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Non-Detained

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN ANTONIO, TEXAS

In the Matter of:	§	
Rosa	§	**File:**
In Removal Proceedings	§	

Immigration Judge:
Honorable Judge Harlow

Individual Hearing:
May 10, 2022 at 8:30 a.m.

RESPONDENT'S AMENDED REPLY TO THE DEPARTMENT OF HOMELAND SECURITY'S MOTION TO DISMISS

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TO THE HONORABLE IMMIGRATION JUDGE:

For the reasons that follow, the Court should deny the Department's motion.

ARGUMENT

1. DHS MAY NOT UNILATERALLY MOVE TO DISMISS PROCEEDINGS AFTER JURISDICTION HAS VESTED WITH THE COURT.

It is unquestionable that the Department of Homeland Security has sole discretion to initiate removal proceedings. *See* 8 C.F.R. 1003.14(a); *see also* section 239(a) of the Immigration and Nationality Act; *Matter of Ordaz*, 26 1&N Dec. 637, 641 (BIA 2015) (noting that DHS has the sole discretion to commence removal proceedings). Likewise, the Department may unilaterally cancel a Notice to Appear before jurisdiction vests with an Immigration Judge. see 8 C.F.R. 239.26), 1239.20. However, the language of 8 CF.R. 239.2 and 1239.2 "marks a clear boundary between the time prior to commencement of proceedings, where a [DHS] officer has decisive power to cancel proceedings, and the time following commencement, where the . . .

officer merely has the privilege to move for dismissal of proceedings." *Matters of Jaso & Ayala*, 271&N Dec. 557, 558 (BIA 2019) (*quoting Matter of G-N-C-*, 221&N Dec. 281, 284 (BIA 1998) (*emphasis added*)).

After jurisdiction vests, it is the IJ's duty to adjudicate the case and the Department **may** only move for dismissal for certain specified reasons. 8 C.F.R. 1004.14, 239.2(a)(7), (c), 1239.2(c); *Matters of Jaso & Ayala*, 27 1&N Dec. 557, 558 (BIA 2019). The Immigration Judge **may**, but is not required, to grant a motion to dismiss. *Matter of S-O-G- & F-D-B-*, 27 1&N Dec. 462, 465-66 (A.G. 2018) (discussing the IJ's authority to dismiss or terminate proceedings only for those reasons specified at 8 C.F.R. 239.2(a)), *abrogated by Gonzalez v. Garland*, 16 F.4th 131 (4th Cir. 2021) (holding that IJ's have the inherent authority to terminate removal proceedings generally); *see also Matter of G-N-C-*, 22 1&N Dec. at 284 ("[T]he regulation presumably contemplates not just the automatic grant of a motion to [dismiss], but an informed adjudication by the Immigration Judge [ ] based on an evaluation of the factors underlying the [DHS's] motion.").

The Court should consider a party's motion to dismiss or terminate proceedings under the standard articulated in *Matter of Avetisyan*, 25 1&N Dec. 688 (BIA 2012). That is, an immigration judge mustn't provide absolute deference to either party's position but must consider whether a given actions is appropriate under the circumstances. *See also id.* at 694 ("[W]e are persuaded that neither an Immigration Judge nor the Board 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.").

Ill. RESPONDENT IS STATUTORILY ELIGIBLE FOR RELIEF AND SHOULD BE PERMITTED TO CONTINUE WITH HER APPLICATION.

As outlined above, Respondent has been in removal proceedings for many years. Her application for cancellation of removal has been pending since **2017**. Respondent acknowledges that "[c]ancellation of removal is a form of discretionary relief which does not give rise to a substantive interest protected by the Due Process Clause." *Lim v. Holder*, 710 F.3d 1074, 1076 (9th Cir. 2013). Indeed, the Ninth Circuit has unequivocally held that denial of a discretionary form of relief cannot violate a substantive due process interest. *Id.* That said, there is a marked difference between denial of a discretionary' form of relief, and refusal to adjudicate it.

The U.S. Supreme Court made clear many years ago that all noncitizens, regardless of their immigration status, are entitled to removal proceedings which "conform to traditional standards of fairness." *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. at 212. Proceedings are fundamentally unfair when, inter alia, the noncitizen is prevented from reasonably presenting his or her case. *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000). The moment the Department of Homeland Security placed Respondent into removal proceedings, she became eligible to apply for relief from removal, and entitled to a decision on the merits. *See* 8 C.F.R. 1240.11(2) ("The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing") (emphasis added).

In *Matters of Jaso and Ayala, supra*, the Respondents applied for asylum before USCIS, and their applications were referred to the Court for adjudication in removal proceedings. At the very first master calendar hearing, the Respondents, through their same attorney, withdrew their applications for asylum and immediately filed for cancellation of removal for non-lawful permanent residents. The DHS filed Motions to Dismiss noting the questionable manner in

which the Respondents, through their attorney, changed the requested form of relief at their first opportunity in Immigration Court after failing to appear at their asylum interview before USCIS. In *Jaso and Ayala, supra,* the BIA upheld the Immigration Judge's decision to grant DHS' Motion to Dismiss finding that "An Immigration Judge has the authority to grant a DHS motion to dismiss removal proceedings pursuant to 8 C.F.R. Section 239.2(a)(7) upon ***finding that it is an abuse of the asylum process to file a meritless asylum application with the USCIS for the sole purpose of seeking cancellation of removal in the Immigration Court".*** (*emphasis added*). The record, in *Jaso*, supported the Immigration Judge's finding that the Respondents' conduct constituted such an abuse. The BIA found that the ***withdrawal*** of the Respondents applications for asylum in *Jaso,* "after the issuance of the Notice to Appear" ***constituted changed circumstances. (emphasis added).*** The BIA determined that the series of actions by the Respondents after applying for asylum changed the circumstances in their case "to such an extent that continuation [of the proceedings was] no longer in the interest of the government" pursuant to 8 C.F.R. **§** 239.2(a)(7), and the government's motion was therefore valid. Id., at 559.

In the instant case, Respondent **did not steer herself** into removal proceedings. It was the DHS that apprehended the Respondent, detained her after determining that she was in the United States without admission or parole, and issued the Notice to Appear on September 25, 2018. Respondent was released on bond. Thereafter, Respondent appeared, with her attorney, at a master calendar hearing and admitted all the allegations in the Notice to Appear and conceded removability as charged. The Court found that removability was established by clear, convincing, and unequivocal evidence. Respondent submitted her application for cancellation of removal for non-lawful permanent residents and she was set for an Individual hearing on May 10, 2022. Respondent, through her attorney, complied with filing of all supporting

documentation prior to the Individual Hearing. DHS has now moved to terminate days before the Individual Hearing. Respondent, in this case, ***has not abused the USCIS Asylum*** system ***nor has she submitted a meritless application for cancellation of removal for non-lawful permanent residents.*** (emphasis added). The relief that the Respondent seeks is clearly one that only and Immigration Judge can grant in removal proceedings, properly instituted, without having abused the system. There are no changed circumstances such as "the questionable manner in which the Respondents and their attorney changed the requested form of relief at their first opportunity", as in *Jaso, supra*. DHS' simply wants to prejudice the Respondent by dismissing the Notice to Appear, thus depriving her of her one and only opportunity to seek relief before the Court. If dismissal is granted, Respondent will be left in the United States with no way to seek to legalize her status although she has two U.S. citizen children who are children of special needs, where she can clearly apply for cancellation of removal before the Court, as intended by Congress when Congress enacted the Immigration and Nationality Act, as amended in 1996.

While many individuals in removal proceedings may welcome the dismissal of their NTAs, Respondent does not; he wishes to pursue his application for cancellation of removal, which is based on the exceptional and extremely unusual hardship her U.S. children will suffer if she is not permitted to remain in the United States.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that the Immigration Judge not grant the Department's motion to dismiss his removal proceedings.

Respectfully submitted on this 6th day of May 2022.

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Bertha A. Zuniga