BENCH GUIDE

FOR

CONTINUANCES

IN THE NINTH & TENTH CIRCUITS

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** This outline includes references to unpublished BIA and circuit court cases for illustrative purposes only.*

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CONTINUANCES

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I. "Good Cause"

Removal proceedings may be continued for "good cause shown," at the Immigration Judge's discretion. *See* 8 C.F.R. §§ 1003.29, 1240.6. *See Matter of Perez- Andrade*, 19 I&N Dec. 433 (BIA 1987); *Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010). An Immigration Judge ("IJ") has broad discretionary authority in determining whether an alien has demonstrated "good cause." *Matter of Sibrun*, 18 I&N Dec. 354, 355-56 (BIA 1983).

A. In General

- "[I]t is critically important that [IJs] use continuances appropriately and only where warranted for good cause or by authority established by case law." OPPM 17-01 at 2 (July 31, 2017).

- "[W]hile administrative efficiency cannot be the only factor considered by an [IJ] with regard to a motion for continuance, it is sound docket management to carefully consider administrative efficiency, case delays, and the effects of multiple continuances on the efficient administration of justice in the immigration courts." OPPM 17-01 at 3 (July 31, 2017).

- A submission of a motion to continue does not relieve an alien or his attorney of the responsibility to attend removal proceedings, unless that motion has been granted. *Matter of Patel*, 19 I&N Dec. 260 (BIA 1985).

- A respondent entitled to a continuance receives one for a reasonable time. 8 C.F.R § 1240.6.

- A continuance should be granted where the Department of Homeland Security (DHS) seeks to re-serve a minor respondent under the age of 14 to effect proper service of a notice to appear that was defective under the regulatory requirements. *Matter of W-A-F-C-*, 26 I&N Dec. 880 (BIA 2016).

B. Good Cause Factors in the Ninth Circuit under *Ahmed*

"The regulations do not define good cause, but [under the Ninth Circuit] the IJ–and, on appeal, the BIA–should consider factors including (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." *An Na Peng v. Holder*, 673

F.3d 1248, 1253 (9th Cir. 2012) (quoting *Ahmed v. Holder*, 569 F.3d 1009, 1012 (9th Cir. 2009)). *See also Owino v. Holder*, 771 F.3d 527, 532 (9th Cir. 2014).

(1) The nature of the evidence excluded as a result of the denial of the continuance;

- E.g., if the denial of a continuance prevents the alien from exercising her right to present evidence during removal proceedings. *See, e.g.*, *Cui v. Mukasey*, 538 F.3d 1298, 1292-93 (noting excluded evidence was of "vital importance" to case); *see also Cruz Rendon v. Holder*, 603 F.3d 1104, 1111 (9th Cir.2010) (holding that the IJ abused her discretion by denying a continuance where the denial of the continuance, in conjunction with other limits placed on the petitioner's testimony, prevented the petitioner "from fully and fairly presenting her case").

(2) The reasonableness of the immigrant's conduct;

- "[D]elays in the USCIS approval process are no reason to deny an otherwise reasonable continuance request. As . . . basing a denial on such grounds is akin to 'blaming a petitioner for an administrative agency's delay.'" *Malilia v. Holder*, 632 F.3d 598, 606 (9th Cir. 2011) (quoting *Ahmed*, 569 F.3d at 1013). However, consider whether the respondent is attempting to delay the proceedings. *See Ahmed*, 569 F.3d at 1013 (distinguishing the petitioner from those petitioners who have applied for labor certification and I-140 visa petition only after removal proceedings were initiated against them, in an attempt to delay the proceedings).

- *See, e.g.*, *Matter of Rajah*, 25 I&N Dec. 127, 456 (BIA 2009) (reversing denial of continuance and remanding to the BIA for further guidance on what constitutes "sufficient time" in light of the "delays endemic in almost every stage of acquiring any visa").

(3) The inconvenience to the court; and

- "[A] myopic insistence upon expeditiousness will not justify the denial of a meritorious request for delay, especially where the delay impairs the petitioner's statutory rights. An immigrant's right to have his or her case heard should not be sacrificed because of the [IJ]'s heavy caseload." *Ahmed*, 569 F.3d at 1013-14 (citations and internal quotation marks omitted); *see also Cruz Rendon v. Holder*, 603 F.3d 1104, 1109 (9th Cir. 2010).

(4) The number of continuances previously granted.

C. Speculative Relief

- "[An] IJ [is] not required to grant a continuance based on . . . speculations." *Singh v. Holder*, 638 F.3d 1264, 1274 (9th Cir. 2011).

    - Awaiting the results of a collateral event that may occur at some indefinite time in the future, where the outcome may or may not be favorable to the respondent, does not demonstrate good cause for a continuance. *See Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987). *See, e.g.*, (b) (6) [redacted] (BIA 2016) (unpublished) ("We agree with the [IJ]'s determination that the respondent has not demonstrated good cause for a further continuance to await the results of a collateral event which may or may not result in an outcome favorable to the respondent at some uncertain date in the future." (citing *Perez-Andrade*, 19 I&N Dec. at 433)).

    - *See Matter of Avetisyan*, 25 I&N Dec. 688, 696 (BIA 2012) (describing a possible change in a law or regulation as "a purely speculative event or action"); (b) (6) [redacted] BIA Oct. 25, 2012) (unpublished) (finding no good cause where respondents sought 1-year continuance "to await the passage of comprehensive immigration reform" because "the speculative possibility that the respondent might eventually benefit from a potential change in the immigration laws does not provide good cause for a continuance.").

II. Judicial Review of Denial of Continuance

A. In General

- The alien must show actual prejudice materially affecting the outcome of the case that resulted from the denial of the continuance. *Matter of Sibrun*, 18 I&N Dec. at 356-57; *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987).

B. Judicial Review in the Ninth Circuit

- The decision to grant or deny a motion for continuance of removal proceedings is within the sound discretion of the IJ and will not be overturned except on a showing of clear abuse. *Garcia v. Lynch*, 798 F.3d 876 (9th Cir. 2015).

- The Ninth Circuit evaluates whether a continuances constitutes an abuse of discretion on a "case by case basis." *Ahmed v. Holder*, 569 F.3d 1009, 1012 (9th Cir. 2009). "When

reviewing an IJ's denial of a continuance, [the Ninth Circuit] consider[s] a number of factors, including: (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." *Id.* at 1012; *see also Cruz Rendon v. Holder*, 603 F.3d 1104, 1110 (9th Cir.2010) (citing *Ahmed*, 569 F.3d at 1013-14).

- An IJ should create a record of his or her consideration of the *Ahmed* factors. *See Ahmed*, 569 F.3d at 1014 ("[T]he IJ abused her discretion by failing to provide any explanation for her decision, and failing to take into account any of the facts and circumstances of [the respondent's] case that were relevant to the grant or denial of a continuance.").

  - *See, e.g.*, *Lagua v. Holder*, 438 F. App'x 598, 600 (9th Cir. 2011) (unpublished) (finding abuse of discretion where IJ stated she was denying petitioner's request for a continuance to await adjudication of an I–130 petition, "because the case has been on the docket since August 2004, and the Department of Homeland Security gives no suggestion as to when it will adjudicate the visa").

C. Judicial Review in the Tenth Circuit

- An IJ's discretion in deciding a motion for a continuance arises from regulation; therefore, as the discretion is couched in regulation, an appellate court has jurisdiction to review that decision using an abuse of discretion standard. *Jiminez-Guzman v. Holder*, 642 F.3d 1294 (10th Cir. 2011); *see also Llanos v. Holder*, 565 F. App'x 675, 675 (10th Cir. 2014) (unpublished).

- The appellate court will only grant a petition for review if the decision regarding the continuance was made without a rational explanation, it inexplicably departed from established polices, or it rested on an impermissible basis. *Castillo-Torres v. Holder*, 394 F. App'x 517, 522 (10th Cir. 2010) (unpublished).

D. Judicial Review Regarding a Due Process Challenge

- "[A]n [IJ]'s decision denying a motion for continuance will not be reversed unless the alien establishes that denial caused him actual prejudice and harm and materially affected the outcome of his case." *Matter of Sibrun*, 18 I&N Dec. at 356-57.

- A decision to deny a continuance will not be overturned on appeal unless it appears that the respondents were deprived of a full and fair hearing. *Matter of Perez-Andrade*, 19 I&N Dec. at 433.

E. Due Process Challenges in the Ninth Circuit

- To prevail on a due process challenge, an alien must show error and substantial prejudice. *See Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000).

- "An alien is entitled to a 'full and fair hearing' that meets the requirements of due process." *Vargas-Hernanzdez v. Gonzales*, 497 F.3d 919, 926 (9th Cir. 2007). "'In order to prevail on such a claim, the alien must demonstrate that the challenged proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.'" *Cruz Rendon*, 603 F.3d 1104, 1109 (9th Cir. 2010) (citing *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000)).

- If there is a violation of the statutory right to counsel through the denial of a continuance, prejudice need not be shown. *See Montes-Lopez v. Holder*, 694 F.3d 1085 (9th Cir. 2012); *But see Gomez-Velazco v. Sessions*, 879 F.3d 989, 994–95 (9th Cir. 2018) (holding that there is "no reason to conclusively presume prejudice when an individual is denied the right to counsel during his initial interaction with DHS officers, provided the individual is able to consult with counsel before the removal order is executed").

- Examples:

    - Due process violation when petitioner was hindered from fully and fairly presenting her case, which would have afforded the petitioner time to gather evidence of her child's special needs. *Cruz Rendon v. Holder*, 603 F.3d 1104, 1111 (9th Cir.2010).

    - No due process violation when petitioner was not prejudiced by a denial of a continuance, because the petitioner was ineligible for relief from removal. *Robleto-Pastora v. Holder*, 591 F.3d 1051, 1062 (9th Cir. 2010).

    - No due process violation and no prejudice when relief was not immediately available to alien. *Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1247 (9th Cir. 2008).

F. Judicial Review Regarding an Equal Protection Challenge

In an unpublished case, the BIA disagreed with the respondent that 8 C.F.R. §§ 1003.29, 1240.6 was applied in a way that violated her equal protection rights. (b) (6) (BIA Nov. 21, 2014). The BIA noted that a presumption of good cause exists in the context of an alien pursuing lawful permanent residence where that alien is the beneficiary of a pending visa petition, and has established a likelihood of obtaining permanent residency. *See Matter of Hashmi*, 24 I&N Dec. 785, 790-91 (BIA 2009). However, the respondent sought to overturn an already final state criminal conviction and, thus, "the requested form of relief is too speculative to warrant such a continuance." (b) (6) (BIA Nov. 21, 2014). Therefore, the BIA concluded that the two classes of people were not similarly situated in a way that would allow the respondent to establish an equal protection claim. *Id.* (citing *Gutierrez v. Holder*, 662 F.3d 1083, 1090 n.11 (9th Cir. 2011) (rejecting an alien's equal protection claim because he did not show that his treatment "differed from that of similarly situated persons")).

III. Common Continuance Requests

A. Request for Additional Preparation Time

Good cause for a continuance can be found if the alien makes a reasonable showing that the lack of preparation occurred despite a diligent good faith effort to proceed and that any additional evidence the alien seeks is probative, noncumulative, and significantly favorable to an alien. *Matter of Sibrun*, 18 I&N Dec. at 356. These assertions must be supported by particular facts or evidence, or accompanied with an explanation of how a denial of the motion will fundamentally change the result reached. *See id.* at 356-57 ("[A]n [IJ]'s decision denying the motion for continuance will not be reversed unless the alien establishes that that denial caused him actual prejudice and harm and materially affected the outcome of his case.").

- Examples in the Ninth Circuit:
    - No abuse of discretion to deny continuance where respondent had more than two years to prepare all of his applications, and the record did not suggest that he was unprepared to present all of his applications at his merits hearing, which would have indicated actual prejudice. *Kemi v. Holder*, 561 F. App'x 615, 618 (9th Cir. 2014) (unpublished).

- Examples in the Tenth Circuit:

    - Denial of continuance reasonable where respondent appeared to be statutorily ineligible for relief sought. *See Ketcher v. Gonzales*, 500 F.3d 1080 (10th Cir. 2007) (finding respondent ineligible for adjustment because of false claim of citizenship and thus denied the request for a continuance); *Medina-Chimal v. Holder*, 602 F. App'x 720 (10th Cir. 2015) (unpublished) (finding denial of continuance reasonable where there was a clear presence issue for cancellation of removal).

    - No good cause shown for a continuance where respondent obtained new counsel after his previous counsel withdrew, and no particular facts or detailed evidence was presented to show that a continuance should be granted. *Ramirez-Canenguez v. Holder*, 528 F. App'x 853 (10th Cir. 2013) (unpublished).

    - No good cause established for a continuance where the respondent failed to submit evidence with his cancellation application, after he had four years to retrieve evidence along with a warning from the IJ that he would not be given any more time. *See Marrufo-Morales v. Lynch*, 627 F. App'x 727 (10th Cir. 2015) (unpublished). Additionally, the respondent did not establish that the failure to submit evidence was due to ineffective assistance of counsel. *Id.*

    - IJ's denial of a continuance, and subsequent finding that respondent's cancellation application was abandoned, was reasonable where respondent had two years to complete biometrics to accompany cancellation application and failed to do so. *Ramirez-Coriz v. Holder*, 761 F.3d 1158 (10th Cir. 2014).

B. Request for Continuance to Find Representation

In the absence of a knowing and voluntary waiver of the privilege of legal representation, a denial of a continuance to seek such representation results in the denial of the respondent's statutory and regulatory privilege. *Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012).

- Examples from the BIA:

    - IJ abused discretion in denying a respondent a second continuance to seek counsel where respondent was detained, made reasonable attempts to obtain counsel, and prior continuance was only two weeks. (b) (6) [redacted] (BIA Mar. 31, 2017)

- Examples from the Ninth Circuit:

    - No abuse of discretion in denying fourth motion for a continuance where the respondent "had not shown that he was diligent in obtaining counsel, provided no documentary evidence that counsel was obtained, and failed to submit any applications for relief." *See Islam v. Sessions*, 695 F. App'x 297, 298 (9th Cir. 2017) (unpublished).

    - Abuse of discretion when the record made apparent that a realistic continuance was warranted to allow the alien to seek an attorney, and that, under those circumstances, the denial of a continuance is tantamount to the denial of counsel. *Biwot v. Gonzales*, 403 F.3d 1094, 1100 (9th Cir. 2005).

- Examples from the Tenth Circuit:

    - An IJ must fulfill obligations under 8 C.F.R. § 1240.11(a) to inform respondent that they may find counsel upon their own expense if they express fear of persecution, and must provide a list of pro bono counsel. If both have been completed, obligations under the regulations have been fulfilled, and there is no abuse of discretion. This is especially true when a respondent is given several months to seek representation but fails to do so. *See Seka v. Sesisons*, 714 F. App'x 901 (10th Cir. 2017) (unpublished).

C. Request for Continuance to Pursue Visa Petition[1]

A presumption of good cause exists in the context of an alien pursuing lawful permanent residence where that alien is the beneficiary of a pending visa petition, and has established a likelihood of obtaining permanent residency. *See Matter of Hashmi*, 24 I&N Dec. 785, 790-91 (BIA 2009).

[1] Of note, the Attorney General referred *Matter of L-A-B-R- et. al.*, 27 I&N Dec. 245 (A.G. 2017) to himself, asking for briefing on when "good cause" exists for an IJ to grant a continuance for a collateral matter to be adjudicated.

Matter of Hashmi Factors

The BIA articulated five factors that an IJ should consider when determining whether to continue proceedings to afford the respondent an opportunity to apply for adjustment of status premised on a pending visa petition. *Hashmi*, 24 I&N Dec. at 790. The factors are:

(1) the DHS's response to the motion;

- "If the DHS affirmatively expresses a lack of opposition, the proceedings ordinarily should be continued by the [IJ] in the absence of unusual, clearly identified, and supported reasons for not doing so." *Hashmi*, 24 I&N Dec. at 791.
- "The [IJ] should evaluate [the DHS's] objection, considering the totality of the circumstances." *Id.* at 791.

(2) whether the underlying visa petition is prima facie approvable;

- "Submission of the visa petition to the [IJ] assists in determining the viability of the underlying I-130. If needed, the respondent's request for a continuance should be supported by particularized facts and evidence, including a copy of the I-130 visa petition packet that the respondent filed with the USCIS, along with the USCIS Notice of Action (Form I-797). *Hashmi*, 24 I&N Dec. at 791-92.
    - If the respondent has prior visa petitions that were denied, the respondent should present those petitions and USCIS's determinations for the Court's consideration. "These prior filings or other evidence of potential fraud or dilatory tactics may impact the viability of the visa petition underlying the motion." *Id.* at 792.
- No abuse of discretion and no prejudice when relief was not immediately available to the respondent. *Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1247 (9th Cir. 2008).

- No abuse of discretion in denying third continuance where Form I-130 had been denied and appeal was pending at the time of the hearing. *Prasad v. Holder*, 481 F. App'x 329 (9th Cir. 2012).

- A respondent who has a prima facie approvable [visa petition] and adjustment application may not be able to show good cause for a continuance if visa

availability is too remote. *Luevano v. Holder*, 660 F.3d 1207, 1215 (10th Cir. 2011).

- "Because [the respondent] did not have an immediately available visa, we conclude that the IJ did not abuse his discretion in denying a continuance based on his estimate that it would be approximately three years before the immigrant visa became available." *Castillo-Torres v. Holder*, 394 F. App'x 517, 522 (10th Cir. 2010) (unpublished).

(3) the respondent's statutory eligibility for adjustment of status

- "[A] continuance request could be denied based on a determination that the respondent is statutorily ineligible for adjustment." *Hashmi*, 24 I&N Dec. at 792 (citing *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978)).

- IJ not required to grant continuance based on speculation. *See Singh v. Holder*, 638 F.3d 1264, 1274 (9th Cir. 2011).

(4) whether the respondent's application for adjustments merits a favorable exercise of discretion;

- Relevant factors include, but are not limited to, "the existence of family ties in the United States; the length of the respondent's residence in the United States; the hardship of traveling abroad; and the respondent's immigration history, including any preconceived intent to immigrate at the time of entering as a nonimmigrant." *Hashmi*, 24 I&N Dec. at 793.

(5) the reason for the continuance and other procedural factors.

- "[A] critical inquiry will revolve around which party is most responsible for the delay in the proceedings. . . . Delay that is not attributable to the respondent augurs in favor of a continuance." *Hashmi*, 24 I&N Dec. at 793; *see also Malilia v. Holder*, 632 F.3d 598, 607 (9th Cir. 2011).

- "Compliance with an [IJ]'s case completion goals, however, is not a proper factor in deciding a continuance request, and [IJ]s should not cite such goals in decisions relating to continuances." *Hashmi*, 24 I&N Dec. at 793; *see also*

Matter of Rajah, 25 I&N Dec. 127, 136 (BIA 2009) ("[T]he focus of the inquiry is the likelihood of success on the adjustment application.").

- IJ permitted to consider "other procedural factors," including "a history of continuances being granted." *Hashmi*, 24 I&N Dec. at 790.

- The IJ should "articulate, balance and explain all these relevant factors, and any others that may be applicable." *Hashmi*, 24 I&N Dec. at 790.

- In *Matter of Rajah*, 25 I&N Dec. 127, 135-36 (BIA 2009), the BIA extended the *Hashmi* factors to employment-based visa petitions (Form I-140s). However, "[t]he pendency of labor certification generally would not be sufficient to grant a continuance in the absence of additional persuasive factors, such as the demonstrated likelihood of its imminent adjudication or DHS support for the motion." *Id.* at 137.

D. Request to Pursue U-Visa

United States Citizenship and Immigration Services has exclusive jurisdiction over U visa applications (along with any application for adjustment of status that may be filed should the U visa be approved), notwithstanding the existence of a removal order.

Matter of Sanchez Sosa Factors

However, the Board in *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012), concluded that continuances for the adjudication of a U visa application may still be appropriate under certain circumstances, and outlined several non-exhaustive factors that an IJ should consider in determining whether good cause exists for granting a continuance based on a respondent's potential U visa eligibility. *See* INA § 245(m):

(1) DHS's response to the motion to continue

- "Where the DHS opposes the continuance or further inquiry is otherwise warranted, 'the focus of the inquiry is the likelihood of success' on the visa petition." *Matter of Sanchez Sosa*, 25 I&N Dec. 807, 813 (BIA 2012). The IJ "should first consider 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 if so, next explore whether the applicant has been, is being, or will be helpful to the authorities. *Id.* at 813–14.

- If DHS does not oppose the continuance, generally no further inquiry is required. *See id.* at 813 (quoting *Matter of Hashmi*, 24 I&N Dec. at 791 ("[T]he proceedings ordinarily should be continued by the [IJ] in the absence of unusual, clearly identified, and supported reasons for not doing so.").

    - "Government opposition that is reasonable and supported by the record is a significant consideration, while unsupported opposition does not carry much weight." *Id*. (quoting *Hashmi*, 24 I&N Dec. at 791) (internal quotation marks omitted)

(2) Whether the underlying visa petition is prima facie approvable

- Determine whether it is likely the respondent will be able to show that he suffered "substantial physical or mental abuse" as a victim of qualifying criminal activity. As opposed to only minor or incidental harm

    - Look at nature of injury inflicted, the duration of harm, and the severity of the perpetrator's conduct

    - Documentary evidence should be submitted to support the finding

- If a prima facie showing of abuse has been made, the IJ should evaluate whether the alien has relevant information and has been, is being, or will be helpful to authorities investigating or prosecuting it.

    - Copies of Form 1-918 and Form I-918 B should be submitted to IJ if forms have been submitted to USCIS

(3) The reason for the continuance and other procedural factors

- Delay of U Visa not attributable to alien "augurs in favor of a continuance." *Sanchez-Sosa*, 25 I&N Dec. at 814 (internal quotation marks and citation omitted).

- "A history of continuances being granted by the IJ to await adjudication of a U visa petition, coupled with other relevant factors, may support a decision to move forward with the case." *Id.* (internal quotation marks and citation omitted).

- IJ can consider length of time application has been pending with USCIS, the number of prior continuances the court has provided, and additional relevant considerations in deciding whether a further continuance is warranted under the circumstances. *Id.* at 815.

- A continuance should not be granted where it is being sought "as a dilatory tactic to forestall the conclusion of removal proceedings" where it is unlikely that application will be granted. *Matter of Sanchez Sosa*, 25 I&N Dec. at 815. *Cf. Matter of Hashmi*, 24 I&N Dec. at 785 (recognizing that a continuance may be warranted where an alien has demonstrated that he is actually the beneficiary of a pending immigrant visa petition and established a likelihood of success on an application for adjustment of status).

➢ "As a general rule, 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." *Id.* at 815.

➢ A respondent can request a stay of removal from DHS if he or she believes that, pending USCIS review of his or her application for U nonimmigrant status, he or she should be permitted to remain in the United States. *See* 8 C.F.R. §§ 214.14(c)(l)(ii), 241.6; *see, e.g.*, (b) (6) [redacted] (BIA April 6, 2018).

E. Request for Continuance to Seek Post-Conviction Relief

- Pursuit of post-conviction relief in state court does not affect the finality of the conviction for federal immigration purposes. *Matter of Adetiba*, 20 I&N Dec. 506, 508 (BIA 1992).

- The BIA reaffirmed its holding in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), and reiterated that they "interpret the definition of a 'conviction' to include convictions that have been vacated as a form of post-conviction relief—for example, for rehabilitative purposes—and we will continue to give them effect in immigration proceedings. . . . [C]onvictions that have been vacated based on procedural and substantive defects in the underlying criminal proceeding as no longer valid for immigration purposes." *Matter of Jose Marquez Conde*, 27 I& N Dec. 251, 255 (BIA 2018)

- Ninth Circuit Examples:

- No abuse of discretion where alien had been in proceedings for six months and had "ample time" to seek post-conviction relief. *Garcia v. Lynch*, 798 F.3d 876, 881 (9th Cir. 2015).

- No abuse of discretion where IJ denied a continuance to seek post-conviction relief, because the conviction was final for immigration purposes. *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir. 1993).

- No abuse of discretion in denying for lack of good cause respondent's motion for continuance to collaterally attack his theft conviction, where he had not begun to seek post-conviction relief on the date of his final merits hearing, and where he was represented by an attorney. *See Santamaria-Delgado v. Sessions*, 706 F. App'x 916, 917 (9th Cir. 2017) (unpublished).

- Tenth Circuit Examples:

  - No abuse of discretion in the denial of a continuance when the respondent was pursuing a post-conviction motion of a criminal conviction that did not negate the finality of that conviction for immigration purposes. Additionally, there was no evidence of ineffective assistance of counsel and the respondent had already received several continuances. *Jimenez-Guzman v. Holder*, 642 F.3d 1294 (10th Cir. 2011).

  - Stating, in dicta, that the IJ "seemingly had no obligation" to grant a continuance for the respondent to pursue post-conviction relief. *United States v. Adame-Orozco*, 607 F.3d 647 (10th Cir. 2010).

F. Continuance to Obtain Corroborating Evidence

***Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015)**

- Where an IJ finds that an applicant for asylum or withholding of removal has not submitted reasonably available corroborating evidence, an automatic continuance is not required. *See Matter of L-A-C-*, 26 I&N Dec. 516, 527 (BIA 2015). Instead, where corroborating evidence has not been presented, the IJ should consider the applicant's explanations for its absence and, if a continuance is requested, whether there is good cause to continue the proceedings for the applicant to obtain the evidence.

- Example of when a continuance would be warranted: "where the IJ determines that the applicant was not aware of a unique piece of evidence that is essential to meeting the burden of proof." *Id.* at 522.

***Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011)**

- If an IJ requires corroborative evidence, then "the IJ must give the applicant notice of the corroboration that is required and an opportunity to either produce the requisite corroborative evidence or to explain why that evidence is not reasonably available." *Ren v. Holder*, 648 F.3d 1079, 1093 (9th Cir. 2011).

- The "notice and opportunity" requirements set forth in *Ren*, do not apply in cases where the respondent has been found to be not credible for reasons apart from failure to corroborate. *See, e.g., Yali Wang v.* Sessions, 861 F.3d 1003, 1008–09 (9th Cir. 2017) (explaining when *Ren* does not apply); *Bhattarai v. Lynch*, 835 F.3d 1037, 1043 (9th Cir. 2016) (observing that the notice-and-opportunity requirement applies when the applicant's testimony is "otherwise credible").

    - No abuse of discretion where IJ denied third request for a continuance where respondent had 1.5 years to provide his corroborating evidence showing religious persecution, and waited until his merits hearing to make his third request for a continuance. *See Hongjiang Chuai v. Sessions*, 708 F. App'x 447, 448 (9th Cir. 2018).

IV. Sample Language

A. Speculative Relief:

The Court finds that the Respondent failed to establish good cause for a continuance, because the motion is based on speculation regarding possible future approval of _____, which might provide *[him/her]* relief. The Respondent has also failed to show prejudice in *this* case if a continuance is to be denied.

The Respondent claims that:

However, the facts show that:

To date, *no immigration reform legislation has been enacted / no post-conviction relief has been granted / there has been scant showing that the respondent is prima facie eligible for a U-Visa* which would grant/render the Respondent eligible for relief from removal, [and *[his/her]* conviction for *[description of crime]* has not been vacated.] Finally, this Court is not persuaded by *[his/her]* argument that *[he/she]* was denied due process because the Respondent was provided a full and fair hearing in this case.

B. Sample Language Applying *Hashmi* Factors

An Immigration Judge may grant a motion for continuance for "good cause shown." *See* 8 C.F.R. § 1003.29. Immigration Judges have broad discretionary authority over continuances. *See Matter of Sibrun*, 18 I&N Dec. at 355-56. In *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), the Board of Immigration Appeals held that, in determining whether good cause exists to continue proceedings for the adjudication of a pending family-based visa petition, a variety of factors may be considered, including, but not limited to: (1) the DHS's response to the motion to continue; (2) whether the underlying visa petition is *prima facie* 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 any other relevant procedural factors. *Id.* at 790. "[T]he focus of the inquiry is the apparent likelihood of success on the adjustment application." *Id.*

Applying the factors set forth in *Matter of Hashmi* to the instant case, the Court first considers the DHS's response to the motion to continue.

The Court next considers whether the underlying visa petition is *prima facie* approvable. [Evaluate the viability of the underlying visa petition. Consider whether eligibility for adjustment of status is speculative e.g. respondent has not yet married USC]

The Court next considers whether the respondent is statutorily eligible for adjustment of status. *See* INA § 245(a)(2), (3) (requiring that an applicant be eligible to receive an immigrant visa, and that an immigrant visa be immediately available, to establish statutory eligibility for adjustment of status under this provision).

The Court next considers whether the respondent has demonstrated that *he/she* would merit a favorable exercise of discretion.

After weighing all of the factors set forth in *Matter of Hashmi*, *supra*, the Court concludes that the respondent [*did/did not*] demonstrate good cause for a continuance.

C. Sample Language Applying *Ahmed* Factors

An Immigration Judge may grant a motion for continuance for "good cause shown." *See* 8 C.F.R. § 1003.29. Immigration Judges have broad discretionary authority over continuances. *See Matter of Sibrun*, 18 I&N Dec. at 355-56. In evaluating whether a denial of a continuance constitutes an abuse of discretion, the Ninth Circuit, under whose jurisdiction this case arises, considers, among other things, the following factors: (1) the nature of any evidence excluded as a result of the denial of the continuance; (2) the reasonableness of the applicant's conduct; (3) any inconvenience to the Court; and (4) the number of continuances previously granted. *See Ahmed v. Holder*, 569 F.3d 1009 (9th Cir. 2009). Administrative efficiency alone can never justify the denial of a continuance. *Id.* at 1014. The Ninth Circuit repeatedly has emphasized to the Board of Immigration Appeals and to Immigration Judges that failure to consider these factors may be construed as error.

The respondent's motion to continue is predicated upon the argument that [state why the respondent is requesting a continuance e.g. to adjudicate I-130].

Applying the factors set forth in *Ahmed* to the instant case, the Court first considers the nature of any evidence excluded as a result of the denial of the continuance. The Court recognizes that the evidence potentially excluded may be [explain nature of evidence and whether it is significant]. As such, this first factor is a factor that weighs [in favor of/against] a continuance.

The Court next considers the reasonableness of the respondent's conduct. [Summarize respondent's conduct and whether reasonable in light of circumstances.]

The Court next considers any inconvenience to the Court.

The Court next considers the number of continuances previously granted. [This is the respondent's first request for a continuance/the Court has granted the respondent's previous [#] requests for continuances].

The factors set forth in *Ahmed* are not exclusive. In evaluating whether a further continuance of proceedings is warranted, the Court also considered [other considerations].

Weighing all the facts and circumstances together, the Court concludes the respondent has failed to demonstrate good cause for a continuance. Accordingly, the motion to continue is denied/granted.

D. Right to Counsel Advisal

To the respondent: You have the right to be represented during these hearings by an attorney or qualified representative at your own expense. The Court cannot provide you with an attorney or qualified representative. However, we are providing you with a list of individuals and organizations that may be able to represent you at little or no cost. You are not limited to just the persons on this list , you may hire an attorney who is not on this list. Do you understand?

Do you want more time to get an attorney or representative to help you in these proceedings?

- Yes, continuance to obtain counsel: Because you told me that you want time to find an attorney, I will continue your case to [date] at [time]. Do you understand?

  If you cannot find or afford an attorney or organization to represent you, be prepared to speak for yourself at the next hearing. Do you understand?

E. After Granting Continuance to Obtain Counsel

To the respondent: At your last hearing, I gave you more time to find an attorney or qualified representative to represent you in these proceedings. Do you have an attorney or representative with you today?

[Respondent answers negatively]

To the respondent: What attempts did you make to try and find an attorney to represent you in these proceedings?

- If granting another continuance: Based on your answers, the Court is going to give you more time to find an attorney or representative. However, if you do not have one at the next hearing, you must be prepared to represent yourself on that date.

- If denial of the continuance: At the last hearing, I advised you that you should be prepared to represent yourself at today's hearing. You do not have an attorney or representative with you today, and I find that [*give reason: e.g.,* 'you did not make a reasonable attempt to secure one,' or 'you have had sufficient opportunity to secure one.'] Therefore, the Court is going to proceed with your case today and you will be representing yourself. Do you understand?