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SECOND CIRCUIT UPHOLDS TRUMP ERA INTERPRETATION ON ADMINISTRATIVE CLOSURE EVEN THOUGH BIDEN HAS CHANGED IT. DOES THIS LEAVE OPEN POSSIBILITY THAT BIDEN ERA INTERPRETATION MAY ALSO BE UPHELD IF FUTURE ADMINISTRATION CHANGES IT?

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The Second Circuit in *Garcia v. Garland* upheld the BIA's decision not to grant administrative closure under *Matter of Castro-Tum*, despite the fact that that the case has since been overruled.

Matter of Castro -Tum, a Trump era decision, held that Immigration Judges (IJs) and the Board of Immigration Appeals (BIA) do not have the authority to administratively close cases, unless expressly authorized by a previous regulation or a previous judicially approved settlement. We have previously advocated that *Matter of Castro-Tum* be withdrawn and its predecessor, *Matter of Avetisyan*, be reinstated. *Avetisyan* held that IJs and the BIA may administratively close removal proceedings, even if a party opposes, if it is otherwise appropriate under the circumstances, and that IJs or the BIA should weigh all relevant factors in deciding whether administrative closure is appropriate. In prior blogs, see here and here, we have argued that *Avetisyan* sets a more common sense standard for administrative closure that and would go a long way towards clearing the Immigration Court's backlogged dockets.

In another previous blog, extracts of which are reproduced here, we discussed the numerous Circuit Court decisions that have overturned *Castro-Tum*. In 2019,

the Fourth Circuit in *Romero v. Barr* held that the language "may take any action.....appropriate and necessary for the disposition" of the case" at 8 CFR §§ 1003.1(d)(1)(ii) & 1003.10(b) unambiguously confers upon IJs and the BIA the general authority to administratively close cases. *Meza-Morales v. Barr*, decided by the Seventh Circuit in 2020, also concluded that the "immigration regulations that grant immigration judges their general powers broad enough to implicitly encompass that authority." Most recently, the Third Circuit in *Sanchez v. Attorney General*, held that 8 CFR §§ 1003.10(b) and 1003.1(d)(1)(ii) unambiguously grant IJs and the BIA general authority to administratively close cases by authorizing them to take "any action" that is "appropriate and necessary" for the disposition of cases. The Court in *Sanchez* relied on the Supreme Court's 2018 decision in *Kisor v. Wilkie*, which held that an agency's interpretation of its own regulations will only be entitled to deference if the following criteria are met: i) that the regulation is "genuinely ambiguous" — the court should reach this conclusion after exhausting all the "traditional tools" of construction; (ii) if the regulation is genuinely ambiguous, whether the agency's interpretation is reasonable; and (iii) even if it is a reasonable interpretation, whether it meets the "minimum threshold" to grant *Auer* deference, requiring the court to conduct an "independent inquiry" into whether (a) it is an authoritative or official position of the agency; (b) it reflects the agency's substantive expertise; and (c) the agency's interpretation of the rule reflects "its fair and considered judgment."

On July 15, 2021, Attorney General Garland issued a decision in *Matter of Cruz-Valdez* that overrules *Castro-Tum* in its entirety and held that "mmigration judges and the Board should apply the standard for administrative closure set out in *Matter of Avetisyan*..." The decision noted that three courts of appeals have rejected *Castro – Tum*, "holding that administrative closure is 'plainly within an immigration judge's authority' under Department of Justice regulations", while only the 6th Circuit upheld it in *Hernandez-Serrano v. Barr*, 981 F.3d 459 (6th Cir. 2020). Even the 6th Circuit eventually ruled that IJs and the BIA do have the authority to administratively close cases for the purpose of allowing noncitizens to apply for provisional unlawful presence waivers, however. *See Garcia-DeLeon v. Garland*, No. 20-3957 (6th Cir. 2021). The decision also pointed to the 2020 DOJ final rule codifying *Castro-Tum*, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588, 81598 (Dec. 16, 2020), which was the subject of a nationwide

preliminary injunction and undergoing reconsideration by the DOJ, as further justification for overruling *Castro-Tum*. Because *Castro-Tum* departed from longstanding practice regarding administrative closure, AG Garland held that IJs and the BIA should revert to the standards for administrative closure laid out in cases like *Avetisyan*.

Despite *Castro-Tum* being overruled, it is disappointing that the Second Circuit held that a decision not to close under a prior precedent is still binding even though the Biden administration has overruled it. It is also surprising that Biden's Justice Department defended the BIA's decision. *Garcia v. Garland* involved a Petitioner, Antonio Luna Garcia, who was issued a Notice to Appear ("NTA") in 2004 under 8 U.S.C. § 1182(a)(6)(A)(i) because he had entered the U.S. in 1999 and remained ever since without having been inspected or paroled. Garcia's wife then filed an I-130 petition on his behalf, which was approved. Because he had never been admitted or paroled into the U.S., however, Garcia was ineligible to adjust status in the U.S. If he were to return to Mexico to consular process, he would be subject to the 10-year bar under 8 U.S.C. § 1182(a)(9)(B)(i)(II) as he had been accrued far more than a year of unlawful presence in the U.S. Garcia requested that the Immigration Judge ("IJ") adjourn his merits hearing to a later date to allow him to apply for an I-601A waiver. The IJ declined to grant a continuance, finding that Garcia failed to show good cause. The IJ also declined to grant administrative closure, stating that it was "no longer an option in this case" after *Matter of Castro -Tum*. On appeal, the BIA upheld the IJ's denial of administrative closure, citing *Matter of Castro -Tum* and holding that "he Attorney General has explicitly held that the Board and the Immigration Judges lack the general authority to administratively close cases."

Garcia appealed to the Second Circuit, arguing first that the agency's overturning of *Matter of Castro -Tum* in *Matter of Cruz-Valdez* renders its previous reliance on *Castro-Tum* an abuse of discretion. Garcia also asserted that, even if the agency's earlier application of *Castro-Tum* was not an abuse of the discretion, *Castro-Tum* conflicted with the regulations which expressly empower IJs and the BIA to grant administrative closure. Finally, Garcia argued that 8 C.F.R. § 212.7(e)(4)(iii) expressly contemplates administrative closure in cases like his, so the IJ or the BIA could have granted administrative closure in his case, despite the general rule of *Castro-Tum*.

The Second Circuit rejected all of Garcia's arguments. First, the court held that the BIA's previous reliance on *Matter of Castro -Tum* was not an abuse of

discretion because the holding of the case was "valid and applicable" at the time of the agency's decision. The court reasoned that agencies need not overturn precedential decisions in the same way that courts do, stating that "when an agency reinterprets an ambiguous statutory provision, it is making policy within the bounds of discretion that Congress has conferred on the agency by statute". The court further stated that "ecause an agency interpretation of its regulations may reflect policy judgment, the interpretation may vary at different times—especially between different administrations—without casting doubt on the validity of the interpretation at either time". Additionally, the court held that the "regulations considered in Matter of Castro-Tum are at least ambiguous and that the Attorney General's interpretation was reasonable", so the BIA did not abuse its discretion by following that interpretation. The court disagreed with circuits that have found the "necessary and appropriate" language of 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii) to unambiguously authorize administrative closure, reasoning that these provisions authorize actions necessary "for the disposition of" a case and administrative closure is arguably not a disposition because it does not resolve a case on its merits. The Sixth Circuit, as the court pointed out, adopted a similar interpretation of the regulations in *Hernandez-Serrano v. Barr*, 981 F.3d 459 (6th Cir. 2020). Because the regulations can be read in this way, the court found both the AG's interpretation to reasonable, and held that the IJ and BIA permissibly relied on this reading. Further, the court rejected Garcia's contention that administrative closure remained an option in his case, reasoning that IJs and the BIA are delegates of the AG, not the Secretary of Homeland Security, so a DHS regulation cannot provide independent authorization for administrative closure.

On the whole, *Garcia v. Garland* upheld as valid the application of *Castro-Tum* before the case was overruled. It also unfortunate that the government did not decline to defend the BIA's decision on that ground that it relied on *Matter of Castro-Tum*, which the Biden administration has since overturned. Nonetheless, the case leaves open some interesting possibilities. In *Garcia v. Garland* the Second Circuit held that that agency's interpretation on administrative closure was valid because *Matter of Castro-Tum* was valid and applicable at the time of the agency's decision. Thus, if an IJ or the BIA grant administrative closure in reliance on *Matter of Cruz-Valdez*, that decision should be upheld even if a less immigrant-friendly administration overrules the decision in future. The same

logic could apply to other Biden administration policies should they be challenged in future. Further, the decision in Garcia v. Garland asserts that principle that different administrations may reinterpret ambiguous statutory provisions. We have previously suggested, here and here, that the Biden administration could interpret INA § 203(d) to count derivatives with the principal family member. The language of INA § 203(d) provides authority for family members to be counted under the preference quotas, and states that family members are "entitled to the same status, and the same order of consideration" as the principal. The plain language of the statue does not require that family members be allocated separate visa numbers. Unfortunately, in *Wang v. Blinken*, the DC Court of Appeals held that there was no ambiguity under INA § 203(d) thus making it clear that derivatives need to be separately counted. If the Biden administration or another administration changes its mind and decides to adopt a nationwide policy to not count derivatives on the ground that INA § 203(d) is ambiguous, it would be precluded from implementing this policy for people living within the jurisdiction of the D.C Circuit, but the policy could be applicable to people outside the DC Circuit under the *Brand X* doctrine (thus overruling the case everywhere except in the DC Circuit). This situation exists today even with administrative closure. *Matter of Cruz-Valdez* has overturned *Castro-Tum* nationwide except in the Sixth Circuit.

Although *Garcia v. Garland* is a disappointing decision, it provides an opening for the administration to reinterpret ambiguous statutes as well as protects prior interpretations should a future administration decide to change the interpretation.

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