Manual 16

USCIS, Processing Times 20

TRAC Immigration, New Data on Unaccompanied Children 14

STATEMENTS OF INTEREST

Kids in Need of Defense ("KIND"), Public Counsel, and Freedom Network USA (FNUSA) (collectively, *Amici*) respectfully request leave to appear as *amici curiae* in response to the invitation of the Attorney General, and in support of Respondent Reynaldo Castro-Tum.

KIND is a national non-profit organization whose ten field offices provide free legal services to immigrant children who arrive in the United States unaccompanied by a parent or legal guardian, and face removal proceedings in Immigration Court. Since 2009, KIND has received referrals for over 15,800 children from 70 countries, and has trained and mentored *pro bono* attorneys at over 500 law firms, corporations, law schools, and bar associations. KIND also advocates for changes in law, policy, and practice to enhance protections for unaccompanied children. Many children served by KIND and its partners have endured serious harms, and many request and receive protection under United States law. KIND has a compelling interest in ensuring their access to the full measure of substantive and procedural protections that the law affords.

Public Counsel, based in Los Angeles, California, is the nation's largest not-for-profit law firm specializing in delivering *pro bono* legal services. Through a *pro bono* model that leverages the talents of thousands of attorney and law student volunteers, Public Counsel annually assists more than 30,000 families, children, and nonprofit organizations, and addresses systemic poverty and civil rights issues through impact litigation and policy advocacy. Public Counsel's Immigrants' Rights Project provides *pro bono* placement and direct representation to individuals and families—including unaccompanied children and asylum seekers—in the Los Angeles Immigration Court, the Board of Immigration Appeals, and the United States Court of Appeals for the Ninth Circuit. Public Counsel has a strong interest in ensuring that immigrants

receive the full and fair removal proceedings to which they are entitled, proceedings that often necessitate administrative closure's unique benefits.

FNUSA is the largest alliance of human trafficking advocates in the United States. Our 56 members work directly with human trafficking survivors in over 30 cities, providing comprehensive legal and social services, including representation in immigration cases. In total, our members serve over 1,000 trafficking survivors per year, over 75% of whom are foreign national survivors. FNUSA provides decision makers, legislators and other stakeholders with the expertise and tools to make a positive and permanent impact in the lives of all survivors. FNUSA provides training and advocacy to increase understanding of the wide array of human trafficking cases in the US, and the many forms of force, fraud and coercion used by traffickers. FNUSA has an interest in ensuring that the US immigration system implements policies and procedures that reduce re-traumatization of trafficking survivors and improve their access to justice.

Amici believe that their collective experiences can assist the Attorney General's analysis of the objectives that administrative closure may continue to serve in the conduct of removal proceedings, especially those involving unaccompanied alien children and other vulnerable immigrants.

INTRODUCTION

For a child placed in proceedings alone, facing possible removal to a place of danger or deprivation, no court hearing is routine. For unaccompanied children and other vulnerable immigrants, administrative closure alleviates some of the pressures and burdens incident to removal proceedings. Immigration Judges and the Board of Immigration Appeals have benefited from the associated efficiency and flexibility. With a firm foundation in statute and regulation,

the practice has also been endorsed by the Board and the Chief Immigration Judge. In response to the questions posed by the Attorney General, *Amici* respectfully submit that the authority for administrative closure should be recognized and extended.

DISCUSSION

I. Congress Delegated Authority That Supports Administrative Closure Directly to Immigration Judges, as Reflected in Regulation, Board Precedent, and EOIR Guidance

The first question in the briefing invitation asks, in part, whether Immigration Judges and the Board have authority to administratively close cases "under any statute, regulation, or delegation of authority from the Attorney General." Authority to order administrative closure stems from the statutory authority to conduct proceedings that Congress delegated directly to Immigration Judges. An additional statute provides the Attorney General the ability to delegate powers such as authority for administrative closure. Regulations, case law, and agency guidance explicate this authority.

A. Authority to Order Administrative Closure Is Implied in Immigration Judges' Statutory Powers to Conduct Removal Proceedings, and Reflected in Regulations

The authority of Immigration Judges to conduct removal proceedings is a statutory power delegated directly by Congress. The term "immigration judge" is defined by statute to mean an appointee of the Attorney General "qualified to conduct specified classes of proceedings, including a [removal] hearing under section 240." INA § 101(e)(4); 8 U.S.C. § 1101(e)(4) (2009). Congress further provided that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien." INA § 240(a)(1); 8 U.S.C. § 1229a(a)(1). Implied within the direct statutory authority to conduct proceedings is the attendant power to schedule such proceedings and determine when a matter is ripe for decision.

EOIR regulations elaborate on this Congressional grant of authority. Specifically, in determining removability and specified applications for relief from removal, the Immigration Judge *may* "take any other action consistent with applicable law and regulations as may be appropriate," and *must* "regulate the course of the hearing." 8 C.F.R. § 1240.1(a)(1)(iv), (c) (2007). Further regulations provide that Immigration Judges and members of the Board, in hearing their respective matters, "shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases." 8 C.F.R. §§ 1003.10(b) (2014), 1003.1(d)(1)(ii) (2017). Such appropriate and necessary actions may include ordering administrative closure where it is found "necessary or, in the interests of justice and fairness to the parties, prudent to defer further action for some period of time." *Matter of Avetisyan,* 25 I&N Dec. 688, 691 (BIA 2012).

In parallel to the direct grant of authority from Congress to Immigration Judges, an additional statutory provision provides that the Attorney General *shall* "establish such regulations, . . . delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out" the Attorney General's powers under the Immigration and Nationality Act (INA). INA § 103(g)(2); 8 U.S.C. § 1103(g)(2) (2009). This provision is sufficient to support a delegation of administrative closure authority, in the event of any doubt that the power is included within the direct Congressional grant of section 240(a)(1).

B. Regulations Applicable to Certain Relief Applications Reflect the Utility of Administrative Closure as a Docket Management Tool

"Administrative closure is a procedural tool created for the convenience of the Immigration Courts and the Board." *Avetisyan*, 25 I&N Dec. at 690. Various DHS and EOIR regulations have expressly contemplated the use of administrative closure by persons in removal

proceedings who file certain applications with USCIS. For example, victims of severe forms of trafficking who are in removal proceedings may request administrative closure during the pendency of an application for T or T-1 nonimmigrant status. 8 C.F.R. § 214.11(d)(1)(i) (2017). Other regulations provide that nationals of specific countries who apply for adjustment of status during the pendency of immigration court proceedings may request administrative closure.[1]

C. The Board Has Used Its Authority to Order Administrative Closure and to Remand for Consideration of Administrative Closure

As noted above, the Board is "empowered by the Attorney General through regulation to resolve the questions before it on appeal in a manner that is timely, impartial, and consistent with the Act," *Avetisyan*, 25 I&N Dec. at 691, and to take any authorized action appropriate and necessary for the disposition of a case before it. 8 C.F.R. § 1003.1(d)(1)(ii). The Board has used this authority to timely resolve appeals and to manage its docket by administratively closing a matter in appropriate circumstances. In *Matter of Montiel*, the parties jointly moved the Board for administrative closure while the respondent's direct appeal from a criminal conviction remained pending. 26 I&N Dec. 555, 556 (BIA 2015). Applying the *Avetisyan* factors to the circumstances, the Board concluded that administrative closure was "warranted as a matter of administrative efficiency." *Id.* at 557. In other matters, the Board has urged DHS, on remand, "to consider agreeing to administrative closure" where there is a pending *prima facie* approvable visa petition. *Matter of Hashmi*, 24 I&N Dec. 785, 791 n. 4 (BIA 2009); *see also Matter of Rajah*, 25 I&N Dec. 127, 135 n. 10 (BIA 2009) (same).

[1] *See*, *e.g.*, 8 C.F.R § 1245.13(d)(3)(i) (2003) (for certain nationals of Nicaragua and Cuba); 8 C.F.R. § 1245.15(p)(4) (2003) (for certain Haitian nationals); 8 C.F.R. § 1245.21(c) (2002) (for certain nationals of Vietnam, Cambodia and Laos); Adjustment of Status for Certain Aliens from Vietnam, Cambodia, and Laos in the United States, 67 Fed. Reg. 78667-01 (proposed Dec. 26, 2002) (codified at 8 C.F.R. § 245) ("Efficiency of the immigration court system is increased by requiring parties to agree to close a case administratively.")

D. The Chief Immigration Judge Has Endorsed the Use of Administrative Closure Through Procedural Guidance

Immigration Judges operate under the supervision and direction of the Chief Immigration Judge. 8 C.F.R. § 1003.9(b) (2007). The Chief Immigration Judge has the power to "direct the conduct of all employees assigned to the [Office of the Chief Immigration Judge ("OCIJ")] to ensure the efficient disposition of all pending cases," and the discretion "to set priorities or time frames for the resolution of cases, to direct that the adjudication of certain cases be deferred," and "otherwise to manage the docket of matters to be decided by the immigration judges." 8 C.F.R. § 1003.9(b)(3). The Chief Immigration Judge may also issue "operational instructions and policy," 8 C.F.R. § 1003.9(b)(1), such as Operating Policies and Procedures Memoranda (OPPM), which may be addressed to all Immigration Judges and all Immigration Court Staff.

In 2013, the Chief Immigration Judge issued OPPM 13-01, *Continuances and Administrative Closure*, to "assist Immigration Judges with fair and efficient docket management practices" and to "help judges focus the courts' scarce resources in an efficient manner."[2] Describing administrative closure as "a docketing tool that has existed for decades," the Chief Immigration Judge "strongly encouraged" its use in appropriate cases to "focus resources on those matters that are ripe for resolution." OPPM 13-01 at 3-4. This guidance and its basis in case law "provide[] judges with a powerful tool to help them manage their dockets." *Id.* at 4.

---

[2] Brian M. O'Leary, Chief Immigration Judge, Operating Policies and Procedures Memorandum 13-01: *Continuances and Administrative Closure* (March 7, 2013) at 2 (herein, "OPPM 13-01"). MaryBeth Keller, Chief Immigration Judge, *Operating Policies and Procedures Memorandum 17-01, Continuances,* EOIR (July 31, 2017) ("OPPM 17-01"), supplements and amends OPPM 13-01, but does not address administrative closure.

In addition, the Immigration Court Practice Manual, published by the Office of the Chief Immigration Judge in 2008, incorporates guidance on motions to recalendar administratively closed cases.[3]

II. The *Avetisyan* and *W-Y-U-* Standards for Administrative Closure Furnish Appropriate Guidance and May Benefit from Refinement

The Attorney General's initial question includes an inquiry as to appropriate standards for administrative closure. *Avetisyan* furnished six non-exclusive factors for evaluating administrative closure, reversing prior precedent that had effectively given "a party, typically the DHS, [ ] absolute veto power over administrative closure requests." 25 I&N Dec. at 692 (reversing *Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996)). *Amici* agree that several of the *Avetisyan* factors "are particularly relevant to the efficient management of resources of the Immigration Courts." 25 I&N Dec. at 695. However, the fourth factor, "the anticipated duration of the closure," does not aid analysis, because administrative closure of *any* duration may "avoid the repeated rescheduling of a case that is clearly not ready to be concluded," and thereby promote efficient management of court resources. *Hashmi*, 24 I&N Dec. at 791 n.4. Furthermore, the duration of closure usually entails factors beyond the respondent's control, as in *Avetisyan* itself, where despite numerous continuances, a visa petition remained pending for an "unexplained period of time." 25 I&N Dec. at 697. Duration of closure is particularly inappropriate as applied to unaccompanied children and other vulnerable immigrants, whose cases may warrant long periods of closure for multiple reasons discussed below.

Five years later, the Board held that of the factors described in *Avetisyan,* the first factor, whether the party opposing administrative closure has provided a persuasive reason for proceeding on the merits, should be the primary consideration. *Matter of W-Y-U*, 27 I&N. Dec.

---

[3] Immigration Court Practice Manual, Chapters 2.1(b)(ii), 5.7(i), 5.10(t), Glossary (Administrative Closing) (November 2, 2017).

17, 20 (BIA 2017) (reinstating proceedings administratively closed at DHS' behest, to allow respondent's asylum application to go forward). In *W-Y-U*, the Board recognized that the interest in efficient use of court resources "does not override an alien's 'invocation of procedural rights and privileges.'" 27 I&N Dec. at 19 (citation omitted). To the extent that *W-Y-U* could be understood to accord greater weight to DHS's reasons for opposing administrative closure than to the reasons for the motion, such a reading is inconsistent with the Board's explicit focus on the "alien's 'invocation of procedural rights and privileges.'" *Id.*

III. Authority for Administrative Closure Should Be Delegated if Lacking, and Should Not Be Withdrawn if Extant

The second question asks whether the Attorney General should delegate authority for administrative closure, if it is now lacking; or withdraw such authority, if currently in place. Whatever conclusions are drawn about the current extent of authority, the Attorney General should ensure that Immigration Courts and the Board are fully empowered to use administrative closure. This would serve the Attorney General's stated commitment to efficient adjudication and preserve judicial discretion. It would also minimize negative impacts of unnecessary court appearances on respondents, especially unaccompanied children, as discussed in section IV, *infra*. Moreover, withdrawing such authority without a clear legal basis would be disruptive to the operation of the Immigration Courts.

A. Administrative Closure Facilitates the Efficient Resolution of Immigration Cases

The Attorney General has noted that "[t]here are approximately 650,000 cases pending before the immigration courts," despite recent efforts to reduce the caseload.[4] This backlog would only increase without the authority to order administrative closure, which efficiently

[4] Jefferson Sessions, Attorney General, Memorandum for the Executive Office for Immigration Review, *Renewing our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest*, EOIR (December 5, 2017) (herein "December 5, 2017 Memo") at 1.

redirects resources to "[t]he ultimate disposition for each case in which an alien's removability has been established," which is "either a removal order or a grant of relief or protection from removal provided for under our immigration laws."[5]

The use of administrative closure throughout the federal courts, both in the immigration context and beyond, shows its proven utility for efficient management of a court's caseload. *See Avetisyan*, 25 I&N Dec. 690 n.2 (collecting cases). As one example, a federal district court administratively closed the indemnification portion of a declaratory judgment action between the insurer and the insured, pending factual resolution in a state court suit between the insured and the accident victim. *See Penn-America Ins. Co. v. Mapp*, 521 F.3d 290, 295-96 (4th Cir. 2008). In 2012, the Second Circuit tolled its immigration matters, observing that "it is wasteful to commit judicial resources" to cases where the government was unlikely to effect removal even if the government prevailed. *In re Immigration Petitions*, 702 F.3d 160, 160 (2d Cir. 2012).

The BIA has noted that administrative closure "will assist in ensuring that only those cases that are likely to be resolved are before the Immigration Judge. This will avoid the repeated rescheduling of a case that is clearly not ready to be concluded." *Hashmi*, 24 I&N Dec. at 791 n.4. Likewise citing the courts' large caseloads, the OCIJ encouraged the use of this "powerful tool" "to focus resources on those matters that are ripe for resolution," adding that "taking up valuable judge and court time on a case where a visa petition may be pending at DHS makes little sense." OPPM 13-01 at 4.

B. Administrative Closure Is Essential to Judges' Independent Discretion

Relatedly, judges' independent discretion extends to management of their dockets. "In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges *shall exercise their independent judgment and discretion* and may take any

---

[5] *Id.* at 2.

action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases." 8 C.F.R. § 1003.10(b) (emphasis added); *see* 8 C.F.R. §1240.6 (2013) (adjournment may be at the judge's instance). Independent discretion is no less important in Immigration Court than in the federal court system. *See, e.g.*, *St. Marks Place Housing Co., Inc. v. U.S. Dep't of Housing & Urban Dev.*, 610 F.3d 75, 80 (D.C. Cir. 2010) (noting that "most obviously, district courts can choose when to decide their cases").

C. The Withdrawal of Administrative Closure Authority Would Be Disruptive and Would Lack Clear Legal Basis

Because of the statutory and regulatory underpinning of administrative closure, it appears that the Attorney General is without power to unilaterally withdraw this tool. First, as discussed in section I *supra*, and as explained by the Sixth Circuit, "[i]n §1229a(a)(1), Congress granted IJs the power to 'conduct proceedings.' Thus, their powers to conduct removal proceedings are *not conferred by the Attorney General.*" *Abu-Khaliel v. Gonzales*, 436 F.3d 627, 634 (6th Cir. 2006) (emphasis added). The Sixth Circuit further explained that "[i]n our view, a necessary component of that power is the ability to decide when to conduct those proceedings, or when it is appropriate to delay a proceeding until a later time." *Id.* If the authority to order administrative closure is conferred by Congress, the Attorney General lacks authority to act in clear contravention of Congressional intent. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-448 (1987) ("The judiciary ... must reject administrative constructions which are contrary to clear congressional intent.").

Second, even if the Attorney General may withdraw authority for administrative closure, he may not do so without using the process of notice-and-comment rulemaking, absent good cause. Agency regulations expressly incorporate the use of administrative closure. *See, e.g.,* 8 C.F.R. §214.11(d)(1)(i). To withdraw the authority for administrative closure would disturb

the structure of regulations that incorporate the concept. *See, e.g., United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) ("In short, as long as the regulations [delegating discretion to the Board] remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner"). Moreover, withdrawal of authority for administrative closure would depart from decades of prior agency practice, and is subject to judicial review, but "an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Cardoza-Fonseca*, 480 U.S. at 446 n. 30.

In summary, for the reasons here and in section IV, removing this docket management device from the judges' toolbox would not further the courts' mission. The Attorney General should ensure that Immigration Judges and the Board are empowered to order administrative closure.

IV. Cases Involving Unaccompanied Children Demonstrate the Value of Administrative Closure to the Fair and Efficient Processing of Removal Proceedings

The Attorney General's third question asks, in part, whether other docket management devices are, in any circumstances, inadequate to promote "expeditious, fair, and proper resolution of matters," citing 8 C.F.R. § 1003.12 (2017).[6] *Amici* respectfully submit that there are many such circumstances, frequently arising in cases involving unaccompanied children and other vulnerable respondents.

The stated aims are best served with an array of tools. Continuances or adjournments, granted for good cause shown or at the Immigration Judge's instance, 8 C.F.R. §§ 1003.29 (1994), 1240.6, are invaluable, particularly when parties can identify a date certain when the

[6] This *amicus* brief does not address the portion of the briefing invitation that asks if there should be differential legal consequences for cases that are administratively closed rather than continued.

matter will be ready to progress. However, using continuances to approximate administrative closure may entail multiple hearing dates that "strain overall court resources, including administrative and interpreter resources, and consume docket time that could otherwise be used to resolve additional cases." OPPM 17-01 at 2. Dismissal without prejudice, 8 C.F.R. § 1239.2(c) (2004), is available on enumerated grounds and at DHS's instance. Termination of proceedings, as under 8 C.F.R. § 1239.2(f), is highly effective to free the court's docket of cases not needing further attention, but often is not acceptable to DHS. Accordingly, if administrative closure were unavailable, these other tools would be unable to compensate.

There is no clearer example of the efficacy of administrative closure than cases of children placed in removal proceedings as "unaccompanied alien children" (UAC).[7] This is because a large proportion of UAC have compelling defenses to removal, yet stand at a marked disadvantage in an adversarial system for which they are poorly resourced. UAC and other vulnerable immigrants need and merit appropriate allowances of time to prepare for dispositive hearings in their cases. At the same time, the entire system – the court, the Department, and any persons supporting the UAC – can realize efficiency gains from eliminating unnecessary hearings. While UAC are among the most vulnerable immigrants, much of the following discussion may apply to other individuals such as all children, survivors of trauma, persons with mental illness, and persons not competent to participate in removal proceedings.[8]

---

[7] An "unaccompanied alien child" (UAC) is defined by statute as a child under age 18, having no lawful immigration status, and having no parent present in the US or no parent available to provide care and physical custody. 6 U.S.C. § 279(g)(2) (2008). Some EOIR memoranda and many children's advocates use the term "unaccompanied child."

[8] *See, e.g.*, USCIS, Asylum Officer Basic Training Course, Children's Asylum Claims (Mar. 23, 2009), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson29_Guide_Children%27s_Asylum_Claims.pdf

A. Administrative Closure Is Valuable in UAC Cases Where a History of Harm Supports Entitlement to Relief but Inhibits Navigation of Removal Proceedings

During 2014, when arrivals of UAC in the United States surged to record levels, General John F. Kelly, then Chief of the Southern Command and later the Secretary of Homeland Security, described gang violence in the "Northern Triangle," the region from which 95% of the UAC originated:[9]

> Drug cartels and associated street gang activity in Honduras, El Salvador and Guatemala, which respectively have the world's number one, four and five highest homicide rates, have left near-broken societies in their wake. . . . Profits earned via the illicit drug trade have corrupted and destroyed public institutions in these countries, and facilitated a culture of impunity — regardless of crime — that delegitimizes the state and erodes its sovereignty, not to mention what it does to human rights.[10]

In addition to gang violence, violence and abuse in the home and by caregivers were among the leading reasons for migration identified through a 2013 study of unaccompanied children from the Northern Triangle and Mexico by the United Nations High Commissioner for Refugees (UNHCR). The study "demonstrate[d] unequivocally that many of these displaced children faced grave danger and hardship in their countries of origin," finding that a clear majority of their cases raise international protection concerns.[11]

---

[9] *Facts and Data,* Office of Refugee Resettlement (January 22, 2013), https://www.acf.hhs.gov/orr/about/ucs/facts-and-data.

[10] *See* Exhibit A, John F. Kelly, *Central America drug war a dire threat to U.S. national security*, Air Force Times, Jul. 8, 2014.

[11] UNCHR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (2016), www.unhcr.org/en-us/about-us/background/56fc266f4/children-on-the-run-full-report.html?query=central american minors migration US reasons at 11; Kelly, *supra* note 10 at 6.

The same risks and harms that spur migration by UAC make many of these children eligible for protection, and support defenses against removal or claims for lawful status.[12] In UAC cases, statistically it is usually not the Immigration Judge who adjudicates the merits of a child's request for protection or status. Instead, as shown by government data on completed Immigration Court cases obtained by the Transactional Records Access Clearinghouse (TRAC) of Syracuse University, it is far more common for other adjudicators to decide a child's application for status, followed by an Immigration Judge's order concluding the proceedings.[13] In large part, this is because USCIS has initial or exclusive jurisdiction over many of the applications frequently made on behalf of UAC.

As further explained by TRAC, "One of the reasons that decisions in [immigration] court cases frequently take time, apart from the court's own backlog of cases, is because court proceedings may be adjourned waiting for another government body to act on applications under these provisions."[14] The BIA has held that "[a]s a general rule, there is a rebuttable presumption that an alien who has filed a *prima facie* approvable application with USCIS will warrant a favorable exercise of discretion for a continuance for a reasonable period of time." *Matter of*

---

[12] *See, e.g.*, USCIS, *Humanitarian*, https://www.uscis.gov/humanitarian ("Some children who are here in the U.S. without legal immigration status may need humanitarian protection because they have been abused, abandoned or neglected by a parent."); *see also* TRAC Immigration, New Data on Unaccompanied Children (hereinafter, TRAC UAC Data) (summarizing "reasons children are allowed to stay"), trac.syr.edu/immigration/reports/359/.

[13] *Id.* ("Most of the time, whether these special forms of relief are granted is determined by some other government agency and not directly by an Immigration Judge . . . . When another agency has granted one of these forms of relief, the Immigration Judge typically will order the case "terminated," or close the case for "other" unspecified reasons, either through a decision or some form of administrative closure. . . . [W]hen the child has an attorney, "terminated" and "other" are the most common reasons recorded for closing a case and allowing the child to remain in the country."

[14] TRAC UAC Data, *supra* note 12.

Sanchez Sosa, 25 I&N Dec. 807, 815 (BIA 2012). Where a child is involved, denying sufficient time for these adjudication processes would result in a child otherwise eligible for relief being returned to harm or separated from caregivers. Serial adjournments can provide sufficient time, but are likely to produce superfluous hearings, especially where the time required for adjudication is indeterminate. Moreover, claims for humanitarian relief are labor-intensive, placing demands on children that they may be unequipped to meet in the short term. As discussed in more detail below, administrative closure is the most efficient and flexible tool available for managing the course of proceedings involving UAC and other vulnerable immigrants.

1. *Flexibility in the preliminary phase of special immigrant juvenile status*

During the two most recent fiscal years combined, USCIS approved over 26,000 petitions for special immigrant juvenile status (SIJS).[15] Each of those approvals represents a child or youth conclusively established to have a history of parental abuse, abandonment, neglect, or similar deprivation, and whose interests would be impaired by removal. INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27(J) (2014). Rather than ask the Immigration Courts or USCIS to venture determinations on child welfare, with attendant risks of legal error and inefficiency, Congress gave them recourse to the expertise of state juvenile courts.[16] By effectively outsourcing the first phase of SIJS matters to state tribunals, Congress preserved Immigration Court and USCIS

[15] USCIS, *Number of I-360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ) by Fiscal Year and Case Status July 1 - Sept 30, 2017* (June 2017), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Citizenship/I360_sij_performancedata_fy2017_qtr4.pdf .

[16] *See, e.g.*, Final Rule, Special Immigrant Juvenile Status , 58 Fed. Reg. 42843-01 at 42846-47 (proposed Aug. 12, 1993) (codified at 8 C.F.R. § 204) ("[T]he decision concerning the best interest of the child may only be made by the juvenile court or in administrative proceedings authorized or recognized by the juvenile court. . . The Service does not intend to make determinations in the course of deportation proceedings regarding the "best interest" of a child.")

resources for questions of immigration law. Inherent in this Congressional plan is appropriate deference to the state juvenile court process.[17]

State court proceedings that establish prerequisites for SIJS can vary in duration from a few weeks to well over a year. The duration is hard to project with certainty, for many reasons. First, wait times for available hearing dates may vary on crowded state court dockets, and other state court priorities may not permit a given case to be expedited. Second, some states may impose a waiting period or residency period before a court action may be commenced. Third, satisfying a state court's due process requirements can be time-consuming, especially if notice to a necessary party is rejected, avoided, or otherwise difficult to effect. Fourth, the parent(s) or others whose conduct gave rise to the child's claim for protection may, intentionally or not, thwart progress. Fifth, state courts need sufficient time for inquiries, investigations, and research into matters raised by the child's request for factual findings. Sixth, an appropriate caregiver for the child may not be immediately available and willing to commence the state court process. Seventh, as a consequence of past harms including those inflicted by parent(s), a child may be unable to rapidly articulate underlying facts until establishing trust in the child's counsel and other support systems. These reasons are not exhaustive, but they exemplify how the time for obtaining SIJS findings is outside the control of the child and the Immigration Court. These reasons also display how state court involvement relieves the Immigration Court of responsibility for many functions necessary to administering the INA standard for SIJS.

In 2015, EOIR revised its guidance prioritizing the scheduling of UAC cases in response to the sharp rise in UAC arrivals.[18] Although that guidance was formally rescinded after "surge"

---

[17] *See, e.g.*, 6 USCIS Policy Manual J.2(D)(4) (declining to "instruct[] juvenile courts on how to apply their own state law.").

dockets for UAC were abolished, the replacement January 31, 2017 guidance is silent on many topics covered in the 2015 guidance, which provided that a child's proceedings "must be administratively closed or reset for that [SIJS] process to occur in the appropriate state or juvenile court."[19] The Board has held likewise in an unpublished opinion.[20] A series of continuances can approximate the time needed by the state court, but at the cost of efficiency. If the final continuance in a series proves to be too long, it leaves excess time between the completion of the state court proceeding and the continued hearing date, unless a motion to advance the hearing date is granted.[21] Conversely, if the state court proceeding is not complete by the chosen hearing date, then one or more unnecessary interim hearings will burden the court, the government, and the child. In contrast, administrative closure can accommodate the variability inherent in the state court process, freeing time on the immigration judge's docket until the parties are ready to proceed. Also, as survivors of parental mistreatment and other trauma, special immigrant juveniles have specialized needs that are better protected by administrative closure, as further discussed, *infra.*

2. *Alternatives to termination pending SIJS-based adjustment of status*

A child who obtains the requisite state juvenile court order may file a SIJS petition with USCIS. A statutory deadline of 180 days should make adjudication times predictable, but in

---

[18]Brian M. O'Leary, Chief Immigration Judge, Memorandum, *Docketing Practices Relating to Unaccompanied Children Cases and Adults With Children Released on Alternatives to Detention Cases in Light of the New Priorities* (Mar. 24, 2015).

[19] *Id.* at 2 (discussing reasons for length of state court processes).

[20] *See* Exhibit B, *Matter of N-R-R*, A XXX XXX 938 (BIA Dec. 14, 2015) ("Absent a compelling reasons, an Immigration Judge should continue proceedings to await adjudication of a pending state dependency petition in cases such as the one before us."), *available at* https://www.scribd.com/document/293858727/N-R-R-AXXX-XXX-938-BIA-Dec-14-2015.

[21] Motions to advance are disfavored. Immigration Court Practice Manual, Chapter 5.10(b) (November 2, 2017) .

practice, the deadline is often exceeded. In the recent past, most Immigration Courts terminated proceedings at the I-360 stage to allow USCIS to receive and adjudicate the child's status adjustment application. However, the visa category for juveniles from El Salvador, Guatemala, and Honduras became oversubscribed in May 2016, and the Department of State adopted January 1, 2010 as the cutoff I-360 filing date for SIJS-based status adjustments.[22] This created the impression of a six-year backlog in SIJS adjustments, and soon after, ICE adopted a practice of opposing termination for children from backlogged countries who had recently filed Form I-360. The State Department later explained that the 2010 date was selected for control purposes, and was not intended to approximate the date of applications being processed,[23] which has since moved to December 1, 2015 for the Northern Triangle. However, ICE may still oppose termination where a visa number is not immediately available. On the other hand, a series of continuances would inconvenience the court and the parties. The Board has also held, in an unpublished decision, that denying a continuance and ordering removal while SIJS-relating proceedings were in progress was "not a good utilization of Immigration Court and Board resources."[24]

Administrative closure provides the Immigration Judge with an efficient alternative. As the Visa Bulletin cutoff date approaches the child's priority date, the child (or government) may time a motion to recalendar so that the next hearing can be productive. The court may choose to terminate proceedings to allow the child to pursue adjustment of status before USCIS, or set a

---

[22] United States Dep't of State, Visa Bulletin, No. 92, Vol. 9 (May 2016) at 4, 8.

[23] United States Dep't of State, Visa Bulletin, No. 94, Vol. 9 (July 2016) at 8. ("Readers should be aware that the establishment of the Employment Fourth preference Final Action date of January 1, 2010 does not mean that applicants are now subject to a wait in excess of six years.")

[24] Ex. B, *N-R-R*, A XXX XXX 938 (BIA Dec. 14, 2015) at 2.

date for adjudicating the adjustment in court. Should circumstances change during the period of administrative closure (for example, if the child elects to abandon the application, or if the government obtains evidence of inadmissibility), either party may move to recalendar in order to request action by the court. The court thereby avoids intervening hearings that serve no purpose, and the attendant motion practice to fix or change such hearings. By conserving governmental resources and minimizing impact on the child (as discussed below), administrative closure appears tailor-made for cases in this posture.

3. *Conserving court resources during asylum office adjudication*

By statutory mandate, USCIS must decide "any application for asylum filed by an unaccompanied alien child." INA § 208 (b)(3)(C); 8 U.S.C. § 1158(b)(3)(C) (2009). Removal proceedings will be terminated if USCIS grants the application, and if not, the child may pursue asylum or other relief before the immigration judge. The time needed for USCIS to schedule an interview, review the claim, and issue its decision varies. While the claim is pending before USCIS, the parties are unlikely to require the court's intervention, so administrative closure is appropriate. Courts may instead use continuances, but a selected hearing date may be too distant or too soon to match the asylum office's schedule.[25] As discussed below, administrative closure also avoids the impact on the child of extra hearings before a tribunal not currently determining the claim.

[25] It is uncontroversial that while an asylum application is pending before USCIS or the court, it is inappropriate to proceed on the merits and order the child's removal. *See* 8 C.F.R. § 208.9(a) (2011) (USCIS "shall adjudicate the claim of each asylum applicant whose application is complete"); § 1240.11(c)(3) (2013) (the immigration judge will decide a filed asylum application after an evidentiary hearing).

4. *Published guidance supports administrative closure for USCIS adjudication of visas for victims of trafficking or other crimes*

USCIS has exclusive jurisdiction over petitions for T and U nonimmigrant status, granted to certain immigrant victims of trafficking or serious crimes, respectively. 8 C.F.R. § 214.11(d); 8 C.F.R. § 214.14(c)(1). USCIS has referred to the relief they provide as a "critical tool for law enforcement."[26] The tool is equally critical for UAC, who may seek protection as principle applicants or as derivative beneficiaries, for instance, where caregivers are survivors of domestic violence or human trafficking. USCIS is now processing T visa applications filed about one year ago, and U visa petitions filed in August 2014.[27] DHS guidance expressly recognizes administrative closure as an appropriate mechanism to allow for adjudication of those applications during removal proceedings. If a U visa applicant is in removal proceedings, a joint motion to terminate without prejudice,[28] a continuance for good cause shown,[29] or administrative closure may be appropriate.[30] As to T visas, regulations expressly contemplate a request for administrative closure. 8 C.F.R. § 214.11(d)(8). In sum, all three mechanisms are contemplated, but administrative closure best balances the concerns, especially because T and U visa applicants present a high incidence of trauma, as further discussed below.

---

[26] USCIS, *Information for Law Enforcement Agencies and Judges* (June 28, 2016), https://www.uscis.gov/tools/resources/information-law-enforcement-agencies-and-judges.

[27] USCIS, Processing Times, https://egov.uscis.gov/cris/processTimesDisplayInit.do.

[28] 8 C.F.R. § 214.14(c)(1)(i), (f)(1)(i).

[29] *Sanchez Sosa,* 25 I&N Dec. at 812-15.

[30] Peter Vincent, Principal Legal Advisor, Memorandum, *Guidance Regarding U Nonimmigrant Status (U visa) Applications in Removal Proceedings or with Final Orders of Deportation or Removal.* (Sept. 25, 2009).

B. Administrative Closure Mitigates Special Hardships Characteristic of UAC Cases

The foregoing demonstrates how administrative closure promotes judicial economy and governmental efficiency, but it also furthers more compelling interests of fairness and due process. UAC in particular stand at a confluence of the challenges facing immigrants, trauma victims, and children – because UAC straddle all three categories. Congress has legislated "a special obligation to ensure that these children are treated humanely and fairly," recognizing the violence and trauma that many have fled.[31] EOIR's recently updated "Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children" (hereinafter, "EOIR Juvenile Guidelines") begin by stating that "[i]mmigration cases involving children are complicated and implicate sensitive issues beyond those encountered in adult cases." OPPM 17-03 at 2. Among such sensitive issues are those relating to children's needs, capacities, trauma survival, and dependency on adults.

The resolution of a child's removal proceedings requires adequate time, not only for adjudication of relief applications as described above, but also because building the child's case is labor- and time-intensive. Children are held to the same high bars for humanitarian relief as other litigants, yet limits are inherent in children's capacities and ongoing development. As advised in USCIS's asylum officer training materials, "[t]he needs of child asylum seekers are best understood if the applicant is regarded as a child first and an asylum seeker second."[32] The

---

[31] 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008) (Sen. Feinstein, re the William Wilberforce Trafficking Victims Protection Reauthorization Act) ("This bill seeks to protect children . . . who have escaped traumatic situations such as armed conflict, sweatshop labor, human trafficking, forced prostitution, and other life-threatening circumstances.")

[32] USCIS, *Asylum Officer Basic Training Course*, Children's Asylum Claims at 12 (Mar. 21, 2009), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson29_Guide_Children%27s_Asylum_Claims.pdf.

materials review a number of factors in child development, and incorporate the principle that "children's needs are different from adults' due to their developmental needs, their dependence, including in legal matters, and their vulnerability to harm" so that governmental actions toward children must be tailored accordingly.[33] In short, a child may indeed be able to satisfy the high bar for legal relief, but may not be able to do so on a rapid timeframe. Children who lack prior experience of the adversarial system need time to develop an understanding of the process and trust in the professionals who advocate for them. As a principle drafter of the TVPRA explained, a child "usually knows nothing about US courts or immigration policies and frequently does not speak English . . . . The majority of these children have been forced to struggle through an immigration system designed for adults." 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008). As the American Bar Association has noted, due process demands that the respondent have an opportunity to participate meaningfully in his or her immigration proceedings,[34] and children lack that opportunity unless adequate time is afforded in keeping with their developmental stage, capacities, and well-being. Trauma and a history of violence exacerbate the gap that a child must bridge to participate in preparing a legal defense, and forcing the confrontation of traumatic facts is likely to be counterproductive.[35]

---

[33] *Id.* at 11-14.

[34] American Bar Ass'n, *Ensuring Fairness and Due Process in Immigration Proceedings*, (Dec. 23, 2008), https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/immigration/2008dec_immigration.authcheckdam.pdf

[35] *See, e.g.*, H. Comm. on the Judiciary, 109th Cong., Dep't of Justice Appropriation Authorization Act, Fiscal Years 2006-2009, H.R. Rep. No. 109-233, at 116-117 (discussing provision enacted and codified at 8 U.S.C. § 1154) (provision "allows child abuse victims time to escape their abusive homes, secure their safety, access services and support that they may need and address the trauma of their abuse."); United States Conference of Catholic Bishops, *Care for Trafficked Children* (April 2006) at 4, available at: http://www.usccb.org/about/children-and-

Adequate continuances satisfy the child respondent's need for time and flexibility, but periodic court appearances are at best burdensome and at worst counterproductive. The EOIR Juvenile Guidelines also specify that judges should limit the number of times that children must be brought to court. OPPM 17-01 at 6. Administrative closure would meet that objective, while also balancing DHS's interest in the ability to address a material change in circumstances by moving to recalendar the proceedings.

A hearing affects not only the child, but also the adult(s) on whom the child depends for financial support and care. As children miss school, adults may miss work, often forfeiting pay and perhaps jeopardizing job security. Transportation costs to attend court can be significant for low-income families. Some UAC do not enjoy the care of close relatives, and their caregivers may feel unable to justify the burden of supporting the child's case, a lack of investment that is well beyond the child's control. Many children and their supporters, especially those with traumatic histories or fear for their future safety, experience the court date as a traumatic event, fearing that deportation or other sanctions are imminent. A salient example is a child with a pending U visa. Where a child respondent, or his or her parent, has suffered "substantial physical or mental abuse"[36] as a result of criminal activity, and where the child or parent has assisted law enforcement, those negative associations may also attach to immigration court hearings. Collectively, these costs are excessive when a scheduled hearing does not advance the case substantively.

As noted above, the burdens of unnecessary hearings also fall on the court and ICE in the form of wasted time and resources for scheduling, preparing, documenting, interpretation, and

---

migration/upload/care-for-trafficked-children.pdf (describing impediments to capacity to trust in child trafficking victims). Therefore, special considerations for trafficked minors are also reflected in U.S. law.

[36] INA § 101(e)(4); 8 U.S.C. § 1101(e)(4) (2009).

the displacement of other cases needing the court's attention. Administrative closure has often been appropriately used to avoid these negative impacts, and should continue to be so used.

V. If Administrative Closure Becomes Unavailable, Existing Orders of Administrative Closure Should Remain in Place for Reasons of Fairness and Judicial Economy

The Attorney General's final question was directed toward what should be done with cases that are currently administratively closed. As demonstrated above, the unavailability of administrative closure would be keenly felt, particularly among UAC and other vulnerable immigrants. In the event of an order rescinding administrative closure as a docket management tool, such rule should apply going forward only, and not to any pending administratively closed case. This is required by the strong presumption against retroactivity, the harms that would arise from retroactive application of a new rule, and the deference due to the judgment of Immigration Judges.

A. The Fairness Considerations Behind the Presumption Against Retroactivity Are Particularly Important in the Context of Administrative Closure

Past administrative closure decisions should remain in place because of the fairness considerations underlying the well-settled, longstanding presumption against retroactive action. *See, e.g.*, *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994). The rationale behind this presumption reflects "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* at 270. Retroactive action unfairly imposes new burdens on persons after the fact, disturbing their reliance on settled policy. *Id.*

The presumption against retroactivity is not limited to criminal cases. As Justice Scalia noted, "since the beginning of the Republic and indeed since the early days of the common law: absent specific indication to the contrary, the operation of nonpenal legislation is prospective only." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 841 (1990) (Scalia, J.

concurring). The presumption also operates against "new provisions affecting contractual or property rights, *matters in which predictability and stability are of prime importance*." 511 U.S. at 271 (emphasis added).

Judicial disfavor of retroactive actions extends to the Executive Branch as well. In *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), for example, the Supreme Court held that agencies could not adopt retroactive rules without explicit congressional authorization.

The presumption against retroactivity has been applied numerous times in the immigration context. *See, e.g.*, *Chew Heong v. United States*, 112 U.S. 536, 559 (1884) (new provision of 1882 "Chinese Restriction Act" of 1882 requiring a certificate prepared when exiting the United States did not bar reentry of a laborer whose exit predated the certification requirement). In *I.N.S. v. St. Cyr*, 533 U.S. 289, 326 (2001), the Court found that 1996 statutory changes to the effects of entering into a plea agreement could not apply to persons who entered pleas before the enactment. The Court noted "significant and manifest" potential for unfairness in retroactive application that would have the effect of punishing individuals who relied "upon settled practice, the advice of counsel, and perhaps even assurances in open court" that entry of a plea would not foreclose relief from deportation. *Id.* at 323.

These principles require that currently administratively closed cases remain in that state regardless of any new prospective rule. Administrative closure is a long-established practice, and while described as a docket management tool, its effects are substantive and often life-changing. Specifically, as discussed above, many respondents rely on a period of administrative closure in order to wait for lengthy processes of adjudication or visa availability. In cases like these, retroactively dismantling administrative closure would introduce reliance on issuance of sufficient continuances, with all the uncertainty and administrative burden that entails. In many

cases, the relief sought is humanitarian in nature, and absent a reliable provision for adequate continuances, the loss of administrative closure could mean deportation to a country where the applicant could face serious harm or death. As discussed above, UAC are at particularly high risk for such collateral consequences, due to the large number of such children who experienced violence or other trauma that precludes their return to their former country.

B. The Considered Judgment of Immigration Judges Should Be Respected

An order of administrative closure reflects the adjudicator's determination, and at times the agreement of both parties, that its use was appropriate given the facts of the particular case. As the BIA has said, "the decision to administratively close proceedings . . . involves an assessment of factors that are particularly relevant to efficient management of resources." *Avetisyan*, 25 I&N Dec. at 695. The selection of administrative closure as the most effective docket management tool should not be set aside.

Moreover, recalendaring administratively closed cases would compel judges to revisit large numbers of cases that are currently in a stable posture. For example, recalendaring a case where an underlying petition remains pending would necessitate multiple continuances to effect the same result as the administrative closure. Furthermore, recalendaring administratively closed cases would increase the number of pending cases on the immigration docket, at a time when the courts are striving to control a large backlog. *See* December 5, 2017 Memo at 1-2. To avoid such disruption should the practice be discontinued prospectively, cases should remain administratively closed in accordance with the considered choice of the Immigration Judge.

CONCLUSION

Immigration Judges are burdened with extremely heavy caseloads, and have used administrative closure over the years to help manage their dockets efficiently and fairly. This salutary tool should remain at their disposal to help prevent the serious and often irreversible

harms that would result if administrative closure were not available. *Amici* respectfully urge the Attorney General to take into account the circumstances of many persons who admire this country precisely because of the fairness, efficiency, and reliability of its judicial and administrative procedures.

Dated: February 16, 2018

Respectfully submitted,

Maria M. Odom
Vice President for Legal Services
Kids in Need of Defense (KIND)
1300 L Street NW, Suite 1100
Washington, DC 20005
(202) 824-8682
Kristen Jackson
Senior Staff Attorney
Public Counsel
610 South Ardmore Avenue
Los Angeles CA 90005
(213) 385-2977

Jean Bruggeman
Executive Director
Freedom Network USA
PO Box 7481
Arlington, VA 22207
(202) 656-9094

Joseph F. Yenouskas
GOODWIN PROCTER LLP
901 New York Avenue, N.W.
Washington, DC 20001-4432
(202) 346-4143

Aviv Zalcenstein
Cindy Chang
Mia Khatcherian
GOODWIN PROCTER LLP

620 Eighth Avenue
New York, NY 10018
(212) 813-8800

Counsel for Amici Curiae

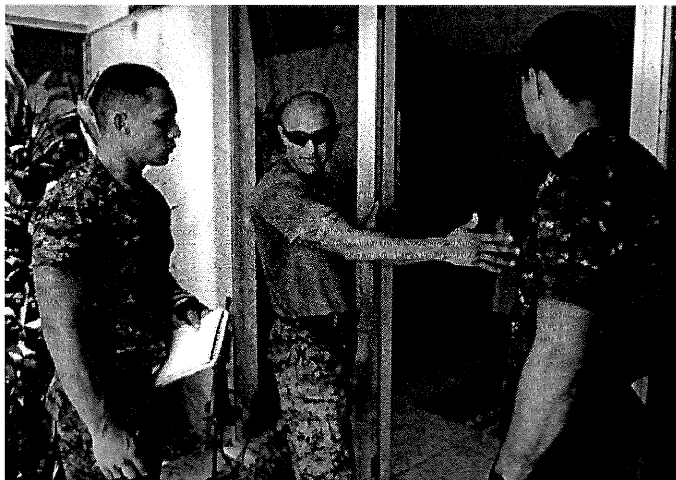
EXHIBIT
A

SOUTHCOM chief: Central America drug war a dire threat to U.S. national security

By Gen. John F. Kelly
Jul. 8, 2014 - 06:00AM |

airforcetimes.com

SOUTHCOM chief: Central America drug war a dire threat to U.S. national security


SCT Guatemala MWM 20140604

SCT Guatemala MWM 20140604

Zoom

Marine Corps Gen. John F. Kelly (Cpl. Tia Dufour/Marine Corps)

After observing the transnational organized crime network for 19 months as commander of U.S. Southern Command, I see the only viable approach is to work as closely as we can with as many nations in the region. Our vision is of an economically integrated region that offers reasons for its people to build their futures at home instead of risking the dangerous and ultimately futile journey north. A region that offers economic opportunity, effective democratic institutions and governance, and safe communities is the key to their future and to our national security.

Drug cartels and associated street gang activity in Honduras, El Salvador and Guatemala, which respectively have the world's number one, four and five highest homicide rates, have left near-broken societies in their wake. Although there are a number of other countries I work with in Latin America and the Caribbean that are going in the same direction, the so-called Northern Triangle (Guatemala, El Salvador and Honduras) is far and away the worst off.

By U.N. statistics, Honduras is the most violent nation on the planet with a rate of 90 murders per 100,000 citizens. Guatemala's rate is 40. These figures become more shocking when compared to those of declared combat zones such as Afghanistan or the Democratic Republic of the Congo (28 in 2012). Profits earned via the illicit drug trade have corrupted and destroyed public institutions in these countries, and facilitated a culture of impunity — regardless of crime — that delegitimizes the state and erodes its sovereignty, not to mention what it does to human rights.

All this corruption and violence is directly or indirectly due to the insatiable U.S. demand for drugs, particularly cocaine, heroin and now methamphetamines, all produced in Latin America and smuggled into the U.S. along an incredibly efficient network along which anything — hundreds of tons of drugs, people, terrorists, potentially weapons of mass destruction or children — can travel so long as they can pay the fare. There are some in officialdom who argue that not 100 percent of the violence today is due to the drug flow to the U.S., and I agree, but I would say that perhaps 80 percent of it is.

More to the point, however, it has been the malignant effects of immense drug trafficking through these nonconsumer nations that is responsible for accelerating the breakdown in their national institutions of human rights, law enforcement, courts, and eventually their entire society as evidenced today by the flow of children north and out of the conflictive transit zone. The human rights groups I deal with tell me young

women and even the little girls sent north by hopeful parents are molested and raped by traffickers. Many in these same age groups join the 17,500 the U.N. reports come into the U.S. every year to work in the sex trade.

Clearly a region that is stable, safe and secure for its own citizens with a functioning legal justice system and police force, with an emerging middle class and real human rights opportunity, is what we want for these nations and is in our national security interests. Colombia is the present-day example of what should be and could be. If these nations were moving in this direction, they would be even stronger and more reliable partners. What is ironic to me is with all their problems they are still functioning democracies and appear to want to stay that way.

SOUTHCOM's efforts in the region are in large part focused on stemming the flow of illegal narcotics, although we have remarkable relationships with all our interagency partners. Heroic and often underappreciated law enforcement professionals like the DEA, FBI, Immigration and Customs Enforcement, Customs and Border Protection, Border Patrol and Treasury Department have numerous efforts focused on countering transnational organized crime in SOUTHCOM's assigned area of responsibility. We also have amazing relationships with every political and military official worthy of our attention, and very good mil-to-mil relationships even in nations that pull back from us politically.

The primary facilitator of this task is Joint Interagency Task Force South, which is responsible for fusing every intelligence source into a clear picture of detecting and monitoring the drug flow. Working with our closest ally in this effort, the Colombians, JIATF-South tracks the flow as it departs the source zone and moves by sea and air through the transit zone directly into the U.S.

Specific to Central America, JIATF-South orchestrates Operation Martillo, designed to interdict trafficking along the littorals on both sides of Central America. Even with few interdiction assets to speak of, the task force's efforts are wildly successful in a relative sense, although much of the take last year was due to Canadian, Dutch, French and British assets. This help is expected to drop off significantly. Unfortunately, over the next few years we will see fewer and fewer assets to detect, monitor and interdict, and the very same reality confronts our Canadian and European allies. This means even more cocaine and heroin making landfall in Honduras, Guatemala, the Dominican Republic, El Salvador and Mexico, exacerbating — if that is even possible — the problems these nations face today.

I have found over my years of working with partner nations around the globe that nothing changes countries for the good like working alongside the U.S. military in a close and continuous relationship. Nothing. Our training, our advice, our tactics, techniques and procedures, and just as importantly our values and good example change them for the good.

Take, for instance, Colombia, an amazing success story of bringing a country back from the same kind of brink Honduras and other Central American nations are facing today. Colombia did all of its own fighting and paid the vast majority of the bill itself. All we provided was advice, intelligence, surveillance and reconnaissance, and encouragement.

Another example is human rights, which are along the road to improvement in these countries not because of criticism, lecturing and censure, but because of U.S.-led conferences, seminars and training modules embedded in everything we do with them, most of which is conducted by junior officers and noncommissioned officers who bring their American ideals to every engagement. I challenge anyone to argue differently, unless of course one does not trust U.S. intentions in the region and also does not have faith in the decency of our military men and women.

Given our current fiscal and asset limitations in working with these partners, and I want to include Costa Rica, Panama, Nicaragua, the Dominican Republic, Colombia and Peru as well, SOUTHCOM's primary

effort is working closely with them on human rights issues, sharing information and intelligence, as well as building capacity within their security forces. We do this by treating them as equals, encouraging them where they are having success, and most importantly working with them where they need help.

Where I can work with a partner nation, as with Honduras and Operation Morazon, a nationwide interagency citizen security initiative, the majority of my support is centered on assisting the Hondurans with securing their borders — particularly the north coast, where we have helped them develop a "maritime shield" against the influx of tons of drugs weekly. This effort includes identifying for them the now over 100 illicit rural dirt airstrips, which they destroy, again with our help.

This package of planning and advising assistance, combined with some other factors, including the strong commitment of Honduras' new president and his national security team, has all but stopped airborne drug flights into Honduras. This effort is completely integrated into JIATF-South's operations, and we have the Hondurans working with the Guatemalans and the Nicaraguans in attempts to better secure land borders among all three. While the maritime shield might reduce the amount of drugs entering the country, it does not attack the proximate cause of unaccompanied minor migration, but it is a first step in an overall package.

SOUTHCOM is also improving defense institutional capacity in Central America, with Guatemala as the most recent example. Over the past two years we have worked with the Defense Institutional Reform Initiative and the William Perry Center to support the Guatemalan defense ministry's efforts to increase its defense sector governance capacity and transparency through development and promulgation of a new national security strategy, national defense strategy, and associated strategic planning and budgeting processes. This has already provided a return on investment: a finished Guatemalan national defense policy and an outcome-based 2014 budget built using a transparent, capabilities-based planning process.

We also conduct humanitarian-assistance/disaster-response activities designed to reduce widespread conditions such as human suffering, disease, hunger and privation. Our objectives are to improve basic living conditions in countries that have ungoverned spaces susceptible to exploitation.

These projects enhance the legitimacy of the host nation government by improving its capacity to provide its population with essential services. We want to erode the influence, control and support for transnational criminal organizations, drug trafficking organizations and violent extremist organizations. This would include denying, deterring and preventing these groups from exploiting ungoverned areas and vulnerable populations.

In comparison to other global threats, the near collapse of societies in the hemisphere with the associated drug and illegal alien flow are frequently viewed to be of low importance. Many argue these threats are not existential and do not challenge our national security. I disagree.

Transnational criminal organizations contribute to instability, breakdown of governance and lawlessness, not to mention the roughly 35,000 deaths and $200 billion that drug use (primarily heroin, coke and meth) costs America every year. I believe that the mass migration of children we are all of a sudden struggling with is a leading indicator of the negative second- and third-order impacts on our national interests that are now reality due to the nearly unimpeded flow of drugs up the isthmus, as well as the unbelievable levels of drug profits (approximately $85 billion) available to transnational criminal organizations to buy police departments, court systems and even governments.

Violent criminal organizations, including gangs and groups engaged in trafficking, take advantage of the region's patchy development and fledgling democracies to threaten government operations and human security. The complex challenges facing Central America cannot be resolved by military means alone, but without appropriate application of U.S. military support it will remain fertile ground for every threat to regional security and stability.

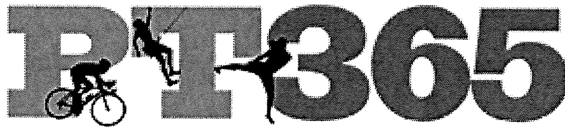
There are solutions. And going forward we have to start with something akin to a new approach to Central America that balances prosperity, governance and security, and funding that has to involve every agency of the U.S. government.

Kelly is commander of U.S. Southern Command in Miami.

Start your day with a roundup of top defense news.

flightlines blog

Si
up
nc



PT365

for free Military Times E-Reports. Choose from Money and Education. Subscribers: log in for premium e-newsletters.

EXHIBIT
B

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Salmon, Rebeca E.
A Salmon Firm, LLC
P.O. Box 1614
Norcross, GA 30091

DHS/ICE Office of Chief Counsel - ATL
180 Ted Turner Dr. SW, Suite 332
Atlanta, GA 30303

Name: R[redacted]-R[redacted], N[redacted]

A [redacted]-938

Date of this notice: 12/14/2015

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.

Userteam: Docket

Immigrant & Refugee Appellate Center, LLC | www.irac.net

For more unpublished BIA decisions, visit
www.irac.net/unpublished/index/

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A[redacted]938 – Atlanta, GA

Date: DEC 14 2015

In re: N[redacted] R[redacted] R[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rebeca E. Salmon, Esquire

APPLICATION: Continuance; remand

Immigrant & Refugee Appellate Center, LLC | www.irac.net

The respondent, a native and citizen of Guatemala, appeals from the Immigration Judge's decision dated June 3, 2015, denying her request for a continuance and ordering her removed from the United States to Guatemala. The Department of Homeland Security has not responded to the appeal. The record will be remanded.

At a hearing on May 15, 2015, the 17-year-old respondent indicated through counsel that she intended to seek Special Immigrant Juvenile (SIJ) status. The matter was continued until June 3, 2015, at which time the respondent filed a motion to continue on the basis that a dependency petition had been filed in state court. The respondent did not provide a copy of the petition but instead provided evidence that a guardianship hearing on the petition was scheduled for June 18, 2015. The Immigration Judge concluded that the respondent did not establish good cause for a continuance, declined to further continue proceedings, and ordered the respondent removed to Guatemala.

On appeal, the respondent argues that the Immigration Judge (1) erred in requiring her to produce her juvenile state dependency petition because doing so would violate the Alabama Juvenile Code and the petition is unnecessary to establish her prima facie eligibility for SIJ status; (2) violated her due process rights to a fair opportunity to apply for available relief and to equal protection under the law, and (3) abused her discretion by refusing to grant the respondent a continuance to allow her to file for SIJ status.

The respondent has submitted evidence on appeal showing that, subsequent to the Immigration Judge's decision, the dependency petition in fact was granted in state court on July 13, 2015, and that she filed a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) and an Application to Register Permanent Residence or Adjust Status (Form I-485) with United States Citizenship and Immigration Services (USCIS). The respondent requests that the case be remanded based on this proffered evidence.

Considering the new evidence that the respondent's dependency petition was granted and her application for SIJ status is now pending with USCIS, we will remand these proceedings to allow the respondent to request a continuance or administrative closure while she pursues SIJ status with USCIS. *See Matter of Sanchez Sosa*, 25 I&N Dec. 807, 815 (BIA 2012) ("As a general rule, there is a rebuttable presumption that an alien who has filed a prima facie approvable application with the USCIS will warrant a favorable exercise of discretion for a continuance for a

reasonable period of time.") (internal citation omitted); *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) (discussing the standards for administratively closing proceedings); *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) (setting forth a framework to analyze whether good cause exists to continue proceedings to await adjudication by USCIS of a pending family-based visa petition).

Because the record will be remanded for further proceedings based on the filing of the I-360 petition and the I-485 application, the issues raised by the respondent on appeal in this case are moot. However, in view of the recurring nature of the issues raised in this case, we note that we find it was error to have denied a continuance in this case where there was no dispute that a dependency petition had been filed in the appropriate state court and a timely hearing scheduled on the guardianship petition. As evidenced in this case, aside from other issues presented, denial of the continuance was not a good utilization of Immigration Court and Board resources. Absent compelling reasons, an Immigration Judge should continue proceedings to await adjudication of a pending state dependency petition in cases such as the one before us.[1]

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings and the entry of a new decision.

FOR THE BOARD

Immigrant & Refugee Appellate Center, LLC | www.irac.net

[1] We separately note that guidance provided to Immigration Judges by the Chief Immigration Judge states that if an unaccompanied child is seeking SIJ status, "the case must be administratively closed or reset for that process to occur in state or juvenile court." *See* Memorandum from Brian M. O'Leary, Chief Immigration Judge, to Immigration Judges (Sept. 10, 2014) (Docketing Practices Relating to Unaccompanied Children Cases in Light of New Priorities).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ATLANTA, GEORGIA

File: A[redacted]-938 June 3, 2015

In the Matter of

N[redacted] R[redacted]-R[redacted]) IN REMOVAL PROCEEDINGS

RESPONDENT)

CHARGE: INA Section 212(a)(6)(A)(i), as amended - in that she is an alien present in the United States without being admitted or paroled or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATION: A motion to continue.

ON BEHALF OF RESPONDENT: REBECA E. SALMON, Esquire
PO Box 1614
Norcross, Georgia 30091

ON BEHALF OF DHS: KELLY FOWLER, Assistant Chief Counsel
Department Of Homeland Security
180 Spring Street SW, 3rd Floor
Atlanta, Georgia 30303

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 17-year-old female native and citizen of Guatemala who was issued a Notice to Appear on January 26, 2014. See Exhibit No. 1.

At a Master Calendar hearing held on May 13, 2015, the respondent appeared

Immigrant & Refugee Appellate Center, LLC | www.irac.net

represented by counsel to enter written pleadings. See Exhibit No. 2. The written pleadings conceded proper service of the charging document, admitted all allegations, conceded the one charge on a 212(a)(6)(A)(i) and the Court designated Guatemala as the country of removal in the event that that should become necessary. The Court found removability to be established. See Section 240 (c)(1)(A) of the Act. The issue before the Court concerns the respondent's request for a motion to continue.

A motion to continue can be granted for a good cause. The issue that presents before this Court today is that the respondent would like for the Court to continue the case based upon an underlying application for dependency in Alabama. Now this issue has come up on repeated occasions with this particular firm and she, the respondent's counsel, has presented the Court with an unpublished decision in another case which is irrelevant to the matter at bar at this time.

In any event, the allegation is that the dependency petition is of a confidential nature and, therefore, cannot be tendered over to the Court. The Court is of the opinion that the TVPRA includes the agencies of the United States Government, including EOIR, that are charged with the responsibility of protection of our juveniles. This is the reason why we have a juvenile docket. And without a copy of that dependency petition, we cannot determine whether that application that is pending is actually well founded. This is the same, and it was stated in the record earlier, as an application for an I-130. The respondent has the burden to show that there is a viable application that is pending outside of the agency in order to pursue, in this Court's opinion, successfully a motion to continue.

The respondent has declined to present that document and has specifically indicated that she would not turn it over to the Court and, therefore, the motion to continue is without good cause. For this reason, the Court will deny the motion to

Immigrant & Refugee Appellate Center, LLC | www.irac.net

continue.

There are no applications other than that before the Court. The respondent will be ordered removed to Guatemala on the charges contained in the Notice to Appear.

June 3, 2015

Please see the next page for electronic signature

MADELINE GARCIA
Immigration Judge

Immigrant & Refugee Appellate Center, LLC | www.irac.net

//s//

Immigration Judge MADELINE GARCIA

garciama on August 31, 2015 at 4:20 PM GMT

Immigrant & Refugee Appellate Center, LLC | www.irac.net

CERTIFICATE OF SERVICE

I hereby certify that I have, this 16th day of February 2018, caused to be served the foregoing BRIEF OF KIDS IN NEED OF DEFENSE, PUBLIC COUNSEL, AND FREEDOM NETWORK USA AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT by causing copies of same to be delivered by United States mail, postage prepaid, to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania A venue, NW
Washington, DC 20530

Reynaldo Castro-Tum
637 Holly Drive
Washington, PA 15301

DHS/ICE Office of Chief Counsel - PHI
900 Market Street, Suite 346
Philadelphia, PA 19107

Christopher Kelly, Chief
Immigration Law and Practice Division
Office of the Principal Legal Advisor
ICE Headquarters - Potomac Center North
500 12th Street, SW, MS 5900
Washington, DC 20536

Joseph F. Yenouskas