



**Practice Alert: *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018)**

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**I. Introduction**

In *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018) the Attorney General held that immigration judges have no inherent authority to terminate removal proceedings. Although many have expressed concern about the scope and breadth of the decision, we write to reassure advocates that the text of the Attorney General’s decision neither purports to have an impact on termination remedies supported by independent legal authority nor could it do so.

While *Matter of S-O-G- & F-D-B-* eliminates an immigration judge’s ability to exercise her independent *discretion* to terminate proceedings, it is a narrow decision that does not affect motions to terminate that are grounded in the law and *require* immigration judges to terminate proceedings.

This practice alert describes the narrow scope of this decision and presents illustrative contexts in which termination remedies continue to apply. An immigration judge continues to maintain the authority to terminate for any nondiscretionary basis supported by BIA or judicial decisions. Of course, a noncitizen is also free to challenge the holding of *Matter of S-O-G- & F-D-B-* itself.

**II. *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018)**

On September 18, 2018, the Attorney General certified to himself and decided two BIA decisions – *Matter of S-O-G-* and *Matter of F-D-B-*. In *Matter of S-O-G-*, the BIA affirmed an immigration judge’s decision to grant DHS’s motion to dismiss the respondent’s case after the agency learned of the respondent’s prior in absentia removal order. The Attorney General affirmed the case.

In *Matter of F-D-B-*, the BIA, according to the Attorney General, affirmed an immigration judge’s decision to grant respondent’s motion to terminate where the respondent had obtained an immigrant visa and a provisional unlawful presence waiver but was awaiting a consular interview abroad. The Attorney General vacated *Matter of F-D-B-*.

In *Matter of S-O-G- & F-D-B-*, the Attorney General held that the BIA erred in *Matter of F-D-B-* “because the immigration judge did not purport to exercise any specific regulatory or delegated authority to terminate.” 27 I&N Dec. 462, 468 (A.G. 2018). Significantly, the decision holds that an immigration judge can always terminate proceedings where DHS has not sustained charges of removability against a respondent. *Id.* The Attorney General also highlights the two

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specific circumstances that allow an immigration judge to exercise her own *discretion* to terminate or dismiss proceedings: (1) Under 8 C.F.R. § 1239.2(f) where a respondent is eligible for naturalization, has a pending naturalization application and has exceptionally appealing or humanitarian factors in their case, and (2) under 8 C.F.R. § 1239.2(c) where DHS moves to dismiss a notice to appear. *Id.* at 466. The Attorney General specifically notes that “apart from these circumstances, the relevant statutes and regulations do not give immigration judges the *discretionary* authority to dismiss or terminate removal proceedings after those proceedings have begun.” *Id.* (emphasis added).

This decision therefore has no bearing on motions to terminate that are premised on other legal bases that *require* judges to terminate proceedings. As the Attorney General notes when citing *Matter of J-A-B- & I-J-V-A-* “[i]t is well settled that an [i]mmigration [j]udge may only ‘terminate proceedings when the DHS cannot sustain the charges [of removability] or in other specific circumstances consistent with the law and applicable regulations.’” 27 I&N Dec. 168, 169 (BIA 2017) (quoting *Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 45 (BIA 2012) (emphasis added)).

The Attorney General has no authority to overturn Supreme Court or circuit case law that would compel an immigration judge to grant a motion to terminate. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Attorney General Sessions recognizes, as he must, that this limitation applies to him. *Matter of Castro-Tum*, 27 I&N Dec. 271, 287 (BIA 2018).

This decision notably does not overrule *any* BIA precedent. Decisions that establish a basis for termination, such as *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980) remain valid. 8 C.F.R. §1003.1(g) (providing that a decision of the BIA is binding unless overruled). *See Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014) (recognizing implicit overruling); *Matter of E-L-H*, 23 I&N Dec. 814 (BIA 2005) (addressing explicit overruling).

### III. Motions to Terminate Not Described in *Matter of S-O-G- & F-D-B-*

As noted above, immigration judges must terminate removal proceedings where they are required to do so by law. There are many examples, a few of which are described below. This list is merely illustrative and does not purport to be exhaustive.

- ***Lack of Subject Matter Jurisdiction***: Respondents can always seek termination for lack of subject matter jurisdiction or to challenge an immigration judge’s hearing of a case as being beyond the scope of her authority or *ultra vires*. *See, e.g., Matter of Badalamenti*, 19 I&N Dec. 623, 626 (BIA 1988) (terminating exclusion proceedings for a noncitizen who was not an applicant for admission). The NIPNLG also encourages its members to challenge the validity of NTA’s lacking time and place information under *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) and investigate filing

termination motions where DHS fails to comply with the certification requirements in 8 U.S.C § 1229(e)(2) after arresting individuals in certain protected locations.<sup>2</sup>

- **Certain Regulatory Violations:** In *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980), the BIA recognized a termination remedy when an agency violates a regulation intended to benefit a respondent. The decision required that a noncitizen demonstrate prejudice for violating certain regulations and determined that prejudice inheres as to others. *Garcia Flores*, 17 I&N Dec. at 329. Detaining or interrogating a suspected noncitizen based on racial or ethnic stereotyping is the type of egregious regulatory violation that warrants terminating without a separate showing of how the violation prejudiced the respondent. *Sanchez v. Sessions*, \_\_\_ F.3d \_\_\_, 2018 WL 4495220, at \*8-9 (9th Cir. Sept. 19, 2018); *Maldonado v. Holder*, 763 F.3d 155, 159 (2d Cir. 2014).
- **Res Judicata:** Respondents can file a motion to terminate arguing that res judicata bars DHS from filing a notice to appear based on removal charges it could have brought in a prior terminated proceeding. The doctrine of res judicata precludes a party from relitigating an issue that was or could have been litigated in a prior proceeding in which there was a final judgement on the merits. *Federated Dep't Stores v. Moitie, Inc.*, 452 U.S. 394, 398 (1981). Both the BIA and federal courts recognize that res judicata applies in immigration proceedings. *See, e.g., Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007) (holding that res judicata bars DHS from initiating a second removal proceeding on the basis of charges that it could have brought in a prior proceeding); *Medina v. INS*, 993 F.2d 499, 503-4 (5th Cir. 1993) (finding that res judicata is a “venerable legal canon” that applies to final valid judgments of the BIA); *Matter of Fedorenko*, 19 I&N Dec. 57 (BIA 1984) (finding that res judicata prevents an individual from relitigating issues in a deportation proceeding that were decided in a prior denaturalization action).

#### IV. Conclusion

*Matter of S-O-G- & F-D-B-* is a narrow decision that circumscribes the context under which an immigration judge can discretionarily terminate removal proceedings. It has no impact on motions to terminate grounded in law – be it binding federal case law, board decisions, or statutory authority – that require immigration judges to grant motions to terminate.

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<sup>2</sup> For more information about this remedy, please see the NIPNLG’s practice advisory entitled “Remedies to DHS Enforcement at Courthouses and Other Protected Locations,” [https://www.nationalimmigrationproject.org/PDFs/practitioners/practice\\_advisories/gen/2017\\_12Apr\\_remedies.pdf](https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2017_12Apr_remedies.pdf) on the subject.