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# INTRODUCTION

NOW COMES the United States Department of Homeland Security (hereinafter “DHS”) and the respondent (collectively the “Parties”), by and through undersigned counsel, and files this Joint Brief in Support of Interlocutory Appeal.

The respondent, a college graduate who has resided in the United States since she was brought here by her parents twenty-one years ago at the age of seven, has an approved I-130 through her U.S. citizen spouse and is eligible to consular process with a provisional waiver. On July 10, 2013, the Parties filed a Joint Motion to Terminate Without Prejudice to allow the respondent to obtain an immigrant visas through the consular process. More than seven months later, on February 19, 2014, the Immigration Judge issued an order denying the Parties’ joint motion. As a result, the removal proceedings – which have been delayed for three years due to the Immigration Judge *sua sponte* continuing the respondent’s individual hearing twice – remain the only impediment to her ability to obtain an immigrant visa through consular processing.

Currently, the respondent’s case is set for an individual hearing on her application for cancellation of removal for certain non-permanent residents on November 4, 2014. For the reasons discussed below, the Parties respectfully request that the Board accept this interlocutory appeal and dismiss the above captioned proceedings, or remand with instructions that the case be assigned to a different Immigration Judge.

# ISSUES PRESENTED FOR REVIEW

## Whether the Immigration Judge erred by denying the joint motion to dismiss proceedings pursuant to 8 C.F.R. §§ 239.2(a) and (c) where he ignored DHS’s determination that continuation of proceedings was no longer in it’s best interest, substituted his own opinion about the best interests of the United States, and misinterpreted 8 C.F.R. § 239.2(a)(6)-(7) to require that the respondent is not removable.

## 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.

## 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).

# INTERLOCUTORY REVIEW

The Board will rule on the merits of an interlocutory appeal where it is deemed necessary to address important jurisdictional issues related to the administration of the immigration laws or to resolve recurring problems in the handling of cases by Immigration Judges. *Matter of Avetisyan*, 25 I&N Dec. 688, 688-89 (BIA 2012); *see also Matter of Guevara*, 20 I&N Dec. 238 (BIA 1990, 1991); *Matter of Dobere*, 20 I&N Dec. 188 (BIA 1990).

Here, a ruling on the merits of this interlocutory appeal is necessary to resolve the important recurring legal issue of whether an immigration judge should defer to the parties and dismiss proceedings where both parties seek dismissal. This issue is one that continues to arise in immigration proceedings before this Immigration Judge. In this case, dismissal is needed to allow the respondent to pursue an immigrant visa through the consular process. Furthermore, dismissal of these proceedings prior to her next scheduled individual hearing on November 4, 2014 will conserve scarce government resources and prevent the respondent from having to needlessly waste time and money continuing to litigate this case in which there is no dispute between the Parties.

# NEED FOR A REVIEW BY A THREE-MEMBER PANEL

Agreements between the parties and DHS’s ability to exercise prosecutorial discretion each play an important role in immigration proceedings. When DHS’ prosecutorial discretion and an agreement between the parties on the best course of action are combined all those involved in immigration proceedings, as well as the United States, benefit. Conversely, an Immigration Judge’s decision to ignore an agreement between the parties and refusal to allow DHS to exercise its prosecutorial discretion benefits no one. Equally important, it wastes scarce government resources and forces respondents to unnecessarily spend additional time and money litigating their case.

DHS, respondents, and the Board have wasted substantial resources on appeals of this important recurring legal issue of whether an immigration judge should defer to the parties and dismiss proceedings where both parties seek dismissal. This issue is one that continues to arise in immigration proceedings before this Immigration Judge. Accordingly, this case necessitates review by a three-member panel pursuant to 8 C.F.R. § 1003.1(e)(6) to settle inconsistent rulings by immigration judges, § 1003.1(e)(6)(i); to resolve this controversy of national import, § 1003.1(e)(6)(iv); and to reverse the decision of the Immigration Judge, § 1003.1(e)(6)(vi).

# STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

## Factual Background

The respondent, a native and citizen of Mexico, entered the United States without inspection in September 1991, when she was just seven years old. She has remained in the United States since her initial entry. The respondent married her U.S. citizen husband, Daniel De Jesus Garcia,[[1]](#footnote-1) on March 6, 2006 in Arlington, Texas.[[2]](#footnote-2) Together they have one child who is now eight years old.[[3]](#footnote-3) The respondent graduated from high school and earned her Bachelor of Business Administration in Finance from the University of Texas at Arlington.[[4]](#footnote-4) The respondent consistently files income taxes, and has never been arrested for or convicted of committing any crimes.[[5]](#footnote-5)

On August 10, 2007, an I-130 petition filed by the respondent’s U.S. citizen husband on her behalf was approved.[[6]](#footnote-6) Despite the fact that the respondent was not eligible to adjust her status at that time, her former attorney incorrectly advised her to file an I-485 application for adjustment of status. Because the respondent was not eligible for adjustment of status, U.S.C.I.S. denied her application and issued her a notice to appear (“NTA”) on February 17, 2010.[[7]](#footnote-7)

## Procedural History

On August 12, 2010, the respondent appeared at a master calendar hearing.[[8]](#footnote-8) At

that hearing, the respondent admitted to the allegations and conceded to the INA § 212(a)(6)(A)(i) charge of removability on the NTA.[[9]](#footnote-9) After removability was established the respondent indicated that she would be seeking cancellation of removal for certain non-permanent residents pursuant to INA § 240A(b) (hereinafter “42B relief” or “42B application”).

Initially, the respondent’s individual hearing on her 42B application was set for August 17, 2011.[[10]](#footnote-10) Prior to the hearing however, the Immigration Judge *sua sponte* reset the date of her individual hearing to November 6, 2012.[[11]](#footnote-11) Then, prior to that date, the Immigration Judge once again *sua sponte* reset the date of her individual hearing to November 4, 2014.[[12]](#footnote-12)

In March of 2013, a new rule was promulgated that allowed certain immigrant visa applicants who are spouses, children and parents of U.S. citizens (immediate relatives) to apply for provisional unlawful presence waivers before they leave the United States. The provisional unlawful presence waiver process allows individuals to apply for the waiver in the United States before they depart for their immigrant visa interviews at a U.S. embassy or consulate abroad when they, (like the respondent), only need a waiver of inadmissibility for unlawful presence.[[13]](#footnote-13) The provisional waiver and ability to consular process are not however, available when there are pending removal proceedings.

Because the new provisional waiver allowed the respondent to pursue an immigrant visa through the consular process without being separated from her husband, child, and home for an extended period of time, the respondent, through her attorney, approached DHS about agreeing to a joint motion to dismiss. DHS agreed, and on July 10, 2013 the parties filed a joint motion to dismiss for the reasons set forth in 8 C.F.R. § 239.2(a)(6)-(7).[[14]](#footnote-14)

On February 19, 2014[[15]](#footnote-15), over seven months later, the court issued a written decision denying the parties joint motion.[[16]](#footnote-16) The Immigration Judge’s two-page decision indicates that the motion was denied because the changed circumstances in the respondent’s case did not relate to removability and he (the Immigration Judge) believed it was in the best interests of the citizens of the United States that proceedings continue.[[17]](#footnote-17) The Immigration Judge’s decision did not provide any legal authority to support his reasoning. Nor did it provide *any* explanation for his conclusory statement that continuation of the respondent’s case was in the citizens of the United States best interest.

# SUMMARY OF THE ARGUMENT

The Immigration Judge erred by finding the question that should be considered when determining if removal proceedings may be terminated under 8 C.F.R. § 239.2(c) for the reasons listed in 8 C.F.R. § 239.2(a)(6)-(7) is whether a respondent is removable as charged. While the first two grounds listed in 8 C.F.R. § 239.2(a) go to whether the respondent is removable, the last five grounds have nothing to do with whether a respondent is removable as charged. *Cf.* 8 C.F.R. § 239.2(a)(1)-(2), *with* 8 C.F.R. § 239.2(a)(3)-(7). The Immigration Judge’s interpretation, therefore, would render the express purpose of 8 C.F.R. § 239.2(c) (i.e. providing DHS with a vehicle to move for dismissal of proceedings based on any of the grounds listed in subparagraph (a)) completely meaningless.

The Immigration Judge also erred by reviewing DHS’ determination the notice to appear in this case was improvidently issued and that continuation is not in the best interest of DHS. Determinations as to whether a NTA was improvidently issued or whether continuation is in the best interests of DHS are prosecutorial decisions which are not subject to review by Immigration Judges. In this case the Immigration Judge erred by not only reviewing DHS’ determination that continuation was not in its best interest, but also by deciding for DHS what is in the best interest of DHS.

In addition to the errors of law the Immigration Judge made when interpreting 8 C.F.R. § 239.2, he also erred by impermissibly taking on the role of both adjudicator and prosecutor. The role of the Immigration Court, like any other tribunal, is to resolve disputes as a neutral adjudicator. Despite the absence of a dispute between the parties and DHS’ desire not to pursue removal proceedings, the Immigration Judge denied the parties’ joint motion dismiss based on his disagreement with DHS’ prosecutorial decision. The Supreme Court has explained that when a regulatory scheme’s division of authority demonstrates an intent to avoid giving a single agency both prosecutorial and adjudicatory powers that the adjudicator cannot be permitted to review the decision to cease prosecuting a case. This, the Supreme Court has found, constitutes an impermissible commingling of roles that was not intended by Congress.

The Immigration Judge also 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 abused his discretion by failing to accord any weight to the parties’ agreement on the best course of action.

# ARGUMENT

## The Immigration Judge erred in denying the parties joint motion to dismiss by misinterpreting 8 C.F.R. § 239.2(a)(7) to require that the change in circumstances relate to removability and by improperly substituting his own opinion concerning DHS’s best interests for DHS’s determination about its own best interests.

### The Immigration Judge’s finding that 8 C.F.R. § 239.2(a)(7) requires that the “changed circumstances” relate to removability is clearly erroneous.

The Immigration Judge’s decision reasons that a motion to terminate pursuant to 8 C.F.R. § 239.2(c) based on the ground that circumstances have changed since the NTA was issued, (as listed in 239.2(a)(7)), requires that the change in circumstances relate to whether a respondent is removable as charged. This is obviously incorrect.

Pursuant to 8 C.F.R. § 239.2(a), DHS may cancel a NTA prior to jurisdiction vesting with an Immigration Judge for the following reasons:

1. The respondent is a national of the United States;
2. The respondent is not deportable or inadmissible under immigration laws;
3. The respondent is deceased;
4. The respondent is not in the United States;
5. The notice was issued for the respondent's failure to file a timely petition as required by section 216(c) of the Act, but his or her failure to file a timely petition was excused in accordance with section 216(d)(2)(B) of the Act;
6. The notice to appear was improvidently issued, or
7. Circumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government.

8 C.F.R. § 239.2(a). After jurisdiction has vested with the Immigration Judge, DHS may move for dismissal of proceedings under 8 C.F.R. § 239.2(c) based on any of the grounds listed in subparagraph (a). 8 C.F.R. § 239.2(c). While the first two grounds listed in 8 C.F.R. § 239.2(a) go to whether the respondent is removable, the last five grounds have nothing to do with whether a respondent is removable as charged. *Cf.* 8 C.F.R. § 239.2(a)(1)-(2), *with* 8 C.F.R. § 239.2(a)(3)-(7).

Nonetheless, the Immigration Judge asserts that the question that should be considered when determining whether removal proceedings may be terminated under 8 C.F.R. § 239.2(c) is whether a respondent is removable as charged. This interpretation, however, would render the express purpose of 8 C.F.R. § 239.2(c) (i.e. providing DHS with a vehicle to move for dismissal of proceedings based on any of the grounds listed in subparagraph (a)) completely meaningless. Such an interpretation flies in the face of the cardinal rule of statutory construction which requires that, when possible, each word be given meaning, significance, and effect. *See Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968) ("Every word used in a statute is presumed to have a meaning, and, if possible, every word must be accorded significance and effect.").

In light of the fact that the Immigration Judge’s interpretation cannot be reconciled with this rule of statutory construction, it is not surprising that he failed to provide any legal authority to support this position. *See* I.J. at 2,(Joint Appendix Tab J p. 119).

Furthermore, the Immigration Judge’s finding that the changed circumstances in this case do not warrant terminating proceedings is contrary to the Supreme Court’s decision in *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (hereinafter “*AAADC*”). The Court in *AAADC* discussed the fact that at the time IIRIRA was passed, DHS had engaged in a “regular practice” of exercising prosecutorial discretion by declining "to institute proceedings, terminat[ing] proceedings, or declin[ing] to execute a final [removal] order." *AAADC*, 525 U.S. at 483-84. These decisions to exercise prosecutorial discretion, the Court noted, were made for humanitarian reasons in some cases and to conserve DHS's immigration enforcement resources in others. *Id*.

Here, DHS sought to exercise its discretion to address the human concern of minimizing the amount time the respondent would be separated from her U.S. citizen child and husband while she goes through the process of legally immigrating to the United States. The respondent’s ability to immigrate to the United States in conjunction with a provisional waiver is a changed circumstance leading DHS to conclude that the case should be dismissed because continuation is not in its best interest.[[18]](#footnote-18).

### Determinations as to whether immigration proceedings were improvidently begun or whether continuation is in the best interests of DHS are prosecutorial, and therefore, are not subject to review by Immigration Judges.

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). Prior to filing the NTA with the Immigration Court, DHS may cancel the NTA for any of the reasons set forth in 8 C.F.R. § 239.2(a). There are, of course, instances in which additional facts or policy considerations lead DHS to conclude that proceedings should not have been begun or that continuation of proceedings is no longer in the government’s best interest. In these instances, 8 C.F.R. § 239.2(c) provides DHS with the ability to request that proceedings be dismissed for any one of the reasons set for in subparagraph (a). *See* 8 C.F.R. § 239.2(c), *supra*; *see also Matter of Vizcarra-Delgadillo*, 13 I. & N. Dec. 51 (BIA 1968) (“[W]here, following the formal start of deportation proceedings, additional facts or policy considerations arise which lead those responsible [for enforcing the laws] to conclude that this is not the sort of case in which such proceedings should have been started in the first place, [the regulations] wisely provides the mechanics for termination on the ground that the proceeding was “improvidently begun.”)).

Determinations as to whether a NTA was improvidently issued or whether continuation is in the best interests of DHS are prosecutorial, and therefore, are not subject to review by Immigration Judges.[[19]](#footnote-19) *See* *Matter of Vizcarra-Delgadillo*, 13 I. & N. Dec. at 54 (“[I]n view of the separation of functions sought to be achieved by the Act, the question whether a proceeding has been improvidently begun is one which is addressed primarily to prosecutive discretion and should therefore not be of concern to [Immigration Judges] or this Board, whose functions are essentially quasi-judicial.”). This is true, as the Board explained, because when a DHS motion to dismiss, joined by the respondent, is made on the basis of exercising prosecutorial discretion “there is no purpose to be served in having [DHS’] conclusion reviewed further by the [Immigration Judge] or th[e] Board.” *Id*.; *see also Matter of G-N-C,* 22 I. & N. Dec. 281 (BIA 1998) (distinguishing between a motion to dismiss pursuant to 8 C.F.R. § 239.2(c) which is opposed by the respondent and one that is joined by the respondent). Said differently, reviewing DHS’ determination that proceedings were improvidently begun or that continuation is no longer in the best interest of DHS when deciding a joint motion to dismiss pursuant to 8 C.F.R. § 239(c) constitutes error.

Here, the Immigration Judge’s decision indicates that he engaged in a review of DHS’ prosecutorial determination that it was not in the best interests of DHS to continue pursuing these removal proceedings. *See* I.J. at 2, (Joint Appendix Tab J p. 119). It is the Parties’ position that engaging in a review of a determination that falls solely within DHS’ discretion constitutes reversible error in and of itself.[[20]](#footnote-20)

Though it is the parties position that DHS’ decision to exercise discretion in this case is not subject to review by the Immigration Judge, the Board, or any other tribunal, it is important to note that the record unequivocally demonstrates that dismissing these proceedings is in the best interest of DHS, as well as “in the best interest of the citizens of the United States”, I.J. at 2, (Joint Appendix Tab J p. 119). This is true because the respondent is an exemplary individual, is married to a United States Citizen, and continuing proceedings will only serve delay her ability to legally immigrate to the United States.

The respondent was brought to the United States 21 years ago when she was seven years old. She graduated from high school and went on to earn a Bachelor’s degree. She has a U.S. citizen spouse and child. The respondent is a tax paying contributing member of her community who has never been arrested and who was placed in removal proceedings through no fault of her own.

For the past four years, the respondent has had a 42B application pending before the immigration court. An individual hearing on her application was originally set for August 17, 2011. The Immigration Judge however, *sua sponte* continued her individual hearing to November 6, 2012. When that date came around the Immigration Judge once again *sua sponte* continued her individual hearing. It is now set for November 4, 2014. Assuming *arguendo* that the Immigration Judge does not once again delay her removal proceedings by *sua sponte* continuing her individual hearing to a far off future date, it is quite possible that a decision could be made on her application on that date as the numerical cap for non-lawful permanent resident cancellation of removal may have been reached. In other words, continuing these proceedings would result in a continued delay and waste of government resources – all of which could be prevented by dismissing proceedings to allow the respondent to gain legal status by consular processing.

Simply put, the notion that it is in the best interests of DHS, (or the citizens of the United States), to continue these removal proceedings is – at best – absurd.[[21]](#footnote-21)

## 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.

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 when the respondent is in agreement with that decision. 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).

Due to the nature of immigration proceedings, it is important to note the distinction between cases in which the respondent wants to have their case heard by an Immigration Judge and those in which the respondent agrees with DHS’ decision to exercise discretion by not pursuing the case. There are cases in which respondents want to seek relief before an Immigration Judge because DHS is unable or unwilling to grant the relief that they seek. For example, a respondent whose asylum application is referred by U.S.C.I.S. may want to continue removal proceedings to the end with the hope that the Immigration Judge will grant their application. *See* 8 C.F.R. § 208.14 (proscribing process for review of asylum applications, including referral of asylum applications to Immigration Judges by asylum officer). In those cases, DHS’ desire – or lack thereof – to pursue removal proceedings before an Immigration Judge must be weighted against the interest of the Respondent, as the Board recognized in *Matter of G-N-C, supra.*  This is because the dispute between the parties (i.e. whether the respondent should be granted asylum) remains active and the Immigration Judge serves as the neutral adjudicator over this dispute. There are however cases, (like the instant one), in which after a respondent was placed in removal proceedings DHS determines that it does not want to pursue a removal order and the respondent does not wish to seek any relief before the court. In these cases, there is no dispute between the parties, and as a result, there is nothing for the Immigration Judge to neutrally adjudicate. Denial of a joint motion to dismiss based on disagreement with DHS’ decision to exercise its prosecutorial discretion in these cases, constitutes an impermissible prosecutorial decision and effectively places the Immigration Judge in the role of prosecutor and neutral adjudicator for the remainder of proceedings.

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 a motion to dismiss proceedings to allow the respondent to legally immigrate to the United States.  This impermissible commingling of roles has left the respondent in the uncomfortable position of having the same individual prosecute and decide her case.

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[[22]](#footnote-22) Similarly, agreements between the parties allow DHS to conserve scarce resources that are better used on cases that are enforcement priorities.[[23]](#footnote-23) 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[[24]](#footnote-24) (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.[[25]](#footnote-25)

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,* 21 I&N Dec. 1025 (BIA 1997). 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’ agreement – much less acknowledge that such an agreement “should, in most instances, be determinative.” *See Yewondwosen*, *supra*. The consequences of the Immigration Judge’s failure to give deference to the Parties’ agreement (e.g. waste of DHS and Board resources, continued delay in the respondent’s ability to legally immigrate, and casting doubt on a just result being reached) demonstrate precisely why the Board has acknowledged the important role the parties play in immigration proceedings.

# CONCLUSION

For the above stated reasons, the Parties respectfully request that the Board accept this interlocutory appeal and dismiss the above captioned proceedings, or remand with instructions that the case be assigned to a different Immigration Judge

Respectfully submitted,

1. *See* Joint Motion to Dismiss Without Prejudice, copy of Birth Certificate for the respondent’s husband, at Exhibit C, (Joint Appendix Tab C p. 13). [↑](#footnote-ref-1)
2. *See* Joint Motion to Dismiss Without Prejudice, copy of Marriage Certificate, at Exhibit C, (Joint Appendix Tab C pp. 14-15). [↑](#footnote-ref-2)
3. *See* Joint Motion to Dismiss Without Prejudice, copy of the respondent’s son’s Birth Certificate, at Exhibit C, (Joint Appendix Tab C p. 16). [↑](#footnote-ref-3)
4. *See* Joint Motion to Dismiss Without Prejudice, copy of the respondent’s diplomas, at Exhibit D, (Joint Appendix Tab D pp. 43-44). [↑](#footnote-ref-4)
5. *See* Joint Motion to Dismiss Without Prejudice, copies of Income Tax Returns, at Exhibit D, (Joint Appendix Tab D pp. 57-98). [↑](#footnote-ref-5)
6. *See* Joint Motion to Dismiss Without Prejudice, Copy of I-130 approval notice attached, at Exhibit B, (Joint Appendix Tab B p. 9). [↑](#footnote-ref-6)
7. I.J. at 2. (Joint Appendix Tab J p. 119). [↑](#footnote-ref-7)
8. *Id*. [↑](#footnote-ref-8)
9. *Id*. [↑](#footnote-ref-9)
10. Hearing Notice dated Feb. 16, 2011, (Joint Appendix Tab F p. 106). [↑](#footnote-ref-10)
11. Hearing Notice dated Aug. 5, 2011, (Joint Appendix Tab G p. 108). [↑](#footnote-ref-11)
12. Hearing Notice dated Oct. 29, 2012 (Joint Appendix Tab H p. 110). [↑](#footnote-ref-12)
13. *See* U.S.C.I.S. webpage explaining the Provisional Unlawful Presence Waivers at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=bc41875decf56310VgnVCM100000082ca60aRCRD&vgnextchannel=bc41875decf56310VgnVCM100000082ca60aRCRD>, (Joint Appendix Tab I pp. 112-116). [↑](#footnote-ref-13)
14. I.J. at 1, (Joint Appendix Tab J p. 118). [↑](#footnote-ref-14)
15. The written decision is dated February 10, 2014, but it was not issued to the Parties until February 19, 2014. [↑](#footnote-ref-15)
16. I.J. at 1-2, (Joint Appendix Tab J pp. 118-19) [↑](#footnote-ref-16)
17. *Id*. at 2, (Joint Appendix Tab J p. 119) [↑](#footnote-ref-17)
18. It is also the Parties’ position that the Immigration Judge erred by finding that whether a NTA was improvidently issued depends on the respondent being removable as charged. “Improvidently issued” is a term of art that does not require that the “improvidence” occur at the time the NTA was issued. Rather, “improvidently issued” is another way of stating that DHS does not seek to proceed with a case as a matter of discretion. *See Matter of Vizcarra-Delgadillo*, 13 I&N 51, 53 (BIA 1968) (“And where, following the formal start of deportation proceedings, additional facts or policy considerations arise which lead those responsible to conclude that this is not the sort of case in which such proceedings should have been started in the first place [former] 8 CFR 242.7 wisely provides the mechanics for termination on the ground that the proceeding was ‘improvidently begun.’” For that reason, the Immigration Judge also erred in finding that the Notice to Appear was not improvidently issued. [↑](#footnote-ref-18)
19. The recognition that these determinations (i.e. whether a NTA was improvidently issued or whether continuation of proceedings is in the best interest of DHS) are prosecutorial decisions that should not be reviewed by an Immigration Judge, *see Matter of Vizcarra-Delgadillo*, *supra*, was not changed or contradicted by the Board’s decision in *Matter of G-N-C,* 22 I. & N. Dec. 281 (BIA 1998). In *G-N-C*, the Board addressed the issueof whether a DHS motion to dismiss pursuant to 8 C.F.R. § 239.2(c) should be automatically granted when the respondent opposes the motion. *Matter of G-N-C,* 22 I. & N. Dec. at 282-84. While *G-N-C*  held that an Immigration Judge must adjudicate a DHS motion to dismiss pursuant to 8 C.F.R. § 239.2(c) on the merits when it is opposed by the respondent, in adjudicating the motion the Immigration Judge should not – and cannot – decide for DHS what is in the best interest of DHS. Rather, the Board’s decision in *G-N-C* is logically interpreted to stand for the proposition that the motion should be adjudicated by determining whether the respondent’s reasons for opposing the motion (e.g. the right to have his immigration proceedings heard by an Immigration Judge) outweigh DHS’ interests in having the case dismissed. In making this determination, it is not necessary, possible, or appropriate for the Immigration Judge to decide what is in the best interest of DHS. [↑](#footnote-ref-19)
20. It is also the Parties position that the Immigration Judge misinterpreted *G-N-C* to assert that he has some sort of de novo review of the prosecutorial discretion of DHS based on the Board finding that motions to dismiss must be adjudicated based on the merits of the motion. The Parties position is based on the fact that the term “adjudicate” is commonly understood to by the process of judicially settling a dispute. Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/adjudicate>. Under this common understanding of the term, there is nothing for a judge to adjudicate when there is no dispute to be settled. There is no reason to believe that the Board intended anything different when it held in *G-N-C* that an Immigration Judge must adjudicate a DHS motion to dismiss pursuant to 8 C.F.R. § 239.2(c) on the merits if it is opposed by the respondent. *Matter of G-N-C, 22 I. & N. Dec.* at 284. To the contrary, the Board specifically distinguished its decision in *G-N-C*, where the respondent opposed DHS’ motion, from its decision in *Matter of Vizcarra-Delgadillo* where the respondent, represented by competent counsel, joined the motion to dismiss. *See id*. [↑](#footnote-ref-20)
21. Notably, the Immigration Judge gives absolutely no reason why it is not in the best interest of the citizens of the United States to allow the respondent to seek to immigrate from abroad. I.J. at 2, (Joint Appendix Tab J p. 119) It is certainly in the best interest of the United States Citizen to whom she is married, whose interest the Immigration Judge ignores. The Immigration Judge also states that he will not dismiss proceedings because the respondent cannot adjust. This concern is completely misplaced as the respondent is not seeking to adjust; she is seeking to depart the United States and immigrate from abroad. By keeping proceedings pending, the Immigration Judge is in fact preventing the respondent from obtaining a provisional waiver, necessary to permit her to immigrate, as such a waiver cannot be granted to an alien in proceedings, unless such proceedings are administratively closed. *See* 8 CFR § 212.7(e)(4)(v), [↑](#footnote-ref-21)
22. *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-22)
23. *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-23)
24. *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-24)
25. *Cf. Ashburn*, 38 F.3d at 814 (noting that plea agreements serve to reduce the risks associated with a trial). [↑](#footnote-ref-25)