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**INTRODUCTION**

NOW COMES the United States Department of Homeland Security (hereinafter the “DHS”) and files this Brief in Support of Appeal. This appeal arises from the Immigration Judge’s decision on July 12, 2013 denying the parties’ Joint Motion for Administrative Closure and ordering the respondent, a 16-year old juvenile whose parents reside in the United States pursuant to a grant of Temporary Protected Status, to be removed to El Salvador.

For decades, administrative closure of immigration proceedings has been used as a tool to control the dockets of the Immigration Courts and the Board, allowing dockets to be trimmed of cases in which DHS wishes to favorably exercise its prosecutorial discretion. Administrative closure in such cases significantly benefits DHS, the respondents, the Immigration Courts, and the Board. The Immigration Judge’s decision ignored the considerable benefits of administrative closure. Additionally, the Immigration Judge’s decision unduly impedes DHS’s ability to exercise prosecutorial discretion in the case of this juvenile respondent, which presents very real humanitarian concerns. For these reasons and those discussed below, the Department respectfully requests that the Board of Immigration Appeals (hereinafter the “Board”) sustain both DHS’s and the respondent’s appeal, vacate the Immigration Judge’s order, and administratively close these proceedings.

**ISSUES PRESENTED FOR REVIEW**

## Whether the Immigration Judge erred by denying the parties’ joint motion where doing so results in an impermissible commingling of the role of prosecutor and adjudicator, unnecessarily impedes DHS’s ability to exercise prosecutorial discretion, and ignores the considerable benefits of administrative closure.

## Whether the Immigration Judge erred by applying the Board’s decision in *Matter of Avetisyan* to this case where neither party opposed administrative closure.

## Whether the Immigration Judge’s abused his discretion by failing to accord any weight or consideration to the agreement of the parties on the appropriate course of action in these proceedings, where the agreement between the parties was in accordance with the law, conserved the resources of all involved, and best served the interests of justice.

**STANDARD OF REVIEW**

The Board reviews questions of law, discretion, and judgment and all non-factual issues in appeals from decisions of immigration judges *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii). Findings of fact are upheld unless clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i).

**STATEMENT OF THE FACTS**

Pursuant to the Chapter 4.6(c)(vi) of the *Board of Immigration Appeals Practice Manual*, DHS stipulates to and adopts the facts as set forth in the respondent’s brief.

**SUMMARY OF THE ARGUMENT**

The Immigration Judge erred by denying the parties’ joint motion for administrative closure and ordering the respondent removed when there was no active dispute between the parties. The role of the Immigration Court, like any other tribunal, is to resolve disputes. Despite the absence of an active dispute between the parties, the Immigration Judge denied the parties’ joint motion to have the case taken off of the court’s docket through administrative closure. The decision to deny the parties’ joint motion to administratively close and instead order the respondent removed resulted in: (1) the Immigration Judge taking on both the role of prosecutor and adjudicator; (2) impeding DHS’s ability to exercise prosecutorial discretion; and (3) an inefficient use of the Board’s, DHS’s, and the respondent’s resources.

The Immigration Judge also erred by applying the Board’s decision in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) to this case. The Board’s decision in *Avetisyan* did not discuss how joint motions for administrative closure should be treated by courts. Rather*,* *Avetisyan* addressed the narrow issue of whether a case could be administratively closed over the objection of one party. Accordingly, applying *Avetisyan* in this case where the parties joined a motion for administrative closure constituted an error of law.

In addition to these errors of law, the Immigration Judge abused his discretion when he failed to accord any weight or consideration to the agreement between the parties before denying the joint motion. Agreements reached between the parties in adversarial proceedings are a vital necessity to litigation in any venue. Due to the significant role the parties have in removal proceedings, an agreement between the parties on a proper course of action will, in most instances, be determinative. The determinative nature of an agreement between the parties is nothing more than a common-sense acknowledgment of the fact that, when *opposing* parties reach an agreement in *adversarial* proceedings, their agreement is likely in the best interests of the parties and best serves the interests of justice.

In this case, the Immigration Judge failed to accord any weight to the parties’ agreement on the best course of action. Instead, the Immigration Judge denied their joint motion to administratively close and ordered the respondent removed.

**ARGUMENT**

1. **The Immigration Judge erred as a matter of law by denying the parties’ joint motion and ordering the respondent removed where DHS, which is charged with enforcing immigration laws, and the respondent both sought administrative closure.**

“The role of the Immigration Court, like any other tribunal, is to resolve disputes.” U.S. Dept. of Justice, EOIR, Office of the Chief Immigration Judge, “Operating Policies and Procedures Memorandum 13-01: *Continuances and Administrative Closure*” (Mar. 7, 2013); *see also Immigration Court Practice Manual*, Chapter 1.3(b) (“As a general matter, Immigration Judges determine removability and adjudicate Applications for relief from removal.”).

Here, there was no active dispute between the parties. DHS did not seek to pursue a removal order and the juvenile respondent did not seek to pursue relief before the Immigration Judge at this time. Despite the absence of an active dispute between the parties, the Immigration Judge denied the joint motion to remove the case from the court’s docket through administrative closure. The decision to deny the parties’ joint motion to administratively close the case and instead order the respondent removed resulted in: (1) the Immigration Judge taking on both the role of prosecutor and adjudicator; (2) impeding DHS’s ability to exercise prosecutorial discretion; and (3) an inefficient use of the Board’s, DHS’s, and the respondent’s resources.

### By reviewing DHS’s decision to exercise its discretion not to pursue removal of the juvenile respondent in this case, the Immigration Judge usurped the prosecutorial authority of DHS resulting in the impermissible commingling of the role of prosecutor and adjudicator.

DHS is invested with the sole discretion to commence removal proceedings and exercise prosecutorial discretion. 8 C.F.R. § 239.1(a) (2013); *see also* 8 C.F.R. § 235.6(a). Once the notice to appear is filed with the Immigration Court, Immigration Judges are responsible for presiding over immigration proceedings and independently adjudicating the disputes that are before the Immigration Court. *See* INA § 240(a) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”); *see also* 8 C.F.R. § 1003.10 (“In decidingthe individual cases before them, . . . immigration judges shall exercise their independent judgment and discretion . . ..”). The Immigration Judge does not, however, have the authority to review DHS’s decision to exercise prosecutorial discretion. By “reviewing” and disagreeing with DHS’ decision regarding whether to continue to pursue removal proceedings, the Immigration Judge is making prosecutorial decisions which the Court is not permitted to do. *See Matter of Bahta*, 22 I&N Dec. 1381, 1391 (BIA 2000) (in IIRIRA’s implementation of section 242(g) of the Act restricting judicial review of “the decision or action by the Attorney General to commence proceedings,” Congress made clear that prosecutorial discretion remained a fundamental authority of the legacy Immigration and Naturalization Service).

In *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3 (1985), the Supreme Court spoke to the impermissibility of an agency with adjudicative authority reviewing the decision not to pursue a case made by a separate agency given the authority to enforce the laws. The regulatory scheme at issue in *Cuyahoga Valley Ry. Co.* assigned the enforcement authority of the Occupational Safety and Health Act (“OSHA”) to the Secretary of Labor. *Cuyahoga Valley Ry. Co.*, 474 U.S. at 3-4. Meanwhile, the Occupational Safety and Health Review Commission (“Commission”) was given adjudicative authority over complaints filed by the Secretary. *Id*. at 4. The issue before the Court was whether the Commission could review the Secretary’s decision to cease prosecuting a citation once it was filed. *Id*. at 5. In reaching its holding, the Court found that the regulatory scheme’s division of authority demonstrated an intent to avoid giving a single agency both prosecutorial and adjudicatory powers. *Id*. at 7. Contrary to this intent, the Court found that the Commission would be making both prosecutorial decisions and serving as the adjudicator if it were permitted to review the Secretary’s decision to cease prosecuting a case. *Id*. This, the Court held, would constitute an impermissible “commingling of roles that Congress did not intend.” *Id*. ,

Like the regulatory scheme in *Cuyahoga Valley Ry. Co.*, the enforcement authority for immigration laws and the adjudicatory authority were intentionally given to separate agencies; indeed, this was one of the main purposes of the current administrative structure, s*ee Aliens and Nationality; Homeland Security; Reorganization of Regulations,* 68 Fed. Reg. 9824-01 (Feb. 28, 2003) (discussing the previous administrative structure, the changes made, and noting that the current administrative structure “foster[s] independent judgment in adjudication”). And like the agency given adjudicatory authority in *Cuyahoga Valley Ry. Co.*, the Immigration Judge’s authority does not extend to making prosecutorial decisions.

Here, the Immigration Judge impermissibly took on the role of prosecutor when he reviewed DHS’s decision to appropriately exercise prosecutorial discretion by joining in the respondent’s motion to administratively close the case. DHS and the respondent reached an agreement that resolved the dispute that was before the Immigration Judge, with both parties seeking administrative closure because it was in their respective best interests to do so. DHS moved for administrative closure as a matter of its prosecutorial discretion because it does not seek a removal order against the respondent at this time, as this case is not an enforcement priority.[[1]](#footnote-1) The respondent sought administrative closure because he is not currently seeking relief from removal, but may become eligible for relief in the future. The respondent does not seek a removal order due to the legal detriments such order brings with it, such as the need for a motion to reopen proceedings, the discretionary nature of reopening, and post-order monitoring by U.S. Immigration and Customs Enforcement.

In sum, there was no active dispute between the parties because DHS was not seeking to go forward with a removability finding at that time. The parties simply asked that the case be removed from the court’s docket. Rather than remove the case from the court’s docket, the Immigration Judge decided that even if DHS did not want to prosecute this case he would order the respondent removed. The Immigration Judge’s decision to take on both the role of prosecutor and adjudicator is precisely what the administrative structure set up by Congress sought to avoid. For this reason, the Immigration Judge erred by denying the parties’ joint motion and ordering the juvenile respondent removed.

### The Immigration Judge’s decision to deny the parties’ joint motion to administratively close unnecessarily impedes DHS’s ability to exercise prosecutorial discretion.

The Immigration Judge erred as a matter of law by ignoring the well-established principle that DHS’s prosecutorial discretion permits it to decide not to pursue removal proceedings once they have begun. *See Lopez-Telles v. INS*, 564 F.2d 1302, 1304 (9th Cir. 1977) (finding the principle that INS, not Immigration Judges, has discretion to determine whether to initiate proceedings as well as whether to “prosecute those proceedings to conclusion” has been “undeviatingly adhered to” and is “well-established”); *see also Discipio v. Ashcroft*, 417 F.3d 448, 450 (5th Cir. 2005) (dismissing a request for rehearing en banc as moot where DHS indicated that it decided to exercise its discretion not to pursue removal proceedings); *Matter of E-R-M & L-R-M*, 25 I&N Dec. 520, 523 (BIA 2011) (holding that the word “shall” in INA § 235(b)(1)(A)(i) must be given the same meaning as “may” because to interpret it as mandatory would interfere with DHS’s authority to exercise prosecutorial discretion).

The exercise of prosecutorial discretion by DHS is not new. Long ago the Board recognized that “those charged with the responsibility for enforcing the immigration laws” are not required to “automatically start and relentlessly pursue deportation proceedings against all aliens.” *Matter of Vizcarra-Delgadillo*, 13 I&N Dec. 51, 53 (BIA 1968). Rather, the “discretion not to proceed in a given case *must* be accorded to those responsible for immigration law enforcement.” *Id*. (emphasis added); *see also Matter of E-R-M & L-R-M*, *supra* (finding that the broad discretion given to the Executive in the criminal context also applies to DHS in the immigration context).

The Supreme Court “has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). By the time Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), 110 Stat. 3009-546, in 1996, the legacy Immigration and Naturalization Service was already engaging in the “regular practice” of exercising prosecutorial discretion by declining “to institute proceedings, terminat[ing] proceedings, or declin[ing] to execute a final [deportation] order.” *Reno v. American-Arab Anti-Discrimination Comm.,* (hereinafter “*AAADC*”), 525 U.S. 471, 483-84 (1999). These decisions may be made for humanitarian reasons in some cases and to conserve the agency’s immigration enforcement resources in others. *Id*. In *AAADC*, the Supreme Court acknowledged that ensuring the agency’s continued ability to exercise prosecutorial discretion was part of the intent of IIRIRA.[[2]](#footnote-2) *Id*. (“[M]anyprovisions of IIRIRA are aimed at protecting the [Service’s] discretion from the courts – indeed, that can fairly be said to be the theme of the legislation.”)

Recently the Supreme Court reaffirmed both the discretion DHS has in enforcing immigration laws and the importance of this discretion. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012)(federal immigration officials may determine that, in their discretion, removal of a particular alien should not be pursued). In reaching this holding, the Court recognized that “[a] principal feature of the removal system is the broad discretion exercised by immigration officials.” *Id*. The Court noted that this broad discretion provides immigration enforcement components with the ability to address immediate and very real human concerns that may be present in each case. *Id*.

Despite the well-established principle that DHS has discretion to decide not to pursue removal proceedings, the Immigration Judge refused to allow DHS to exercise its discretion and instead ordered the respondent removed. In this case, DHS sought to exercise prosecutorial discretion for both humanitarian reasons and because the juvenile respondent is not an enforcement priority. The respondent not only agreed with DHS’s decision to exercise prosecutorial discretion, but recognized that it is in his best interest at this time. The Immigration Judge’s decision was contrary to well-established law and unduly impeded DHS’s ability to exercise prosecutorial discretion. For these reasons, as well as those discussed below, the Immigration Judge erred as a matter of law and abused his discretion when he denied the parties’ Joint Motion.

### Administrative closure ensures the efficient use of the Board’s, immigration court’s, DHS’s, and the respondent’s scarce resources.

Utilizing the tool of administrative closure in cases where DHS seeks to exercise prosecutorial discretion and the parties agree to administrative closure, significantly benefits the Immigration Courts, the Board, DHS, and respondents. Specifically, it benefits all that are involved in the process ensuring that scarce resources do not have to be allocated to cases in where there is not an active dispute between the parties.

As stated numerous times above, there is no active dispute in this case. Pursuant to the parties’ agreement to administratively close, the respondent agreed not to seek any relief before the court and DHS agreed not to seek a removal order. Not only did this agreement serve to conserve the resources of the parties, but it also served to conserve the immigration court’s resources by removing the case from its docket. Furthermore, this agreement would have ensured that the Board did not have to waste any of its scarce resources on a case in which there is no active dispute between the parties.

The Immigration Judge, however, refused to remove the case from its docket by granting the joint motion for administrative closure. In refusing to administratively close this case, the Immigration Judge effectively commandeered the Board, DHS, and the respondent into wasting their scarce resources further litigating this case in which there is no active dispute between the parties.

For all of the reasons discussed above, the Immigration Judge erred by denying the parties joint motion for administrative closure and ordering the respondent removed.

1. **The Immigration Judge erred as a matter of law by applying *Avetisyan* in this case where neither party opposed administrative closure and by misstating the holding of *Avetisyan*.**

The Board’s decision in *Avetisyan* did not discuss how joint motions for administrative closure should be treated by courts. *Avetisyan*, 25 I&N Dec. at 688-97. To the contrary, *Avetisyan* addressed the narrow issue of “whether an Immigration Judge or the Board has the authority to administratively close a case *if* *either party to the proceeding opposes*.” *Avetisyan*, 25 I&N Dec. at 690 (emphasis added). The fact that the Board’s decision in *Avetisyan* was limited to this narrow issue is reflected in its holding that an Immigration Judge and the Board may administratively close a case even if one party opposes.[[3]](#footnote-3) *Avetisyan*, 25 I&N Dec. at 697.

Despite the inapplicability of *Avetisyan*’s narrow holding to this case where neither party opposed administrative closure, the Immigration Judge’s decision relied almost exclusively on *Avetisyan* as the basis for denying the parties’ joint motion. Said differently, the Immigration Judge’s legal basis for denying the joint motion for administrative closure was a case that applies in precisely the opposite context. The Immigration Judge’s misplaced reliance on *Avetisyan*, therefore, constituted an error of law in and of itself, where both parties agreed to and jointly requested administrative closure.

Further compounding this error, (or possibly causing it), was the Immigration Judge’s incorrect belief that *Avetisyan* found “that Courts must not advocate [*sic*] the responsibility to exercise independent judgment and discretion irrespective of the parties’ agreement or disagreement on whether administrative closure is appropriate.” I.J. at 4-5. *Avetisyan* did not make a finding about – or even discuss – an Immigration Judge’s responsibilities when the parties agree that administrative closure is the proper course of action. *See Avetisyan*, 25 I&N Dec. at 688-697. The Immigration Judge’s mischaracterization of the Board’s finding in *Avetisyan* not only compounded the error of applying *Avetisyan* in this case, but also constituted a separate error of law.

1. **The Immigration Judge abused his discretion by failing to give any deference or consideration to the parties’ agreement on the appropriate course of action in these proceedings.**

Agreements reached between the parties in adversarial proceedings are a vital necessity to litigation in any venue. The importance of agreements between the parties lies in the benefits to all those involved in the process. Though most often discussed in the context of criminal and civil litigation, there can be no doubt that agreements between the parties in removal proceedings serve the same important purposes and are just as vital to all those involved. Specifically, agreements between the parties in removal proceedings serve the interests of judicial economy by reducing the significantly overburdened case load of both the Board and Immigration Courts[[4]](#footnote-4) Similarly, agreements between the parties allow DHS to conserve scarce resources that are better used on cases that are enforcement priorities.[[5]](#footnote-5) In addition to benefiting the Board, EOIR, and DHS, agreements between the parties benefit the respondents by significantly reducing the cost of litigating their removal case[[6]](#footnote-6) (e.g. attorney’s fees, travel expenses, etc.) and eliminating the risks (e.g. a removal order) that can be associated with litigating all of the issues at an individual hearing.[[7]](#footnote-7)

The substantial deference that should be given to an agreed course of action by the parties, as well as the significant role of the parties in removal proceedings, was directly addressed by the Board in *Matter of Yewondwosen*). In *Yewondwosen*, the Board held that, despite failing to comply with governing regulatory requirements, the respondent’s motion to reopen/remand, which was affirmatively joined by the former Immigration and Naturalization Service, could be granted in the interests of fairness and administrative economy. *Id.* at 1025. When reaching this decision the Board emphasized the importance of the parties and their agreement on the issue, stating:

[W]e consider the Service’s position in this case to be significant. Rather than oppose the motion . . . the Service joined [the respondent’s] motion to remand for further proceedings. We believe the parties have an important role to play in these administrative proceedings, and that their agreement on an issue or proper course of action should, in most instances, be determinative.

*Matter of Yewondwosen*, 21 I&N Dec. 1025, 1026 (BIA 1997).

*Yewondwosen*’s recognition of the parties’ significant role in immigration proceedings is a common-sense acknowledgment of the fact that, when *opposing* parties reach an agreement in *adversarial* proceedings, their agreement is likely in the best interests of the parties and the best interests of justice. Moreover, this acknowledgment and the recognition that great – even determinative – weight should be given to an agreement between the parties in adversarial proceedings is not a novel concept. To the contrary, the practice of giving immense weight to an agreement between the parties in adversarial proceedings has been routine in criminal, civil, and administrative courts for decades. Not only does this practice take place in courts every single day, but without this practice most courts would come to an effective standstill.

Here, the record shows that the Immigration Judge did not give any weight or deference to the parties’ agreements – much less acknowledge that such an agreement “should, in most instances, be determinative.” *See Yewondwosen*, *supra*. In fact, it appears from the Immigration Judge’s misplaced reliance on *Avetisyan*, *see* Section II *supra*, that he believed the parties’ agreement to be completely irrelevant to deciding whether the joint motion should be granted. The Immigration Judge’s failure to accord any weight to the parties’ agreements in this case was contrary to Board precedent and an abuse of discretion.[[8]](#footnote-8)

**CONCLUSION**

For the above stated reasons, DHS respectfully requests that the Board sustain both DHS’s and the respondent’s appeals, vacate the Immigration Judge’s order, and administratively close these proceedings.

1. DHS sought administrative closure, rather than termination of proceedings, so that if the respondent were to engage in future misconduct or otherwise become an enforcement priority, it could simply re-calendar the proceedings without need for serving the respondent with a new Notice to Appear. [↑](#footnote-ref-1)
2. In discussing the agency’s ability to exercise prosecutorial discretion the Supreme Court did not hide its disapproval for those who attacked the exercise of prosecutorial discretion. *See generally AAADC*, 525 at U.S. 484 (“Since no generous act goes unpunished, however, the [Service's] exercise of [prosecutorial] discretion opened the door to litigation in instances where [it] chose *not* to exercise discretion.”). [↑](#footnote-ref-2)
3. Additional evidence that *Avetisyan*’s holding was limited to this narrow issue can be found in the inapplicability of some of the factors to be considered when determining whether a case should be administratively closed over the objection of one party. For example, the second factor to be considered is the “basis for any opposition to administrative closure.” *Id*. at 696. This factor is obviously inapplicable when the parties have agreed on and joined in a motion for administrative closure. Similarly, when the parties have agreed to and joined a motion for administrative closure, the fifth factor, which looks to who is responsible for any present or future delay in the proceedings, *id*., is also inapplicable. [↑](#footnote-ref-3)
4. *Cf. United States v. Ashburn*, 38 F.3d 803, 814 (5th Cir. 1994) (Goldberg, J., dissenting) (“The plea bargain is an essential component of our criminal justice system, by which all involved benefit. . . .Plea bargains also benefit society as a whole, since guilty pleas reduce the number of cases on our overburdened court dockets.”). [↑](#footnote-ref-4)
5. *Cf. United States v. Ruiz*, 536 U.S. 622, 632-33 (2002) (holding that the resource-saving advantages to plea agreements in criminal proceedings far outweigh any due process concerns caused by the government’s failure to disclose impeachment evidence prior to the entry of a plea agreement). [↑](#footnote-ref-5)
6. *Cf. Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1218 (5th Cir. 1978) (discussing the benefit of reducing litigation expenses that is served by settlement agreements). [↑](#footnote-ref-6)
7. *Cf. Ashburn*, 38 F.3d at 814 (noting that plea agreements serve to reduce the risks associated with a trial). [↑](#footnote-ref-7)
8. While DHS believes the Board could resolve this case simply by finding that the immigration judge abused his discretion under the standards in *Yewondwosen*, DHS would ask the Board to specifically find that the Immigration Judge also erred as a matter of law in denying the Joint Motion for the reasons stated in Section I above. Otherwise, DHS expects the immigration judge to continue to deny joint motions to administratively close proceedings. Similarly, if the Board were simply to administratively close proceedings in this case, without specifically finding the Immigration Judge erred as a matter of law in not granting the joint motion, DHS would expect the Immigration Judge to continue to deny joint motions. [↑](#footnote-ref-8)