PRACTICE ADVISORY[1]
March 22, 2018

MOTIONS FOR A CONTINUANCE

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[1] This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. The cases cited herein do not constitute an exhaustive search of relevant case law in all jurisdictions. The author of this practice advisory is Aaron Reichlin-Melnick. The Council is grateful for the assistance of Cecilia Friedman Levin, Katy Lewis, Gail Pendleton, Mary Slattery, and Jessica Zhang for reviewing and providing feedback. Questions regarding this practice advisory should be directed to clearinghouse@immcouncil.org.

I. Introduction

Continuances are an essential part of the everyday practice of any immigration attorney who appears in immigration court. In any removal case, it is often necessary to delay a hearing to best represent a client. During the Obama Administration, motions for continuances by all parties—including joint motions—significantly increased, rising by 23% between 2006 and 2015.[2] This increase was due in large part to the increased use of prosecutorial discretion by DHS. The Trump administration's elimination of most forms of prosecutorial discretion, combined with a new push to reduce immigration court backlogs, likely will make it more difficult to obtain continuances. Considering these shifts, this practice advisory aims to provide an overall review of continuance practice in immigration court, as well as a review of federal court and Board of Immigration Appeals (BIA) precedent on continuances, including analysis of various scenarios in which continuances are most appropriate.

II. Overview of Continuances

What is a continuance?

A continuance or adjournment is a docket-management tool that an Immigration Judge (IJ) may utilize to move an upcoming hearing from one scheduled date to another or to pause an ongoing hearing and move it to a future date.

[2] *See* U.S. Gov't Accountability Off., *Immigration Court: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges* (June 1, 2017).

What authority gives immigration judges the power to grant continuances?

Two regulations authorize continuances in removal cases: 8 C.F.R. § 1003.29, which permits IJs to continue a hearing for good cause shown, and 8 C.F.R. § 1240.6, which permits IJs to grant a "reasonable adjournment at his or her own instance" or for good cause shown by a requesting party. The BIA has suggested that the power to grant continuances also arises from regulations which permit IJs, in their discretion, to regulate the course of the hearing and take any action consistent with applicable law and regulations as may be appropriate and necessary for the disposition of such cases, which may include deferring action in a case to promote the "interests of justice and fairness to the parties."[3]

How long does a continuance last?

An IJ has discretion to determine the length of a continuance, so long as the period is "reasonable." 8 C.F.R. § 1240.6. However, the BIA has advised against continuances or similar deferments that would indicate that the IJ is attempting to exercise prosecutorial discretion or otherwise unreasonably delay removal of a removable noncitizen.[4]

The length of a continuance often depends on the size and flexibility of the IJ's docket, which is also affected by whether the respondent is included in the Executive Office of Immigration Review's ("EOIR") case processing priorities.[5] Continuances in detained cases, for example, often are shorter than those in non-detained cases.[6] Average continuance times vary among courts, depending on the practices of individual judges and the number of pending cases.[7] Local

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[3] *Matter of Avetisyan*, 25 I&N Dec. 688, 691 (BIA 2012) (citing 8 C.F.R. §§ 1003.10(b), 1240.1(a)(1)(iv), (c)).

[4] *See Matter of W-Y-U-*, 27 I&N Dec. 17, 19-20 (BIA 2017) (holding that DHS has "exclusive jurisdiction" over prosecutorial discretion and cautioning against "unreasonable delay" in adjudication of removal proceedings); *Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. 168 (BIA 2017) (reiterating that IJs have a "duty to adjudicate" cases before them and may not act in a way that "impinges upon the [DHS's] exclusive authority to control the prosecution of [removable] aliens" (citing *Matter of Roussis*, 18 I&N Dec. 256, 258 (BIA 1982))).

[5] Pursuant to a 2018 memorandum, EOIR is required to prioritize "all cases involving individuals in detention or custody," as well as "cases subject to a statutory or regulatory deadline, cases subject to a federal court-ordered deadline, and cases otherwise subject to an established benchmark for completion." *See* EOIR Director James McHenry, *Case Priorities and Immigration Court Performance Measures* (Jan 17, 2018), at 2 (hereinafter "2018 Case Priorities Memorandum"). This memorandum supersedes all previous case processing priorities and rescinds guidance issued at the beginning of the Trump administration. *See* Chief Immigration Judge MaryBeth Keller, *Case Processing Priorities*, EOIR (Jan 31, 2017).

[6] The average length of a continuance to find counsel was 24 days for detained respondents and 119 days for those never detained. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 36 n.137 (2015).

[7] For example, at the height of the Obama-era prioritization of case processing, the length of continuances between the first and second hearings for priority cases ranged from around 30

practitioners familiar with judges' dockets are the best resource for determining the likely length of a continuance.

Who can ask for a continuance?

Either the respondent or DHS may request a continuance, or the IJ may *sua sponte* continue a case.[8] Except in specific circumstances detailed below, neither party is entitled to automatic continuances and both the respondent and DHS must show good cause to justify a continuance.[9]

When should you ask for a continuance?

Continuances may be requested in a variety of circumstances, including, but not limited to, the following:

1. To request time for the respondent to acquire an attorney;
2. To request time for attorney preparation or evidence-gathering;
3. When a medical problem or other emergency prevents either the respondent or the attorney from appearing at a hearing;
4. When either the attorney or the respondent has an unexpected conflict with a hearing;
5. When the respondent is awaiting adjudication of a form of relief outside of immigration court, such as an I-130 Petition for Alien Relative or any USCIS-adjudicated application;
6. When the respondent is not competent to proceed;
7. To pursue a family court order when seeking Special Immigrant Juvenile Status;
8. To await the outcome of a pending direct appeal of a criminal conviction;
9. To await the outcome of pending post-conviction relief; or
10. To give DHS the opportunity to correct a defective or incomplete Notice to Appear ("NTA") and to permit the respondent an opportunity to respond to the new charges.

As with all continuances, the party requesting the continuance—in these examples, the respondent—bears the burden of proof to show good cause for the continuance. The BIA has provided significant guidance on factors that IJs should consider when evaluating whether good cause exists, as detailed in Section III below.

What is the difference between a continuance and administrative closure?

Administrative closure is a docket management tool in which a case currently pending in immigration court or at the BIA is removed from the court or BIA's active docket.[10] Unlike a

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days in Atlanta, GA to roughly 125 days in Memphis, TN. *See* David Hausman & Jayshri Srikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*, 84 Fordham L. Rev. 1823, 1829 (2016). Processing times for non-priority cases were likely significantly longer.

8 8 C.F.R. §§ 1003.29, 1240.6.

9 8 C.F.R. § 1003.29.

10 *Matter of Avetisyan*, 25 I&N Dec. at 690, 692.

continuance, an administratively closed case remains off the court's active docket until either the respondent or DHS moves to "recalendar" it to the active docket.

Because there is no need to return to court while a case is administratively closed, the BIA has indicated that it "is an attractive option" for cases that are not likely to be resolved quickly, as it "avoid[s] the repeated rescheduling of a case that is clearly not ready to be concluded."[11]

What is the effect of a continuance on an asylum EAD clock?

A request for a continuance by a respondent will stop the asylum EAD clock.[12] Additionally, the asylum clock will stop if *both* parties request a continuance.[13] By contrast, the EAD clock will continue to run if the IJ continues the case *sua sponte* or grants a DHS motion for a continuance.[14] For that reason, practitioners may wish to take no position on DHS requests for a continuance.

How has the use of continuances changed under the Trump administration?

During the first year of the Trump administration, the Department of Justice ("DOJ") has taken aim at reducing the large backlog of cases in immigration courts, which it has largely blamed on systematic issues within EOIR and on immigration lawyers.[15] The DOJ has repeatedly attacked immigration attorneys for allegedly frivolous conduct which delays removals, including Attorney General Sessions' infamous assertion that "dirty immigration lawyers" were flooding the immigration courts by encouraging noncitizens to make false claims of asylum.[16]

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[11] *Matter of Hashmi*, 24 I&N Dec. 785, 791 n.4 (BIA 2009). On January 4, 2018, Attorney General Sessions certified the case of *Matter of Castro-Tum*, 27 I&N Dec. 187 (A.G. 2018), asking interested organizations to submit briefing on a series of questions relating to administrative closure, including whether IJs and the BIA have statutory or regulatory authority to order administrative closure. Should Sessions end administrative closure or severely restrict it, the use of continuances would be impacted. For more information on circumstances where administrative closure may be appropriate, see the American Immigration Council's 2017 practice advisory, Administrative Closure and Motions to Recalendar.

[12] EOIR Operating Policies and Procedures Memorandum 13-02: The Asylum Clock (Dec. 2, 2013), at 12.

[13] EOIR Operating Policies and Procedures Memorandum 17-02: Definitions and Use of Adjournment, Call-up, and Case Identification Codes (Oct. 5, 2017), at 6.

[14] EOIR Operating Policies and Procedures Memorandum 13-02: *The Asylum Clock* (Dec. 2, 2013), at 12.

[15] *See, e.g.*, Dep't of Justice, *Backgrounder on EOIR Strategic Caseload Reduction Plan* (Dec. 5, 2017). By December 2017, over 665,000 cases were pending in the immigration courts. *Immigration Court Backlog*, TRAC IMM, http://trac.syr.edu/phptools/immigration/court_backlog/.

[16] Attorney General Jefferson Beauregard Sessions, Remarks to the Executive Office of Immigration Review (Oct 12, 2017).

In December 2017, the DOJ took aim at continuances practices, claiming that "Representatives of illegal aliens have purposely used tactics designed to delay the adjudication of their clients' cases" and citing as evidence increased continuances—both DHS and respondent-requested—from 2006 to 2015.[17]

With the rescission of the Obama Administration's memoranda on prosecutorial discretion, practitioners report that DHS will now routinely oppose continuances, including those that were formerly considered routine, such as continuances for attorney preparation. In addition, where DHS would have previously agreed to administrative closure, practitioners now report that DHS only will agree to continuances.

On July 31, 2017, EOIR issued Operating Policies and Procedures Memorandum ("OPPM") 17-01, *Continuances*, a guideline for IJs on "fair and efficient docket management" through use of continuances.[18] The guidance states that "it is more important than ever that Immigration Judges ensure that our resources are used efficiently" in light of the immigration court backlog, and claims that delays caused by "granting multiple and lengthy continuances" have "exacerbate[d] already crowded immigration dockets."[19] Although it repeatedly clarifies that continuances must be granted if good cause exists, the guidance, if strictly followed, may greatly reduce the use of continuances.[20]

EOIR also has taken aim at continuances through modifications to IJ case completion goals. In late 2017, EOIR began the process of implementing a new set of case completion goals into the collective bargaining agreement with the National Association of Immigration Judges, which would tie goals directly to IJ performance reviews.[21] If implemented, these goals could put significant pressure on IJs to resolve cases rapidly. EOIR also rescinded guidance that previously exempted cases involving children from case completion goals.[22] As discussed in Section III

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17 *See* DOJ Backgrounder, *supra* note 15, at 1.

18 EOIR Operating Policies and Procedures Memorandum 17-01: *Continuances* (July 31, 2017). This memorandum "supplements and amends" OPPM 13-01, *Continuances and Administrative Closure*. EOIR Operating Policies and Procedures Memorandum 13-01: *Continuances and Administrative Closure* (Mar. 7, 2013).

19 OPPM 17-01, *supra* note 18, at 2.

20 *See, e.g.*, *id.* at 3 (declaring that "Immigration Judges must be [] vigilant in rooting out continuance requests that serve only as dilatory tactics."). For more analysis on OPPM 17-01, *see* Section III, *infra*.

21 *See, e.g.*, American Immigration Lawyers Ass'n, *Imposing Numeric Quotas on Judges Threatens the Independence and Integrity of Courts* (Oct. 12, 2017); 2018 Case Priorities Memorandum, *supra* note 5, at 5 n.6 (noting that bargaining was ongoing).

22 *See* EOIR Operating Policies and Procedures Memorandum 07-01, *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children* (May 22, 2007) (noting that "when considering requests for continuances, immigration judges should be mindful that cases involving alien children are exempt from case completion goals and aged case completion deadlines"), *rescinded by* EOIR Operating Policies and Procedures 17-03, *Guidelines for*

below, however, an IJ *cannot* consider case completion goals in granting or denying a continuance.

On January 17, 2018, EOIR Director James McHenry issued *Case Priorities and Immigration Court Performance Measures*, a memorandum outlining a series of new, non-binding, case completion goals which "will be tracked by EOIR" on a court-by-court basis.[23] These goals include requirements that 85% of all detained removal cases be completed within 60 days of filing an NTA and that 85% of all non-detained removal cases be completed within 365 days of filing the NTA.[24] Courts that fail to meet these goals may be given "specialized attention in the form of additional resources, training, court management, creative thinking and planning, and/or other action as appropriate."[25]

III. Guidance on Requesting Continuances

How do you make a motion for a continuance?

A motion for a continuance may be made orally or in writing. If submitted in writing, the motion must comply with the Immigration Court Practice Manual. It should "set forth in detail the reasons for the request," and "include the date and time of the [upcoming] hearing, as well as preferred dates" for a rescheduled hearing.[26] Because the requester bears the burden of showing good cause, a motion to continue should be supported with evidence of the good cause.[27]

Can you oppose a DHS request for a continuance?

Yes. A significant percentage of continuances are requested by DHS.[28] However, like the respondent, DHS must still articulate good cause for the continuance.[29] Because the IJ should not grant pro forma continuances to DHS, practitioners should be prepared to argue against an unreasonable or unsupported motion from DHS. Practitioners should also be aware that one of the most common reasons DHS requests a continuance is to conduct background checks and

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Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children (Dec. 20, 2017) (containing no such language).

[23] 2018 Case Priorities Memorandum, *supra* note 5, at 4-5. Practitioners report that in at least some courts, IJs are advancing long-pending cases to "special master calendar" hearings and resetting these cases in an expedited manner.

[24] *See id.* at Appendix A. Given the current backlogs, the memorandum admits that some of these goals are merely "aspirational." *Id.* at 5.

[25] *Id.* at 5.

[26] Immigration Court Practice Manual at § 5.10(a).

[27] 8 C.F.R. § 1003.29

[28] *GAO Report: Actions Needed to Reduce Case Backlog*, *supra* note 2, at 124 (showing that Respondent-related continuances were 66% of total continuances, compared to 14% DHS-related, 11 % IJ-related, and 9% "operational-related").

[29] 8 C.F.R. § 1003.29

biometrics prior to an IJ's grant of relief.[30] Because such background checks are required by regulation, the IJ almost always will grant such a continuance.[31]

Because DHS bears the burden to establish removability of a deportable noncitizen,[32] practitioners should consider opposing any DHS request for additional time to gather evidence of removability. Alternatively, practitioners should consider requesting that the IJ set a deadline for DHS to submit any documents establishing removability. If DHS has not produced sufficient evidence to establish removability, practitioners should consider a motion to terminate proceedings, especially where DHS has been granted multiple continuances and still has not produced sufficient evidence to establish removability.

In which scenarios has the BIA suggested that a continuance should be granted?

Because a continuance may be granted for any reason which constitutes "good cause," there are no universal factors that apply to all continuances.[33] In three precedential decisions the BIA has laid out specific factors that an IJ must consider in evaluating a request for a continuance: (1) where a visa petition has been filed for the respondent, (2) where the respondent is seeking a U Visa, and (3) where the respondent is seeking to adjust status through an employment petition. The BIA also has discussed when continuances should be granted in a number of other scenarios.

Continuances for a pending I-130 Petition for Alien Relative

In *Matter of Hashmi*, the BIA laid out a non-exhaustive five-factor test that IJs must apply in determining whether good cause exists for a continuance to await the adjudication of an I-130 Petition for Alien Relative, which, if granted, would make the respondent eligible for adjustment of status. In assessing good cause, the IJ must consider:

(1) the DHS response to the motion to continue;
(2) whether the underlying visa petition is prima faci*e* approvable;
(3) the respondent's statutory eligibility for adjustment of status;
(4) whether the respondent's application for adjustment merits a favorable exercise of discretion; and
(5) the reason for the continuance and other relevant procedural factors.[34]

Because "the focus of the inquiry is the apparent ultimate likelihood of success on the adjustment application," if the respondent is prima facie eligible for a visa petition and for adjustment of

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30 *GAO Report: Actions Needed to Reduce Case Backlog, supra* note 2, at 128.

31 8 C.F.R. § 1003.47. The regulations permit IJs to continue the case for a reasonable period to permit DHS to complete background checks. 8 C.F.R. §§ 1003.47(e)-(f).

32 *See* INA § 240(c)(3)(A).

33 *Matter of Hashmi*, 24 I&N Dec. 785, 788 (BIA 2009) ("The regulations do not contain a definition of what constitutes good cause. We have defined the parameters of 'good cause' in different ways depending on the facts and circumstances presented.").

34 *Id.* at 790.

status, the IJ should favorably exercise discretion and grant a continuance.[35] If DHS does not oppose a continuance, an IJ should generally grant it, absent "unusual, clearly identified, and supported reasons for not doing so."[36]

Practitioners should be prepared to submit sufficient evidence to demonstrate that a client's visa petition is prima facie approvable. This evidence may include a full copy of the I-130 application, including any evidence submitted along with the application which demonstrates the respondent's prima facie eligibility; for example, marriage certificates and other evidence of the *bona fides* of the marriage. Because the IJ must consider the likelihood of success of the adjustment application, practitioners should provide evidence demonstrating that an I-485 Application for Adjustment of Status ultimately will be approved. This should include evidence necessary to show statutory eligibility, such as evidence of good moral character or evidence that a respondent would succeed in obtaining any necessary discretionary waiver of inadmissibility.[37]

The IJ may deny a request for a continuance after determining, for example, that the respondent is unlikely to succeed on the visa petition or application for adjustment of status.[38] Thus, if there is any debate as to whether the respondent is eligible for adjustment of status, practitioners should be fully prepared to brief the issue before the IJ.[39]

Where DHS opposes a continuance, the IJ should again apply a totality of the circumstances test, evaluating the strength of the DHS opposition against the reasons for the continuance.[40] Even if DHS offers reasons for opposition that are "reasonable and supported by the record," the IJ may

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35 *Id*. ("[D]iscretion should be favorably exercised where a prima facie approvable visa petition and adjustment application have been submitted in the course of an ongoing removal hearing"); *see Matter of Garcia*, 16 I&N Dec. 653, 657 (BIA 1978) ("[D]iscretion should, as a general rule, be favorably exercised where a prima facie approvable visa petition and adjustment application have been submitted in the course of a deportation hearing…"); *see also Dawoud v. Holder*, 561 F.3d 31, 33 n.1 (1st Cir. 2009) (noting the presumption of entitlement to a continuance where a prima facie visa petition is pending); *Pedreros v. Keisler*, 503 F.3d 162, 165 (2d Cir. 2007) (same); *Hassan v. INS*, 110 F.3d 490, 492-93 (7th Cir. 1997) (same).

36 *Matter of Hashmi*, 26 I&N Dec. at 790.

37 *Id.* at 792 ("If warranted, the respondent should provide evidence establishing his admissibility or his eligibility for a corresponding waiver of inadmissibility.").

38 *Id.*; *see also Pedreros v. Keisler*, 503 F.3d at 166 ("As other circuits have concluded, we find no basis for obligating the agency to grant continuances pending adjudication of an immigrant visa petition when there is a reliable basis to conclude that the visa petition or the adjustment of status will ultimately be denied.").

39 *See, e.g.*, *Flores v. Holder*, 779 F.3d 159, 164 (2d Cir. 2015) (reversing denial of continuance where IJ made legal error in determining that respondent was ineligible for adjustment of status).

40 *Matter of Hashmi*, 26 I&N Dec. at 791.

still grant a continuance.[41] If DHS opposes the continuance, but the opposition is unsupported, the IJ should not give the opposition much weight.[42]

Practitioners also should be prepared for a DHS opposition that argues that a continuance should be denied because the respondent is an enforcement priority or because the immigration court backlogs require that removal proceedings be carried out as expeditiously as possible.[43] In response, practitioners should argue that, under *Matter of W-Y-U-*, IJs should not consider DHS enforcement priorities in granting or denying a continuance.[44]

Furthermore, practitioners may argue that any DHS opposition based on general policy positions that arise outside of the respondent's removal proceedings is not "supported by the record" as required by *Matter of Hashmi.*[45] Because all removable immigrants are considered enforcement priorities under the Trump administration, DHS opposition on such grounds is not based on the individualized record of a respondent, and should bear little to no weight.

Continuances for a pending U visa

Respondents are eligible for U Nonimmigrant Status and may apply for a U nonimmigrant visa petition with USCIS if they (1) have "suffered substantial physical or mental abuse as a result of having been a victim of [certain] criminal activity," (2) possess information concerning the criminal activity, and (3) have been, or are likely to be, helpful to a law enforcement agency investigating the criminal activity.[46] Applications for a U visa are entirely outside of the jurisdiction of IJs and must be pursued with USCIS.[47]

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41 *Id.*

42 *Id.* ("unsupported opposition [by the government] does not carry much weight").

43 *See generally* Secretary John Kelly, *Enforcement of the Immigration Laws to Serve the National Interest* § A (Feb. 21, 2017). Practitioners report that DHS also opposes continuances by citing to *Matter of W-Y-U-*, 27 I&N Dec. at 19, for the proposition that "the role of the Immigration Courts and the Board is to adjudicate whether an alien is removable and eligible for relief from removal in cases brought by the DHS."

44 "[I]n considering administrative closure, an [IJ] cannot review whether an alien falls within the DHS's enforcement priorities or will actually be removed from the United States." *Matter of W-Y-U-*, 27 I&N Dec. at 19. Because administrative closure is analogous to a continuance, the language applies with equal force in this context.

45 *Matter of Hashmi*, 24 I&N Dec. at 791.

46 *See* INA § 101(a)(15)(U)(i); 8 C.F.R. § 214.14.

47 8 C.F.R. § 214.14(c)(1). This includes any required waiver of inadmissibility. *See Matter of Khan*, 26 I&N Dec. 797 (BIA 2016) (IJs do not have authority under INA § 212(d)(3)(A)(ii) to adjudicate a waiver of inadmissibility for a U visa). *But see L.D.G. v. Holder*, 744 F.3d 1022, 1028 (7th Cir. 2014) (finding that INA § 212(d)(3)(A) does grant such authority); *Baez-Sanchez v. Sessions*, 872 F.3d 854 (7th Cir. 2017) (reaffirming *L.D.G.* and remanding to BIA to determine whether 8 C.F.R. § 1003.10(a) grants IJs authority to adjudicate such waivers notwithstanding *Matter of Khan*).

In *Matter of Sanchez Sosa*, the BIA articulated the factors an IJ must consider in deciding whether to grant or deny a continuance to await the adjudication of a U visa petition. Like *Matter of Hashmi*, under *Sanchez Sosa* an IJ must evaluate good cause based on the totality of circumstances, weighing (1) the DHS position and grounds for the opposition, (2) whether the respondent is prima facie eligible for a U Visa, and (3) "the reason for the continuance and other procedural factors."[48]

If the IJ determines that the respondent is prima facie eligible for a U visa, "there is a rebuttable presumption that an alien who has filed a prima facie approvable application with the USCIS will warrant a favorable exercise of discretion for a continuance for a reasonable period of time."[49] Pursuant to ICE guidance, ICE is charged with requesting expedited prima facie eligibility decisions from USCIS for U visa applicants in removal or detention.[50] Once a respondent provides evidence that a U visa application has been filed with USCIS, the ICE Trial Attorney "shall request a continuance to allow USCIS to make a prima facie determination." If USCIS determines that the respondent is prima facie eligible for a U Visa, ICE "should consider administratively closing the case or seek to terminate proceedings pending final adjudication."[51]

Practitioners report that many ICE attorneys continue to follow this memorandum, and others may follow it once practitioners remind them of their obligations under this guidance. Despite ICE HQ affirmation that this guidance still applies,[52] practitioners report some ICE attorneys ignore the latter command of the memorandum, positing that removing crime victims while USCIS adjudicates the U Visa application does not undermine their rights since they can apply from abroad and reenter if the visa is granted. This position is particularly troubling because it discounts the significant negative impact of a deportation—even a brief one—on crime victims, and because any U applicant with unlawful presence issues may no longer be admissible if deported and would require additional waivers which might never be granted.

In the absence of a prima facie determination by USCIS, when determining whether to grant or deny a continuance to seek a U visa, the IJ must conduct an individualized determination of the respondent's prima facie eligibility by considering (1) "whether it is likely that the respondent will be able to show that he suffered 'substantial physical or mental abuse' as a victim of qualifying criminal activity" and (2) "whether the [respondent] has relevant information and has

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48 *Matter of Sanchez Sosa*, 25 I&N Dec. 807, 812-13 (BIA 2012).

49 *Id.* at 815.

50 ICE Principle Legal Advisor Peter S. Vincent, Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with 'Final Orders of Deportation or Removal' (Sept. 25, 2009), at 2 (hereinafter "Vincent Memo").

51 *Id.*

52 *See Chasing Down Rumors*, AILA.org (Nov 3, 2017) ("If ICE ERO encounters an individual that is out of status with an outstanding final order of removal but ICE is provided with proof that a U visa is pending, ICE counsel will seek a prima facie determination of the U visa application from USCIS. If USCIS is unable to issue a prima facie finding within five days as contemplated in the memo, ICE ERO will process the removal order and proceed with deportation.")

been, is being, or will be helpful to authorities investigating or prosecuting it."[53] The second prong is satisfied if the respondent has already obtained a law enforcement certification.[54]

Thus, when seeking a continuance under *Matter of Sanchez Sosa*, in the absence of a prima facie determination from USCIS, practitioners should be prepared to submit a full U visa application, along with any documentary evidence that would normally be submitted to DHS with such application."[55] Practitioners should be mindful that a prima facie showing is not the same as a showing that a U visa will definitely be granted, and thus should reject any attempt by ICE or the IJ to require such a showing.

USCIS currently takes over three and a half years to adjudicate a U visa application for placement on the waitlist.[56] Because *Matter of Sanchez Sosa* provides only a rebuttable presumption that a continuance should be granted if the respondent is prima facie eligible for a U visa, IJs may be disinclined to continue proceedings for a respondent who is prima facie eligible for a U visa, where the USCIS adjudication of the U visa application for placement on the waitlist is remote. However, the BIA has overturned IJs who denied such continuances based on USCIS delay alone, finding that USCIS delays in adjudicating U visa applications was "delay not attributable to the [respondent]" and thus "augurs in favor of a continuance."[57]

As in *Matter of Hashmi*, if a respondent requires a waiver of inadmissibility, the IJ "should assess the likelihood that the USCIS will exercise its discretion favorably under the regulatory standard [at 8 C.F.R. § 212.17(b)] as part of the determination of prima facie eligibility."[58] If a respondent is inadmissible on criminal grounds, the IJ should consider the "number and severity" of a respondent's offenses; if the offenses involved "violent or dangerous crimes," the IJ should consider that USCIS will only grant waivers in "extraordinary circumstances."[59] Although the

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53 *Matter of Sanchez Sosa* at 813 (citing INA § 101(a)(15)(U)(i); 8 C.F.R. § 214.14(b)).

54 *Matter of Sanchez Sosa*, 25 I&N Dec. at 813.

55 *Id.*

56 The cap on the annual allocation of U visas, set in INA § 214(p)(2)(A) at 10,000 visas, has been met every year since 2010. After the cap has been met for a given year, USCIS continues to adjudicate applications and place approvable cases on a waitlist, allowing applicants to receive deferred action. *See* 8 C.F.R. § 214.14(d)(2). At the time of release of this advisory, the Vermont Service Center was processing applications submitted on August 25, 2014 for placement on the waitlist. *See* *USCIS Processing Time Information for the Vermont Service Center*, USCIS (last accessed March 20, 2018). However, practitioners report that the agency responds quickly to prima facie determination requests from ICE.

57 *See Matter of Garcia-Diaz*, 2017 WL 4118903, at *2 (BIA June 29, 2017); *Matter of Alvarado-Turcio*, at 2 (BIA Aug 17, 2017) ("While we recognize that USCIS has a significant U visa backlog, processing delays are insufficient, in themselves, to deny an alien's request for a continuance."), *available at* https://www.scribd.com/document/360077591/Edgar-Marcelo-Alvarado-Turcio-A201-109-166-BIA-Aug-17-2017.

58 *Id.* at 814.

59 *Id. See generally* National Immigrant Justice Center, *Practice Advisory: U Visa Inadmissibility Waivers in Removal Proceedings* (Dec 2017).

not addressed in *Matter of Sanchez-Sosa*, if relevant, the IJ should consider whether a respondent merits a "public or national interest" waiver for U visa applicants under INA § 212(d)(14).[60]

Continuances for a pending labor certification or I-140 Petition for Alien Worker

Where a respondent is seeking adjustment of status through an employment petition, the IJ should "first determine the respondent's place in the employment-based adjustment of status process and then consider and balance the *Hashmi* factors."[61] This applies to respondents awaiting the adjudication of either a certification from the Department of Labor or a visa through an I-140 petition with USCIS.

Where the respondent is awaiting the adjudication of a pending labor certification, there is no presumption that a continuance should be granted. Because labor certification may take years, "the pendency of a labor certification" alone is "not [] sufficient to grant a continuance," unless the respondent presents evidence of the "likelihood of imminent adjudication" or "DHS support for the motion."[62]

Where the respondent's labor certification has been granted but the respondent is awaiting a pending I-140, the IJ should primarily consider visa availability, such that a respondent may not be able to demonstrate good cause for a continuance if "visa availability is too remote."[63] However, even where visa availability is remote, the IJ must "evaluate the individual facts and circumstances relevant to each case."[64]

Practitioners seeking a continuance in this scenario should be prepared to submit information to the IJ regarding the processing times for labor certifications and the availability of employment-based visas. Where a visa is not immediately available, practitioners should consider requesting administrative closure instead.[65]

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60 *See Matter of Torres De Santiago*, 2015 WL 1605455, at *2 (BIA Feb. 27, 2015) (remanding where IJ denied a continuance to seek a U visa but failed to "meaningfully discuss the role of the respondent's waiver application," which included a waiver application under INA § 212(d)(14), when evaluating the respondent's prima facie eligibility).

61 *Matter of Rajah*, 25 I&N Dec. 127, 130 (2009).

62 *Id.* at 137. The respondent may submit evidence showing that adjudication is imminent, such as "evidence that the application has been filed with the DOL, that the employer is prepared to file the I-140 within the 180-day validity period, and that the offer of employment, as prescribed in the labor certification, remains available," as well as "[d]ocumentation establishing that the relevant DOL processing times are imminent." *Id*. at 137 n.11.

63 *Id.* at 136.

64 *Id.*; *see* "What should you do if requesting a particularly lengthy continuance" below for suggestions on how to argue for good cause in this situation.

65 *Id.* at 135 n.10 ("We encourage the DHS to consider agreeing to administrative closure … where there is a pending prima facie approvable visa petition.").

Continuances to seek an attorney

Because respondents have a right to counsel of their own choice at no expense to the government, an IJ must ensure that respondents have "a reasonable and realistic period of time to provide a fair opportunity for a respondent to seek, speak with, and retain counsel."[66] The right to counsel may be violated if the IJ does not give a respondent sufficient time to seek counsel.[67] While there is no bright-line rule, courts have generally found continuances for less than a month violate the right to counsel.[68] In OPPM 17-01, EOIR has further instructed IJs that "it remains general policy that *at least one* continuance should be granted" to obtain legal counsel.[69]

At least in the Ninth Circuit, the right to counsel may also be violated if the IJ denies a continuance where a respondent's attorney unexpectedly fails to appear, and the respondent requests a reasonable continuance so that the attorney may appear.[70]

Continuances for attorney preparation or evidence-gathering

Attorney preparation is another common ground for seeking a continuance.[71] In *Matter of Sibrun*, the BIA held that an attorney seeking a continuance "at least must make a reasonable showing that the lack of preparation occurred despite a diligent good faith effort to be ready to proceed and that any additional evidence he seeks to present is probative, noncumulative, and significantly favorable to the [respondent]."[72]

Thus, practitioners should be prepared to submit evidence of the need for attorney preparation. For example, an attorney who is awaiting a FOIA request for an A-File might provide evidence

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66 *Matter of C-B-*, 25 I&N Dec. 888, 889 (BIA 2012); *see* INA § 292 (right to counsel).

67 *Matter of C-B-*, 25 I&N Dec. at 890.

68 In *Biwot v. Gonzales*, the court found a denial of the right to counsel where a respondent was given only "five working days" to procure counsel. 403 F.3d 1094, 1096 (9th Cir. 2005); *see also Castaneda-Delgado v. I.N.S.*, 525 F.2d 1295, 1299-1300 (7th Cir. 1975) (right to counsel violated by single two-day continuance to acquire counsel). Similarly, the BIA has overturned an IJ where a respondent was given only "two weeks" to procure counsel. *Matter of Gaitan*, 2017 WL 1951549, at *1 (BIA Mar. 31, 2017) (finding that the respondent "was not afforded a reasonable and realistic period of time in which to obtain counsel"). *But see Matter of Herrera*, 2017 WL 4946954, at *1 (BIA Sept. 5, 2017) (single continuance from Apr. 7, 2017 to May 3, 2017 to procure counsel satisfied *Matter of C-B-*).

69 *See* OPPM 17-01, *supra* note 18, at 3 (emphasis added). OPPM 13-01 previously instructed that "absent good cause shown, *no more than two* continuances should be granted … for the purpose of obtaining legal representation." OPPM 13-01, *supra* note 18, at 2-3 (emphasis added). OPPM 17-01 does not appear to significantly alter the previous policy.

70 *See Mendoza-Mazariegos v. Mukasey*, 509 F.3d 1074, 1080-84 (9th Cir. 2007).

71 *See GAO Report: Actions Needed to Reduce Case Backlog*, *supra* note 2, at 125.

72 *Matter of Sibrun*, 18 I&N Dec. 354, 356 (BIA 1983). The BIA has characterized the standard for a continuance set forth in *Sibrun* as a "high standard" establishing the "minimum" required for a continuance for attorney preparation. *Matter of Hashmi*, 24 I&N Dec. at 788.

that the FOIA was submitted as well as a printout showing what position the request is in the USCIS processing queue. In general, the more concrete the evidence of a specific need for a delay, the better. Practitioners should be prepared to articulate timelines or specific dates wherever possible. Such evidence is especially important as the BIA only will reverse if the respondent can show that the denial of a continuance caused "actual prejudice and harm and materially affected the outcome of his case."[73]

The right to a full and fair hearing also may be violated if an IJ denies a continuance without providing sufficient time for respondents to gather evidence.[74] Similarly, respondents may be entitled to a continuance where DHS presents material evidence at a hearing without providing the evidence in advance or permitting sufficient time to review it.[75]

Continuances to await a pending direct appeal of a criminal conviction

Where the criminal conviction that made the respondent removable is pending on direct appeal, the IJ may either grant administrative closure or a series of continuances to await the outcome of the appeal.[76] If the respondent "prevail[s] on the direct appeal" and is no longer removable, the IJ should terminate the case; if the respondent is unsuccessful, the IJ will sustain removability and proceed with the case.[77]

When a respondent requests a continuance or administrative closure to seek a direct appeal, the IJ should consider the "circumstances of the appeal" and apply either the *Matter of Hashmi* or *Matter of Avetisyan* factors, granting the motion where the respondent shows a likelihood of

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73 *Matter of Sibrun*, 18 I&N Dec. at 356-57.

74 *See, e.g.*, *Cruz Rendon v. Holder*, 603 F.3d 1104 (9th Cir. 2010) (finding that the denial of a continuance to gather evidence violated due process where less than one month had passed between the respondent's first appearance with counsel and the merits hearing).

75 *See Cinapian v. Holder*, 567 F.3d 1067, 1076-77 (9th Cir. 2009) ("When the government fails to notify Petitioners in advance of the hearing of evidence and also does not take reasonable steps to make the preparer of that evidence available for cross-examination at the hearing, the proper course is for the IJ either to grant a continuance or to refuse to admit the evidence.").

76 *Matter of Montiel*, 26 I&N Dec. 555, 557 n.3 (BIA 2015). The BIA distinguished a direct appeal—an appeal by right made immediately after a conviction—from a "pending post-conviction motion to collaterally attack a conviction," noting that the latter did not implicate issues of finality for the purposes of removal. *Id.* at 557 n.2.

77 *Id.* at 558. If the conviction on direct appeal does not affect removability or eligibility for relief from removal, the IJ should generally deny the continuance absent other good cause. *See, e.g.*, *Matter of Soriano-Diaz*, 2017 WL 4418369, at *1 (BIA July 13, 2017) (affirming denial of a continuance to await direct appeal of a controlled substance offense because the respondent was "not charged with any ground of removability based on the controlled substance conviction"); *Matter of Hernandez*, 2016 WL 4120597, at *2 (BIA July 6, 2016) (rejecting argument that a pending direct appeal merited a continuance because "here, removability is not at issue").

success on the appeal.[78] If the IJ determines that the direct appeal is "based on a facially frivolous argument," the IJ will generally deny administrative closure or continuances.[79]

Because IJs may be unfamiliar with criminal law and procedure, practitioners should be prepared to argue why the respondent's criminal appeal is not frivolous. Practitioners should provide the IJ with the full appellate briefing if available or consider alternative means of support such as an affidavit from a criminal defense attorney knowledgeable in the area laying out the possibility of success on appeal.

Continuances for USCIS adjudication of an I-751 Petition to Remove Conditions

Conditional permanent residents seeking to remove conditions while in removal proceedings must file an I-751 Petition to Remove Conditions on Residence with USCIS, and not the IJ.[80] Therefore, the BIA has made clear that an IJ should grant a continuance to permit USCIS to adjudicate the I-751 application.[81]

If the respondent is prima facie eligible for a waiver of the requirement to file a joint petition, but has not yet filed for a waiver, the IJ should grant a continuance to give the respondent "a reasonable opportunity to file the application … and for [USCIS] to decide the application."[82] This includes situations where the respondent becomes statutorily eligible for a waiver due to changed circumstances during the pendency of the removal proceedings.[83] If USCIS denies the application, the IJ acquires jurisdiction to adjudicate the merits of the I-751. If USCIS grants the application, the IJ should terminate proceedings.

Continuances to re-serve charging documents where the respondent is under 14 or not competent

If DHS does not properly serve the NTA on a respondent, an IJ may either terminate the proceedings without prejudice or continue the proceedings to permit DHS to correct the defective service. However, there are two scenarios where an IJ must grant DHS a continuance to allow the government to re-serve the NTA.

First, if the IJ determines "at a master calendar hearing held shortly after service of the [NTA]" that the respondent is "not competent" or "identifies sufficient indicia of incompetency to

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78 *See Matter of Montiel*, 26 I&N Dec. at 557. The BIA has suggested that continuances may be more appropriate than administrative closure if the respondent is detained. *Id.* at 557 n.3.

79 *Id.* at 557 n.4.

80 *See* 8 C.F.R. §§ 216.4, 216.5.

81 *Matter of Mendes*, 20 I&N Dec. 833, 840 (BIA 1994).

82 *Id.*; *see also Matter of Stowers*, 22 I&N Dec. 605, 613-14 (BIA 1999) ("Where an alien is prima facie eligible for a waiver under section 216(c)(4) of the Act and wishes to have his or her waiver application adjudicated by the Service, the proceedings should be continued in order to allow the Service to adjudicate the waiver application.").

83 *See Matter of Anderson*, 20 I&N Dec. 888, 892 (BIA 1994).

warrant handling the case under 8 C.F.R. §§ 103.8(c)(2)(i) and (ii)," then "DHS should be granted a continuance to serve the [NTA] in accordance with those regulations."[84] Second, where DHS failed to follow the regulatory requirements in 8 C.F.R. § 103.8(c)(2)(ii) for service of the NTA on a minor under the age of 14, the IJ should grant a continuance to re-serve the NTA.[85] In both situations, because 8 C.F.R. § 103.8(c)(2)(ii) requires that "whenever possible, service shall also be made on the near [sic] relative, guardian, committee, or friend," the IJ should ensure that any continuance for proper service is long enough to allow DHS to identify such an individual.[86]

Continuances to respond to charges newly filed by DHS

During the course of a removal hearing, DHS may file in writing additional charges of inadmissibility or deportability or amend the factual allegations in the Notice to Appear.[87] This is usually done through the filing of a Form I-261, Additional Charges of Removability. If DHS files additional charges of removability, IJs are required to inform respondents that they "may be given a reasonable continuance to respond to the additional factual allegations and charges."[88]

While the BIA has not held that 8 C.F.R. § 1240.10(e) entitles respondents to an automatic continuance, it has held that respondents must be given a "reasonable opportunity" to respond to any new grounds of removability.[89]

Continuances where respondent is not competent to proceed

Respondents in removal proceedings who are not competent to proceed must be provided adequate safeguards to "protect [their] rights and privileges."[90] Under *Matter of M-A-M-*, IJs are required to "take measures to determine whether a respondent is competent to participate in proceedings."[91] Because this determination requires evidence, IJs should grant requests for continuances to "allow the parties to gather and submit evidence relevant to these matters," which could include anything from medical reports documenting a respondent's competency to "letters and testimony from [] third party sources that bear on the respondent's mental health."[92]

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84 *Matter of E-S-I-*, 26 I&N Dec. 136, 144 (BIA 2013).

85 *Matter of W-A-F-C-*, 26 I&N Dec. 880, 882 (BIA 2016).

86 *See Matter of M-J-K-*, 26 I&N Dec. 773, 778 (BIA 2016).

87 8 C.F.R. § 1240.10(e).

88 *Id.* IJs also are required at that time to inform unrepresented respondents of their right to counsel. *Id.*

89 *See, e.g.*, *Matter of Salazar*, 17 I&N Dec. 167, 169 (BIA 1979); *Matter of Malich*, 2007 WL 4699740, at *1 (BIA Dec. 6, 2007) (noting that 8 C.F.R. § 1240.10(e) entitles respondents to a "reasonable opportunity to respond" to new charges).

90 INA § 240(b)(3).

91 *Matter of M-A-M-*, 25 I&N Dec. 474, 480 (BIA 2011). For more information on *Matter of M-A-M-*, see the American Immigration Council's practice advisory, Representing Clients with Mental Competency Issues under Matter of M-A-M-.

92 *Matter of M-A-M-*, 25 I&N Dec. at 481.

If a respondent is not competent, the IJ must provide adequate safeguards for removal proceedings to continue.[93] A continuance may be necessary to establish safeguards. For example, "a continuance or motion to change venue may be granted to enable a respondent to be closer to family or available treatment programs."[94] If an IJ believes that a respondent may become competent after treatment, the IJ "can continue proceedings to allow for further evaluation of competency or an assessment of changes in the respondent's condition."[95]

Continuances to gather corroborating evidence for asylum applications

Under INA § 208(b)(1)(B)(ii), IJs may require that asylum applicants submit "evidence that corroborates otherwise credible testimony" of persecution. While respondents are not entitled to an automatic continuance to gather corroborating evidence when the IJ requests it, the IJ may still grant a continuance to seek corroborating evidence if requested.[96] However, if the IJ determines that the respondent "was not aware of a unique piece of evidence that is essential to meeting the burden of proof," a continuance should generally be granted to provide the respondent with an opportunity to obtain said evidence.[97]

Similarly, where DHS confronts a respondent with new evidence contradicting a key part of an asylum claim, the IJ should grant a continuance to permit the respondent to respond.[98] Thus, even though the respondent bears the burden to authenticate documents and provide corroborating evidence, the IJ should permit a respondent a reasonable opportunity to respond to newly provided DHS evidence which contradicts the respondents' own evidence.[99]

Importantly, the Ninth Circuit has found that INA § 208(b)(1)(B)(ii) *requires* IJs to grant respondents an opportunity to produce corroborating evidence, once the IJ concludes that such evidence is necessary.[100] Respondents in the Ninth Circuit are entitled to "notice and an opportunity to either produce the evidence or explain why it is unavailable" once the IJ

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93 *Id.*

94 *Id.* Because of the important role family may play where the respondent is not competent, the BIA has noted that "continuances for the respondent's counsel to investigate sources of biographical information may be warranted." *Matter of M-J-K-*, 26 I&N Dec. at 778.

95 *Matter of M-A-M-*, 25 I&N Dec. at 481.

96 *Matter of L-A-C-*, 26 I&N Dec. 516, 522 (BIA 2015). If the IJ requires the submission of specific corroborating evidence, respondents must be given "an opportunity to explain why [they] could not reasonably obtain [the] evidence." *Id*. at 521.

97 *Id.* at 522.

98 *See Bondarenko v. Holder*, 733 F.3d 899, 907 (9th Cir. 2013). In that case, the Ninth Circuit held that it violated due process where the respondent was denied a continuance to investigate a DHS forensic report suggesting that the respondent's evidence was fraudulent.

99 *See also Cinapian v. Holder*, 567 F.3d 1067, 1076-77 (9th Cir. 2009).

100 *Ren v. Holder*, 648 F.3d 1079, 1090-92 (9th Cir. 2011). This requirement applies only to respondents who are "deemed credible." *Id.* at 1092 n.13.

determines that corroboration is required.[101] The Second, Sixth, and Seventh Circuits have rejected this argument and, like the BIA, found that INA § 208(b)(1)(B)(ii) does not entitle respondents to notice and an opportunity for a continuance to produce corroborating evidence.[102]

Continuances to bolster discretionary eligibility for discretionary forms of relief

Many respondents seeking discretionary relief from removal must demonstrate rehabilitation to merit a favorable exercise of discretion. When removal proceedings occur soon in time after a conviction, showing rehabilitation often proves difficult. In two separate decisions, the BIA has overturned IJs who granted respondents continuances in order for the respondents to accrue positive equities in the form of rehabilitation. As a result, practitioners should be aware that such requests are unlikely to be granted.

In *Matter of Garcia-Reyes*, the BIA overturned an IJ who had granted a six-month continuance for the respondent to demonstrate rehabilitation, finding that the continuance was not warranted because the respondent had no other form of relief and rehabilitation was unlikely to occur in six months.[103] Similarly, in *Matter of Silva-Rodriguez*, the BIA overturned an IJ who granted a one-year continuance and indicated that if the respondent could show he had rehabilitated during that year, the IJ would grant relief under former INA § 212(c).[104] The BIA rejected the argument that detained respondents or those who had only recently been convicted should be given continuances solely because they would have a more difficult time than individuals with less-recent convictions in demonstrating rehabilitation.[105]

Continuances where visa priority dates have retrogressed

The Visa Bulletin is the primary source for evidence that a visa is available to an applicant for adjustment of status.[106] However, at times the Visa Bulletin will reflect retrogression of visas—when more people apply for a visa in a particular category or country than there are visas available—which pushes back priority dates.[107] This may mean an applicant for adjustment of status is no longer eligible for a visa, even though the application was properly filed.

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101 *Id.* at 1090-92. The Ninth Circuit has further held that failure to provide notice and an opportunity for the respondent to produce corroborating evidence violates the INA. *See, e.g.*, *Bhattarai v. Lynch*, 835 F.3d 1037, 1043 (9th Cir. 2016) ("[A]n IJ cannot articulate for the first time in her decision denying relief that key corroborative evidence is missing.").

102 *See Wei Sun v. Sessions*, 883 F.3d 23, 30-31 (2d Cir. 2018); *Gaye v. Lynch*, 788 F.3d 519, 529-30 (6th Cir. 2015); *Rapheal v. Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008).

103 *Matter of Garcia-Reyes*, 19 I&N Dec. 830 (BIA 1988).

104 *Matter of Silva-Rodriguez*, 20 I&N Dec. 448 (BIA 1992).

105 *Id.* at 450.

106 Dep't of State, Bureau of Consular Affairs, *The Visa Bulletin*, TRAVEL.STATE.GOV (listing current processing times for family-based visas).

107 *See generally Visa Retrogression*, USCIS (last accessed Feb. 22, 2018).

Where an application for adjustment is pending with USCIS and the application cannot be completed "solely because visa numbers became unavailable subsequent to the filing," USCIS will hold the application in abeyance until a visa number is allocated.[108]

In *Matter of Ho*, the BIA held that this principle also should apply to removal proceedings, and that IJs should grant a continuance where a respondent becomes ineligible for a visa solely because the preference category retrogressed.[109]

May an IJ deny a continuance based on case completion goals or court congestion?

No. The BIA has repeatedly held that an IJ may not consider case completion goals in deciding to grant or deny a continuance.[110] This prohibition is categorical; an IJ "should not rely upon their completion goals when determining whether good cause exists for a continuance."[111] This is because an IJ must consider the individualized circumstances of a respondent, making it an abuse of discretion to deny a continuance based on external court-related goals.[112] Similarly, an IJ may not consider court congestion or the overall state of the docket.[113] Finally, neither the Attorney General nor EOIR may dictate the outcome of any particular removal proceeding or motion.[114]

However, the recent continuance policy changes laid out in EOIR OPPM 17-01 (as detailed in Section II *infra*), along with Attorney General Sessions' repeated attacks on immigration lawyers for dilatory motions and the January 17, 2018 EOIR memorandum on case priorities, may place

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108 USCIS Operating Instructions 245.4(a)(6).

109 *Matter of Ho*, 15 I&N Dec. 692, 694 (BIA 1976). In 2008 the Fifth Circuit reaffirmed the binding nature of *Matter of Ho*, and the BIA still cites to it in unpublished decisions. *See Masih v. Mukasey*, 536 F.3d 370, 373 (5th Cir. 2008) (reversing and remanding a denial of a continuance on abuse of discretion grounds after failure to apply *Matter of Ho*); *Matter of Mohamed*, 2008 WL 4222195 (BIA Aug. 29, 2008) (affirming validity of *Matter of Ho*).

110 *Matter of Hashmi*, 24 I&N Dec. at 793-94 ("Compliance with an Immigration Judge's case completion goals [] is not a proper factor in deciding a continuance request, and Immigration Judges should not cite such goals in decisions relating to continuances."); *see also Hashmi v. Att'y Gen.*, 531 F.3d 256, 260-61 (3d Cir. 2008) (holding that a denial of a continuance based on case completion goals is an abuse of discretion); *Keller v. Filip*, 308 F. App'x 760, 763 (5th Cir. 2009) ("case disposition targets" are not "fetters" on IJ discretion).

111 *Matter of Rajah*, 25 I&N Dec. at 136.

112 *See, e.g., Hashmi,* 531 F.3d at 261 (noting that it is "impermissibly arbitrary" to decide a continuance motion "with no regard for the circumstances of the case itself"); *Matter of Rajah*, 25 I&N Dec. at 136 (holding that "the Immigration Judge must evaluate the individual facts and circumstances relevant to each case") (citing *Ahmed v. Holder*, 569 F.3d 1009 (9th Cir. 2009)).

113 *See Matter of W-Y-U-*, 27 I&N Dec. at 19 (noting that "court resources" can not be a factor in evaluating whether to administratively close a case and comparing that to the "similar context" of considering case completion goals in *Matter of Hashmi*).

114 *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1235 (9th Cir. 1999), *supplemented*, 236 F.3d 1115 (9th Cir. 2001).

IJs under significant pressure to resolve cases expeditiously.[115] This pressure is likely exacerbated by EOIR's ongoing attempt to establish "IJ quotas," which would directly tie performance review metrics to case completion goals.[116]

OPPM 17-01 contains suggestions and "guidance" that may encourage IJs to depart from the rule that each case be considered on its individual merits. For example, OPPM 17-01 asks IJs to "carefully consider administrative efficiency, case delays, and the effects of multiple continuances on the efficient administration of justice in the immigration courts."[117] Similarly, OPPM 17-01 instructs IJs to "review[] very carefully" all requests to continue an individual merits hearing because "the continuance of an individual merits hearing necessarily has a significant adverse ripple effect on the ability to schedule other hearings across an Immigration Judge's docket."[118] However, at least one court has found that almost exactly this scenario—denying a continuance because of the lengthy delays in merits hearing—is improper.[119]

Thus, an IJ who follows EOIR's guidance and actually takes into account the "effects of multiple continuances [on the] immigration courts" or any "ripple effect [on the] docket" when denying a continuance is violating both BIA and circuit case law,[120] and practitioners should strongly consider appealing any such improper denial.

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115 Indeed, the official position of the DOJ is now that "[t]he timely and efficient conclusion of cases serves the national interest. Unwarranted delays and delayed decision making do not." Attorney General Sessions, *Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest*, Dep't of Justice (Dec. 5, 2017).

116 *See generally* Nat'l Ass'n of IJs, NAIJ Has Grave Concerns Regarding Implementation of Quotas on Immigration Judge Performance Reviews (Oct. 18, 2017) (letter to Senate Judiciary Committee).

117 OPPM 17-01, *supra* note 18, at 3.

118 *Id.* at 5. The guidance concludes that "Immigration Judges generally should not continue individual merits hearings absent a genuine showing of good cause or a clear case law basis." *Id.*

119 In *Mendoza-Mazariegos v. Mukasey*, the Ninth Circuit overturned the denial of a continuance where a respondent sought a continuance because his newly-acquired counsel was unprepared to move forward. *See* 509 F.3d at 1078, 1085. The continuance was denied largely because the next open merits hearing date was two years in the future. *Id.* at 1078. The Ninth Circuit rebuked the government for punishing respondents for delays caused by court congestion:

> The IJ, BIA, and the government all repeatedly lament that Mendoza's proceeding had stretched on for almost five years. It should be clear to the government that Mendoza should not be blamed for [this] fact … [nor] is it Mendoza's fault that the short continuance [his] attorney [] requested would have required another two-year delay. It is disturbing that an individual petitioner was, in effect, punished for the crowded docket of the immigration courts. Petitioners should not be forced to proceed without counsel because of the scheduling problems of the immigration court.

Id. at 1084.

120 *See, e.g.*, *Matter of W-Y-U-*, 27 I&N Dec. at 19; *Hashmi*, 531 F.3d at 261 (finding abuse of discretion when IJ relied only on his "perceived 'obligation' to 'manage his calendar' and 'complete cases within a reasonable period of time'" (internal alterations omitted)).

What should you do if requesting a particularly lengthy continuance?

In many scenarios, a respondent's only hope for avoiding an order of removal is a form of relief that will become available only after a long period of time. For example, significant delays in the availability of family-based visas mean that a respondent may remain ineligible for adjustment of status for years.[121] Respondents seeking a continuance in this situation face an uphill battle because IJs are generally discouraged from granting lengthy continuances, especially where "visa availability is too remote."[122]

Practitioners should first consider administrative closure where possible, especially when the respondent is the beneficiary of an approved I-130. "Administrative closure is an attractive option in these situations, as it will assist in ensuring that only those cases that are likely to be resolved are before the Immigration Judge."[123]

However, where administrative closure has been denied or is otherwise impracticable, practitioners should be prepared to argue why a lengthy delay would still satisfy good cause. For example, where a respondent has significant family or employment ties to the United States, these may provide good cause for delaying proceedings. Practitioners also should emphasize the extensive precedent holding holding that discretion should be favorably exercised if a respondent is prima facie eligible for a visa.[124] If the respondent's case presents individualized factors which might necessitate a longer delay than normal, such factors may provide good cause.[125]

Because good cause must be evaluated under the totality of the circumstances, an IJ may not consider visa availability alone in denying a continuance.[126] One other tactic that practitioners

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121 *See* INA § 235(a)(3) (requiring that a visa be immediately available to adjust status); *see also* The Visa Bulletin, *supra* note 106.

122 *Matter of Rajah*, 25 I&N Dec. at 136.

123 *Matter of Hashmi*, 24 I&N Dec. at 791 n.4; *see also Matter of Rajah*, 25 I&N Dec. at 135 n.10 ("We encourage the DHS to consider agreeing to administrative closure in appropriate circumstances, such as where there is a pending prima facie approvable visa petition."); *Matter of Yauri*, 25 I&N Dec. 103, 111 n.8 (BIA 2009) (noting that "[t]here can be sound reasons to continue or administratively close proceedings while matters outside the Immigration Judge's jurisdiction are resolved, often including reasons directly related to administrative efficiency and the best utilization of adjudicative resources"). *See generally* American Immigration Council, *Administrative Closure and Motions to Recalendar* (2017).

124 *See Matter of Hashmi*, 24 I&N Dec. at 793; *Matter of Garcia-Reyes*, 19 I&N Dec. at 832.

125 For example, the Second Circuit has noted, without holding, that "if the Government takes longer to process certain groups of citizenship applicants because of the need to protect national security, it would seem reasonable for IJs to take this fact into account along with the other *Hashmi* factors when considering whether to grant continuances." *Farooq v. Holder*, 339 F. App'x 37, 39 (2d Cir. 2009).

126 *See, e.g.*, *Ferreira v. U.S. Att'y Gen.*, 714 F.3d 1240, 1243 (11th Cir. 2013) (finding that the BIA abused its discretion "by limiting its analysis to only [the] factor" of whether a visa was immediately available and not applying *Matter of Hashmi*); *Simon v. Holder*, 654 F.3d 440, 443

may consider is to request that the IJ consider the continuance against the background of the immigration court backlog; where a visa or other form of relief will become available earlier than the next available merits hearing, the visa is arguably not "remote."

Where delays are caused by USCIS processing times, not visa availability, respondents should argue that this is "delay not attributable to the alien[, which] 'augurs in favor of a continuance.'"[127] Both the BIA and the Fourth Circuit have held in unpublished decisions that USCIS processing delays should be considered "delay by the DHS" under *Matter of Hashmi* and should not be held against the respondent.[128] The Ninth Circuit has also held that "[d]elays in the USCIS approval process are no reason to deny an otherwise reasonable continuance request."[129] Similarly, lengthy delays caused by a crowded EOIR docket should not be held against a respondent seeking a continuance.[130]

IV. Seeking Review of a Denial of a Continuance

Can an IJ's grant or a denial of a continuance be appealed?

Generally, yes. An appeal from a grant or denial of a continuance may either take the form of an interlocutory appeal or an appeal of a final order of removal. The BIA will hear an interlocutory appeal only if a decision is "necessary to address important jurisdictional questions regarding the administration of the immigration laws or to correct recurring problems in the handling of cases by Immigration Judges."[131] Thus, while it is unusual for the BIA to take an interlocutory appeal of a denial of a continuance, the BIA has granted interlocutory appeals—usually from DHS—appealing the grant of a continuance in situations where it determines that the IJ is abusing the power to grant continuances.[132]

The most common scenario for appeal of a continuance is upon review of an order of removal entered following a denial of a continuance. Denials of continuances are reviewed under a *de*

(3d Cir. 2011) ("[V]isa availability should never be the one and only factor considered in a particular case."); *Wu v. Holder*, 571 F.3d 467, 470 (5th Cir. 2009) (finding abuse of discretion where IJ denied a continuance based only on the length of delay in processing an I-130).

127 *Matter of Sanchez Sosa*, 25 I&N Dec. at 814 (quoting *Matter of Hashmi*, 24 I&N Dec. at 793).

128 *See Marube v. Sessions*, No. 17-1898, __ Fed. App'x __ 2018 WL 922195, at *1 (4th Cir. Feb. 16, 2018) (delay in USCIS processing of I-130s should be treated as "delay by the DHS" under *Matter of Hashmi*); *Matter of Garcia-Diaz*, 2017 WL 4118903, at *2 (BIA June 29, 2017) (finding that USCIS processing delays for U Visa applicants was "delay not attributable to" the respondent).

129 *Malilia v. Holder*, 632 F.3d 598, 606 (9th Cir. 2011); *see also Rajah v. Mukasey*, 544 F.3d 449, 456 (2d Cir. 2008) (expressing concern about the denial of continuances due to "endemic" delays in application processing).

130 *Mendoza-Mazariegos v. Mukasey*, 509 F.3d at 1084.

131 *Matter of Avetisyan*, 25 I&N Dec. 688, 688-89 (BIA 2012).

132 *See, e.g.*, *Matter of Silva-Rodriguez*, 20 I&N Dec. at 449.

novo standard of review.[133] A denial of a continuance "will not be reversed [by the BIA] unless the [noncitizen] establishes that that denial caused him actual prejudice and harm and materially affected the outcome of his case."[134]

Practitioners should also reserve the right to appeal the denial of a continuance even if seeking more than one form of relief. For example, a respondent seeking both adjustment of status through a visa petition, as well as asylum, may seek a continuance to await adjudication of the visa petition. If the continuance is denied, and the asylum application subsequently is denied, the merits of the asylum claim and the denial of the continuance both may be litigated on appeal.

What standard do circuit courts use to review denials of continuances?

Circuit courts generally review a denial of a continuance for abuse of discretion.[135] Because IJs have "broad discretion" to grant or deny continuances, review of their decisions at the circuit court level is deferential.[136] All circuits—with the exception of the Ninth—review a denial of a continuance under each respective circuit's general abuse of discretion standard.[137] Although each circuit applies a slightly different abuse of discretion standard, the courts generally are in agreement that a continuance only will be overturned if the decision rests on an error in law or was arbitrary and capricious; for example, because the decision rested on a clearly erroneous factual finding, inexplicably departed from established policies, was without rational explanation, or rested on an impermissible basis such as invidious discrimination.

In the Ninth Circuit, review of a denial of a continuance for abuse of discretion is a "case by case" determination that "cannot be decided through the application of bright-line rules";[138] some factors to be considered are "(1) the nature of the evidence excluded as a result of the denial of the continuance, (2) the reasonableness of the immigrant's conduct, (3) the inconvenience to the court, and (4) the number of continuances previously granted."[139]

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133 8 C.F.R. § 1003.1(d)(3)(ii) ("The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*.").

134 *Matter of Sibrun*, 18 I&N Dec. at 356-57.

135 *See, e.g., Sheikh v. Holder*, 696 F.3d 147, 149 (1st Cir. 2012) ("We review the denial of a continuance for abuse of discretion.").

136 *See, e.g. Sanusi v. Gonzales*, 445 F.3d 193, 199 (2d Cir. 2006) (discussing the deferential standard of review for appeals from denials of continuances).

137 *Cruz-Bucheli v. Gonzales*, 463 F.3d 105, 107 (1st Cir. 2006); *Pedreros v. Keisler*, 503 F.3d 162, 164 (2d Cir. 2007); *Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 377 (3d Cir. 2003); *Onyeme v. I.N.S.*, 146 F.3d 227, 231 (4th Cir. 1998); *Cabral v. Holder*, 632 F.3d 886, 890 (5th Cir. 2011); *Abu-Khaliel v. Gonzales*, 436 F.3d 627, 634 (6th Cir. 2006); *Calma v. Holder*, 663 F.3d 868, 878 (7th Cir. 2011); *Thimran v. Holder*, 599 F.3d 841, 845 (8th Cir. 2010); *Jimenez-Guzman v. Holder*, 642 F.3d 1294, 1297 (10th Cir. 2011); *Ferreira v. U.S. Att'y Gen.*, 714 F.3d 1240, 1241-42 (11th Cir. 2013).

138 *Ahmed v. Holder*, 569 F.3d 1009, 1012 (9th Cir. 2009) (quoting *Cui v. Mukasey*, 538 F.3d 1289, 1292 (9th Cir. 2008)).

139 *Id.* (citing *Karapetyan v. Mukasey*, 543 F.3d 1118, 1129 (9th Cir. 2008)).

In appropriate circumstances, practitioners may also appeal the denial of a continuance on the argument that the denial violated a constitutional right, such as the right to due process.[140] Such a claim would be reviewed under each circuit's respective standards for appealing the denial of a constitutional right.

Are there any circumstances where you cannot appeal a denial of a continuance?

Yes. If your client is removable on the basis of certain criminal convictions, you may not be able to appeal a denial of a continuance to a circuit court in a Petition for Review of the final order of removal because of the jurisdiction-stripping provision at INA § 242(a)(2)(C).[141] Notwithstanding this jurisdiction-stripping provision, INA § 242(a)(2)(D) permits review of any "constitutional claims or questions of law." There are circuit splits on whether and how INA § 242(a)(2)(C) interacts with INA § 242(a)(2)(D), and whether it bars review of the denial of a continuance for abuse of discretion where the respondent has a criminal conviction.[142]

The Ninth Circuit retains full jurisdiction, finding that INA § 242(a)(2)(C) "does not bar review of the denial of a procedural motion (such as a motion to continue) that is not predicated on the fact that the movant has been convicted of a qualifying crime."[143]

The Second Circuit, and to a lesser extent the First, Sixth, and Eleventh Circuits, retain at least some jurisdiction to review denials of continuances for abuse of discretion where INA § 242(a)(2)(C) is at issue. The Second Circuit has held that a respondent's claim that "the agency failed to assess [a] continuance motion under the correct legal standard" is a "question[] of law"

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140 *See, e.g.*, *Bondarenko v. Holder*, 733 F.3d at 906-07 (holding that the denial of a continuance, which prevented the respondent from having the opportunity to respond to newly presented evidence, violated due process).

141 "[N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i)." This provision covers all criminal grounds of inadmissibility, all aggravated felonies, all controlled substance offenses, all firearms offenses, and certain miscellaneous crimes at INA § 237(a)(2)(D).

142 For many years, the government also argued that circuit courts did not have jurisdiction to review denials of continuances because INA § 242(a)(2)(B)(ii) bars review of decisions committed to the Attorney General's discretion. However, in *Kucana v. Holder*, 558 U.S. 233, 244 (2010), the Supreme Court held that INA § 242(a)(2)(B)(ii) applies "only when the statute itself specifies the discretionary character of the Attorney General's authority." Because the INA does not mention continuances, the government has abandoned this argument post-*Kucana*.

143 *Garcia v. Lynch*, 798 F.3d 876, 880 (9th Cir. 2015). *See generally Unuakhaulu v. Gonzales*, 416 F.3d 931, 935 (9th Cir. 2005) (establishing the sweep of INA § 242(a)(2)(C)).

under INA § 242(a)(2)(D).[144] However, whether the court would have jurisdiction where the abuse of discretion was based on "clearly erroneous factual findings" alone remains an open question.[145]

The Eleventh Circuit has suggested in dicta and directly stated in unpublished decisions that, notwithstanding INA § 242(a)(2)(C), it retains jurisdiction under INA § 242(a)(2)(D) to review denials of continuances where the BIA or the IJ applied the wrong legal standard.[146] However, the court has also held that a "garden-variety abuse of discretion argument" challenging the denial of a continuance is not a "legal question," leaving the court with no jurisdiction to review the denial where INA § 242(a)(2)(C) applies.[147]

While the First Circuit has not issued any decisions directly on point, it has found jurisdiction to review claims of abuse of discretion in a similar context, maintaining jurisdiction notwithstanding INA § 242(a)(2)(C) where the "BIA committed a material error of law or failed to articulate its reasoning adequately."[148] Similarly, although the Sixth Circuit has not issued any decisions directly on point, it has found that INA § 242(a)(2)(C) does not bar "claims that require an evaluation of whether the BIA adhered to legal standards or rules of decision articulated in its published precedent."[149]

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144 *Flores v. Holder*, 779 F.3d 159, 163 n.1 (2d Cir. 2015) (reviewing denial of a continuance for abuse of discretion).

145 *Sanusi*, 445 F.3d at 199 (establishing standard of review for abuse of discretion); *see also Kulyak v. Mukasey*, 277 F. App'x 116, 117-18 (2d Cir. 2008) (expressing doubt that INA § 242(a)(2)(C) applied to continuances and reviewing whether the IJ's decision "rested on a 'clearly erroneous' factual finding" (citation omitted)). However, even following *Flores*, the Second Circuit has been inconsistent in the application of INA § 242(a)(2)(C) to continuances. *Compare Balbuena v. Sessions*, 700 F. App'x 85, 86 (2d Cir. 2017) (reviewing a denial of a continuance for abuse of discretion notwithstanding INA § 242(a)(2)(C)), *with Lora v. Sessions*, No. 17-133, __ Fed. App'x __, 2017 WL 5713229, at *1 (2d Cir. Nov. 28, 2017) ("An IJ's continuance ruling does not ordinarily implicate a constitutional claim or question of law, because IJs are accorded wide latitude in calendar management, and such decisions are reviewed under a highly deferential standard of abuse of discretion." (internal citations omitted)).

146 *Alvarez Acosta v. U.S. Att'y Gen.*, 524 F.3d 1191, 1197 (11th Cir. 2008); *Paris v. U.S. Att'y Gen.*, 564 F. App'x 986, 990 (11th Cir. 2014) ("An argument that the BIA applied an incorrect legal standard presents a legal question that we have jurisdiction to review pursuant to § 1252(a)(2)(D).").

147 *Alvarez Acosta*, 524 F.3d at 1196-97.

148 *Aponte v. Holder*, 610 F.3d 1, 4-5 (1st Cir. 2010) (remanding where BIA mailed briefing schedule to incomplete address and then denied motion to reopen on grounds of inadequate notice in decision which included unsupported contention that counsel had received previous filings with same incomplete address).

149 *Ettienne v. Holder*, 659 F.3d 513, 517 (6th Cir. 2011) (holding that these are "nondiscretionary 'questions of law'" reviewable under INA § 242(a)(2)(D)).

The Third, Fifth, Seventh, and Eighth Circuits have held that INA § 242(a)(2)(C) removes their jurisdiction to review denials of continuances for abuse of discretion alone.[150] In a series of unpublished decisions, the Tenth Circuit has also adopted this position.[151] In general, these circuits have held that the BIA's failure to follow its own precedent is not a "legal question" under INA § 242(a)(2)(D),[152] or that abuse of discretion as a whole does not present a legal question.[153]

There are no Fourth Circuit reported decisions on the issue, and in unpublished decisions the court has come down on both sides of the issue.[154]

Despite the circuit split on review for abuse of discretion, all circuits agree that they retain jurisdiction under INA § 242(a)(2)(D) to review a challenge to the constitutionality of the denial of a continuance; however, most circuits have rejected respondents' attempts to frame a garden-variety denial of a continuance as a denial of a constitutional right.[155]

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150 *See Rachak v. Att'y Gen.*., 734 F.3d 214, 217 (3d Cir. 2013) (concluding that the court had "no jurisdiction over [a] denial of [a] motion for a continuance" because "discretionary decisions, as here, do not raise a constitutional claim or question of law covered by [INA § (a)(2)(D)'s] judicial review provision" (internal citations omitted)); *Ogunfuye v. Holder*, 610 F.3d 303, 307 (5th Cir. 2010) (finding that a claim of abuse of discretion in denying a continuance "does not present a constitutional claim or issue of law that this court has jurisdiction to consider"); *Moral-Salazar v. Holder*, 708 F.3d 957, 961 (7th Cir. 2013) (holding that the "jurisdictional bar on reviewing 'any final order of removal' [in INA § 242(a)(2)(C)] includes prior procedural orders like a motion for continuance"); *Waugh v. Holder*, 642 F.3d 1279, 1284-85 (10th Cir. 2011) (finding that a claim of abuse of discretion in denying a continuance "raises neither a constitutional nor a legal issue, so we are without jurisdiction to review it").

151 *See, e.g.*, *Tejeda-Acosta v. Holder*, 506 F. App'x 785, 788 (10th Cir. 2012) (citing to *Waugh v. Holder* for the proposition that it had no jurisdiction to review a denial of continuance for abuse of discretion); *Taufu'i v. Holder*, 589 F. App'x 881, 883 (10th Cir. 2014) (same).

152 *See, e.g.*, *Waugh*, 642 F.3d at 1285.

153 *See, e.g.*, *Ogunfuye*, 610 F.3d at 307.

154 *Compare Cespedes v. Holder*, 542 F. App'x 227, 229-30 (4th Cir. 2013) (concluding that INA § 242(a)(2)(C) applied except for the provisions of INA § 242(a)(2)(D), then evaluating the merits of a claim of abuse of discretion), *with Owusu v. Holder*, 474 F. App'x 153, 154 (4th Cir. 2012) ("Because our review of the denial of Owusu's request for a continuance is for abuse of discretion, he does not raise a reviewable constitutional claim or a question of law." (citations omitted)).

155 *See, e.g. Waugh*, 642 F.3d at 1284-85 ("Petitioner attempts to frame this argument as a denial of due process, suggesting the BIA ignored its own (unidentified) precedents. It appears petitioner's true objection, however, is to the way the IJ and BIA exercised their discretion…."); *see also Jarbough v. Att'y Gen.*, 483 F.3d 184, 190 (3d Cir. 2007) ("Recasting challenges to factual or discretionary determinations as due process or other constitutional claims is clearly insufficient to give this Court jurisdiction under [INA § 242(a)(2)(D)]."); *Alvarez Acosta*, 524 F.3d at 1197 (holding that a denial of a continuance did not present a due process claim because the respondent had no liberty interest in obtaining a discretionary continuance).