



**Practice Alert:  
EOIR Final Rule on Administrative Closure and Termination<sup>1</sup>**

**June 11, 2024**

On July 29, 2024, an important new Executive Office for Immigration Review (EOIR) final rule, [Efficient Case and Docket Management in Immigration Proceedings](#), will go into effect. Among other things, the rule codifies the authority of immigration judges (IJ) and the Board of Immigration Appeals (BIA) to administratively close and terminate removal proceedings. This practice alert describes this rule’s origins and summarizes its key provisions.

**Background on the Rule**

The backstory of this final rule is lengthy. During the Trump administration, the attorney general and EOIR took steps to curtail the authority and independence of IJs and the BIA. These steps included limiting adjudicators’ authority to postpone or terminate cases that were not ripe for final adjudication. President Trump’s attorney general issued a decision that largely eliminated IJs’ and the BIA’s authority to administratively close cases, *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), followed by a decision that drastically restricted IJs’

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and the BIA's authority to terminate cases, *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018). These decisions reasoned that IJs and the BIA could not administratively close or terminate removal proceedings without explicit regulatory or other legal authority, and that there was no explicit regulatory authority that generally authorized administrative closure or termination. These decisions prompted numerous legal challenges, with several courts reversing the attorney general and finding that the regulations did generally authorize IJs and the BIA to administratively close and terminate cases. *Gonzalez v. Garland*, 16 F.4th 131 (4th Cir. 2021); *Arcos Sanchez v. Att'y Gen. U.S.*, 997 F.3d 113 (3d Cir. 2021); *Meza Morales v. Barr*, 973 F.3d. 656 (7th Cir. 2020); *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019). *But see Hernandez-Serrano v. Barr*, 981 F.3d 459 (6th Cir. 2020).

The Trump administration's next move was to issue a regulation effectively codifying *Matter of Castro-Tum*, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (Dec. 16, 2020), which went into effect on January 15, 2021. In addition to eliminating IJs' and the BIA's general administrative closure authority, the regulation contained many other harmful provisions, including eliminating *sua sponte* reopening and motions to remand. Immigrant rights groups promptly sued, and a federal district court enjoined the Trump final rule two months after it went into effect. *Centro Legal de La Raza v. EOIR*, 524 F. Supp. 3d 919 (N.D. Cal. Mar. 10, 2021). Thus, since March 2021, the currently-in-effect version of the rules has returned to the pre-January 2021 version. This has made it challenging to locate online and cite the correct version of the regulations.<sup>2</sup>

The Biden administration took steps to restore IJs' and the BIA's authority to manage their dockets. First, Attorney General Garland issued decisions restoring their administrative closure authority, *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021), and termination authority, *Matter of Coronado Acevedo*, 28 I&N Dec. 648 (A.G. 2022), pending forthcoming rulemaking on these issues. Then, in the fall of 2023, EOIR issued a proposed rule that would overhaul the enjoined Trump final rule, largely restore the pre-Trump-rule status quo, and introduce key new provisions, including those regarding administrative closure

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<sup>2</sup> One helpful resource is a handout created by the DOJ's Office of Immigration Litigation and filed in *Centro Legal de La Raza v. EOIR*, 21-cv-00463-SI (May 3, 2023), Doc. 87-1, which links to currently in effect regulations, available at [https://nipnl.org/sites/default/files/2023-05/2023\\_3May-EOIR-regs-chart.pdf](https://nipnl.org/sites/default/files/2023-05/2023_3May-EOIR-regs-chart.pdf).

and termination. [Appellate Procedures and Decisional Finality in Immigration Proceedings: Administrative Closure](#), 88 Fed. Reg. 62242 (Sept. 8, 2023). EOIR received 851 comments on the proposed rule.<sup>3</sup> On May 29, 2024, EOIR published the final rule under a new name, [“Efficient Case and Docket Management in Immigration Proceedings,”](#) 89 Fed. Reg. 46742.<sup>4</sup> The rule will go into effect on July 29, 2024.

## Summary of the Rule’s Key Provisions

The final rule makes both substantive and procedural (and/or technical) revisions to 14 different EOIR regulations. This practice alert does not discuss each change but rather focuses on the most impactful provisions of the regulations.

### 1. *The Rule Codifies IJ and BIA Administrative Closure Authority*

The final rule codifies IJs’ and the BIA’s administrative closure authority and provides a list of factors for deciding whether to administratively close a case or recalendar a previously administratively closed case. 8 CFR §§ 1003.18(c); 1003.1(l). The rule generally mandates administrative closure if based on a joint motion or a motion filed by one party where the other party “has affirmatively indicated its non-opposition.” 8 CFR §§ 1003.18(c)(3); 1003.1(l)(3). In all other situations, the IJs and the BIA may grant administrative closure or recalendar a case if they deem it warranted, even if a party opposes. However, IJs and the BIA must consider the “totality of the circumstances” including the following non-exclusive factors<sup>5</sup>:

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<sup>3</sup> 89 Fed. Reg. at 46742. The National Immigration Project issued a [comment](#) that largely supported the proposed rule but urged EOIR to make some changes that would protect noncitizens’ rights; EOIR adopted some but not all of our recommendations in the final rule.

<sup>4</sup> The name change may be attributable to the Biden administration’s recent efforts to appear tough on immigration. The Department of Justice announced the final rule in a press release about a new rocket docket. Departments of Homeland Security and Justice to Announce “Recent Arrivals” Docket Process for More Efficient Immigration Hearings (May 16, 2024), <https://www.justice.gov/opa/pr/departments-homeland-security-and-justice-announce-recent-arrivals-docket-process-more>.

<sup>5</sup> The rule also sets forth a list of non-exclusive factors to be considered when deciding whether to recalendar a case. 8 CFR § 1003.1(l)(3)(ii).

- “(A) The reason administrative closure is sought;
- (B) The basis for any opposition to administrative closure;
- (C) Any requirement that a case be administratively closed in order for a petition, application, or other action to be filed with, or granted by, DHS;
- (D) The likelihood the noncitizen will succeed on any petition, application, or other action that the noncitizen is pursuing, or that the noncitizen states in writing or on the record at a hearing that they plan to pursue, outside of proceedings before [EOIR];
- (E) The anticipated duration of the administrative closure;
- (F) The responsibility of either party, if any, in contributing to any current or anticipated delay;
- (G) The ultimate anticipated outcome of the case pending before [EOIR]; and
- (H) The ICE detention status of the noncitizen.”

8 CFR §§ 1003.18(c)(3)(i); 1003.1(l)(3)(i). Helpfully, the regulation also specifies that a noncitizen does not need to have an action pending outside of EOIR proceedings to present an appropriate case for administrative closure. 8 CFR §§ 1003.18(c)(3); 1003.1(l)(3). The final rule is nearly identical to the proposed rule, with the addition of the noncitizen’s ICE detention status as an administrative closure factor. Many of the factors listed in the rule are similar to those previously outlined in leading BIA administrative closure cases, *see Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012); *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017). However, practitioners should be sure to cite to the regulations in administrative closure motions beginning on July 29, 2024.<sup>6</sup>

## 2. *The Rule Codifies IJ and BIA Termination Authority*

The final rule describes when an IJ or the BIA can terminate proceedings. It creates two separate types of termination: “mandatory” termination and “discretionary” termination. 8 CFR §§ 1003.18(d); 1003.1(m); *see also* 8 CFR § 1239.2(b).

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<sup>6</sup> *See* 89 Fed. Reg. at 46753 (“[T]o the extent that the Board’s holding in *Matter of W-Y-U-* that “the primary consideration . . . in determining whether to administratively close or recalendar proceedings is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits,” *id.*, is inconsistent with the unweighted, “totality-of-the-circumstances” standard implemented by this rule, *Matter of W-Y-U-*, 27 I&N Dec. 17, is superseded.”).

Under the **mandatory termination** category, IJs and the BIA are required to terminate proceedings if any of the below circumstances are present:

- The removal charge(s) cannot be sustained;
- Termination is otherwise required by law;
- Fundamentally fair proceedings are not possible because the noncitizen is mentally incompetent and adequate safeguards are unavailable;
- The noncitizen obtained U.S. citizenship after removal proceedings started;
- The noncitizen has obtained one of the following statuses and would not have been removable as charged if they had obtained such status before the initiation of proceedings: LPR status, refugee status, asylee status, U nonimmigrant status, T nonimmigrant status, or S nonimmigrant status;
- The noncitizen meets the regulatory standard for termination after NACARA adjustment, *see* 8 CFR § 1245.13(*l*); or
- The parties filed a joint motion to terminate, or “one party filed a motion to terminate and the other party affirmatively indicated its nonopposition, unless the [BIA or IJ] articulates unusual, clearly identified, and supported reasons for denying the motion.”

8 CFR §§ 1003.18(d)(1)(i); 1003.1(m)(1)(i).

Under the **discretionary termination** category, the rule allows IJs and the BIA to terminate in their discretion if the case falls into any of the following circumstances:

- The noncitizen has filed an asylum application with USCIS as an unaccompanied child;
  - The final rule reflects changes from the proposed rule that expand the group of young people eligible for this category. It now includes not only those whom the IJ determines currently meet the “unaccompanied child” (UC) definition, but also those whom USCIS considers eligible for filing as an unaccompanied child under its policy. Thus, both young people who currently meet the UC definition and [\*J.O.P. v. DHS class members\*](#) (people who previously met the UC definition but turned 18 or reunified with a parent or legal guardian before filing for asylum) can benefit from this

termination ground.

- The noncitizen is prima facie eligible for adjustment of status;
- The noncitizen is prima facie eligible for other relief from removal or a lawful status, over which USCIS has jurisdiction if the noncitizen were not in proceedings and which the noncitizen has filed with USCIS;
  - Discretionary termination is not allowed, however, for a noncitizen to pursue an asylum application before USCIS, unless filing as a UC as described above, or unless the motion is jointly filed or affirmatively non-opposed.
- The noncitizen is prima facie eligible for naturalization, except that the IJ or BIA may not terminate if DHS opposes;<sup>7</sup>
- The noncitizen has Temporary Protected Status, deferred action, or Deferred Enforced Departure;
- The noncitizen has an approved provisional unlawful presence waiver under 8 CFR § 212.7(e);
- Termination is authorized by the separate regulation permitting termination in certain circumstances where a noncitizen has filed a joint petition to remove conditions on permanent residence, 8 CFR § 1216.4(a)(6);<sup>8</sup>
- Termination is authorized by the separate regulation permitting termination on DHS motion in cases of noncitizens with aggravated felony convictions, in order to commence administrative removal proceedings under INA § 238, see 8 CFR § 1238.1(e); or
- The noncitizen's case presents circumstances comparable to those specifically listed above, making termination similarly necessary or appropriate. However, IJs and the BIA "may not terminate a case for purely humanitarian reasons, unless DHS

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<sup>7</sup> The discretionary termination ground related to naturalization eligibility described here replaces the previous regulation, found at former 8 CFR § 1239.2(f). In justifying the rule's requirement that DHS not affirmatively oppose the motion, the commentary cites "DHS's unique role in adjudicating naturalization applications, and Congress's directive that pending removal proceedings—which DHS serves as the prosecutor in initiating—should bar consideration of naturalization applications, and therefore will not terminate cases over DHS's opposition." 89 Fed. Reg. at 46776.

<sup>8</sup> While the rule contains several discretionary termination provisions that cross reference and incorporate other termination regulations, the final rule eliminated a ground included in the proposed rule for discretionary termination related to U and T visas, reasoning that including those grounds would be superfluous and potentially confusing. 89 Fed. Reg. at 46776.

expressly consents to such termination, joins in a motion to terminate, or affirmatively indicates its nonopposition to a noncitizen’s motion.”

8 CFR §§ 1003.18(d)(1)(ii); 1003.1(m)(1)(ii). In response to comments, the final rule forbids IJs and the BIA from terminating in the absence of a party’s motion and explicitly requires the IJ or BIA to “consider the reason termination is sought and the basis for any opposition to termination when adjudicating the motion to terminate.” *Id.* These changes will hopefully prevent an problematic practice practitioners have reported under the Biden administration’s prosecutorial discretion policy, where DHS unilaterally moves to terminate a case despite the noncitizen’s desire to have it adjudicated in court, and IJs grant DHS’s motion sometimes without waiting for the response period to elapse.

### 3. *The Rule Adds a New Provision on Post-Conviction Relief*

The rule adds an entirely new section, 8 CFR § 1003.55, discussing the retroactive application of *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019). The 2023 proposed rule had solicited input from commenters on whether *Matter of Thomas & Thompson* should be applied retroactively. *Matter of Thomas & Thompson*, an attorney general decision issued during the Trump administration, ruled that state court sentence modification orders would only be given effect for immigration purposes if the order was based on a procedural or substantive defect in the underlying criminal proceeding. Orders issued for rehabilitation or other purposes would not be recognized. Before *Matter of Thomas & Thompson*, BIA case law directed that state court sentence modification orders should generally be given full faith and credit regardless of the reason for the modification. *See Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005); *Matter of Song*, 23 I&N Dec. 173 (BIA 2001); *see also Matter of H. Estrada*, 26 I&N Dec. 749 (BIA 2016). The National Immigration Project’s comment in response to this request urged the administration to overturn *Matter of Thomas & Thompson*—a result we have been advocating for years—and alternatively argued that the decision should not be applied retroactively.

The final rule states that *Matter of Thomas & Thompson* shall not apply to a criminal sentence if:

- The court granted a request to modify the sentence at any time, and that request

was filed on or before October 25, 2019; or

- The noncitizen demonstrates that they “reasonably and detrimentally relied” on the availability of a sentence modification order entered in connection with a guilty plea, conviction, or sentence on or before October 25, 2019.

8 CFR § 1003.55(a)(1). In other words, *Matter of Thomas & Thompson* will not be applied to noncitizens who (1) requested a sentence modification on or before October 25, 2019—even if the sentence modification was not granted until after that date; or (2) pled guilty, were convicted, or were sentenced on or before October 25, 2019; “reasonably and detrimentally relied” on the availability of a sentence modification entered in connection with that plea, conviction, or sentence; and later obtained a sentence modification order.<sup>9</sup> If the circumstances meet one of those two requirements, then the IJ or BIA shall assess the relevant order under the prior BIA case law as applicable—*Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), *Matter of Song*, 23 I&N Dec. 173 (BIA 2001), and *Matter of H. Estrada*, 26 I&N Dec. 749 (BIA 2016). 8 CFR § 1003.55(a)(2).

The final rule also provides that IJs and the BIA should give effect to orders that “correct[] a genuine ambiguity, mistake, or typographical error on the face of the original conviction or sentencing order and that [were] entered to give effect to the intent of the original order.” 8 CFR § 1003.55(b).

While this provision lessens some of the harmful impact of *Matter of Thomas & Thompson*, the National Immigration Project [continues](#) to believe that the decision was wrongly decided and should be overturned. The National Immigration Project also believes that the decision should categorically not apply retroactively to any sentence modification, regardless of when it was granted or requested, to convictions preceding *Matter of Thomas & Thompson*.

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<sup>9</sup> The rule’s commentary states that the noncitizen has the burden to establish reliance, regardless of which party carries the burden of proof in the removal proceedings. 89 Fed. Reg. at 46783 n.15.



#### 4. *The Rule Restores Important Procedural Safeguards That the Trump Rule Had Eliminated*

Many provisions of the final rule restore regulations to their pre-January-2021 state, thus maintaining the status quo established since the Trump rule was enjoined in March 2021. Key provisions falling in this category include:

- Restoration of IJs and the BIA’s ***sua sponte* reopening authority**, which the Trump rule had eliminated. 8 CFR §§ 1003.23(b)(1), 1003.2(a).<sup>10</sup>
- Restoration of **robust BIA remand authority** for additional IJ fact-finding, including recognition of motions to remand filed while a BIA appeal is pending, and again limiting the situations when the BIA can take administrative notice of a fact not found by the IJ. 8 CFR §§ 1003.2(b)(1), 1003.2(c)(4), 1003.1(d)(3)(iv).
- Reinstating **consecutive, rather than simultaneous, BIA briefing schedules in non-detained cases**. 8 CFR § 1003.3(c)(1). In detained cases, BIA briefing continues to be simultaneous under the rule, which also specifies that a reply brief can be filed only with the leave from the BIA, within 21 days of the initial briefs’ deadline.<sup>11</sup> The final rule also restores the BIA’s authority to extend the briefing deadline upon written motion establishing good cause for up to 90 days (the Trump rule would have created a 14-day maximum extension period). The rule retains language from the Trump rule recognizing that the BIA “may request supplemental briefing from the parties after the expiration of the briefing deadline.” *Id.*
- **Eliminating the Trump rule provision that allowed IJs to certify cases remanded from the BIA to the EOIR Director** for further review, former 8 CFR § 1003.1(k), as well as other Trump rule provisions that would have allowed the EOIR Director to interfere in cases being handled by BIA members, former 8 CFR § 1003.1(e)(8)(v).

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<sup>10</sup> The final rule also removed two new no-deadline reopening grounds that the Trump rule had added, for U.S. citizenship claims and noncitizens who were no longer removable. Former 8 CFR §§ 1003.23(b)(4)(v)-(vi); 1003.2(c)(3)(v)-(vi).

<sup>11</sup> The final rule also expands the time for filing a response to a party’s motion to reopen with the BIA from 13 days to 21 days. 8 CFR § 1003.2(g)(3).

### *5. The Rule Makes Humanizing Terminology Changes*

The final rule creates new definitions for “noncitizen” and “unaccompanied child” and replaces the terms “alien” and “unaccompanied alien child” with the new terms throughout. 8 CFR § 1001.1(gg)-(hh). The final rule also replaces gendered language like “his or her” with gender neutral language.

### *6. The Rule Gives the BIA Expanded Authority to Grant Voluntary Departure Rather than Remand*

The final rule largely retains a provision from the Trump rule that specifies circumstances when the BIA can grant a noncitizen voluntary departure during an appeal, rather than remanding the case for the IJ to grant voluntary departure. 8 CFR §§ 1240.26(k); 1003.1(d)(7)(ii). Among other requirements, the noncitizen must have requested voluntary departure before the IJ and must specify in the notice of appeal that they are appealing the voluntary departure denial.

## **Conclusion**

The EOIR final rule represents the final word—for now at least—in a years-long dispute regarding IJs’ and the BIA’s authority over their own dockets. It is a relief to many practitioners that the Biden administration finally acted to complete this rulemaking before the end of the current presidential term. With this final rule in place, noncitizens in removal proceedings have some additional protection against arbitrary and unfair outcomes driven by the prosecutorial discretion policy de jour or a particular IJ’s hostility. For example, by expressly granting IJs and the BIA administrative closure and termination authority that is not dependent on DHS’s approval, these crucial mechanisms will remain available to noncitizens even if a next presidential administration eradicates DHS prosecutorial discretion. Further, by requiring IJs and the BIA to consider a party’s opposition to the other party’s motion to terminate, the rule helps prevent terminations based on DHS’s motion that would prejudice and harm noncitizens. Finally, by largely requiring IJs and the BIA to grant jointly filed or affirmatively non-opposed motions to terminate and administratively close cases, the rule gives effect to the parties’ agreements and insulates against IJs who may wish to take an inappropriately prosecutorial role in the case.

With those notes of optimism, the devil is in the implementation. NIPNLG is especially interested in monitoring how IJs and the BIA interpret and exercise their termination authority under the regulation. We invite practitioners to complete our [short survey](#) to report notable IJ or BIA termination decisions on or after July 29, 2024 based on the new regulations.