OOD
PM 21-13

Effective: January 8, 2021

To: All of EOIR
From: James R. McHenry III, Director
Date: January 8, 2021

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CONTINUANCES

PURPOSE:	Update Executive Office for Immigration Review guidance on continuances in immigration proceedings
OWNER:	Office of the Director
AUTHORITY:	8 C.F.R. § 1003.0(b)
CANCELLATION:	Operating Policies and Procedures Memorandum 17-01

I. Background

This Policy Memorandum (PM) updates and replaces Operating Policies and Procedures Memorandum (OPPM) 17-01, *Continuances* to account for legal and policy developments subsequent to its issuance. *See, e.g.*, *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018). Although this PM replaces OPPM 17-01,[1] it retains that OPPM's core principle: although fundamental fairness and due process require that legal proceedings be postponed in appropriate circumstances, Immigration Judges must also be mindful to ensure that each decision granting or denying a continuance request is in accordance with the law. Moreover, although the appropriate use of continuances serves to protect due process, which Immigration Judges must safeguard above all, there is also a strong incentive by respondents in immigration proceedings to abuse continuances, and Immigration Judges must be equally vigilant in rooting out continuance requests that serve only as dilatory tactics. As the Supreme Court has recognized, "[o]ne illegally present in the United States who wishes to remain already has a substantial incentive to prolong litigation in order to delay physical deportation for as long as possible." *INS v. Rios-Pineda*, 471 U.S. 444, 450 (1985). Further, "as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS v. Doherty*, 502 U.S. 314, 323 (1992). Continuance requests that seek only to prolong a removable alien's presence in the United States serve neither the public's interest nor the interests of justice, including the related interests of other aliens with meritorious claims whose cases may be delayed collaterally.

[1] This PM does not supersede or alter any other OPPM or PM.

II. Continuances

This PM provides the following, non-exhaustive list of relevant legal and policy principles as an aid to adjudicators considering common types of continuance requests, though adjudicators should always remain cognizant of and apply the most current and appropriate law to any motion for a continuance:

- All continuance requests should be adjudicated only based on the record and in accordance with applicable law—statutes, regulations, and binding precedents or court orders.

- EOIR has no policy mandating or requiring Immigration Judges to grant a continuance for any reason in any particular case or circumstance, except where a continuance is required by binding law. *See* PM 20-07, *Case Management and Docketing Practices* at 5 (Jan. 31, 2020). EOIR management does not possess authority to direct the result of an adjudication by an Immigration Judge by directing the Judge to grant or deny a continuance request in specific cases.

- Consistent with former OPPM 17-01, continuances based on requests made by the U.S. Department of Homeland Security (DHS) should be comparatively rare.

    - Consistent with OPPM 05-03, *Background and Security Investigations in proceedings Before Immigration Judges and the Board of Immigration Appeals* (Mar. 28, 2005) and PM 21-06, *Asylum Processing* (Dec. 4, 2020), a failure by DHS to report on the completion and results of relevant investigations and examinations does not require a continuance of the hearing, though Immigration Judges may not grant certain applications until the results of those investigations and examinations have been reported. 8 C.F.R. § 1003.47.[2]

    - Consistent with PM 20-07, EOIR has no policy requiring an Immigration Judge to grant a continuance if a DHS attorney does not appear for a hearing or does not possess that agency's administrative file at the hearing.

- The general standard for a continuance is good cause, 8 C.F.R. § 1003.29. By statute, however, "[i]n the absence of exceptional circumstances, final administrative adjudication of [an] asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed." INA § 208(d)(5)(A)(iii). "Exceptional circumstances" is a higher standard than "good cause." PM 19-05, *Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii)* (Nov. 19, 2018) at 2-3 ("A continuance does not automatically justify exceeding the 180-day timeline in INA § 208(d)(5)(A)(iii), however, because the statute's 'exceptional circumstances'

[2]If DHS cannot report the results because the alien failed to timely provide biometrics and other biographical information without good cause, such failure by the alien "will constitute abandonment of the application" at issue. 8 C.F.R. § 1003.47(d).

standard is higher than the 'good cause' standard for continuances."). Thus, "if granting a continuance would result in missing the 180-day deadline, the Immigration Judge may only grant the continuance if the respondent satisfies both the good-cause standard of 8 C.F.R. § 1003.29 and also shows the 'exceptional circumstances' required by INA § 208(d)(5)(A)(iii)." *Id*. at 2.

- Continuance requests regarding collateral matters, especially applications for benefits pending before DHS, are generally governed by the Attorney General's decision in *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018). To the extent they are consistent with *Matter of L-A-B-R*, the following principles may also apply in specific cases:

    - Potential visa availability that is "too remote" does not establish good cause for a continuance. *Matter of L-A-B-R-*, 27 I&N Dec. at 418 ("good cause does not exist if the alien's visa priority date is too remote to raise the prospect of adjustment of status above the speculative level"); *accord Matter of Quintero*, 18 I&N Dec. 348, 350 (BIA 1982) ("In any case, the fact that the respondent has an approved visa petition does not entitle him to delay the completion of deportation proceedings pending availability of a visa number."), *aff'd sub nom. Quintero-Martinez v. INS*, 745 F.2d 67 (9th Cir. 1984).

    - Under well-established precedent from the Board of Immigration Appeals (Board), a request for deferred action by DHS does not support an adjournment of proceedings. *Matter of Quintero*, 18 I&N Dec. at 350 ("Furthermore, since the respondent can request deferred action status at any stage in the proceedings, the immigration judge did not err in refusing to adjourn the hearing to allow him to pursue that relief.").

    - Aliens who are *prima facie* eligible for an 1-751 waiver, including as a matter of discretion, should generally have their cases continued while that waiver application is pending with DHS. *Matter of Stowers*, 22 I&N Dec. 605 (BIA 1999).

    - Cases in which a confirmed unaccompanied alien child (UAC) has filed an asylum application with DHS must be continued while that application is pending adjudication with DHS because DHS has initial jurisdiction over such applications. INA § 208(b)(3)(C).[3]

[3]Immigration Judges retain authority, however, to determine their own jurisdiction in this context, *i.e.* whether an alien in immigration proceedings met or meets the legal definition of a UAC, 6 U.S.C. § 279(g)(2), at the time the asylum application was filed. *See* PM 21-06 at 1 n.2; *accord Garcia v. Barr*, 960 F.3d 893, 895 (6th Cir. 2020) ("Nowhere does the statute ask whether an immigration official previously found the applicant to be an 'unaccompanied alien child.' Rather, it asks only whether the alien meets the statutory criteria at the time of his application. And like other judges, immigration judges have the power to determine their own jurisdiction. . .Thus, the immigration judge properly exercised jurisdiction once he found that [the respondent] did not meet the statutory criteria at the time of his asylum application.").

- Continuance requests related to applications for a U nonimmigrant visa involve a recent and developing area of law. Accordingly, as case law evolves, adjudicators are encouraged to review applicable precedents, including *Matter of L-A-B-R-* and new circuit court decisions as appropriate. *See, e.g.*, *Matter of L-N-Y-*, 27 I&N Dec. 755 (BIA 2020); *Matter of Sanchez-Sosa*, 25 I&N Dec. 807 (BIA 2012)[4]; *see also, e.g.*, *Alvarez-Espino v. Barr*, 959 F.3d 813, 818 (7th Cir. 2020) ("[DHS] will process the [U visa] application whether or not Alvarez-Espino has a final order of removal against him . . . . Because Alvarez-Espino can continue to pursue every immigration benefit he seeks [outside of removal proceedings], the Board did not abuse its discretion in denying his motion for remand or for a continuance."); *Maldonado-Guzman v. Sessions*, 715 F. App'x 277, 284-85 (4th Cir. 2017) ("To the contrary, the Board did not violate the Due Process Clause when it dismissed Maldonado-Guzman's appeal because the denial of a continuance does not affect Maldonado-Guzman's interest in filing or pursuing the U visa application. . .Furthermore, Maldonado-Guzman's right to be heard is in no way prejudiced by the denial of a continuance. Even if he is subject to a final order of removal, he is not precluded from filing a petition for U–1 nonimmigrant status directly with [DHS]. . .If [DHS] later grants Maldonado-Guzman's U visa, he may file to reopen and terminate the removal proceedings against him. . .Most significantly, Maldonado-Guzman can seek an administrative stay of removal despite being subject to a final order of removal. . .Given that Maldonado-Guzman's right to be heard was not prejudiced by the denial of a continuance on removal proceedings, he has failed to establish a violation of the Due Process Clause." (cleaned up)).

- Category (2) status-docket cases generally warrant continuances until they can be resolved. *See generally* PM 19-13, *Use of Status Dockets* at (Aug. 16, 2019) at 2.

    - Cases in which an Immigration Judge intends to grant cancellation of removal for certain nonpermanent residents pursuant to INA § 240A(b), which are subject to an annual statutory cap of 4000, should be continued if the cap has been reached for the year and that application is the only one the alien has filed. 8 C.F.R. § 1240.21(c)(1); *see also* OPPM 17-04, *Applications for Cancellation of Removal or Suspension of Deportation that are Subject to the Cap* (Dec. 20, 2017).

    - Cases in which an alien otherwise *prima facie* eligible for adjustment of status before an Immigration Judge in the United States had an immediately-available visa at the time the adjustment of status application was filed with the immigration court but the visa category subsequently retrogressed by the time of the hearing, should be held in abeyance. *Matter of Briones*, 24 I&N Dec. 355, 357 n.3 (BIA 2007).

[4]The Board did not address visa availability—or the remoteness of such availability—in *Matter of Sanchez Sosa*, as it appears that the annual statutory cap on U visas had not been reached at the time the decision was issued.

- By statute, "[i]n order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 240 of the Act, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date." INA § 239(b)(1). But, "[n]othing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 240 of the Act if the [10-day] time period described [above] has elapsed and the alien has failed to secure counsel." INA § 239(b)(3). Aliens should receive a fair opportunity to seek counsel, if they wish to do so, consistent with the statute and applicable case law. *Matter of C-B-*, 25 I&N Dec. 888 (BIA 2015).[5]

- Consistent with former OPPM 17-01, requests for attorney preparation time should be reviewed carefully, especially given that the time between a master calendar hearing and an individual merits hearing, which often exceeds one year in a non-detained case, already encompasses substantial time for preparation.

    - Frequent or multiple requests for additional preparation time based on a practitioner's workload concerns related to large numbers of other pending cases should be rare and warrant careful review. "A practitioner's workload must be controlled and managed so that each matter can be handled competently." 8 C.F.R. § 1003.102(q)(1). Thus, for a practitioner who takes on more cases than he or she can responsibly and professionally handle, necessitating the need for multiple continuances across multiple cases, it may be appropriate for an Immigration Judge to consider referral to EOIR disciplinary counsel for further action and possible sanction for a violation of 8 C.F.R. § 1003.102.

- Consistent with former OPPM 17-01, requests to continue an individual merits hearing that has already been scheduled remain of particular importance. Such hearings are typically scheduled far in advance, which provides ample opportunity for preparation time, and often involve interpreters or third-party witnesses whose schedules have been carefully accommodated. Moreover, slots for individual merits hearings cannot be easily filled by other cases, especially if the decision to continue the hearing is made close in time to the scheduled date. Although some continuances of individual merits hearings are unavoidable, 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. Thus, such a request should be reviewed very carefully, especially if it is made close in time to the hearing. For a continuance request made well in advance of the scheduled date of the hearing, an Immigration Judge should adjudicate that request expeditiously and, if granted, should endeavor to fill that hearing slot with another individual merits hearing after providing sufficient notice. Further, because an individual merits hearing is typically scheduled far in advance and generally only after considering the availability of a respondent's representative, a request for a continuance based on a

[5]The respondent in *Matter of C-B-* was detained, and his only hearing occurred eight days after he was issued a notice to appear, in apparent contravention of INA § 239(b)(1). 25 I&N Dec. at 889. Thus, that decision did not address the relevance of the statutory language in INA § 239(b)(1),(3) regarding an alien's opportunity to seek representation, nor did it address a situation common in non-detained cases in which a respondent has many months after the issuance of a notice to appear to seek representation before a hearing.

scheduling conflict with a respondent's representative that arose after the individual merits hearing has been calendared should be rare and should be considered very carefully.

- Consistent with former OPPM 17-01, continuance requests solely for dilatory purposes should not be countenanced by Immigration Judges. *See also* 8 C.F.R. § 1003.102(j)(1) ("A practitioner engages in frivolous behavior when he or she knows or reasonably should have known that his or her actions. . .are taken for an improper purpose, such as. . .to cause unnecessary delay.").

- A decision on a continuance request based solely on agency case completion goals or an employee's individual performance appraisal is improper and contrary to well-established law. *Matter of L-A-B-R-*, 27 I&N Dec. at 416. However, Immigration Judges are not prohibited from appropriately considering "the number of continuances previously requested or the continuance's impact on the efficient determination of the case" when adjudicating a continuance request. *Id*. at 417.

- On November 27, 2020, the Department of Justice published a Notice of Proposed Rulemaking (NPRM) proposing to codify multiple principles related to continuances in EOIR's regulations. Good Cause for a Continuance in Immigration Proceedings, 85 *Fed. Reg*. 75925 (Nov. 7, 2020). Although that NPRM has not been finalized—and, thus, the proposed regulatory changes in the NPRM are not in effect—it nevertheless contains a wealth of potentially helpful information for adjudicators regarding continuance requests in immigration proceedings.[6] Accordingly, adjudicators who are interested are encouraged to review the NPRM for additional information on the subject.

- In all situations in which a continuance is granted at a hearing, Immigration Judges must make the reason(s) for the adjournment clear on the record by annotating the case worksheet on the left side of the Record of Proceedings with the corresponding adjournment code. The Court Administrators and court staff must ensure that each adjournment code is accurately entered into CASE (or any successor case management system). *See* PM 21-07 *Annotating Adjournment, Call-up, and Case Identification Codes* (Dec. 10, 2020).

III. Conclusion

This PM is intended solely to assist adjudicators in considering continuance requests by both parties in immigration proceedings. It is not intended to, does not, and may not be relied upon to create, any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Nothing herein should be construed as mandating a particular outcome in any

[6] If the NPRM is finalized and becomes effective, then EOIR will provide specific guidance on the final rule's regulatory provisions accordingly.

specific case. Nothing in this PM limits an adjudicator's independent judgment and discretion in adjudicating cases or an adjudicator's authority under applicable law.

Please contact your supervisor if you have any questions.