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THE FIRST STEP FOR REFORMING THE IMMIGRATION COURTS IS TO ALLOW IMMIGRATION JUDGES TO ADMINISTRATIVELY CLOSE CASES

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By Cyrus D. Mehta

On May 5, 2021, the majority opinion in the Third Circuit Court of Appeals decision in *Sanchez v. Attorney General* followed two other circuit courts in holding that an Immigration Judge (IJ) has the authority to administratively close cases. If there is a case that is deserving for an IJ to administratively close a case, this is it. Former Attorney General Sessions, under President Trump, issued *Matter of Castro Tum* holding that an IJ and the Board of Immigration Appeals (BIA) did not have this authority. It is about time that the Biden administration stop defending *Matter of Castro Tum*. There is a great and urgent need to reform the immigration courts, including making them more independent, but a simple first step is for Attorney General Merrick Garland to withdraw *Matter of Castro Tum*. This would have a great impact in reducing the immigration court backlog, bring a modicum of fairness and allow an IJ to focus on serious cases.

The Petitioner in *Sanchez v. AG*, Arcos Sanchez, a native and citizen of Mexico, entered the US at the age of seven without inspection. In 2012, he applied for Consideration of Deferred Action for Childhood Arrivals (DACA) status, which was approved. The DHS periodically granted his requests for renewals. In April 2019, Sanchez was arrested and charged in New Jersey with sexual assault and endangering the welfare of a child. As a result of these charges, the USCIS revoked Sanchez's DACA status and placed him in removal proceedings. Sanchez applied for asylum and related relief. The IJ denied his claims and issued an order of removal. Two weeks from the IJ's decision, the state criminal charges were dismissed. As a result of the dismissal of the charges, Sanchez

was eligible again for DACA status.

On appeal to the BIA, Sanchez challenged the IJ's decision and requested that the BIA remand the case to the IJ for consideration of administrative closure so that his DACA application could be approved, which in turn would favorably impact the disposition of the removal proceeding. The BIA denied remand, citing the binding decision of *Castro Tum*. The Third Circuit overruled the BIA and held that 8 CFR 1003.10(b) and 1003.1(d)(1(ii) unambiguously grants 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 majority in *Sanchez* relied on the Supreme Court's 2018 decision in *Kisor v. Wilkie*, which has come to the aid of petitioners challenging DHS's interpretation of supposedly ambiguous immigration regulations. Our prior blogs addressing the beneficial impact of *Kisor v. Wilkie* on federal court decisions involving immigration law are here and here. In *Auer v. Robins*, the Supreme Court held that the same *Chevron* type of deference applies to the agency's interpretation of its own regulations. After *Kisor*, no longer can the DHS invoke *Auer* deference with respect to its ability to interpret its own regulations. The majority opinion in *Kisor* essentially "cabined the scope" of *Auer* deference, and set forth a three-step approach. Under this test, the court must determine (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."

A great example of a federal court applying *Kisor* in an immigration case is the 2019 Fourth Circuit decision *Romero v Barr*. The court in *Romero* overturned *Matter of Castro-Tum* by holding that the plain language of 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii) unambiguously confers upon IJs and the BIA the general authority to administratively close cases such that an *Auer* deference assessment is not warranted. Even if these regulations are ambiguous, the court citing *Kisor* noted that *Auer* deference cannot be granted when the new interpretation results in "unfair surprise" to regulated parties

especially when the agency's current interpretation conflicts with a prior one. The Fourth Circuit in *Romero v. Barr* focused on the specific language "may take any action.....appropriate and necessary for the disposition" of the case" in 8 CFR 1003.1(d)(1)(ii) & 1003.10(b). According to the Fourth Circuit, this language would necessarily encompass actions of whatever kind appropriate, including administrative closure, and hence there was no ambiguity thus necessitating *Auer* deference.

The majority in in *Sanchez* agreed with this analysis. In a dissent, Judge Paul Matey said that the rule which states that cases may only be administratively closed when "appropriate and necessary," shouldn't be interpreted to grant "unfettered discretion." According to Judge Matey, "o the contrary, 'appropriate and necessary' is itself an important restriction on the scope of the attorney general's delegation, and one that comes with some bite."

In a subsequent opinion in June 2020 following *Romero v. Barr* by now Justice Amy Coney Barrett, the Seventh Circuit in *Meza Morales v. Barr* also concluded that "the immigration regulations that grant immigration judges their general powers broad enough to implicitly encompass that authority." Although the Sixth Circuit in *Hernandez-Serrano v. Barr* a few months later in November 2020 upheld *Castro-Tum*, the Third Circuit majority in *Sanchez* sided with the reasoning in the Fourth and Seventh Circuit. The majority in *Hernandez-Serrano* was concerned that when immigration cases leave an IJ's active calendar they never come back and "hus the reality is that, in hundreds of thousands of cases, administrative closure has amounted to a decision not to apply the Nation's immigration laws at all." But even if that is a legitimate concern, the *Sanchez* court reasoned that the Attorney General can amend the regulation and it is not the role for the court to interpret the regulation in a way that would alleviate the government's concern.

Given that there are three circuits that have overruled *Castro-Tum* on the ground that there is no ambiguity in the regulation authorizing administrative closure, with the Supreme Court's decision in *Kisor v. Wilkie* aiding this interpretation, it is about time that AG Garland restore the BIA's decision in *Matter of Avetisyan* and withdraw *Castro Tum*. As argued in our prior blogs, here and here, *Matter of Avetisyan* makes more sense than *Castro Tum*. In *Matter of Avetisyan*, an IJ repeatedly continued a removal hearing pending the filing and adjudication of a family-based immigrant visa petition. During the final hearing, despite DHS's opposition, the IJ granted the respondent's motion to

administrative closure, and the DHS filed an interlocutory appeal. The issue here was whether an IJ or the BIA has the authority to administratively close a case when one of the parties to the proceeding opposes. The BIA determined that there was fault in the general rule stated in *Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996) that "a case may not be administratively closed if opposed by either party." The BIA, in overruling *Matter of Gutierrez*, held that affording absolute deference to a party's objection is improper and that the IJ or the BIA, in the exercise of independent judgement and discretion, has the authority to administratively close a case, regardless of party opposition, if it is otherwise appropriate under the circumstances. The BIA further held that when evaluating a request for administrative closure, the IJ should weigh all relevant factors presented in the case, including, but not limited to: (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is recalendared before the IJ or the appeal is reinstated before the BIA. In *Avetisyan*, the visa petition had been pending for a long time through no apparent fault of the respondent or her husband, and there was no obvious impediment to the approval of the visa petition or ability of the respondent to successfully apply for adjustment of status. The BIA determined that the circumstances supported the exercise of the IJ's authority to administratively close the case.

There are hundreds of thousands of cases in immigration court that do not need to be active as the respondents will be eligible for permanent residence or related relief. Reviving *Avetisyan* and withdrawing *Castro Tum* will go a long way in clearing the backlog in Immigration Court. In addition to reducing clutter in the immigration court's docket, certain removal cases require resolution of questions that depend on outcomes from other immigration agencies that neither the IJ nor the BIA have any control over. Thus, the approval of an I-130 petition filed by a US citizen spouse on behalf of the foreign national spouse in removal proceedings, or the resolution of an appeal of an I-130 denial, will greatly determine the outcome of the removal case, although neither the IJ or the BIA have any control over the adjudication of the I-130 petition in a removal

proceeding. It would make sense, and also be fair, for the IJ or BIA to receive the outcome of the I-130 petition before deciding to order removal of the respondent.

The Biden administration should thus refrain from appealing *Sanchez* to the Supreme Court notwithstanding the circuit split. As a practical matter, the administration may likely lose since all the nine justices were either part of the majority or concurring opinions in *Kisor v. Wilkie*, which aids in finding that there is no need to give *Auer* deference to the government's interpretation of 8 CFR 1003.1(d)(1)(ii) & 1003.10(b). Justice Ginsburg is sadly no more and has been replaced by Justice Barrett, who wrote the opinion in *Meza-Morales v. Barr* when she was a judge on the Seventh Circuit, which overruled *Castro Tum*. Hence, despite the change in composition of the Supreme Court, there is still a very strong likelihood that the Biden administration will lose big in the Supreme Court if it asks the court to uphold *Castro Tum*. It would be much easier, and more in line with the Biden administration's thinking on bringing fairness to immigration proceedings that Trump undermined, for AG Garland to withdraw *Castro Tum* and reinstate *Avetisyan*.