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

Court/Board

Topic

Body On January 31, 2012, the Board of Immigration Appeals (Board) issued *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), an adverse decision overruling *Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996), and holding that immigration judges and the Board may administratively close removal proceedings despite opposition from either party.

The respondent in *Avetisyan*, an Armenian national, overstayed her nonimmigrant J-1 visa in 2003. 25 I&N Dec. at 689. The Department of Homeland Security (DHS) placed her in removal proceedings in 2004, charging her with removability pursuant to section 237(a)(1)(C)(i) of the Immigration and Nationality Act for failing to maintain or comply with the conditions of her nonimmigrant status. *Id.* In June 2004 the respondent conceded the charge of removability, and in November 2006 she advised the IJ that (1) she had recently married; (2) she and her husband had a United States citizen (USC) child; and (3) her husband would soon naturalize and file a visa petition on her behalf. *Id.* In February 2007 the respondent presented proof of the visa petition, informed the IJ in June 2007 that her husband had become a USC, and further advised in September 2007 that she had submitted documents requested by DHS to adjudicate the visa petition. *Id.* The IJ granted five additional continuances to the respondent. *Id.* In April 2008, with adjudication of the visa petition still pending, the respondent sought administrative closure, but DHS objected. *Id.* at 689-90. Following two subsequent hearings, the respondent again asked for administrative closure in June 2009. *Id.* at 690. DHS objected and requested another continuance, but the IJ denied the DHS request and administratively closed the proceedings. *Id.* DHS then filed an interlocutory appeal with the Board. *Id.* at 688.

At the outset, the Board reiterated that “[a]dministrative closure is a procedural tool created for the convenience of the Immigration Courts and the Board.” *Id.* at 690 (quoting *Gutierrez*, 21 I&N Dec. at 479) (footnote omitted). Rejecting its prior holding in *Gutierrez*, the Board found it “improper to afford absolute deference to a party’s objection” and thus ruled that an IJ or the Board has the authority to administratively close a case

over a party's opposition. *Id.* In support of this ruling, the Board pointed to the authority of an IJ "to regulate the course of [a] hearing"; "to take any action consistent with applicable law and regulations as may be appropriate"; "[to] exercise his or her independent judgment and discretion"; and "[to] take any action consistent with the [Immigration and Nationality] Act and regulations that is appropriate and necessary for the disposition of [individual] cases." *Id.* at 691 (citing, *inter alia*, 8 C.F.R. §§ 1003.10(b), 1240.1(a)(1)(iv), (c)). Similarly, the Board cited its authority to resolve questions on appeal in a timely and impartial manner, to exercise independent judgment and discretion, and to take any action consistent with the law as is necessary and appropriate for the disposition of cases. *See id.* (citing 8 C.F.R. § 1003.1(d)(1)).

The Board stated that it may be "necessary or, in the interests of justice and fairness . . . , prudent to defer action [in removal proceedings] for some period of time." *Id.* While a continuance is one option available to an IJ, *see id.* at 691-92, the Board explained that administrative closure, which is available to both an IJ and the Board, "may be appropriate to await an action or event that is relevant to [the] proceedings but is outside the control of the parties and may not occur for a significant or undetermined period of time," *id.* at 692 (footnote omitted). Reviewing its jurisprudence on administrative closure, *see id.* (discussing *Matter of Amico*, 19 I&N Dec. 652 (BIA 1989), and *Gutierrez*, 21 I&N Dec. 579), the Board opined that generally permitting DHS to have "absolute veto power over administrative closure" directly conflicts with the authority delegated to the IJs and the Board, as well as their obligation to exercise independent judgment and discretion and to take action as is necessary and appropriate for the disposition of cases, *see* 25 I&N Dec. at 693.

Analogizing to the authority of the IJs and the Board with respect to motions to reopen or requests for continuance, the Board noted that it and various circuit courts have rejected the notion that a party can have "absolute veto power." *See id.* at 693-94 (discussing, *inter alia*, *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009); *Matter of Lamus*, 25 I&N Dec. 61 (BIA 2009); and *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009)). Accordingly, the Board concluded that neither it nor an IJ "may abdicate the responsibility to exercise independent judgment and discretion in a case by permitting a party's opposition to act as an absolute bar to administrative closure of that case when circumstances otherwise warrant such action." *Id.* at 694. The Board added that none of the circuit court decisions deferring to *Gutierrez*

constrain the Board from overruling that precedent. *See id.* The Board also reaffirmed that DHS retains the unreviewable authority to institute removal proceedings and that while “administrative closure impacts the course removal proceedings may take, it does not . . . infringe on the DHS’s prosecutorial discretion.” *Id.* In this regard, the Board observed that unlike the termination of proceedings, administrative closure does not result in a final order, so either party may move to recalendar a case before an IJ or to reinstate an appeal before the Board. *See id.* at 695.

The Board provided a non-exhaustive list of factors to weigh in deciding whether proceedings should be administratively closed: (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 when the case is recalendared before the immigration judge (IJ) or the appeal is reinstated before the Board. *See id.* at 696. The Board cited certain illustrative circumstances where administrative closure would not be appropriate, including a request “based on a purely speculative event or action.” *See id.* Turning to the matter before it, the Board noted that the respondent is the beneficiary of an approvable visa petition filed by a USC spouse, one that “has been pending before the DHS for a significant and unexplained period of time.” *Id.* at 697. Because “DHS has not identified any obvious impediment to the respondent’s ability to successfully apply for adjustment of status once the visa petition is approved,” the Board dismissed the DHS appeal and returned the record to the IJ without further action. *Id.*

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