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Raechel Horowitz
Chief, Immigration Law Division, Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1800
Falls Church, VA 22041

Submitted via <http://www.regulations.gov>

RE: Executive Office for Immigration Review Notice of Proposed Rulemaking, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure* (EOIR Docket No. 021-0410; AG Order No. 5738–2023; RIN 1125–AB18)

Dear Ms. Horowitz:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) submit the following comments in response to the above-referenced Executive Office for Immigration Review (EOIR) Notice of Proposed Rulemaking (NPRM), *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure* (EOIR Docket No. 021-0410; AG Order No. 5738–2023; RIN 1125–AB18), 88 Fed. Reg. 62242 (September 8, 2023).

Established in 1946, AILA is a voluntary bar association of more than 16,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA’s mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America’s immigrants. The Council litigates in the federal courts to protect the statutory, regulatory, and Constitutional rights of noncitizens, advocates on behalf of noncitizens before Congress, and has a direct interest in ensuring that those seeking protection in the United States have a meaningful opportunity to do so.

In addition, AILA and the Council have a joint initiative, the Immigration Justice Campaign (Justice Campaign), whose mission is to strengthen the community of defenders, including

attorneys and other supporters, who are ready to vigorously advocate for the rights of detained immigrants in removal proceedings and advocate for systemic change. The primary focus of the Campaign is to channel the energy of the broader legal community into pro bono work for detained immigrants and asylum seekers. The Justice Campaign has a network of more than 12,000 volunteers across the country who serve noncitizens detained in Texas, Colorado, New Jersey, California, and throughout the southeast.

I. AILA and the Council Support the Proposed Rule

AILA and the Council support the proposed rule because it restores EOIR's ability to review a fully developed record and make reasoned decisions based on that record while returning the ability to respondents to make an effective appeal. The proposed rule returns procedural protections that were eliminated by the December 2020 rule entitled Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure ("AA96 Final Rule"), by allowing respondents time to brief issues raised by opposing counsel and adjudicators to reopen cases in the interest of justice. The proposed rule's maintenance of impartiality is key to ensuring both sides have a fair chance to be heard. Considering our general support for this proposed rule, AILA and the Council respond below to the Department's specific requests for comment and provide additional suggestions to strengthen this rule.

a. Briefing Extensions

The proposed rule seeks to eliminate the AA96 Final Rule's limitations on the Board of Immigration Appeal's (Board) authority to grant briefing extensions.¹ Previously, the Board was authorized to allow up to 90 days to file a brief or reply brief for good cause shown, though in practice, it generally only gave 21-day extensions. However, the AA96 Final Rule cut the Board's authority to extend briefing to a maximum of 14 days, with only one possible extension permitted.

We welcome the Department's proposed rule to return to the Board's policy before the AA96 Final Rule was implemented. The reduction of the time the Board was permitted to grant briefing extensions needlessly constrained the Board's ability to appropriately manage its docket. For example, where a party shows good cause, it may be that the extension is based on circumstances which will last for longer than two weeks—natural disasters, a death in the family, parental leave, or serious illness or the death of counsel of record, etc. While many extension requests might only necessitate a short briefing extension, inevitably there will be situations where a longer extension is required.

There was no reason to eliminate the Board's authority to grant any extension beyond 14 days without consideration of the specific circumstances supporting the extension request, which is why we welcome the removal of the AA96 Final Rule's limitation to a single 14-day briefing extension. That limitation was particularly devastating to pro se respondents who file notices of appeal while seeking appellate counsel. Attorneys may be unwilling or unable to represent an immigrant if the briefing schedule has already been issued, knowing that they would be forced to rush through writing a brief in a matter of days while simultaneously familiarizing themselves

¹ See Proposed Rule, 88 Fed. Reg. at 62254.

with the record. The AA96 Final Rule did not meaningfully consider the difficulties experienced by pro se respondents in the process of finding counsel while having to prepare a brief in such a short period of time.

b. Simultaneous Briefing

The proposed rule seeks to remove the AA96 Final Rule's requirement for simultaneous briefing for non-detained noncitizen's appeals.² The rationale behind the AA96 Final Rule was to enable the Board to provide for more expeditious review and bring non-detained case adjudication in line with the adjudication of detained cases.³ However, as the Department acknowledges in the proposed rule, truncating the briefing schedule "could impact a noncitizen's ability to adequately prepare their case for appeal or secure legal representation to do so, and create undue confusion for pro se noncitizens and practitioners appearing before EOIR."⁴ We agree for several reasons.

First, simultaneous briefing requires the appellee to anticipate or guess the appellant's lines of argument. Recently retained counsel may not be familiar enough with the record and the issues raised in the Notice of Appeal to do so. Furthermore, arguments are often developed, added, or changed based on a review of the transcript, which is not available at the time of the Notice of Appeal.

Second, respondents often retain counsel specifically for their appeal. In addition to lacking a transcript of the removal proceedings, newly retained counsel will not have notes from the proceedings for cases handled pro se at the immigration court level and may not have a complete or comprehensive record of the proceedings when taking over cases handled by another attorney at the immigration court level. In such cases, the respondents would be unable to effectively counter arguments presented by the Department of Homeland Security (DHS) in the simultaneous briefing.

Conversely, consecutive schedules allow for the proper briefing of the record because the appellee has a full and fair opportunity to respond to the appellant's arguments and characterization of the record on appeal. For these reasons we strongly support reinstituting consecutive briefing schedules for non-detained cases.

c. Administrative Closure Authority—Immigration Judges and the Board

We welcome the Department's proposal to restore EOIR adjudicators' administrative closure authority and eliminate the AA96 Final Rule's limitations on such authority.⁵ The limitations imposed by the AA96 Final Rule, in combination with other efforts to eliminate administrative closure, such as former Attorney General Jeff Sessions' decision in *Matter of Castro Tum*, 27 I&N Dec. 187 (A.G. 2018), severely restricted immigration judges' ability to manage their own dockets and contributed to the growing immigration court backlog. Preserving administrative

² See *id.*

³ *Id.*

⁴ Proposed Rule, 88 Fed. Reg. at 62254.

⁵ See Proposed Rule, 88 Fed. Reg. at 62255.

closure via a regulation is a crucial way to ensure that EOIR adjudicators will have access to this important tool in the future.

Administrative closure is a critical docketing tool for immigration judges, which allows them to effectively manage their burgeoning caseloads by temporarily removing cases from the court's calendar.⁶ As discussed in the proposed rule's preamble, EOIR adjudicators have a long history of using administrative closure.⁷ The ability to administratively close cases is especially important in situations where a noncitizen is seeking relief available only through U.S. Citizenship and Immigration Services (USCIS), such as an I-130 petition, Special Immigrant Juvenile Status (SIJS), or VAWA, U, or T relief. Administrative closure is also a useful tool in cases where the noncitizen is awaiting action by another court system that would affect their eligibility for relief from removal, such as a state court's issuance of a predicate order for SIJS. Instead of wasting court resources by forcing the parties, the judge, and court personnel into the courtroom, administrative closure promotes efficiency until the case may become ripe for the active docket.

The availability of administrative closure is also important to DHS officials who may wish to exercise prosecutorial discretion, something which was common during 2012 to 2016 under the Obama administration. Administrative closure permits trial attorneys to offer a unique form of prosecutorial discretion that does not require the termination or dismissal of a removal case, which can promote efficiency should ICE or the respondent ever wish to resume removal proceedings for one reason or another. Without administrative closure, DHS can only offer termination, dismissal, or a stipulation to relief. Restoring administrative closure keeps that fourth option alive.

Restoring EOIR adjudicators' administrative closure authority aligns with both precedent⁸ and practices across other court systems. As the President of the National Association of Immigration Judges has made clear, administrative closure is "an effective and common docket management tool"⁹ used across judicial systems.¹⁰ And as the proposed rule's preamble notes,¹¹ administrative closure is similar to the widespread practice of issuing a stay of proceedings in federal court to avoid unnecessary litigation.¹²

⁶ See *AILA Submits Amicus Brief on Administrative Closure Authority*, AILA Doc. No. 18032634 (Feb. 16, 2018), <https://www.aila.org/infonet/aila-submits-amicus-brief-administrative-closure>.

⁷ See Proposed Rule, 88 Fed. Reg. at 62255.

⁸ *Id.*

⁹ Lorelei Laird, *ABA urges DOJ to continue allowing immigration judges to close appropriate cases*, ABA Journal, (Feb. 20, 2018, 3:52 PM) https://www.abajournal.com/news/article/aba_urges_doj_to_continue_allowing_immigration_judges_to_close_appropriate.

¹⁰ See, e.g., *Dees v. Billy*, 394 F.3d 1290, 1294 (9th Cir. 2005) (addressing the jurisdictional effects of a district court order administratively closing a case while the parties were in arbitration); *Matter of Avetisyan*, 25 I&N Dec. 688, 690 n.2 (BIA 2012) ("Administrative closure is not limited to the immigration context. It is utilized throughout the Federal court system, under a variety of names, as a tool for managing a court's docket," and citing cases in the U.S. Courts of Appeal discussing administrative closure).

¹¹ See Proposed Rule, 88 Fed. Reg. at 62262.

¹² See, e.g., *Ayanian v. Garland*, 64 F.4th 1074, 1078–79 (9th Cir. 2023) (explaining that the court previously granted a motion to stay appellate proceedings "to allow time to examine grounds for a possible alternative to litigation").

We strongly support the Department's proposals to reinstate EOIR adjudicators' administrative closure authority. Below are our recommendations to the specific questions posed in the proposed rule about administrative closure and recalendar.

i. Further protections for noncitizens who wish to have their cases adjudicated despite DHS's desire to seek administrative closure

The Department requested comment on "whether the proposed rule should include any further protections for noncitizens who wish to have their cases adjudicated despite DHS's desire to seek administrative closure, including . . . where one party opposes administrative closure, the primary consideration for the adjudicator is whether the party opposing closure has provided a persuasive reason for the case to proceed."¹³ We support including additional protections for noncitizens who wish to have their cases adjudicated in this situation. In particular, the noncitizen should be afforded the opportunity to formally state their opposition to DHS's request for administrative closure and to brief their reasons for opposing the request. We recommend that the Department provide the noncitizen with a 60-day period to submit any brief in opposition.

We recommend amending the proposed rule to state that a case shall not be administratively closed if the respondent objects. Including this protection is critical because administratively closing a case against the noncitizen's wishes could result in their inability to obtain legal relief. For example, the noncitizen's claim could grow stale while the case is administratively closed, country conditions could change in an asylum case, or a qualifying child in a non-LPR cancellation of removal case could turn 21. The possibility of foreclosing the noncitizen from obtaining legal relief should outweigh DHS's desire to have the case taken off the court's docket, especially if DHS is seeking administrative closure as an exercise of prosecutorial discretion.

ii. Factors to consider when adjudicating motions to administratively close - 8 CFR § 1003.1(l)(3)(i) (proposed)

The Department requested comment on "whether the specified factors for adjudicators to consider in adjudicating motions to administratively close and motions to recalendar cases are appropriate and whether the proposed factors should be revised in any way."¹⁴ We propose amending the factors to consider in adjudicating administrative closure requests in several ways.

First, we propose amending factor (D), which currently states, "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 the adjudicator."¹⁵ Instead of including an assessment of the noncitizen's likelihood of success on the petition, application, or other action, we recommend modifying factor (D) to state: "the noncitizen's *prima facie* eligibility for 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 the adjudicator." Because this

¹³ Proposed Rule, 88 Fed. Reg. at 62261.

¹⁴ Proposed Rule, 88 Fed. Reg. at 62262.

¹⁵ 8 CFR §§ 1003.1(l)(3)(i)(D) (proposed), 1003.18(c)(3)(i)(D) (proposed).

factor relates to petitions, applications, and other actions the noncitizen will pursue outside of immigration court proceedings, this change would prevent unnecessary inquiry into a noncitizen's likelihood of success in a matter in which the immigration judge lacks expertise. A prima facie showing of eligibility for the petition, application, or other action should be sufficient. This change would also mirror the language in *Matter of Hashmi*, where the Board encouraged DHS to consider moving for administrative closure in cases "where there is a pending prima facie approvable visa petition."¹⁶

Second, we propose removing factor (G), which currently states, "the ultimate anticipated outcome of the case."¹⁷ This factor is inapt because it fails to consider situations where administrative closure alone is the "ultimate anticipated outcome of the case." For example, DHS decides to exercise prosecutorial discretion by requesting administrative closure in the case of a noncitizen who is not an enforcement priority. In that situation, there is no clear "outcome of the case" apart from administrative closure itself. Moreover, as currently written, this factor is ambiguous because it does not state whether the "case" refers to the noncitizen's removal proceedings or other action that the noncitizen may be pursuing outside of EOIR proceedings.

iii. Factors to consider when adjudicating motions to recalendar – 8 CFR §§ 1003.1(l)(3)(ii) (proposed), 1003.18(c)(3)(ii) (proposed)

The Department requested comment on "whether the specified factors for adjudicators to consider in adjudicating motions to administratively close and motions to recalendar cases are appropriate and whether the proposed factors should be revised in any way."¹⁸ We propose amending the factors to consider in adjudicating motion to recalendar in several ways.

First, we recommend eliminating factor (D), which states, "[i]f the case was administratively closed to allow the noncitizen to file a petition, application, or other action outside of proceedings before the adjudicator, whether the noncitizen filed the petition, application, or other action and, if so, the length of time that elapsed between when the case was administratively closed and when the noncitizen filed the petition, application, or other action."¹⁹ This factor fails to consider the reasons why the filing of certain petitions, applications, or other actions could be delayed. For example, to obtain an SIJS predicate order in state court in the case of abuse, abandonment, or neglect by one parent, service must typically be effected on that parent. Serving the parent, particularly if the parent is outside the United States, can be a time-consuming process that may involve complicated issues of international law and require hiring an attorney in the country. In other cases, the applicant may have needed additional time to compile evidence, attend mental health treatment, or find an attorney who specializes in another type of law, such as family law for those seeking an SIJS predicate order.

Second, we propose amending factor (F), "[i]f a petition, application, or other action remains pending outside of proceedings, the likelihood the noncitizen will succeed on that petition,

¹⁶ *Matter of Hashmi*, 24 I&N Dec. 785, 791 n.4 (BIA 2009).

¹⁷ 8 CFR §§ 1003.1(l)(3)(i)(G) (proposed), 1003.18(c)(3)(i)(G) (proposed).

¹⁸ Proposed Rule, 88 Fed. Reg. at 62262.

¹⁹ 8 CFR §§ 1003.1(l)(3)(ii)(D) (proposed), 1003.18(c)(3)(ii)(D) (proposed).

application, or other action.”²⁰ Instead of including an assessment of the noncitizen’s likelihood of success on the petition, application, or other action, we recommend modifying factor (6) to state: “if a petition, application, or other action remains pending outside of proceedings, the noncitizen’s *prima facie eligibility* for that petition, application, or other action.” Because this factor relates to petitions, applications, and other actions pending outside of immigration court proceedings, this change would prevent unnecessary inquiry into a noncitizen’s likelihood of success in a matter in which the immigration judge lacks expertise. A *prima facie* showing of eligibility for the petition, application, or other action should be sufficient.

Third, we propose adding “if other than seeking a final adjudication,” in factor (G), which currently states “[t]he ultimate anticipated outcome if the case is recalendared.”²¹ As currently drafted, this factor invites the immigration judge to assess the ultimate anticipated outcome of the noncitizen’s claim for relief in court before providing the noncitizen with the opportunity to present evidence and fully brief their application for relief. It is premature for the immigration judge to inquire into the ultimate anticipated outcome at this stage in proceedings if the noncitizen is seeking a final adjudication in immigration court.

iv. Specific language regarding whether a request for administrative closure to allow for the adjudication of a petition, application, or other action should generally be granted

We are supportive of adding language to the rule stating that a request for administrative closure to allow for the adjudication of a petition, application, or other action “should generally be granted if the noncitizen demonstrates a *prima facie eligibility for relief*, and that the noncitizen has been reasonably diligent in pursuing such relief.”²² Though the spirit and text of the proposed rule supports administrative closure in this situation, it is helpful to explicitly include the language above to ensure consistency of the proposed rule’s application across EOIR. The proposed rule currently only instructs adjudicators to “weigh the totality of the circumstances taking into consideration all relevant factors, including any relevant factors from a nonexhaustive list”²³ before deciding whether to administratively close a case. Without the addition of the suggested language, it is likely that different EOIR adjudicators will weigh similar factors differently, leading to disparate outcomes for noncitizens.

v. Whether the proposed rule should set out specific scenarios in which administrative closure may be appropriate where there is no petition, application, or other action pending outside EOIR proceedings

The proposed rule should include specific but non-exhaustive scenarios in which administrative closure may be appropriate where there is no petition, application, or other action pending outside of EOIR proceedings. We are supportive of the Department’s proposal that “there is no requirement of a pending petition, application, or other action for a case to be administratively

²⁰ 8 CFR §§ 1003.1(l)(3)(ii)(F) (proposed), 1003.18(c)(3)(ii)(F) (proposed).

²¹ 8 CFR §§ 1003.1(l)(3)(ii)(G) (proposed), 1003.18(c)(3)(ii)(G) (proposed).

²² Proposed Rule, 88 Fed. Reg. at 62262.

²³ Proposed Rule, 88 Fed. Reg. at 62260.

closed.”²⁴ However, because administrative closure was severely limited under *Matter of Castro Tum* and the AA96 Final Rule, some EOIR adjudicators may not be accustomed to administratively closing proceedings in cases where no action is pending outside of removal proceedings. Therefore, examples would provide a useful guidepost and ensure consistent application of the regulations throughout immigration courts.

We recommend that, at minimum, the following scenarios be included as examples:

- The noncitizen marries a U.S. citizen and intends to pursue an I-130 petition followed by adjustment of status or consular processing.
- The noncitizen has been a victim of a qualifying crime for U nonimmigrant status and intends to pursue a law enforcement certification.
- The noncitizen is prima facie eligible for SIJS and intends to pursue an SIJS predicate order in state court.
- The noncitizen intends to seek mental health treatment and there is a reasonable possibility that such treatment could assist with the noncitizen’s pursuit of relief from removal. For example, the noncitizen has suffered abuse in their country of origin but is not able to discuss the details of the abuse with their attorney, though the incident could make them eligible for asylum.

These examples are situations where administratively closing a case would conserve significant EOIR resources as opposed to keeping the cases on the active docket and issuing multiple continuances.

We strongly recommend that the Department explicitly state that any list of recommendations is by no means exhaustive. Adding this clarification would prevent EOIR adjudicators from denying administrative closure merely because a particular situation is not included on the list.

vi. Administrative closure without a motion from either party

The Department requested comments on “whether administrative closure should be upon the motion of a party or whether it might be necessary or appropriate in certain situations for an immigration judge or a Board member to administratively close a case without having received a written motion and, if on appeal, in situations in which parties do not generally have the opportunity to make an oral motion before the Board.”²⁵

Administrative closure should generally be upon the motion of a party and should not be determined by an adjudicator without prior notice. Administrative closure is consequential and a significant outcome in a removal case. This is particularly important given that the proposed factors considered for both administrative closure and for termination are similar. The legal consequences that flow from either suggests that an adjudicator should make this determination only after being properly briefed on the specific facts or issues by the parties in the case. There are several reasons why it may be beneficial for a respondent to continue their case in removal proceedings. An adjudicator is not in the position to explain all the ramifications of

²⁴ Proposed Rule, 88 Fed. Reg. at 62260. See also 8 CFR §§ 1003.1(l)(3) (proposed), 1003.18(c)(3) (proposed).

²⁵ Proposed Rule, 88 Fed. Reg. at 62262.

administratively closure to respondents, especially to a pro se respondent before administratively closing their case. Therefore, the adjudicator should solicit the parties' positions on administrative closure before deciding.

However, should the Department decide that it is necessary or appropriate to administratively close a case without motion from a party, we propose adding language to the rule stating that where the noncitizen opposes administrative closure, the EOIR adjudicator should keep the case on the court's calendar. There are many reasons a noncitizen may oppose administrative closure, such as a desire to seek relief before the immigration court, or a strategic decision to pursue termination or dismissal of their case instead of administrative closure. The adjudicator should carefully weigh any opposition from the noncitizen and adopt a low threshold for keeping the case on the active docket in such instances.

Thus, we recommend that the EOIR adjudicator first send a notice to the parties informing them that the case will be administratively closed unless a party files within 60 days of the notice a written request to keep the case on the docket. This would provide the parties with an opportunity to oppose administrative closure and would align with the process set forth in EOIR's "Taking Cases Off Calendar Pursuant to 8 C.F.R. § 1003.9(b)"²⁶ policy.

d. Termination and Dismissal

The AA96 Final Rule did not seek to alter the prior regulations regarding immigration judges' authority to terminate or dismiss cases.²⁷ However, the proposed rule seeks to add and distinguish several factors for mandatory termination, discretionary termination, and termination in other proceedings.²⁸ We welcome the Department's proposed rule for clarity on termination and dismissal authority and offer suggestions to improve these proposed regulations.

i. Factors to consider when adjudicating motions to terminate – 8 §§ CFR 1003.1(m) (proposed), 1003.18(d) (proposed)

The Department seeks comments on whether the factors for these standards should be broadened, narrowed, or altered.²⁹ AILA and the Council suggest the following alterations to these factors:

First, factor (A) of the mandatory termination in removal, deportation, or exclusion proceedings states that termination is required when no charge of deportability, inadmissibility, or excludability can be sustained.³⁰

AILA and the Council recommend adding "alienage" to this list of charges that the DHS must sustain. It is DHS' burden of proof to establish the alienage of a respondent. Once DHS establishes this burden, it then shifts to the respondent to demonstrate that they are lawfully in

²⁶ EOIR, *Taking Cases Off Calendar Pursuant to 8 C.F.R. § 1003.9(b)* (Apr. 26, 2022), <https://www.aila.org/File/DownloadEmbeddedFile/93059>.

²⁷ See Proposed Rule, 88 Fed. Reg. at 62247.

²⁸ See Proposed Rule, 88 Fed. Reg. at 62262-62263, 62265. See also 8 CFR § 1003.1(m) (proposed), § 1003.18(d) (proposed).

²⁹ See Proposed Rule, 88 Fed. Reg. at 62265.

³⁰ Proposed Rule, 88 Fed. Reg. at 62263. See also 8 CFR §§ 1003.1(m)(1)(i)(A) (proposed), 1003.18(d)(1)(i)(A).

the United States.³¹ It is important to include “alienage” along with deportability and inadmissibility because it is elemental to being placed in removal proceedings. It is what allows DHS to retain jurisdiction over a case. To sustain the other elements of this factor, DHS must first establish the respondent’s alienage. Therefore, the proposed rule should include “alienage” as an element that DHS must sustain, otherwise an adjudicator must terminate the case.

Second, AILA and the Council recommend changing factor (A) of the discretionary termination of removal, deportation, or exclusion proceedings list and including it as a factor for mandatory termination.³² The factor describes the scenario in which an unaccompanied child who states an intent, either in writing, or on the record at a hearing, to seek asylum with USCIS, which has initial jurisdiction over the application.

Many unaccompanied children (“UC”) in removal proceedings do not have counsel and almost one-third of all removal proceedings are children.³³ The Kim Memo, which provides guidance on the UC designation of minors, states that when Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE) have determined that a noncitizen is an unaccompanied child, no additional factfinding is to be completed to affirm or change this determination.³⁴ Therefore, USCIS will retain jurisdiction of all asylum cases filed by noncitizens who intend to seek asylum and are designated as UCs. The proposed regulations should make termination mandatory in this instance because it will enable the courts’ dockets to clear more quickly³⁵ and will safeguard due process for minors who are entitled to receive appropriate sensitivity and attention in their cases.³⁶ However, if the UC wishes to proceed with their case asylum case before EOIR and declines to proceed with USCIS first, then the UC should be allowed to do so. We recommend that the discretion as to where the asylum case can proceed should lie with the UC respondent and not the EOIR adjudicator. Leaving this factor discretionary for EOIR adjudicators will only add to their dockets and may delay the UC’s ability to file for asylum affirmatively.

ii. Evidence to Support Termination

Next, the Department seeks comments on the evidence that would best support certain proposed grounds for termination.³⁷ For example, whether evidence of filings with USCIS should be required in some cases. AILA and the Council recommend that adjudicators require respondents to present prima facie eligibility as evidence.

³¹ See 8 CFR § 1240.8(c).

³² See 8 CFR §§ 1003.1(m)(1)(ii)(A); 1003.18(d)(1)(ii)(A).

³³ TRAC Immigration, *One-Third of New Immigration Court Cases Are Children; One in Eight Are 0-4 Years of Age*, Mar. 17, 2022, <https://trac.syr.edu/immigration/reports/681/>.

³⁴ See Memorandum from Ted Kim, Acting Chief, Asylum, to All Asylum Office Staff, “Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children” (May 28, 2013) at 2; see also Amended Preliminary Injunction, *J.O.P. v. DHS*, No. 19-01944 (D. Md. July 1, 2019).

³⁵ See AILA *Cardozo Law School Provide Recommendations for Removing Non-Priority Cases from the Immigration Court Backlog*, AILA Doc. No. 21050301 (May 3, 2021), <https://www.aila.org/infonet/remove-non-priority-cases>.

³⁶ See USCIS, *Asylum Procedures for Minor Children* (last updated Dec. 12, 2021), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-procedures-for-minor-children#:~:text=Asylum%20officers%20conduct%20child%20appropriate,you%20to%20apply%20for%20asylum>.

³⁷ See Proposed Rule, 88 Fed. Reg. at 62265.

Given that attorneys are overburdened³⁸, the complexity of immigration law³⁹, and the growing backlog of cases for immigration judges to review⁴⁰, respondents and their counsel should be able to establish the prima facie eligibility for relief before USCIS to terminate their case in court. Asking EOIR adjudicators to review evidence of USCIS filings only adds to the backlog because court cases could be delayed by USCIS delays.⁴¹

iii. Distinguishing Dismissal and Termination

The Department seeks comment on the proposed framework which would distinguish the exercise of dismissal from termination authority.⁴² AILA and the Council welcome this distinction. Many practitioners use the two terms interchangeably; the proposed rule will clear up any confusion.

iv. Additional Constraints on Termination Authority

The Department seeks comment on whether the regulations should impose additional constraints on termination authority.⁴³ AILA and the Council believe that the currently proposed limitations on termination authority are sufficient. The proposed framework allows both parties to support or oppose termination, and to “timely rescind” its involvement in a joint motion if appropriate.⁴⁴

v. Termination with Prejudice

Next, the Department seeks comment on whether the regulations should specify that termination should generally be without prejudice to DHS’ ability to recommence removal proceedings if circumstances change except where termination was based on DHS’s failure to sustain the removal charges.⁴⁵ AILA and the Council believe that dismissal or termination without prejudice to DHS’s ability to recommence removal proceedings should not be applied generally. Instead, it should be evaluated carefully on a case-by-case basis, with consideration to the entire record of proceedings.

The list of reasons for when an EOIR adjudicator’s decision warrants termination or dismissal with prejudice for DHS is extensive. Taking guidance from well-established civil case law, these

³⁸ See *AILA Policy Brief: High Stakes Asylum: How Long an Asylum Case Takes and How We Can Do Better*, AILA Doc. No. 23061202 (June 14, 2023), <https://www.aila.org/advo-media/aila-policy-briefs/high-stakes-asylum-how-long-an-asylum-case-takes>.

³⁹ See American Immigration Council, *How the United States Immigration System Works* (Sept. 14, 2021), <https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works>.

⁴⁰ See TRAC Immigration, *Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases*, Jan. 18, 2022, <https://trac.syr.edu/immigration/reports/675/>.

⁴¹ See USCIS, *Information on Form I-589 Intake and Processing Delays* (last updated July 28, 2022), <https://www.uscis.gov/archive/information-on-form-i-589-intake-and-processing-delays>.

⁴² See Proposed Rule, 88 Fed. Reg. at 62265.

⁴³ *Id.*

⁴⁴ Proposed Rule, 88 Fed. Reg. at 62263.

⁴⁵ See Proposed Rule, 88 Fed. Reg. at 62265.

proposed regulations should provide a non-exhaustive list of examples in which EOIR adjudicators should exercise discretion to dismiss or terminate DHS's cases with prejudice.

For example, federal civil courts may consider dismissal with prejudice if a party disregards or fails to comply with the orders, rules, or settings of the court.”⁴⁶ This reasoning should be adapted to immigration courts, as they, too, are civil proceedings. Here is a list of non-exhaustive examples in which EOIR adjudicators should weigh dismissal or termination with prejudice:

- Dilatory conduct by DHS, including, but not limited to, filing multiple Notices to Appear and failure to prosecute⁴⁷;
- DHS counsel repeatedly appears for hearings unprepared or fails to disclose evidence;
- DHS counsel's failure to attend any hearings;
- Subsequent judicial decisions;
- Grant of benefit to respondent by USCIS; and
- Violation of settlement agreements or injunctions.

vi. Termination without a motion from either party

Finally, the Department requests comment on whether EOIR adjudicators may terminate a case only on a party's motion or whether there are situations where EOIR adjudicators may exercise termination authority *sua sponte*.⁴⁸ AILA and the Council believe that EOIR adjudicators should not exercise *sua sponte* termination authority without giving prior notice to both parties.

Like AILA and the Council's suggestion for whether EOIR adjudicators should exercise *sua sponte* authority to administratively close cases, we believe that termination should not be determined by an adjudicator without prior notice. Case termination is consequential and a significant outcome in a removal case. Though it means that a respondent is not in removal proceedings, it may leave them without any legal status or another avenue to pursue relief. Given the gravity of the consequences, an adjudicator should make this determination after being properly briefed on the specific facts or issues in the case. There are several reasons why it may be beneficial for a respondent to continue their case in removal proceedings. An adjudicator is not in the position to explain all the ramifications of case termination to respondents, especially to a *pro se* respondent before terminating their case. Therefore, the adjudicator should solicit the parties' positions on termination before deciding.

However, should the Department decide that it is necessary or appropriate to terminate a case without motion from a party, we propose adding language to the rule stating that where the noncitizen opposes termination, the EOIR adjudicator should not terminate. There are many reasons a noncitizen may oppose termination, such as a desire to seek relief before the immigration court, or a strategic decision to pursue administrative closure of their case instead of termination. The adjudicator should carefully weigh any opposition from the noncitizen and adopt a low threshold for keeping the case open in such instances.

⁴⁶ *Link v. Wabash Railroad Company*, 291 F.2d 542, 545-546 (7th Cir. 1961), *aff'd*, 370 U.S. 626 (1962).

⁴⁷ See TRAC Immigration, *DHS Fails to File Paperwork Leading to Large Numbers of Dismissals*, July 29, 2022, <https://trac.syr.edu/whatsnew/email.220729.html>.

⁴⁸ See Proposed Rule, 88 Fed. Reg. at 62265.

Thus, AILA and the Council recommend that an adjudicator provides 60 days' notice to both parties of their intent to terminate the case in removal proceedings.⁴⁹ If, after the notice period has expired, no objection has been filed, then the adjudicator should terminate the case.

e. Sua Sponte Reopening or Reconsideration and Self-Certification

We welcome the Department's proposal to restore the Board's long-standing authority to reopen and reconsider cases sua sponte and to self-certify cases.⁵⁰ The enjoined AA96 Final Rule limited the Board's relevant authorities by claiming they were inconsistently applied and that they could be abused, which undermined the finality of proceedings.⁵¹ However, as we noted in our previous comment highlighting our concerns with this change,⁵² a noncitizen requesting that adjudicators exercise their sua sponte authority is not getting the equivalent of a motion to reopen. This is because, with rare and narrow exceptions, requests for the use of sua sponte authority are not subject to judicial review. Furthermore, binding precedent already limits the use of sua sponte authority to "exceptional situations."⁵³

Restoring the Board's long-standing authority preserves the Board's ability to correct grave injustices. For example, if a lawful permanent resident is precluded from applying for cancellation of removal due to a conviction that is later vacated due to constitutional defect or proof of actual innocence, the Board can use its sua sponte authority to reopen proceedings to allow the noncitizen to seek the cancellation of removal they were previously wrongly barred from requesting from the immigration court.

Furthermore, the Board's sua sponte authority provides a key avenue for noncitizens who may otherwise be eligible to pursue relief to do so. For example, where a Respondent has subsequently acquired lawful status but is unable to pursue a motion to reopen due to time and number bars, such authority could allow the Board to reopen proceedings. Despite the possibility of pursuing a joint motion to reopen, the ability to reopen removal orders for those who have gained lawful status is not adequately preserved because DHS is under no obligation to agree to join a motion to reopen, even for someone who has become a lawful permanent resident.

Though uncommonly used, the Board's self-certification authority also allows the Board to correct injustices. As with sua sponte authority, self-certification is used in exceptional situations.⁵⁴ For example, where extended and unanticipated delay by the postal service results in a notice of appeal being delivered a day after the deadline, the Board can currently assess the efforts of the appealing party to timely file the appeal and the extent to which the delay was

⁴⁹ See Memorandum from James R. McHenry III, Director to All Immigration Court Personnel (Aug 16, 2019), <https://www.justice.gov/eoir/page/file/1196336/download>.

⁵⁰ See Proposed Rule, 88 Fed. Reg. at 62265.

⁵¹ See Proposed Rule, 88 Fed. Reg. at 62248.

⁵² See *AILA, the Council, and the Immigration Justice Campaign Submit Comments Opposing Proposed EOIR Rule on Appeals*, AILA Doc. No. 20092831 (Sept. 25, 2020), <https://www.aila.org/infonet/aila-council-ijc-comments-opposing-proposed-eoir>.

⁵³ *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).

⁵⁴ *Matter of Jean*, 23 I&N Dec. 373, 380 n.9 (A.G. 2002).

outside of the party's control.⁵⁵ If warranted, the Board can accept the appeal by certification and avoid error by the postal service resulting in dismissal.⁵⁶

The justification for the changes made by the AA96 Final Rule rested on a flawed understanding that the interest in “finality” should outweigh all other considerations. It stripped away a key mechanism to reopen time or number-barred orders from the noncitizen in exceptional circumstances while continuing to exempt DHS motions from time or number bars, effectively locking in decisions against respondents in the name of finality while continuing to allow DHS to seek to reopen a case without any limitations. Thus, we welcome the Department's restoration of the Board's sua sponte and self-certification authorities, which reinstates important though uncommonly used tools to prevent injustice and ensure that cases are decided on the merits.

f. Board Remand Authority—Administrative Notice, New Evidence, Standard of Review

We strongly support the Department's proposal to rescind the restrictions made by the AA96 Final Rule on the Board's remand authority. This authority provides the Board flexibility in adjudicating cases, which leads to efficiency and prevents gross injustices from taking place. For example, the AA96 Final Rule prohibited the Board from remanding a case for additional findings of fact or new evidence.⁵⁷ In practice, this would mean that a respondent with a U.S. citizen spouse whose pending I-130 application was delayed due to USCIS processing backlogs could be ordered removed by an immigration judge who refused to grant a motion to continue to wait for the I-130's adjudication. On appeal, the respondent would have been precluded from requesting a motion to remand upon approval of his I-130 by USCIS the day after the Notice of Appeal to the Board was filed. Whereas a simple remand followed by a straightforward adjustment in immigration court would have preserved the Board's resources.

The AA96 Final Rule provided exceptions to these restrictions, but they showed a deliberate preference towards DHS, which undermined fundamental principles of fairness. While respondents would be barred from submitting evidence that “would likely change the result of the case,”⁵⁸ DHS would be expressly permitted to submit new evidence resulting from “identity, law enforcement, or security investigations.”⁵⁹ Thus, DHS was permitted to submit evidence that would change the result of the case, while the respondent would not be allowed.

We also welcome the Department's restoration of the Board's proper role regarding administrative notice of undisputed facts. Under the AA96 Final Rule, the Board could take administrative notice of any undisputed facts contained in the record and affirm an immigration judge on *any* basis.⁶⁰ These allegedly undisputed facts could relate to issues that were not the basis of the appeal and/or were not the focus of proceedings before the immigration court and

⁵⁵ *Matter of Morales-Morales*, 28 I&N Dec. 714 (BIA 2023) (overturning *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006) and establishing that they will accept late-filed appeals where a party can establish equitable tolling applies).

⁵⁶ See, e.g., *R-L-R-L-*, AXXX XXX 540 (BIA Nov. 2, 2018) (certifies appeal to itself where Notice of Appeal was filed one day late due to delay caused by U.S. Postal Service).

⁵⁷ See AA96 Final Rule, 85 Fed. Reg. 81588, 81590 (Dec. 16, 2020). See also 8 CFR 1003.1(d)(3)(iv)(C) and (D).

⁵⁸ *Matter of L-O-G-*, 21 I&N Dec. 413, 420 (BIA 1996) (quoting *Matter of Coelho*, 20 I&N Dec. at 473).

⁵⁹ See AA96 Final Rule, 85 Fed. Reg. at 81590.

⁶⁰ *Id.* at 81589.

thus were not fully developed. This impermissibly blurred the roles between the Board as an appellate body and the immigration courts, causing confusion for all parties involved. The Board, like federal courts, has long had the power to take administrative notice of facts not reasonably subject to dispute, but any other factual dispute should be properly remanded to the immigration courts to be addressed.

We strongly support the Department's rescission of the AA96 Final Rule's restrictions on the scope of an immigration judge's authority upon the remand of a case.⁶¹ Unnecessarily narrowing the issues an immigration judge can consider on remand can result in unfair and inefficient outcomes. As a practical matter, there are compelling reasons to allow the immigration court to consider issues not contemplated on appeal. With appeals regularly taking many months or years, it is exceedingly common for the law or the respondent's circumstances to change in ways that affect both removability and eligibility for relief. For example, it is more efficient to authorize an immigration judge to grant relief to a respondent who becomes newly eligible, even if the relief wasn't at issue in the appeal, than to require the issuance of an order that all parties know is likely to be appealed again to the Board—requiring another transcript, another round of briefing, and another decision.

Lastly, we also support restoring the Board's authority to remand based on “the totality of the circumstances.”⁶² Where a Board member observes a potential gross injustice coming out of the proceedings below, but the record requires further development before the potential issuance of a final order of termination, removal, or relief from removal, the Board must have the authority to remand to develop the record. A blanket prohibition on such remands only ties the hands of the Board and forces the issuance of decisions based on undeveloped records.

g. Board Remand Authority—Voluntary Departure

We welcome the Department's restoration of the Board's authority to remand a case to an immigration judge to consider a request for voluntary departure under INA 240B(b).⁶³ The AA96 Final Rule's prohibition presumed that records below would in all circumstances be developed for consideration of a voluntary departure request, which is not the case. For example, where a noncitizen focused their efforts toward another form of relief, the relief was granted, and then the Board overturns the grant and wishes to order removal or voluntary departure, it is likely that the record will not have been fully developed on establishing eligibility for post-conclusion voluntary departure. The respondent may not have had reason to emphasize why the adjudicator should find that they have been a person of good moral character for the preceding five years because voluntary departure was never at issue in the underlying proceedings.

Similarly, we support the Department's decision to clearly authorize the Board to make voluntary departure determinations if the record is sufficiently developed.⁶⁴ This approach conserves resources and promotes efficiency.

⁶¹ See Proposed Rule, 88 Fed. Reg. at 62269.

⁶² See *id.*

⁶³ See Proposed Rule, 88 Fed. Reg. at 62267. See also 8 CFR §§ 1003.1(d)(7) (proposed), 1240.26(k)(1) (proposed).

⁶⁴ See Proposed Rule, 88 Fed. Reg. at 62267.

h. Background Checks

We support the Department's proposal to allow the Board to hold a case pending a background check instead of remanding to the immigration court solely for that purpose.⁶⁵ This eliminates an unnecessary step that can only increase the time a case is pending before the immigration court and the Board.

However, we are concerned that there aren't sufficient protections for noncitizens whose identity checks are not completed in a timely manner by DHS. For example, the proposed rule allows the Board to hold a case indefinitely if DHS has not completed the required background checks but doesn't provide an explicit mechanism for a noncitizen to communicate with the Board about their diligent efforts to comply or to request a remand to the immigration court to continue to pursue compliance after failing to receive notice from or establish communication with DHS to complete their biometrics. Practitioners often struggle to communicate and schedule a biometrics appointment with DHS and a process that depends only on the communication between the Board and DHS may unnecessarily delay a noncitizen's case without a meaningful opportunity for the noncitizen to participate.

We suggest that the Department explicitly add a process for which a noncitizen may request the Board to require DHS to meet its obligations under 8 C.F.R. § 1003.47(d) and/or provide a limit as to the amount of time a case may remain pending with the Board solely to complete a background check before it is required to be remanded to the immigration court.

i. Adjudication Times and Forwarding of Record on Appeal

We strongly support the rescission of the AA96 Final Rule's internal processing deadlines.⁶⁶ We agree with the Department that AA96 Final Rule's timelines are overly rigid and unnecessarily inflexible given the varying cases before the Board, the varying circumstances of the parties, and the Board's ever shifting caseload.⁶⁷ For instance, the previous rule required that initial screening for summary dismissal be completed within 14 days of filing with a decision to be issued within 30 days and that cases not subject to summary dismissal be decided within 14 days of receipt.⁶⁸ Such a mandatory deadline together with a large volume of cases is a recipe for erroneous summary dismissals. While we believe screening should be completed as quickly as possible, the priority should be in getting decisions correct—not in complying with an arbitrary deadline set without regard for variations in their workload at any given time.

Similarly, we support the proposed rule's reinstatement of the requirement that immigration judges review their oral decision transcripts and approve them within specified timeframes.⁶⁹ Given the importance of accurate transcripts, we believe that a 14-day review period prioritizes fairness and quality without hindering speed.

⁶⁵ See Proposed Rule, 88 Fed. Reg. at 62250. See also 8 CFR § 1003.1(d)(6)(ii)-(iii) (proposed).

⁶⁶ See Proposed Rule, 88 Fed. Reg. at 62270.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See Proposed Rule, 88 Fed. Reg. at 62272. See also 8 CFR § 1003.5(a) (proposed).

j. Director's Authority to Issue Decisions and Quality Assurance Certification

We strongly support the Department's removal of EOIR Director's appellate adjudicatory authority and return the Director position to its pre-2019 role.⁷⁰ The AA96 Final Rule impermissibly politicized the immigration court system by giving the EOIR Director unprecedented authority to issue decisions under certain circumstances. That rule stripped respondents of the ability to have their cases decided by career adjudicators at the Board and instead placed substantial numbers of individual cases in the hands of the Director, a government bureaucrat susceptible to the political whims of the Executive branch.

Additionally, we support removing the procedure by which an immigration judge could certify a case to the Director due to alleged Board error. That rule undermined the immigration judge's role as a neutral arbiter between DHS and the respondent as it set up a parallel legal battle between an immigration judge and the Board, which affected the rights of respondents and DHS and in which neither was a party. For example, where an immigration judge denied an application for relief and the Board overturned the decision, the immigration judge would have to draft a brief arguing against the respondent—outside the normal record of proceedings. Thus, we welcome the Department returning the Director to a non-adjudicatory managerial position that is meant to run EOIR operations.

k. Definitional Changes

AILA and the Council are supportive of the Department's interest in using inclusive and humane language in the proposed rule. We believe it is appropriate to replace the term "alien" with "noncitizen" as this aligns with the Immigration and Nationality Act's (INA) definition of the term.⁷¹ Additionally, this also aligns with current EOIR guidance⁷² and the practice of several Justices of the United States Supreme Court.⁷³ Similarly, we are supportive of replacing the term "unaccompanied alien" to "unaccompanied child" to better reflect the age and humanity of the minor child.

l. Requested comment on *Matter of Thomas and Thompson* and *Matter of Pickering*

The Department requests comment on the implementation of *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) and *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (AG 2019).⁷⁴ As an initial matter, we maintain that both cases were wrongly decided. *Matter of Pickering*, relying on *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), wrongly held that a vacated conviction remains a "conviction" under 8 U.S.C. § 1101(a)(48)(A) unless the vacatur was based on a "procedural or

⁷⁰ See Proposed Rule, 88 Fed. Reg. at 62271.

⁷¹ See INA § 101(a)(3) (defining the term "alien" to mean any person not a citizen or national of the United States).

⁷² See EOIR, *Terminology* PM 21–27 (July 23, 2021), <https://www.justice.gov/eoir/book/file/1415216/download>.

⁷³ See, e.g., *Santos-Zacaria v. Garland*, 143 S. Ct. 1103 (2023) (opinion written by Justice Ketanji Brown Jackson); *Barton v. Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (opinion written by Justice Brett Kavanaugh, noting that the opinion "uses the term 'noncitizen' as equivalent to the statutory term 'alien' "); *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020) (opinion written by Justice Kavanaugh); *Johnson v. Arteaga-Martinez*, 596 U.S. ____ (2022), (opinion written by Justice Sonya Sotomayor); *Patel v. Garland*, 596 U.S. ____ (2022) (opinion written by Justice Amy Coney Barrett).

⁷⁴ Proposed Rule, 88 Fed. Reg. at 62273.

substantive defect in the underlying proceedings.”⁷⁵ For decades, the Board gave effect to most vacated convictions.⁷⁶ When Congress codified the term “conviction” in the INA, it adopted language from Board precedent, only modifying the treatment of certain withheld adjudications.⁷⁷ Under the well-established prior construction canon, Congress intended to preserve the pre-existing meaning of “conviction” developed by the Board (other than withheld adjudications), which excluded vacated and expunged state court convictions.⁷⁸

The Attorney General similarly wrongly reversed decades of Board precedent, including *Matter of Cota-Vargas*,⁷⁹ when he refused to give full legal effect to all sentence modifications in *Matter of Thomas & Thompson*. With the enactment of 8 U.S.C. § 1101(a)(48)(B), Congress explicitly overruled Board precedent regarding suspended sentences but did not alter the treatment of sentence modifications.⁸⁰ It is therefore clear that Congress intended to adopt the Board’s case law giving effect to such modifications.⁸¹

In addition, both decisions are more likely to harm Black and brown immigrants, who are disproportionately targeted by the criminal legal system.⁸²

i. Retroactivity

The Department has asked for comment on whether *Matter of Thomas & Thompson* should be given retroactive effect. We maintain that even if *Matter of Thomas & Thompson* were correctly decided, it cannot lawfully apply retroactively to any person engaged in sentencing advocacy—either through a plea agreement or at sentencing following trial—prior to the Attorney General’s 2019 decision. At a minimum, the decision must not be applied retroactively to sentence modifications that noncitizens sought before the decision. While we support a bright line rule limiting retroactivity, we further maintain that noncitizens who do not fall within any bright line rule must have an opportunity to establish that they relied on existing agency precedent regarding sentencing modifications such that *Matter of Thomas & Thompson* should not apply retroactively to them.

⁷⁵ *Pickering*, 23 I&N Dec. at 624.

⁷⁶ See *Pinho v. Gonzales*, 432 F.3d 193, 208 (3d Cir. 2005) (“The BIA held as early as 1943 that an expunged conviction was not a ‘conviction’ for immigration purposes, and adhered to that position with only occasional exceptions until *Roldan*.”).

⁷⁷ Compare *Matter of Ozkok*, 19 I&N Dec. 546, 551 (BIA 1988), with 8 U.S.C. § 1101(a)(48)(A).

⁷⁸ See *Williams v. Taylor*, 529 U.S. 420, 434 (2000) (explaining that “[w]hen the words of the Court are used in a later statute governing the same subject matter,” courts should “give the words the same meaning in the absence of specific direction to the contrary”).

⁷⁹ 23 I&N Dec. 849 (BIA 2005).

⁸⁰ *In re Cota-Vargas*, 2006 WL 2008266, *6 (BIA June 5, 2006) (“Nothing in the language or legislative history of section 101(a)(48)(B) of the Act reflects that Congress intended to supersede the default rule of *Matter of Martin*, [18 I&N Dec. 226 (BIA 1982)], with respect to [noncitizens] who had been resentenced.”).

⁸¹ See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change[.]”).

⁸² See, e.g., Emma Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States*, 4 Nature Human Behavior, 736-745 (July 2020), <https://www.nature.com/articles/s41562-020-0858-1.pdf>; Vera Institute, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System* (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>

The Supreme Court requires adjudicators to consider “the ill effect of the retroactive application of a new standard.”⁸³ The Board and a majority of U.S. courts of appeals apply the factors first laid out *Retail, Wholesale & Dep’t Store Union v. NLRB* (“*Retail Union*”), 466 F.2d 380, 390 (D.C. Cir. 1972) to determine whether an agency decision should have retroactive effect under *Chenery*.⁸⁴ The *Retail Union* factors are:

(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.⁸⁵

The *Retail Union* factors support limiting the retroactive application of *Matter of Thomas & Thompson* to individuals who were sentenced prior to that decision—and at a very minimum, to those with pre-existing sentencing modifications.

First, when the agency seeks to apply *Matter of Thomas & Thompson* to individuals not a party to that case, it does so as a case of “second impression.”⁸⁶ The government has previously conceded that this factor weighs against retroactive application.⁸⁷

Second, *Matter of Thomas & Thompson* was an abrupt departure from decades of settled, binding precedent.⁸⁸ The Attorney General overruled three published decisions—he did not fill a void. The second factor weighs against retroactive application.

Third, noncitizens (and attorneys on their behalf) who engaged in sentencing advocacy prior to the 2019 decision would have reasonably relied on the well-established former rule under *Matter of Cota-Vargas* and its predecessors. Unsure of whether an underlying conviction might fall within the many removal grounds which depend upon the length of sentence—for example, the evolving judicial construction of the “offense relating to obstruction of justice” aggravated felony⁸⁹—noncitizens and advocates would have relied on the additional protection of the possibility of a sentence modification under the straightforward *Cota-Vargas* standard, consistent with the advice from leading contemporary immigration treatises.⁹⁰ A noncitizen would have

⁸³ *Sec. & Exch. Comm’n v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

⁸⁴ See *Matter of Cordero-Garcia*, 27 I. & N. Dec. 652, 657 (BIA 2019); *Zaragoza v. Garland*, 52 F.4th 1006, 1023 (7th Cir. 2022); *Francisco-Lopez v. Att’y Gen. United States*, 970 F.3d 431, 436–37 (3d Cir. 2020); *Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 300 (4th Cir. 2018); *Velasquez-Garcia v. Holder*, 760 F.3d 571, 581 (7th Cir. 2014); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007).

⁸⁵ *Retail Union*, 466 F.2d at 390.

⁸⁶ *Id.*

⁸⁷ *Zaragoza*, 52 F.4th at 102.

⁸⁸ See *Thomas*, 27 I&N Dec. at 674.

⁸⁹ See *Pugin v. Garland*, 599 U.S. 600 (2023) (overturning Ninth Circuit precedent requiring a nexus to a pending proceeding or investigation in order to qualify as an obstruction of justice aggravated felony); *Cordero Garcia*, 27 I&N Dec. at 652 (applying new, broader construction of obstruction of justice retroactively).

⁹⁰ See Dan Kesselbrenner, Lory D. Rosenberg & Maria Baldini-Potermín, *Immigration Law and Crimes*,

been more willing to negotiate a sentence of one year or more with the possibility of a *Cota-Vargas*-compliant sentence modification. The third factor supports limiting retroactivity as to those sentenced before *Matter of Thomas & Thompson*.

In the alternative, the third factor indisputably weighs heavily against retroactivity for noncitizens who sought sentence modifications prior to the Attorney General's decision. Noncitizens and their counsel would have reasonably consulted binding agency guidance before seeking a modification in state court and acted accordingly—following the simple, straightforward *Cota-Vargas* rule. They forwent obtaining a more substantive court order because such an order, under existing law, was clearly unnecessary.⁹¹ Expediency, the potential for additional personal expense (including additional legal fees), and conservation of judicial resources all counseled against pursuing a more complex order.

Fourth, noncitizens who were sentenced before *Matter of Thomas & Thompson* would face a significant burden upon its retroactive application. The requirement to show “a procedural or substantive defect in the underlying criminal proceeding” for a sentence modification to be given effect is arguably even more difficult than making such a showing for the vacatur of a conviction. So long as a sentence falls within a permissible range (generally set by statute), courts may “exercise a wide discretion in the sources and types of evidence used to craft appropriate sentences.”⁹² A sentence that initially appeared just and proportional to the court may not be considered just if it subsequently becomes clear that it will lead to the “particularly serious penalty” of deportation.⁹³ The Supreme Court has acknowledged that immigration consequences may be among the considerations a noncitizen—and consequently a sentencing judge—considers in resolving a criminal case.⁹⁴ Yet under *Matter of Thomas & Thompson*, it is not enough to show that a judge made a lawful modification of a sentence based on its consideration of “the whole person before him or her”⁹⁵—some additional defect must be identified, or the noncitizen faces deportation. The fourth factor supports limiting retroactivity as to those sentenced before *Matter of Thomas & Thompson*.

In the alternative, the burden to those who already received modifications is plainly severe. Before *Matter of Thomas & Thompson*, these individuals were not deportable or were otherwise eligible for discretionary relief from removal. After *Matter of Thomas & Thompson*, they face deportation and “the loss ‘of all that makes life worth living.’” *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

Moreover, it is extremely difficult, if not impossible, for an individual to obtain a second sentence modification order identifying the procedural or substantive defects in the initial sentencing proceedings. First, many states set time limits on when a person may seek a sentence

98 (2019 ed.); Ira J. Kurzban, *Immigration Law Sourcebook* 344 (16th ed. 2018); Katherine Brady & Dan Kesselbrenner, *Grounds of Deportability and Inadmissibility Related to Crimes* 4 (2012).

⁹¹ *See id.*

⁹² *Concepcion v. United States*, 142 S. Ct. 2389, 2395 (2022) (quotation omitted).

⁹³ *Lee v. United States*, 137 S. Ct. 1958, 1968 (2017) (citing *Padilla v. Kentucky*, 599 U.S. 356, 365 (2010)).

⁹⁴ *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (internal quotations and citations omitted) (observing that noncitizens will enter “‘safe harbor’ guilty pleas” to avoid “the risk of immigration sanctions”).

⁹⁵ *Concepcion*, 142 S. Ct. at 2395.

modification or forbid successive motions.⁹⁶ A noncitizen who obtained a modification just months prior to *Thomas & Thompson* may be barred by statute from obtaining a more fulsome order. Second, a noncitizen may be prevented from obtaining a new order because the underlying criminal records have been destroyed, consistent with many States' procedures.⁹⁷ Third, the noncitizen may need to navigate any subsequent modification requests without the assistance of counsel, given the limits of the Sixth Amendment right to counsel in collateral proceedings,⁹⁸ and from immigration detention.⁹⁹ These hurdles would be insurmountable for most noncitizens.

Finally, the four factors—and in particular, the significant reliance interests and enormous burdens that retroactive application of *Matter of Thomas & Thompson* would inflict—outweigh any benefit to the uniform application of the ruling.

Moreover, for those noncitizens who do not fall within whatever bright line rule the Department adopts, *Chenery* requires that adjudicators weigh the harm of retroactivity against any benefit as applied to them.¹⁰⁰ A bright line rule in favor of retroactivity would be contrary to Supreme Court and circuit court precedent requiring the balancing of factors.¹⁰¹

ii. Specific Application

The Department also requests comment on the application of *Matter of Pickering* and *Matter of Thomas & Thompson* on particular state court orders. We reiterate that both decisions were wrongly decided and should not limit the effectiveness of state court vacatur and sentence modifications in removal proceedings. Moreover, Cal. Penal Code § 1473.7—which covers

⁹⁶ See, e.g. AL Crim Rule 32.2 (one year period for filing, no successive motions); Alaska R. Crim. P. 35 (180 days for filing for reduction of sentence, no successive motions); Ariz. R. Crim. P. 32.4 (90 days from sentencing to challenge to illegal sentence under Rule 32.1 (c)); Ark. R. Crim. P. 37.2 (90 days from plea or 60 days from mandate to challenge illegal sentence under Rule 37.1); CO ST RCRP Rule 35 (126 days after sentence imposed to challenge sentence imposed in illegal manner); Conn. Gen. Stat. Ann. § 53a-39(c) (bar to filing successive petition for 3 years after a partial grant); Del. Super. Ct. Crim. R. 35 (90 days from sentencing to argue illegally imposed, bar to successive requests); Fla. R. Crim. P. 3.800(a)(2) (limits on successive motions); Ga. Code Ann. § 17-10-1(f) (one year from sentencing); Haw. R. Penal P. 35 (90 days from sentencing to argue illegally imposed); Idaho Crim. R. 35(b) (120 days from judgment to argue illegally imposed); 730 Ill. Comp. Stat. Ann. 5/5-4.5-50 (30 days from sentencing); Ind. Code Ann. § 35-38-1-17(j) (limits on subsequent petitions); Iowa R. Civ. P. 2.74 (10 days from sentencing to argue illegally imposed); ME R U CRIM P Rule 35 (one year to challenge illegal sentence); Md. Rule 4-345(e) (court may not revise sentence after 5 years from sentencing); Mass. R. Crim. P. 29 (60 days from disposition); MI R RCRP MCR 6.429 (before filing of appeal); N.H. Rev. Stat. Ann. § 651:58 (30 days from sentencing); N.J. Ct. R. 3:21-10 (60 days from judgment); NMRA, Rule 5-801 (90 days from sentencing); N.D. R. Crim. P. 35 (120 days from sentencing to argue illegally imposed); Okla. Stat. Ann. tit. 22, § 982a (60 months from sentencing); Wis. Stat. Ann. § 973.19 (90 days from sentencing).

⁹⁷ See Brief for Amici Curiae National Association of Criminal Defense Lawyers & National Association of Federal Defenders in Support of Petitioner, 13-16, *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021), https://www.supremecourt.gov/DocketPDF/19/19-438/130952/20200204163644598_19-438%20tsacNACDL%20et%20al.pdf (collecting criminal record destruction policies).

⁹⁸ See *Coleman v. Thompson*, 501 U.S. 722, 755 (1991) (“[T]here is no right to counsel in state collateral proceedings.”).

⁹⁹ See 8 U.S.C. § 1226(c).

¹⁰⁰ See 332 U.S. at 203.

¹⁰¹ See *Zaragoza*, 52 F.4th at 1023; *Francisco-Lopez*, 970 F.3d at 436–37; *Jimenez-Cedillo*, 885 F.3d at 300; *Velasquez-Garcia*, 760 F.3d at 581; *Miguel-Miguel*, 500 F.3d at 951.

“legally invalid” convictions or sentences, “[n]ewly discovered evidence of actual innocence,” and convictions or sentences obtained based on discrimination—on its face applies only to procedural or substantive defects in the underlying criminal proceedings. All vacatur and sentence modifications under that statute satisfy *Pickering* and *Thomas & Thompson*. Similarly, a Georgia court order clarifying a sentence must be taken at face value and given full effect—it is not the role of federal agencies or the federal judiciary to re-write a state court order to declare that it is a modification, rather than a clarification.¹⁰²

m. Conclusion

AILA and the Council strongly support the proposed regulations because they restore fairness, efficiency, and flexibility for all parties involved.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

THE AMERICAN IMMIGRATION COUNCIL

¹⁰² See *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379–80 (BIA 2000), *partially overruled by Matter of Thomas & Thompson*, 27 I&N Dec. at 687 n.2 (recognizing it is improper for the agency to “go behind the state court judgment and question whether the [State] court acted in accordance with its own state law”).