



**Practice Pointer: *Matter of S-O-G- & F-D-B-*
December 3, 2018**

On September 18, 2018, Attorney General (“AG”) Jeff Sessions yet again issued a self-certified decision, this time limiting the power of Immigration Judges (“IJs”) and the Board of Immigration Appeals (“BIA”) to dismiss or terminate removal proceedings, absent very narrow circumstances. In the decision [*Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 \(A.G. 2018\)](#), AG Sessions held that, consistent with his recently published decision in [*Matter of Castro-Tum*, 27 I&N Dec. 271 \(A.G. 2018\)](#), IJs have no inherent authority to terminate or dismiss removal proceedings. Notably, AG Sessions ruled that an IJ’s general authority set forth under the regulations to “take any other action consistent with applicable law and regulations as may be appropriate,” 8 C.F.R. § 1240.1(a)(1)(iv), does not provide any additional authority to terminate or dismiss removal proceedings beyond those authorities expressly set out in the relevant regulations. Finally, the AG instructed the IJs and the BIA to “recognize and maintain the distinction between a dismissal under 8 C.F.R. § 1329.2(c) and a termination under 8 C.F.R. § 1329.2(f).

Termination of removal proceedings has commonly been utilized by IJs to allow eligible respondents to pursue relief before other agencies outside of the immigration court, for example adjustment of status before USCIS or adjudication of an immigrant visa. Termination of removal proceedings for those who were both intent on pursuing and prima facie eligible for relief outside of the immigration court, in turn allowed the immigration judges to devote their limited time and resources on more complex and contested matters. This practice alert will examine the AG’s decision in *Matter of S-O-G- & F-D-B-*, as well as the impact going forward for Respondents in removal proceedings.

Matter of S-O-G-

In *Matter of S-O-G-*, the Respondent was a native and citizen of Mexico. The Department of Homeland Security (“DHS”) initiated removal proceedings against S-O-G- by issuing a Notice to Appear (“NTA”) dated March 15, 2015. S-O-G- was charged as being removable under § 212(a)(6)(A)(i) of the Immigration and Nationality Act (“INA”). S-O-G- conceded that she was removable as charged and indicated that she would apply for relief from removal. However, the DHS subsequently learned that S-O-G- had previously been ordered removed *in absentia* on July 29, 2002. For this reason, the DHS moved to dismiss the case without prejudice. The IJ granted the DHS’s motion, although referring to it as a “motion for termination of these proceedings.” The reason for the termination was because the respondent was already subject to a removal order. The resulting effect of the decision to terminate proceedings was that it denied S-O-G- the opportunity to apply for relief from removal.

S-O-G- appealed the IJ’s decision to the BIA, both “challenging the DHS’s reliance on its prosecutorial discretion and arguing that the termination violated her due process right to apply to

the IJ for relief or protection from removal.” However, the Board affirmed the IJ’s decision to terminate proceedings, finding that the DHS indeed did have prosecutorial discretion to seek dismissal of proceedings. The Board specifically found that the DHS's motion was explicitly permitted under the governing regulations. It also rejected S-O-G-'s argument that the order to dismiss proceedings had violated her due process rights.

Matter of F-D-B-

The Respondent in *Matter of F-D-B-* was a citizen of Brazil. She had entered the United States without inspection in 2004. Shortly thereafter, the DHS placed F-D-B- in removal proceedings, charging her as being removable under section § 212(a)(6)(A)(i) of the INA. F-D-B- failed to appear for a hearing in removal proceedings in 2004. Accordingly, the IJ ordered her removed *in absentia*. She was not removed, however, and on December 9, 2013, F-D-B- filed a motion to reopen proceedings and rescind her *in absentia* order. This motion to reopen was unopposed and granted by the IJ. After reopening proceedings, F-D-B- conceded that she was removable as charged. However, she had now obtained an approved Immigrant Visa petition as the immediate relative of a U.S. Citizen. Based on her having an approved immigrant visa petition, her case was then administratively closed in 2016 pending the adjudication of her application for an I-601A provisional unlawful presence waiver by the USCIS.

F-D-B- obtained an I-601A provisional unlawful presence waiver approval from the USCIS, and her case was then re-calendared before the IJ. On December 14, 2017, F-D-B- moved to terminate the removal proceedings and stated that she intended to complete her consular processing for her immigrant visa while abroad. The DHS opposed this motion on the basis that her removability had been established. The DHS argued that F-D-B- should seek voluntary departure or relief from removal on some other basis. The IJ, however, granted F-D-B-'s motion and terminated proceedings.

DHS subsequently appealed the IJ’s decision to the BIA. However, on July 18, 2018, the Board affirmed the IJ’s order finding that “voluntary departure could result in the revocation of her provisional waiver or . . . an additional ground of inadmissibility that cannot be waived by the provisional waiver.” Consequently, in light of these facts and circumstances, the Board found that the IJ’s decision was appropriate.

Attorney General’s Holding

Matter of S-O-G- AG Sessions held that the BIA and IJ had properly followed the regulations in dismissing S-O-G-'s removal proceedings, because she was already subject to an order of removal. Specifically, he agreed with the BIA that dismissal was appropriate either because the NTA initiating those proceedings had been improvidently issued, in accordance with 8 C.F.R. § 239.2(a)(6), or under 8 C.F.R. § 239.2(a)(7) because "DHS had demonstrated that moving forward in this proceeding, duplicating its previous efforts, was not in the best interests of the Government."

Matter of F-D-B- By contrast, AG Sessions noted that the IJ in *Matter of F-D-B-* "did not identify any statutory or regulatory basis to justify terminating the removal proceedings." Rather, the judge "cited only the facts of the matter, the court's 'busy docket, and her own 'discretion' to terminate the case." He continued, "Similarly, the Board cited no legal basis to affirm the termination, relying solely on 'the particular facts and circumstances of the case' to support its decision." Accordingly, the matter was remanded to the Immigration Judge for further instructions.

Implications of *S-O-G-* & *F-D-B-*

Matter of S-O-G- & F-D-B- further expands the AG's decision in *Matter of Castro-Tum* to limit the authority of immigration judges to appropriately handle their ever-growing dockets. While *Matter of Castro-Tum* concerned the IJ's authority to administratively close cases, *Matter of S-O-G- & F-D-B-* drastically limits the IJ's and the BIA's authority to terminate or dismiss removal proceedings. The tool of administrative closure, which when available to an IJ and the BIA, was used to temporarily remove a case from the IJ's active calendar or the Board's docket. An order of administrative closure is not final. At any time after a case has been administratively closed, either the Respondent's counsel or DHS may move to re-calendar it before the IJ, or re-instate the appeal before the Board. On the other hand, the dismissal or termination of proceedings constitutes a conclusion of the proceedings whereby the IJ or the BIA issues a final order. In the absence of a successful appeal, DHS must file another charging document to initiate new removal proceedings on the case.

AG Sessions reminded IJs and the Board to distinguish between the terms "dismissal" and "termination," which have distinct meanings under law. However, his decision in *Matter of S-O-G-* also made it clear that a failure to distinguish between the terms constitutes "harmless error" if the proper legal standard was applied in the decision.

Going forward, AG Sessions has made clear that he believes IJs may only dismiss or terminate proceedings on grounds explicitly set forth in the applicable regulations. Those grounds referenced are the aforementioned 8 C.F.R. § 1239.2(c) (motion to dismiss filed by DHS Counsel, as in the case of *S-O-G-*) and 8 C.F.R. § 1239(f), which involves very limited authority by an IJ to terminate removal proceedings for an LPR Respondent as to allow them to proceed "to a final hearing on a pending application or petition for naturalization when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors." *Id.* Accordingly, factual scenarios that would justify termination under 8 C.F.R. § 1239(f) are anticipated to be very rare. Nevertheless, in a footnote, AG Sessions questions the BIA's authority to terminate removal proceedings pursuant to 8 C.F.R. § 1239.2(f) given the plain text of the regulation. He notes that the regulation states that "[a]n immigration judge may terminate removal proceedings..." (Emphasis added) However, since this question was beyond the scope of the opinion, he did not address it. It will be worth watching whether this specific question is addressed at a later date.

Practitioners should be zealous in representing their clients and challenging removability when appropriate. If DHS fails to sustain removability as charged, an immigration judge must still terminate removal proceedings pursuant to 8 C.F.R. § 1240.12(c). There are also other narrow instances when termination may be available, such as if a respondent is granted relief outside of court, which affects the Respondent's immigration status and underlying basis for removal. For instance an I-589 application granted for a UAC by the asylum office or an I-751 petition granted by the USCIS for a conditional permanent resident would seem to still merit termination.

Importantly, one holding of the decision is that granting an I-601A provisional unlawful presence waiver and seeking consular processing of one's immigrant visa does not present a ground for termination or dismissal of removal proceedings outside of the grounds set forth in the regulations. Accordingly, respondents in this situation may be left with the less attractive option of accepting voluntary departure prior to proceeding with consular processing. Coordinating a Respondent's voluntary departure to their home country in conjunction with the scheduling of an immigrant visa interview will certainly pose timing concerns based upon inconsistent wait times for immigration

visa interviews abroad. Practitioners must also be prepared to now pursue relief applications before the immigration judge, which traditionally had been handled by USCIS, to unburden the Court. This is certain to include many I-485 applications to adjust status.

Challenging *S-O-G- & F-D-B-*

Similarly to those in [Matter of Castro-Tum](#), there are possible arguments to challenge *Matter of S-O-G- & F-D-B-*, including (1) IJ's general authority to terminate or dismiss cases is inherent in their broader authority to manage dockets and decide cases; (2) the decision in *S-O-G- & F-D-B-* raises due process and retroactivity concerns; and (3) AG Sessions lacked authority under the Administrative Procedure Act to strip immigration judges of the power to terminate or dismiss the removal proceedings through a self-certified decision.

As previously stated, practitioners must be prepared to challenge removability when appropriate and must also be prepared to now pursue relief applications before the immigration judge, which traditionally had been handled by USCIS, such as applications to adjust status. Nevertheless, practitioners should consider seeking termination when appropriate and always preserve these challenges on appeal. In instances where DHS moves to dismiss a matter that is improper and detrimental to the client, a written opposition should be filed. On appeal to the BIA, attorneys should brief relevant issues. Lastly, be prepared, be creative, and be persistent when seeking termination of proceedings, and do not be afraid to appeal the case if the decision does not favor your client.

Additional Resources:

- AILA Press Release: [Attorney General's Concerted Effort to Strip Immigration Judges of Judicial Independence Continues](#) – September 19, 2018
- AILA Quicktake: [Attorney General's Decision in Matter of S-O-G- & F-D-B- - September 20, 2018](#)
- AILA Call for Examples: [Continuances and Administrative Closure Following EOIR Policy Changes](#) – August 28, 2018
- AILA Policy Brief: [Restoring Integrity and Independence to America's Immigration Courts](#) – September 28, 2018
- AILA Featured Issue Page: [Immigration Courts](#)