



CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Advisory

Seeking Continuances in Immigration Court in the Wake of the Attorney General’s Decision in *Matter of L-A-B-R*¹

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I. Introduction

Former Attorney General Jeff Sessions used his role as the chief immigration adjudicator within the Department of Justice to drastically change settled immigration court procedure, thereby highlighting the need for an immigration court that is independent of the whims of a political appointee in the executive branch.² His decisions as Attorney General were intended to speed cases toward removal and limit respondents'³ ability to pursue immigration relief for which they are eligible. Former Attorney General Sessions turned uncontroversial docketing procedures, such as marking a case as off-calendar through administrative closure, or continuing a case, into politically charged issues as his decisions prioritized so-called efficiency over fairness. This practice advisory discusses the Attorney General's decision *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018), and suggests strategies practitioners may use to fight for their clients' ability to obtain needed continuances. Part II of this advisory gives an overview of the *Matter of L-A-B-R-* decision and discusses prior Board of Immigration Appeals decisions on continuances. Part III discusses specific considerations on how to best frame requests for continuances in removal proceedings while pursuing common forms of relief before U.S. Citizenship and Immigration Services. Part IV gives practice tips for successful immigration court advocacy following *Matter of L-A-B-R-*.

II. Overview of *Matter of L-A-B-R-* and Previous Board of Immigration Appeals Decisions on Continuances

A. The Attorney General's Decision in *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018)

Matter of L-A-B-R- is a precedent decision about how immigration judges (IJs) should decide certain motions for continuances in removal proceedings. It is one of a series of decisions former Attorney General Sessions referred to himself that collectively aim to expedite immigration proceedings and remake immigration court procedure.⁴ Specifically, the holding in *L-A-B-R-* addresses what factors an IJ must consider when a respondent makes a request for a continuance in order "to await the resolution of a collateral matter."⁵ The decision interprets an immigration regulation that allows IJs to grant continuances "for good cause shown."⁶ The good cause standard requires the application of a multifactor balancing test, but *L-A-B-R-* places added emphasis on just two specific criteria that it states should outweigh other factors in a continuance request analysis: (1) the likelihood that the "collateral" relief will be granted, and (2) whether the relief will materially affect the outcome of the removal proceedings.⁷

² See Karolina Walters, American Immigration Council, *Immigration Judges' Union Fights for Judicial Independence* (Aug. 17, 2018), <http://immigrationimpact.com/2018/08/17/immigration-judges-union-judicial-independence/>. Unless otherwise noted, this practice advisory uses "Attorney General" to refer to the office generally rather than to any specific individual who may be the Attorney General at a given moment in time.

³ This practice advisory uses the term "respondent" to refer to an individual who is in removal proceedings in immigration court. The advisory also uses the term "non-citizen" to refer generally to individuals who are not U.S. citizens.

⁴ See 8 CFR § 1003.1(h)(1) (describing the certification procedure).

⁵ *Matter of L-A-B-R-*, 27 I&N Dec. 405, 413 (A.G. 2018).

⁶ 8 CFR § 1003.29.

⁷ 27 I&N Dec. at 413.

The *L-A-B-R*- decision details what IJs should consider as other “secondary” factors including:

- 1) Whether the respondent has exercised reasonable diligence in pursuing the “collateral” matter
- 2) The Department of Homeland Security’s (DHS) position on the motion
- 3) The length of the requested continuance
- 4) The procedural history of the case, and
- 5) Administrative efficiency.⁸

B. “Collateral” Matters in *Matter of L-A-B-R*-

In the decision, the term “collateral” matter⁹ refers to filings with U.S. Citizenship and Immigration Services (USCIS) and other matters pursued outside of immigration court that could affect the outcome of the removal proceedings. A respondent may be eligible for immigration relief that is adjudicated by USCIS and over which USCIS has exclusive jurisdiction. For example, a respondent may move for a continuance because he or she is the beneficiary of a pending petition or application before USCIS that, if approved, would provide a lawful or authorized status or a pathway to seek adjustment of status.

While *L-A-B-R*- does not detail when IJs should grant continuances for a “collateral” matter to be adjudicated, it does provide specific examples of types of “collateral” matters that would likely **not** provide good cause for a continuance to be granted:

- 1) A continuance to apply for a provisional waiver from USCIS while in removal proceedings (because a respondent is only eligible for a waiver if the proceedings have been administratively closed or a final decision has been entered).¹⁰
- 2) A collateral attack on a criminal conviction through post-conviction relief (because courts have found this to be too “tentative” and “speculative”).¹¹
- 3) When the “collateral” relief has already been denied once and there are no relevant changed circumstances.

⁸ *Id.* at 413, 415.

⁹ It is worth noting that while the Attorney General uses the terms “collateral matter” or “collateral relief” to describe benefits over which USCIS has exclusive jurisdiction, prior published BIA decisions on motions to continue do not use this framing. The first definition of the adjective “collateral” in the Merriam Webster Dictionary is “accompanying as secondary or subordinate.” *Collateral (Adjective) Definition*, Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/collateral> (last visited Nov. 20, 2018). The authors do not believe such applications are secondary and also note that by choosing this word, the Attorney General is echoing its use in the context of “collateral” arrests by Immigration and Customs Enforcement. As such, the authors will not adopt the term “collateral” and instead refer to its use by the Attorney General in quotations.

¹⁰ For information about the Attorney General’s separate 2018 decision largely eliminating administrative closure, see CLINIC, *Practice Pointer: Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018)* (June 5, 2018), <https://cliniclegal.org/sites/default/files/Castro-Tum-Practice-Pointer-Final-6-5-2018.pdf> [hereinafter “CLINIC *Castro-Tum* Practice Pointer”].

¹¹ Pursuant to the recent BIA decision *Matter of J. M. Acosta*, 27 I&N Dec. 420 (BIA 2018), a late-filed direct appeal related to the merits of a conviction renders the conviction “non-final.” Thus a direct appeal related to the issue of guilt or innocence or a substantive defect in the criminal proceedings, even if late-filed, should not be considered “collateral.” See also part III.I *infra*.

- 4) When the adjustment of status application filed by a respondent who is the beneficiary of a visa petition would be denied by the IJ anyway because of statutory ineligibility or as a matter of discretion, and
- 5) When a respondent's visa priority date is "too remote to raise the prospect of adjustment of status above the speculative level."¹²

C. The Legal Framework for Immigration Court Continuances Before *Matter of L-A-B-R-*

L-A-B-R- did not overrule previous Board of Immigration Appeals (BIA) precedents governing continuances to pursue specific types of "collateral" matters. Before *L-A-B-R-*, the BIA's leading case and framework for assessing a motion for a continuance to allow time for a visa petition to be adjudicated with USCIS was *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). In that case, the BIA held that an IJ should consider and balance various factors in assessing a motion for a continuance to allow the respondent to pursue a family-based visa petition. The five-factor test set forth by the BIA included:

- 1) DHS's response to the motion
- 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 of status merits a favorable exercise of discretion, and
- 5) The reason for the continuance and other procedural factors.¹³

While the BIA held that all of these factors may be relevant in a given case, the BIA said the "focus of the inquiry is the apparent ultimate likelihood of success on the adjustment application."¹⁴ If DHS¹⁵ did not oppose the motion, the BIA held that the "proceedings ordinarily should be continued" unless there were "unusual, clearly identified, and supported reasons for not doing so."¹⁶ Even when DHS opposed a motion to continue, the BIA held that if, in the totality of the circumstances, DHS's opposition is unsupported, it should not "carry much weight."¹⁷

In *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009), the BIA extended *Hashmi* to continuance requests in the employment-based visa context. The BIA declined to remand the case to the IJ because the respondent had not established *prima facie* eligibility for adjustment of status and therefore lacked a showing of good cause. The respondent, who was seeking an employment-based visa, was not *prima facie* eligible for adjustment of status because he did not have a pending labor certification and had therefore not yet begun the three-step employment-based

¹²*L-A-B-R-*, 27 I&N Dec. at 415, 417-418.

¹³ *Hashmi*, 24 I&N Dec. at 790.

¹⁴ *Id.*

¹⁵ DHS is comprised of dozens of sub-agencies including Immigration and Customs Enforcement's (ICE) Office of the Principal Legal Advisor (OPLA) for Office of Chief Counsel (OCC). OPLA OCC attorneys represent ICE in immigration court removal proceedings. Unless otherwise specified this practice advisory uses DHS and OCC interchangeably because the BIA cases often refer to DHS as opposing counsel in removal proceedings.

¹⁶ *Hashmi*, 24 I&N Dec. at 791.

¹⁷ *Id.* at 791.

adjustment process. The BIA held that in determining whether good cause exists to continue removal proceedings to await the adjudication of a pending employment-based visa petition or labor certification, an IJ should determine the respondent's place in the adjustment of status process and consider the applicable factors identified in *Hashmi*. In this context, the pendency of a labor certification is generally not sufficient to warrant a grant of a continuance.

In *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012), discussed in greater detail in part III.C below, the BIA tailored *Hashmi* in order to apply it to respondents petitioning USCIS for U nonimmigrant status, which is available to certain crime victims who provide assistance to law enforcement. The BIA modified the *Hashmi* standard to fit the jurisdictional particularities of U nonimmigrant status petitions wherein USCIS has exclusive jurisdiction over the petitions, as well as the applications for adjustment of status under Immigration and Nationality Act (INA) § 245(m). The BIA echoed *Hashmi*'s pronouncement that when DHS does not oppose a continuance, generally proceedings should be continued.¹⁸ If DHS did oppose or "further inquiry is otherwise warranted," then the focus would be on the likelihood of success on the U nonimmigrant status petition.¹⁹

D. How *Matter of L-A-B-R*'s Continuance Standard Compares with Previous BIA Precedent

L-A-B-R does not change the regulatory good cause requirement²⁰ for a motion for a continuance to be granted. As discussed above, the BIA has previously interpreted the "good cause" language in the regulation to require a consideration and balancing of multiple factors when a respondent requests a continuance to pursue relief over which the IJ does not have jurisdiction. However, the primary factors an IJ must consider are shifted in *L-A-B-R*'s holding. According to the decision, the determination of good cause remains within the IJ's discretion, but the IJ should give more weight to the likelihood that the "collateral" matter will be granted and will materially affect the outcome of the removal proceedings and less weight to DHS's position and other procedural factors.

L-A-B-R also differs from previous BIA decisions on continuances for "collateral" matters in its tone and seeming intention to make it harder for IJs to grant continuances to respondents seeking relief in other forums. It attempts to limit the IJ's discretion in granting continuances and emphasizes administrative efficiency over the IJ's authority in applying the good cause standard in removal proceedings. The Attorney General states that the BIA's development and extension of *Hashmi* over the past decade has coincided with a rise in the total number of continuances granted by IJs, asserts that the "overuse of continuances in the immigration courts is a significant and recurring problem,"²¹ and implies that respondents seek continuances as a "dilatory tactic" to abuse the immigration process.²² In fact, according to government statistics, only 13 percent of

¹⁸ *Sanchez Sosa*, 25 I&N Dec. at 813.

¹⁹ *Id.*

²⁰ 8 CFR § 1003.29.

²¹ *L-A-B-R*, 27 I&N Dec. at 411.

²² *Id.* at 407.

continuances sought between 2006 and 2015 were granted for respondents seeking relief before USCIS.²³

The decision’s purported promotion of efficiency is evident in its characterization of the good cause standard as an appropriate check on IJs’ authority that “reflects the public interest in expeditious enforcement of the immigration laws, as well as the tendency of unjustified continuances to undermine the proper functioning of our immigration system.”²⁴ “Efficiency” is seemingly the core value in *L-A-B-R-*, but the decision fails to mention other causes of delays in immigration courts, such as lengthy USCIS adjudication delays outside of the control of respondents, the administration’s increased immigration enforcement, DHS’s decreased use of prosecutorial discretion, and an increase in the overall number of cases in immigration court. Suggesting that administrative efficiency is an appropriate factor for an IJ to emphasize in denying a continuance request, the decision limits IJs’ discretionary authority and implies that IJs should be more careful in their grants of continuances to avoid BIA reversal on interlocutory appeal.²⁵ *L-A-B-R-*, when viewed in conjunction with former Attorney General Sessions’s other decisions on immigration matters—including *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018), *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), and *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018)—reflects his goals of limiting IJs’ discretion in removal proceedings, speeding up decisions, and likely increasing removals.

L-A-B-R- imposes procedural hurdles on both the IJ and the respondent that make it more difficult for the respondent to pursue a Form I-130 visa petition or other application that must be filed with USCIS and adjudicated before the respondent will be eligible to seek relief from removal. The decision directs already overburdened IJs to justify any grants of continuances on the record or in a written decision, including their evaluation and balancing of the relevant factors, implying that without this reasoning, IJs’ continuance grants may be reversed on interlocutory appeal.²⁶ There is no language in either the regulations or the INA, however, to impose this heightened burden on an IJ to justify a continuance grant, but not a continuance denial.²⁷ In addition, a significant change under *L-A-B-R-* is that DHS non-opposition may not be a sufficient basis for granting a continuance and IJs are cautioned to “avoid improperly shifting the burden to DHS to demonstrate the absence of good cause.”²⁸ The decision also emphasizes that the respondent must provide evidentiary submissions about the “collateral” proceeding to support the continuance request, as discussed in greater detail in part III below.

²³ See U.S. Government Accountability Office (GAO), Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges, at 125 (June 2017), <https://www.gao.gov/assets/690/685022.pdf> [hereinafter “2017 GAO Report on Immigration Courts”].

²⁴ *L-A-B-R-*, 27 I&N Dec. at 406.

²⁵ *Id.* at 416-19.

²⁶ *Id.* at 418-19.

²⁷ Even though *L-A-B-R-* does not appear to require it, practitioners should argue that the IJ must provide a reasoned decision for the denial of a continuance in order to permit meaningful review. See *Matter of S-H-*, 23 I&N Dec. 462, 466 (BIA 2002) (noting the importance that IJs “include in their decisions clear and complete findings of fact that are supported by the record and are in compliance with controlling law”).

²⁸ *L-A-B-R-*, 27 I&N Dec. at 416.

Although *L-A-B-R-* does not change the regulatory good cause requirement for motions for continuances, the decision, combined with the new IJ performance evaluation metrics, will likely lead to fewer grants of motions to continue. In March 2018, Executive Office for Immigration Review (EOIR) Director James McHenry issued a memorandum stating that as of October 1, 2018, IJs are required to meet numerical quotas as part of their performance evaluation. These metrics require IJs to complete 700 cases per year to receive a satisfactory rating.²⁹ They also require IJs to complete 95 percent of individual hearings on the same day that they begin the hearing and to decide 85 percent of motions within 20 days of receipt.³⁰ While the memorandum does not specifically mention continuances, IJs may feel pressured to complete cases quickly and be less inclined to grant continuances.³¹ For those IJs who can withstand the pressure of the new performance evaluation metrics, one consequence of *L-A-B-R-* will likely be an increase rather than decrease in the immigration court backlog.³² Practitioners will have to submit more evidence and IJs will have to devote more time to evaluating the merits of a motion for a continuance, which now includes an evaluation of a respondent’s likelihood of success on his or her application before USCIS, rather than spending that time on individual hearings.

E. Immigration Court Continuances That Are Not Governed by *Matter of L-A-B-R-*

In referring *Matter of L-A-B-R-* to himself, the Attorney General laid out the question to be addressed: “Under what circumstances does ‘good cause’ exist for an IJ to grant a continuance for a collateral matter to be adjudicated?”³³ The decision does not directly address other “good cause” for postponements. Thus, two of the primary reasons respondents seek continuances—the need to find counsel and the need to prepare the case³⁴—should not be directly affected by the decision in *L-A-B-R-* because those requests do not involve “collateral” matters.

In fact, respondents in two of the three consolidated cases in *L-A-B-R-* received continuances to find counsel. The first respondent, Mr. L-A-B-R-, had his first master hearing in November 2015 at which time he stated his intention to file for asylum. The judge continued the case until March 2016 and again until May 2016 to give the respondent time to find counsel and complete his asylum application. Significantly, in his decision, the Attorney General does not question the IJ’s

²⁹ EOIR, Performance Plan: Adjudicative Employees (Mar. 30, 2018), AILA Doc. No. 18040301, www.aila.org/infonet [hereinafter “EOIR Performance Plan”].

³⁰ *Id.*

³¹ Indeed, in testimony before a Senate subcommittee hearing dealing with the immigration courts, Judge A. Ashley Tabaddor, president of the National Association of Immigration Judges stated, “It is difficult to imagine a more profound financial interest than one’s very livelihood being at stake with each and every ruling on a continuance or need for additional witness testimony which would delay a completion.” Statement of A. Ashley Tabaddor, President, National Association of Immigration Judges, *Strengthening and Reforming America’s Immigration Court System: Hearing Before the Subcommittee on Border Security and Immigration of the Senate Committee on the Judiciary*, 115th Cong., at 7 (Apr. 18, 2018) (statement of A. Ashley Tabaddor, President, National Association of Immigration Judges), <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf>.

³² For information on the immigration court backlog, which is currently over 750,000 cases, see Transactional Records Access Clearinghouse (TRAC), Immigration Court Backlog Tool, http://trac.syr.edu/phptools/immigration/court_backlog/ (last updated Sept. 2018) [hereinafter “TRAC Immigration Court Backlog Tool”].

³³ *Matter of L-A-B-R-*, 27 I&N Dec. 245 (A.G. 2018).

³⁴ According to a GAO report on immigration court, 21 percent of continuances are sought by respondents to seek representation and another 20 percent are sought by the respondent or respondent’s legal representative for case preparation. 2017 GAO Report on Immigration Courts, *supra* note 23, at 125.

decision to allow these continuances; he only questions the IJ's later continuances to allow the respondent to pursue a visa petition with USCIS. Likewise, the second respondent, Ms. Somphet, received two continuances to seek counsel, which the Attorney General did not question. The Attorney General does not mention a continuance to seek counsel or for attorney preparation in the third consolidated case.

In 2017, EOIR released an updated Operating Policies and Procedures Memorandum (OPPM) on continuances.³⁵ The OPPM cautions against dilatory tactics by respondents, but also reminds judges that “the appropriate use of continuances serves to protect due process, which IJs must safeguard above all.”³⁶ The OPPM states that “it remains general policy that at least one continuance should be granted” in order to “give a respondent the opportunity to obtain legal counsel.”³⁷ This policy is consistent with BIA precedent. In a 2012 case, the BIA stated, “In order to meaningfully effectuate the statutory and regulatory privilege of legal representation where it has not been expressly waived, the Immigration Judge must grant a reasonable and realistic period of time to provide a fair opportunity for a respondent to seek, speak with, and retain counsel.”³⁸ However, the OPPM does caution IJs to “inquire as to the respondent’s diligence” in seeking counsel in granting further continuances to find counsel and to take into consideration the fact that the respondent has been given a list of pro bono counsel.³⁹ Representatives at nonprofit organizations who conduct an intake with a respondent, but are unable to immediately accept the case due to resource constraints, should consider writing a letter on the respondent’s behalf that the respondent can show the court to prove his or her diligence in seeking counsel.

The OPPM likewise reiterates that it is appropriate to grant at least one continuance for attorney preparation though subsequent requests “should be reviewed carefully.”⁴⁰ It adds, “[i]t is also appropriate for IJs to consider the overall complexity of the case in determining the appropriateness and length of any continuance for attorney preparation time, as well as the number and length of prior continuances for preparation time.”⁴¹

On November 19, 2018, EOIR issued a memorandum about IJ adjudications of asylum applications, which “establishes the policy of EOIR—consistent with INA § 208(d)(5)(A)(ii)—to complete adjudication of asylum applications within 180 days to the maximum extent practicable.”⁴² The memo discusses the asylum statute’s language that absent “exceptional circumstances” asylum application adjudications shall be completed within 180 days of filing. It states that if granting a continuance would cause the 180-day deadline to pass, the IJ can only

³⁵ Memorandum from Mary Beth Keller, Chief IJ, EOIR, Operating Policies and Procedures Memorandum 17-01: Continuances (July 31, 2017), <https://www.justice.gov/eoir/file/oppm17-01/download> [hereinafter “OPPM 17-01”].

³⁶ *Id.* at 3. In the six page OPPM, the Chief IJ mentions due process as a guiding principle twice. By way of contrast, the words “due process” do not appear at all in the Attorney General’s 15-page *L-A-B-R-* decision.

³⁷ *Id.* at 4.

³⁸ *Matter of C-B-*, 25 I&N Dec. 888, 889 (BIA 2012).

³⁹ OPPM 17-01, *supra* note 35, at 4.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Memorandum from James R. McHenry III, Director, EOIR, Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii), at 1 (Nov. 19, 2018), <https://www.justice.gov/eoir/page/file/1112581/download> [hereinafter “EOIR Asylum Memo”].

grant the continuance if the respondent meets the regulatory good cause standard and also shows “exceptional circumstances” under INA § 208(d)(5)(A)(iii). Thus those seeking preparation-based continuances in asylum cases may face a higher burden than those seeking preparation-based continuances in other cases.

With the increased scrutiny IJs will be giving to requests for continuances, practitioners who need more than one continuance for preparation should be able to explain to the court what evidence they are waiting for to complete preparation. For example, in one unpublished decision sustaining the respondent’s appeal, the BIA held that the IJ erred in not continuing proceedings to allow her attorney a meaningful opportunity to review and present her case before the court and that “[w]hile we appreciate an Immigration Judge’s desire to keep a detained docket moving efficiently, it is also essential that Immigration Judges be mindful of a respondent’s invocation of procedural rights and privileges.”⁴³ In other cases, a practitioner may be waiting for a response to a Freedom of Information Act (FOIA) request or for documents from abroad. In such situations, the practitioner should submit evidence to the court showing the letters or e-mails that have been exchanged in seeking the documents. The practitioner should consider whether the correspondence should be redacted as needed to preserve attorney-client privilege and to only include the information needed to show the respondent’s diligence in seeking the evidence.

A respondent may also need to seek a continuance to form or memorialize a relationship that will make him or her eligible for relief before the IJ, such as cancellation of removal or adjustment of status in immigration court.⁴⁴ A continuance may be needed, for example, to allow the respondent to marry a partner, to allow the respondent or partner to seek a divorce to be eligible to marry, or to wait for a child to be born. In any of these situations, the practitioner should argue that *L-A-B-R-* does not apply because cancellation of removal is not a “collateral” matter in that the IJ has exclusive jurisdiction to decide the case. Instead, the steps that the respondent must take to demonstrate the required family relationship are more akin to case preparation that is not at issue in *L-A-B-R-*.

Practitioners may also need more than one continuance for attorney preparation when working with a vulnerable client. The BIA has previously acknowledged the special problems facing individuals with mental disabilities in removal proceedings and established a framework for analyzing cases in which issues of mental competency arise.⁴⁵ Similarly, a practitioner working

⁴³ *Bernartita Moses*, A206-352-760 (BIA Dec. 9, 2014) (unpublished), <https://www.scribd.com/document/252073879/Bernartita-Moses-A206-352-760-BIA-Dec-9-2014#download> (remanding case where respondent’s continuance request had been denied after she had retained counsel at the last minute before the hearing).

⁴⁴ See *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018) (curtailing IJs’ termination authority). As a result of the holding in *Matter of S-O-G- & F-D-B-*, many respondents may be limited to seeking adjustment before the immigration court, rather than with USCIS, unless DHS files a motion to dismiss.

⁴⁵ *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), discusses INA § 240(b)(3)’s reference to protective “safeguards” that must be implemented where there are competency concerns and specifies that in cases where a respondent’s competency is at issue, IJs “can continue proceedings to allow for further evaluation of competency or an assessment of changes in the respondent’s condition.” *Id.* at 481. Section 504 of the Rehabilitation Act, 29 USC § 701 *et seq.*, states that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency.” EOIR is subject to section 504 of the Rehabilitation Act and may not

with a respondent who is a minor or an asylum seeker who has been severely traumatized may require multiple meetings over a period of time to establish a relationship of trust. These vulnerable clients may need to work with a therapist to be able to discuss the source of their trauma and assist in case preparation.

Finally, practitioners may need time to locate expert witnesses and, once located, the witnesses may need time to prepare a report or prepare to testify. Practitioners should be prepared to describe how the expert's testimony will be relevant to the case.⁴⁶ For example, asylum cases proceeding under a particular social group theory may require an expert to establish the proposed group's social distinction or particularity.⁴⁷ In any of these or other attorney preparation situations, it will be important for the practitioner to fully document the diligent steps he or she has taken in preparing for the case.

The leading BIA case that addresses attorney preparation is *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983). In that case the BIA held that even though an IJ may grant a continuance for attorney preparation in his or her discretion, counsel must demonstrate that he or she has made a "diligent good faith effort" to prepare and that denying the continuance would result in actual harm to the applicant.⁴⁸ This balancing test is similar to the reasoning in *L-A-B-R-*, although *L-A-B-R-* focuses on IJs' need to increase "efficiency," which was not a factor discussed explicitly in *Sibrun*.

III. Specific Considerations for Seeking Continuances to Pursue Various Types of "Collateral" Matters After *Matter of L-A-B-R-*

Many of the over 750,000 respondents in immigration courts nationwide are likely eligible to file for "collateral" relief or have a pending "collateral" matter.⁴⁹ The following section highlights common forms of "collateral" matters and reasons practitioners may need to seek continuances to pursue relief in another forum. This section is not intended to be exhaustive, but the ideas and reasoning advocated can be adapted to other reasons for continuances that are not covered here.

discriminate based on disability. Mental or emotional illness can be recognized as a disability. See 28 CFR § 41.31. The statutory definition of disability is "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 USC § 12102(1). To avoid a discrimination allegation, EOIR must offer proper accommodations for the disability, which may include a series of continuances. See also *Matter of Castro-Tum*, 27 I&N Dec. 271, 293 n.13 (A.G. 2018) (recognizing continuances as a "superior alternative" for "particularly vulnerable respondents" including cases where mental competency is at issue).

⁴⁶ See, e.g., *Matter of Vides Casanova*, 26 I&N Dec. 494 (BIA 2015).

⁴⁷ See *M-E-V-G-*, 26 I&N Dec. 227, 244 (2014) ("Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as 'distinct' or 'other' in a particular society.").

⁴⁸ 18 I&N Dec. at 356. A November 2018 EOIR memorandum cites *Sibrun* as an example of where a continuance may be justified, where "despite a good faith effort to prepare, alien needs additional time to obtain probative, noncumulative and significantly favorable evidence." EOIR Asylum Memo, *supra* note 42, at 3.

⁴⁹ See TRAC Immigration Court Backlog Tool, *supra* note 32 (providing number of pending immigration court cases).

A. Seeking Continuances in Family-Based Matters

A non-citizen may apply for lawful permanent residence through an approved family-based visa petition if he or she has a visa number immediately available as an immediate relative (spouse, parent, or unmarried child of a U.S. citizen) or through the visa preference system with a priority date that is current. Two sections of the law control eligibility for family-based adjustment of status: sections 245(a) and 245(i) of the INA. The first requires that applicants have been inspected and admitted or paroled into the United States. In addition, the applicant must either (1) be an immediate relative, or (2) be in one of the preference categories and never have violated lawful immigration status by working without authorization, overstaying the period of allotted time, or otherwise violating the terms of the nonimmigrant visa. Section 245(i) allows those who do not satisfy these requirements to adjust status if they were the beneficiary of a petition filed on their behalf or their parent's or spouse's behalf on or before April 30, 2001. Sections 245(a) and 245(i) both require that an underlying Form I-130, Petition for Alien Relative, have been approved and that the applicant be otherwise admissible. Those who are ineligible to adjust status within the United States must seek consular processing to benefit from an approved Form I-130.

Respondents may move for a continuance to pursue family-based visa petitions, which in some cases give rise to eligibility for adjustment of status. Eligibility for a continuance will depend on the applicant's immediate relative status, whether an underlying petition has been filed or approved establishing the applicant's relationship to a U.S. citizen or lawful permanent resident (LPR), and other evidence of *prima facie* eligibility for adjustment of status. It is also possible that those planning to pursue consular processing would want to seek a continuance.⁵⁰

1. Forming or Memorializing Family Relationships

Proving that the respondent has taken the predicate steps⁵¹ towards eligibility for adjustment of status through a family-based visa petition is important because the Attorney General held in *L-A-B-R* that one relevant secondary factor for IJs to consider in adjudicating a motion to continue may include the respondent's diligence in seeking relief before USCIS in advance of the noticed hearing date.⁵² For family-based relief, a respondent may need to establish a family relationship that did not previously exist. For example, a respondent may need to legally marry a partner in order to qualify as a beneficiary on a Form I-130 visa petition or a beneficiary on a spouse's application for relief. Respondents who plan to marry a U.S. citizen thereby creating an immediate relative relationship should submit a copy of a marriage license or an application for a marriage license to the IJ to show that the respondent is taking necessary predicate steps towards permanent relief. Practitioners should remember that a respondent who marries after the

⁵⁰ Respondents might seek a continuance to await the adjudication of the Form I-130 from within the United States, while still united with family, and then could seek dismissal or voluntary departure and pursue consular processing from abroad. However, respondents under 18 years of age seeking continuances to await a current priority date should take care to avoid accruing 180 days or more of unlawful presence beyond the 18th birthday, as that will lead to accruing a three- or ten-year penalty for unlawful presence that is triggered upon departure. *See* INA § 212(a)(9)(B)(i).

⁵¹ While this section addresses the forming or documenting of relationships in the context of adjustment of status, predicate steps are also relevant to the other forms of relief discussed in this section.

⁵² 27 I&N Dec. at 415.

commencement of removal proceedings must establish the *bona fide* nature of the marriage by clear and convincing evidence.⁵³

Respondents who will soon have an immediate relative relationship should submit evidence showing that an immediate relative relationship is forthcoming. For example, if the respondent has a U.S. citizen child that is nearing his or her 21st birthday thereby creating an immediate relative relationship, the practitioner should consider submitting the child's birth certificate to prove the imminent birthday as evidence that he or she will be able to submit a Form I-130 on the respondent's behalf to USCIS. If the respondent's spouse, child (who is over age 21 or nearing 21), or parent (in cases where the respondent is under 21, will still be under 21 by the time the naturalization application is adjudicated, and is unmarried), is an LPR who has an application for naturalization pending,⁵⁴ or who will soon become eligible to apply for naturalization, the practitioner should provide proof to the IJ that the naturalization application has been filed, or will be filed, along with the supporting documentation. The practitioner should also provide evidence to the court both that the applicant will be likely to succeed in the application for naturalization and that that application's approval will affect the outcome in the respondent's removal case.

2. *Filing Form I-130 and Seeking a Continuance to Pursue Family-Based Adjustment of Status*

USCIS has exclusive jurisdiction over Form I-130 petitions. Thus, under *L-A-B-R*, family-based petitions are considered "collateral" matters. According to the Attorney General's decision, to grant a continuance, the IJ must find both: (1) that the Form I-130 petition is likely to be approved, and (2) that its approval will materially affect the outcome of the removal proceedings, *i.e.*, that the respondent would qualify for adjustment of status.⁵⁵

The motion for a continuance should set forth the relationship between the petitioner and the beneficiary respondent and provide evidence establishing the existence of the relationship. If the

⁵³ See INA § 245(e) (explaining that a foreign national who enters into a marriage after the commencement of proceedings must overcome the presumption of marriage fraud); see also 8 CFR § 204.2(a)(1)(iii).

⁵⁴ The practitioner should include the case processing time for Form N-400s at the particular USCIS field office, which is available on USCIS's website at <https://egov.uscis.gov/processing-times/>.

⁵⁵ *L-A-B-R*, 27 I&N Dec. at 415, 417-418. The Attorney General cites to *Cadavedo v. Lynch*, 835 F.3d 779, 783 (7th Cir. 2016), noting that in that case the "alien's chance of success in his collateral proceeding was 'at best speculative,'" *L-A-B-R*, 27 I&N Dec. at 415, but he fails to explain that the U.S. Court of Appeals for the Seventh Circuit found that the "visa petition was not 'prima facie approvable' due to the USCIS finding in 2009 that Cadavedo had engaged in marriage fraud." 835 F.3d at 783. In *Cadavedo*, the "collateral" proceeding would be "at best speculative" because, as the Seventh Circuit noted, "[i]f an immigrant attempts to obtain adjustment of status through a sham marriage, . . . no future petition on behalf of that immigrant may be approved." 835 F.3d at 781. Similarly, the Attorney General cites *Oluayemi v. INS*, 902 F.2d 1032, 1034 (1st Cir. 1990), but fails to provide a complete quote and relevant facts that explain the reasoning of the U.S. Court of Appeals for the First Circuit. *L-A-B-R*, 27 I&N Dec. at 415. The complete quote states: "*In light of the circumstances of this case*, we cannot say that the immigration judge abused the broad discretion that *Garcia* confers upon him in refusing to delay the hearing because he believed that the adjustment petition eventually would be denied." 902 F.2d at 1034 (emphasis added). The unique and correct circumstances that led the IJ to believe that adjustment would be denied were past deportations, attempts to return to the United States using different names and counterfeit passports, and three marriages, "one of which was bigamous and (in the view of the INS) possibly entered into in order to obtain the right to stay in this country." *Id.*

Form I-130 petition is pending, the practitioner should submit a copy of the Form I-130 filing along with the Form I-797, Notice of Action, showing the date of receipt.

The motion should also address the respondent's eligibility for adjustment of status in order to show that the visa petition's approval will materially affect the outcome of the removal proceeding. The motion should explain why the respondent qualifies for adjustment of status under INA §§ 245(a) or (i), indicate that the respondent has a current priority date, if applicable, and explain that the respondent is not inadmissible, with the relevant evidence attached.⁵⁶ The motion could cite to *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978), a case involving a respondent who sought reopening to allow for an adjustment of status application based on his marriage to a U.S. citizen. The BIA reasoned, "[W]e believe that discretion 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 or upon a motion to reopen."⁵⁷ In cases where the priority date is not yet current, practitioners may wish to review U.S. courts of appeal decisions that have considered whether the visa priority date is too remote.⁵⁸

If the respondent has a Form I-130 visa petition pending with USCIS or has an approved Form I-130 that is waiting for the priority date to become current, the practitioner should consider making a motion to place the case on the status docket, *see* part IV.B below, if the immigration court where the respondent is in removal proceedings has a status docket.

If the family petition falls under the family preference system rather than the immediate relative category, the respondent will likely be ineligible to adjust unless he or she qualifies to adjust status under section 245(i) of the INA. This is because to adjust under the family preference system, the respondent would have to have maintained lawful status. But if he or she were in lawful status, then there would likely not be grounds for removal proceedings.⁵⁹ If the respondent

⁵⁶ Where relevant, the motion could also explain how the respondent is eligible for a waiver of inadmissibility, such as under INA § 212(h) or INA § 212(i).

⁵⁷ 16 I&N Dec. at 657. This case is dated, but it has not been overruled.

⁵⁸ *See, e.g., Martinez-Cedillo v. Sessions*, 896 F.3d 979, 994-95 (9th Cir. 2018) (no error to deny continuance where untimely, visa priority date was remote as adult Mexican child of U.S. citizen father, and eligibility of adjustment was speculative likely because of serious criminal convictions); *Ferreira v. Att'y Gen.*, 714 F.3d 1240, 1243 (11th Cir. 2013) (error to deny continuance solely because priority date was six years away, in employment context, without considering all of the factors); *Calma v. Holder*, 663 F.3d 868, 878-79 (7th Cir. 2011) (upholding continuance denial where there was a four year priority date wait); *Luevano v. Holder*, 660 F.3d 1207, 1214-15 (10th Cir. 2011) (upholding continuance denial where petitioner was "unlikely to be eligible [for adjustment] within a reasonably proximate time" in sibling fourth preference visa petition case); *Simon v. Holder*, 654 F.3d 440, 443 (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, 468-70 (5th Cir. 2009) (holding that IJ abused his discretion by denying Wu's third motion for a continuance solely based on the length of the delay in obtaining approval of his wife's Form I-130 petition and noting that an IJ would not abuse his discretion to deny a continuance "upon his determination that the visa petition is frivolous or that the adjustment application would be denied on statutory grounds or in the exercise of discretion notwithstanding the approval of the petition." (quoting *Matter of Garcia*, 16 I&N Dec. at 657)).

⁵⁹ INA § 245(c)(2); *see also Matter of Kotte*, 16 I&N Dec. 449 (BIA 1978) (holding that a respondent does not have an absolute right to a continuance until the petition has been adjudicated in the case of a respondent who had a pending third-preference petition pending, was seeking to adjust status, and argued that the IJ was required to continue deportation proceedings).

cannot adjust status within the United States, it will be difficult to demonstrate how a current priority date will affect the outcome of the removal case.

Until recently it was common for an adjustment-eligible respondent with an approved Form I-130 and who was either an immediate relative or in the preference category with a current priority date to move to dismiss or terminate proceedings⁶⁰ so that USCIS could adjudicate the adjustment application. While DHS used to routinely agree to such dismissals in most jurisdictions,⁶¹ DHS has increasingly opposed such dismissals under the current administration.⁶² Now, as a result of *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018), IJs are prohibited in many circumstances from dismissing a case unless DHS seeks dismissal. Unless proceedings are dismissed or terminated, USCIS would typically lack jurisdiction to adjudicate the adjustment application and the adjustment of status would have to be sought before the IJ.⁶³ This is because IJs have exclusive jurisdiction over most adjustment applications for respondents in removal proceedings.⁶⁴ The respondent can file Form I-485, Application to Register Permanent Residence or Adjust Status, with the court so that the IJ can adjudicate it.

In cases where the IJ will be adjudicating Form I-485, practitioners should argue that any continuance that is needed to gather evidence for the adjustment hearing should fall under the category of attorney preparation. A request for a continuance to prepare for the adjustment hearing should not be subject to the strictures of the *L-A-B-R-* decision since it is not “collateral” to the relief sought before the IJ.

⁶⁰ In *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 467 (A.G. 2018), the Attorney General noted that “it is not uncommon for immigration judges and the Board to use [the terms ‘dismissal’ and ‘termination’] interchangeably or to conflate them under a common heading of ‘termination,’” and directed that the BIA and IJs recognize and maintain the terms’ distinct meanings going forward.

⁶¹ See Memorandum from John Morton, Ass’t Sec’y, ICE, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions (Aug. 20, 2010), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/handling-removal-proceedings.pdf> (“Where there is an underlying application or petition and ICE determines in the exercise of discretion that a non-detained individual appears eligible for relief from removal, OCC should promptly move to dismiss proceedings without prejudice before EOIR.”); see also Memorandum from John Morton, Director, ICE, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf> (“Discretion may also take different forms and extend to decisions to place or withdraw a detainer, to issue a Notice to Appear, to detain or release an alien, to grant a stay or deferral of removal to seek termination of proceedings, or to join a motion to administratively close a case.”) [hereinafter “ICE Victims Memo”].

⁶² See Memorandum from Tracy Short, Principal Legal Advisor, ICE Office of the Principal Legal Advisor, Guidance to OPLA Attorneys Regarding the Implementation of the President’s Executive Orders and the Secretary’s Directives on Immigration Enforcement, at 6 (Aug. 15, 2017), AILA Doc. No. 18100807, www.aila.org/infonet (suggesting that exercising prosecutorial discretion to dismiss a case so that an individual can pursue “permanent legal immigration status” with USCIS would not be appropriate if the individual falls within current enforcement priorities or would need a waiver to qualify).

⁶³ See 8 CFR §§ 245.2(a)(1), 1245.2(a)(1).

⁶⁴ The immigration court has jurisdiction to adjudicate adjustment of status applications of individuals in removal proceedings other than for those filed by “arriving aliens.” For information on adjustment of status for arriving aliens, see parts III.G-H.

3. Family-Based Consular Processing and Provisional Waivers

Persons who are not eligible for adjustment of status, but are beneficiaries of a pending or approved Form I-130 visa petition, will be required to depart the United States and consular process to obtain an immigrant visa. If they have acquired “unlawful presence” before departing, they could trigger a three- or ten-year bar to reentry, depending on how much unlawful presence they acquired. The provisional waiver program, which allows some immigrant visa applicants to waive the unlawful presence ground of inadmissibility prior to departing the United States, is not available to those in removal proceedings where no final decision has been entered, unless the proceedings have been administratively closed.⁶⁵ *Castro-Tum* appears to prevent IJs from granting administrative closure for these purposes, although that decision is subject to challenge.⁶⁶ It will therefore likely be difficult for respondents in line to consular process to succeed in obtaining a continuance for adjudication of Form I-130 or a provisional waiver.

4. Termination of Conditional Residency

Individuals who are placed into removal proceedings and are conditional residents may need to seek a continuance to pursue a petition to remove the conditions with USCIS. Spouses whose marriage occurred fewer than two years before they either were admitted to the United States as LPRs or adjusted status are subject to the conditional residence provisions of the INA.⁶⁷ A petition to remove the conditions is filed on Form I-751. It can either be jointly filed or filed seeking a waiver of the joint filing requirement based on: extreme hardship that would result if the respondent is removed; a good faith marriage that terminated through no fault of the respondent; or a good faith marriage where the spouse or the intended spouse suffered abuse.⁶⁸ Some conditional residents may end up in removal proceedings because their Forms I-751 were denied and USCIS issued a Notice to Appear (NTA).⁶⁹ Others may be in proceedings because the beneficiary failed to timely file a Form I-751 at the end of the two-year period and USCIS issued an NTA.⁷⁰

In cases where the conditional resident files Form I-751 with USCIS and USCIS denies it, the respondent may renew the petition before the IJ and therefore does not need to seek a continuance to pursue Form I-751 as a “collateral” matter before USCIS. Since the immigration court has *de novo* review authority over denied Forms I-751, the respondent should be prepared to submit additional evidence that was not included in the petition filed with USCIS.⁷¹ And since

⁶⁵ 8 CFR § 212.7(e)(4)(iii).

⁶⁶ 27 I&N Dec. 271, 293 n.3 (A.G. 2018).

⁶⁷ INA § 216(g); *see also Matter of Mendes*, 20 I&N Dec. 833, 835 (BIA 1994). Children who immigrate to the United States within two years of their parent’s marriage will also be subject to the conditional residency limitations. INA § 216(g)(2).

⁶⁸ 8 CFR § 216.5.

⁶⁹ 8 CFR § 216.5(f).

⁷⁰ INA § 216(c)(2).

⁷¹ 8 CFR §§ 216.4(d)(2), 216.5(f); *see Matter of Herrera del Orden*, 25 I&N Dec. 589 (BIA 2011) (respondent may introduce, and the IJ should consider, any relevant evidence without regard to whether it was previously submitted or considered in proceedings before USCIS).

such evidence is not “collateral” to the respondent’s removal proceedings, a reasonable continuance for attorney preparation to obtain such evidence should be granted.⁷²

In cases where a conditional resident is placed into removal proceedings after failing to file Form I-751 with USCIS or comply with the interview requirement, the conditional resident will usually file a late Form I-751 petition with USCIS first because the IJ only has jurisdiction to review the denial of Form I-751.⁷³ BIA case law, which was not overruled by *L-A-B-R-*, requires the IJ to continue the proceedings in cases where the respondent has not yet filed Form I-751 and is “prima facie eligible for such relief,” to give the respondent a “reasonable opportunity to file the application before [USCIS] and for [USCIS] to decide the application.”⁷⁴ The BIA’s reasoning in these cases is based on the statutory and regulatory framework for adjudication of Form I-751 petitions, which provides USCIS “and not the immigration judge” with “original jurisdiction” over the application.⁷⁵ Given the special regulatory and statutory framework and the BIA’s case law on this point, arguably the *L-A-B-R-* framework is not applicable at all in this scenario, and it would be premature and inappropriate for the IJ to deny a continuance if the respondent is *prima facie* eligible.⁷⁶

Even assuming *arguendo* that *L-A-B-R-* governs in cases where the respondent is pursuing a Form I-751 petition with USCIS, the practitioner could argue that the good cause requirement is met by showing that Form I-751 is pending with USCIS and thus likely to receive an adjudication, be it favorable or unfavorable. Either result will materially affect the outcome of the removal proceedings—an approval from USCIS would result in the respondent being recognized as an LPR,⁷⁷ and a denial would cause the IJ to acquire *de novo* jurisdiction over the Form I-751 petition.

⁷² See *Apolonia Altagracia Bautista D Cotto*, A075-004-507, 2010 WL 2846323 (BIA June 23, 2010) (unpublished) (respondent has not shown how she has been prejudiced by the denial of the motion, particularly in view of the fact that she declined to pursue *de novo* review of her Form I-751); *Roosevelt Auguste*, A056-149-610, 2008 WL 762750 (BIA Feb. 28, 2008) (unpublished) (denying request for a further continuance pending the adjudication by USCIS of the respondent’s second Form I-751).

⁷³ 8 CFR § 216.4(d)(2) (“No appeal shall lie from the decision of the director [regarding the joint petition]; however, the alien may seek review of the decision in removal proceedings.”); 8 CFR § 216.5(f) (“No appeal shall lie from the decision of the director [regarding a waiver application]; however, the alien may seek review of such decision in removal proceedings”); see *Matter of Lemhammad*, 20 I&N Dec. 316, 323 (BIA 1991).

⁷⁴ *Matter of Mendes*, 20 I&N Dec. 833, 840 (BIA 1994); see *Matter of Stowers*, 22 I&N Dec. 605, 613-14 (BIA 1999).

⁷⁵ *Lemhammad*, 20 I&N Dec. at 322.

⁷⁶ See *Stowers*, 22 I&N Dec. at 614 (concluding that IJ erred in using a theory of “constructive denial” to assume jurisdiction over an unadjudicated waiver application, since the INA and the regulations “expressly contemplate an initial adjudication of the waiver application before the regional service center director”). In requesting a continuance for USCIS to adjudicate the Form I-751, practitioners should provide proof of filing the Form I-751 with USCIS. Practitioners may also want to bring the entire Form I-751 filing to court in the event the IJ requests it.

⁷⁷ While the Form I-751 petition is pending, the applicant is still considered a conditional lawful permanent resident. See 8 CFR § 216.4(a)(1); see also Memorandum from William R. Yates, Acting Assistant Director for Operations, USCIS, Extension of Status for Conditional Residents with Pending Forms I-751, Petition to Remove Conditions on Residence (Dec. 2, 2003),

https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2003/crextensn120203.pdf.

Alternatively, practitioners could argue that a continuance is warranted under *L-A-B-R-* because the respondent's Form I-751 is likely to be granted by USCIS. To show likelihood of success for a jointly filed Form I-751, the respondent could provide a copy of the Form I-751 petition pending with USCIS, including proof of bona fides of the marriage. The spouse's presence during the removal proceedings could also help show a likelihood of success on a jointly filed Form I-751. For a continuance request to pursue a Form I-751 seeking a waiver of the joint filing requirement, the respondent should document well the waiver ground(s) in the submission to USCIS and provide a complete copy of the filing to the IJ. Since a waiver application can be filed at any time, either before or after the two-year conditional residence period has expired, the respondent should be prepared to explain why he or she did not file the Form I-751 soon after the waiver ground(s) arose. For example, a respondent who is seeking a waiver under the abuse ground may have an argument that he or she had been under the control of the abusive spouse, which prevented an earlier waiver filing.⁷⁸

While awaiting USCIS's adjudication of the respondent's Form I-751, the practitioner should consider making a motion to place the case on the status docket, *see* part IV.B below, if the immigration court where the respondent is in proceedings has a status docket.

B. Seeking a Continuance to Pursue Special Immigrant Juvenile Status

Under INA § 101(a)(27)(J), certain juveniles who have been declared dependent on a juvenile court or placed by the court under the custody of an individual or entity, whose reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar state law basis, and for whom it has been determined that return to his or her country is not in his or her best interest, may apply to USCIS for Special Immigrant Juvenile Status (SIJS), and ultimately for lawful permanent residence. Children seeking SIJS may have different strategies for continuance motions depending on what stage of the process they are in. Three common scenarios include: (1) pursuing the predicate order in state court, (2) awaiting USCIS adjudication of a pending Form I-360 SIJS petition, or (3) awaiting a current priority date after receiving a Form I-360 petition approval.

1. Continuance to Seek Predicate Order in State Court

Before *L-A-B-R-*, IJs frequently granted continuances so that an SIJS-eligible child could seek the required state court order. In multiple unpublished opinions predating *L-A-B-R-*, the BIA stated that absent evidence of ineligibility for SIJS or compelling reasons, "an IJ should, as a general practice, continue . . . proceedings to await adjudication of a pending state proceeding that could serve as a predicate order for SIJ status."⁷⁹ Continuances for vulnerable child

⁷⁸ *See Matter of Munroe*, 26 I&N Dec. 428 (BIA 2014) (discussing legislative intent of the INA § 216(c)(4)(A) waiver). Note that in hardship cases, the relevant period for a hardship determination is the two-year period for which the individual was admitted as a conditional permanent resident.

⁷⁹ *See, e.g., B-A-M-G-*, A XXX-XXX-558, 2016 WL 8471139, at *1–2 (BIA Dec. 27, 2016) (unpublished); *W-E-P-M-*, AXXX-XXX-859 (BIA July 15, 2015) (unpublished), <https://www.scribd.com/document/274423255/W-E-P-M-AXXX-XXX-859-BIA-July-15-2015>. The authors have used initials and omitted full A numbers to protect privacy in cases of child respondents. Practitioners are cautioned that after *L-A-B-R-* the BIA may no longer see pre-*L-A-B-R-* cases on continuances as correctly interpreting the law; however, *L-A-B-R-* did not overrule previous BIA precedents on continuances. Previous EOIR memos (no longer in effect) also required IJs to continue or

respondents are also explicitly cited as appropriate by the Attorney General in *Matter of Castro-Tum*, which states that “continuances are a superior alternative to administrative closure for cases involving particularly vulnerable respondents,” as they allow the IJ to “monitor the relief process while ensuring that the case does not get lost,” noting that “a continuance may allow an IJ to oversee an alien minor’s progress in obtaining appropriate alternative forms of relief.”⁸⁰

After *L-A-B-R-*, practitioners may support a motion for a continuance in this situation by showing a likelihood that the state court order will be obtained and will materially affect the outcome of the removal proceedings. Obtaining a qualifying predicate order is likely to materially affect the outcome in removal proceedings because it allows the child to immediately file a petition with USCIS for SIJS, which, if granted, provides a basis for adjustment of status. Practitioners should submit proof of the status or filing of the state court case, such as a filing receipt, a conformed copy of the cover page of a filing, a court register of actions, and/or notice or other proof of a state court hearing.⁸¹ It is important to show that the state court action is being diligently pursued.⁸² If requesting a specific length of continuance, the practitioner could also include information about the estimated length of time it will likely take to obtain a state court order, such as documentation from the state court with an estimate of the amount of time until a hearing is scheduled, proof of having completed interim steps such as notice to parent(s), or an explanation of any factors outside of the child’s control that may delay the state court process.

In the continuance motion, practitioners could argue that the fact that the state court action has been filed and is being diligently pursued is all that is needed to establish good cause. In enacting the SIJS statutory provision, Congress recognized the authority and expertise of state juvenile courts over matters of child welfare, including placement, best interest, and parental reunification determinations, and gave state courts a determinative role in the SIJS process, obviating the need

administratively close proceedings while a child pursued the state court predicate order in an SIJS case. *See* Memorandum from Brian O’Leary, Chief IJ, EOIR, Docketing Practices Relating to Unaccompanied Children Cases and Adults with Children Released on Alternatives to Detention Cases in Light of the New Priorities (Mar. 24, 2015) (rescinded), <https://www.justice.gov/eoir/pages/attachments/2015/03/26/docketing-practices-related-to-uacs-and-awcatd-march2015.pdf>; Memorandum from Brian O’Leary, Chief IJ, EOIR, Docketing Practices Relating to Unaccompanied Children Cases in Light of the New Priorities (Sept. 10, 2014) (superseded), <https://www.justice.gov/sites/default/files/eoir/legacy/2014/09/30/Docketing-Practices-Related-to-UACs-Sept2014.pdf>. The BIA’s history in reviewing continuance requests and past policies in this context could be relevant for building a strong appeal record.

⁸⁰ 27 I&N Dec. 271, 293 n.13 (A.G. 2018). While the Attorney General ruled in this decision that IJs generally do not have authority to grant administrative closure, practitioners may still wish to seek administrative closure in the alternative arguing that this case was wrongly decided in order to preserve the issue for appeal. *See* CLINIC *Castro-Tum* Practice Pointer, *supra* note 10.

⁸¹ *See K-N-M-T-*, AXXX-XXX-495 (BIA May 31, 2016) (unpublished), <https://www.scribd.com/document/316006610/K-N-M-T-AXXX-XXX-495-BIA-May-31-2016> (error to deny continuance when there was no dispute that state court matter was pending and was in process of getting hearing scheduled).

⁸² *Compare W-A-L-B-*, AXXX-XXX-337, 2018 WL 1897691, at *1 (BIA Feb. 23, 2018) (unpublished) (upholding continuance denial where respondent had not met immigration court’s deadline for providing proof of the pending juvenile court action, despite having been in proceedings for about three years), *with K-Z-P-*, AXXX-XXX-965, 2018 WL 1897722, at *1–2 (BIA Feb. 16, 2018) (error to deny continuance where state court action was pending and respondent had provided hearing notice showing that he was “actively pursuing the petition at the time that he requested a continuance”).

for IJs to analyze state child welfare questions.⁸³ IJs should recognize that authority and allow the state child welfare process to play out, as Congress intended. To instead deny a continuance and order removal based on the IJ's assessment of a state child welfare matter over which IJs lack expertise and authority would thwart the carefully constructed SIJS scheme created by Congress and inappropriately interfere with matters exclusively reserved to the states, raising federalism concerns.

Given the statutory framework and IJs' lack of institutional expertise or authority to make substantive merits determinations over state child welfare matters, the IJ should find good cause for a continuance upon a showing that the matter is pending in state court and being actively pursued. This approach is consistent with pre-*L-A-B-R*- BIA decisions that suggest that the fact of the pending state court matter is good cause, absent evidence of ineligibility or some other compelling reason. In an unpublished 2015 case, the BIA reversed a continuance denial that had been based on the IJ's view that a particular type of custody action (where one parent sought custody) would not suffice for SIJS. The BIA held that generally an IJ should continue proceedings "to await adjudication of a pending state proceeding that could serve as a predicate order for SIJ status."⁸⁴

While in the past many practitioners felt it was best practice to provide the immigration court with only the minimum documents sufficient to show that a state court matter was pending, after *L-A-B-R*- practitioners will have to weigh the possible downside of submitting additional information, including potentially sensitive information or information that the IJ is not qualified to assess, against the possibility of having a continuance denied on a record that is not as complete as it could be. Practitioners should also be prepared to make the arguments laid out in the sections immediately below, because after obtaining a state court order, the respondent will need to wait for USCIS to adjudicate the Form I-360 petition and, for applicants from some countries, await the priority date, necessitating further continuances in the future.

2. Continuance to Await USCIS Adjudication of a Pending Form I-360 SIJS Petition

Once the state court has issued its order(s), the next step in the SIJS process is filing Form I-360. USCIS has exclusive jurisdiction over these petitions. As with seeking a continuance to obtain a state court order, in seeking a continuance to await USCIS adjudication of Form I-360, practitioners should show that they satisfy the principal *L-A-B-R*- factors of likelihood that the petition will be granted and that it will materially affect the outcome of the removal proceedings. An approved petition will materially affect the outcome of the removal proceedings because it will make the respondent eligible to adjust status.⁸⁵

Practitioners should submit evidence to establish the likelihood that the Form I-360 will be granted, including the Form I-360 receipt notice, which suggests that USCIS has found the petition contains the required initial evidence. Practitioners may also consider submitting additional documents such as the Form I-360 and accompanying state court order, or a copy of

⁸³ See INA § 101(a)(27)(J).

⁸⁴ *M-G-M-M-*, AXXX-XXX-194, 2015 WL 3896298, at *1–2 (BIA June 1, 2015) (unpublished).

⁸⁵ See INA § 245(h).

the cover letter submitted to USCIS (with tracking number and proof of delivery) showing the list of documents that was submitted along with proof of what documents USCIS requires for SIJS petitions.⁸⁶ Practitioners should be mindful of state confidentiality laws⁸⁷ as well as privacy concerns, and weigh the possible downside of giving the IJ more information than is needed, including potentially sensitive information or information that the IJ is not qualified to assess, against knowledge of what the IJ will require in order to avoid a removal order.

In addition to demonstrating that the Form I-360 has been filed, practitioners should be prepared to argue for a continuance long enough to allow for USCIS to adjudicate the petition. For Forms I-360 that have been pending with USCIS beyond the statutory 180-day deadline, practitioners should e-mail the National Benefits Center (NBC) at NBCSIJ@uscis.dhs.gov regarding this delay and consider filing the e-mail (as well as any response) with the IJ explaining that the delay is on account of the NBC's violation of the statute.⁸⁸ Finally, the practitioner should consider making a motion to place the case on the status docket, *see* part IV.B below, while the Form I-360 petition is being adjudicated by USCIS, if the immigration court where the respondent is in proceedings has a status docket.

3. *Continuance After Form I-360 Approval to Await Visa Availability (for Those Subject to Backlog)*

SIJS beneficiaries are eligible for adjustment of status even if they entered without inspection, because under INA § 245(h) they are deemed paroled for purposes of INA § 245(a). Because of the humanitarian nature of SIJS, beneficiaries are also exempted from certain grounds of inadmissibility, while other grounds may be waived.⁸⁹ Thus, those with approved SIJS petitions generally face fewer hurdles towards successful adjustment of status than those pursuing adjustment based on other grounds.

As of the time of this advisory's issuance, applicants for SIJS from El Salvador, Guatemala, Honduras, and Mexico are subject to a backlog because the 4th preference category for employment-based visas under which SIJS petitions fall is oversubscribed for these countries.⁹⁰ Thus, as with family preference petition beneficiaries, SIJS applicants from these countries with

⁸⁶ *See, e.g., Boyron v. Lynch*, 604 F. App'x 72, 74 (2d Cir. 2015) (unpublished) (no abuse of discretion to deny continuance because respondent had not made *prima facie* showing, where order granted voluntary conservatorship over financial and personal affairs to a cousin but did not place him under anyone's custody or make the required best interest determination); *C-O-L-C-*, AXXX-XXX-686, 2018 WL 1897742, at *1 (BIA Feb. 13, 2018) (unpublished) (continuance warranted despite USCIS denial of Form I-360, because order had required language and case was on appeal).

⁸⁷ For more information on state confidentiality laws, see Juvenile Law Center and Community Legal Services of Philadelphia, *Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement*, (2014), <https://juvenilerecords.jlc.org/juvenilerecords/documents/publications/national-review.pdf>.

⁸⁸ *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. 110-457, § 235(d)(2), 122 Stat. 5044, 5080 (Dec. 23, 2008). The 180-day timeframe begins on the Notice of Action (Form I-797) receipt date.

⁸⁹ *See* INA § 245(h)(2).

⁹⁰ *See* U.S. Department of State, The Visa Bulletin, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html> (last visited Nov. 30, 2018).

approved Forms I-360 must wait to adjust status until a visa number becomes available.⁹¹ In the December 2018 Visa Bulletin, for example, SIJS beneficiaries from Honduras, Guatemala, and El Salvador were current if their priority date was before February 22, 2016, and those from Mexico were current if their priority date was before January 1, 2017.⁹²

In seeking a continuance after USCIS has approved the SIJS petition in order to await visa availability, practitioners can argue that the Form I-360 approval demonstrates likelihood that the child will be able to adjust status, which materially affects the outcome of the removal proceedings. Practitioners may cite evidence that the child is statutorily eligible for adjustment of status (this could include, depending on what the IJ may require, citing the INA § 245(h) provisions and/or providing a copy of a completed Form I-485) and offer evidence why the child should be granted adjustment of status as a discretionary matter if there are any adverse factors.⁹³ Practitioners should consider making a motion to place the case on the status docket while awaiting a current priority date, see part IV.B below, if the immigration court where the respondent is in proceedings has a status docket.

Practitioners should also be prepared to distinguish the facts in their case with situations deemed in *L-A-B-R-* to be too uncertain or speculative to merit a continuance. In *L-A-B-R-*, the Attorney General cites *Matter of Quintero*, 18 I&N Dec. 348, 350 (BIA 1982), to support the position that in some situations the “visa priority date is too remote to raise the prospect of adjustment of status above the speculative level.”⁹⁴ In *Matter of Quintero*, the respondent from Mexico had an approved visa petition filed by his LPR wife. The BIA upheld the IJ’s denial of the request for a continuance to await a current priority date. At the time of the IJ’s October 1981 decision, the priority date for second preference petitions for Mexico was March 1970.⁹⁵ Further, it did not appear in that case that the respondent was eligible to adjust status in the United States through having been previously inspected and admitted or paroled. In contrast, SIJS beneficiaries are deemed paroled for purposes of INA § 245(a) by operation of statute, INA § 245(h)(1). Practitioners should compare the applicable date in the Visa Bulletin’s Chart A Final Action Dates with the respondent’s priority date and note that the wait time is relatively short compared to that at issue in the *Quintero* case. Where helpful, practitioners may also want to include the previous month’s Visa Bulletin to show forward progress.

⁹¹ Even though an SIJS beneficiary cannot adjust status without a current priority date, sometimes USCIS allows applicants to file for adjustment based on the “filing date chart” rather than the “final action date chart.” For the month of December 2018, for example, USCIS is following the “filing date chart” under which Mexican fourth preference petitioners are current (even though their final action date is subject to backlog). See USCIS, Adjustment of Status Filing Charts from the Visa Bulletin (last reviewed/updated Nov. 13, 2018), <https://www.uscis.gov/visabulletininfo>. This means that a Mexican SIJS beneficiary could apply for adjustment of status (and corresponding employment authorization) with USCIS during the month of December 2018 despite not having a current priority date. USCIS must have jurisdiction over an adjustment application in order to adjudicate it, however. See 8 CFR § 1245.2(a)(1). For USCIS to have jurisdiction over the adjustment application, the IJ must dismiss or terminate the removal proceedings unless the respondent is an “arriving alien.”

⁹² U.S. Department of State, Visa Bulletin for December 2018, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2019/visa-bulletin-for-november-2018.html> (last visited Nov. 30, 2018).

⁹³ See *L-A-B-R-*, 27 I&N Dec. at 418 (requiring IJs to deny continuances where, “even if USCIS approved the respondent’s visa petition, [the IJ] would deny adjustment of status as a discretionary matter or because the respondent is statutorily ineligible for adjustment”).

⁹⁴ *L-A-B-R-*, 27 I&N Dec. at 418.

⁹⁵ See 58 Interpreter Releases 461, 465 (Sept. 15, 1981) (providing October 1981 visa numbers).

Practitioners should also analyze other relevant factors that weigh in favor of a continuance, as *L-A-B-R-* requires IJs to consider and balance “all relevant factors.”⁹⁶ In the SIJS context, several persuasive factors arguably require the IJ to grant sufficient continuances to an SIJS beneficiary until the priority date becomes current. A condition to being granted SIJS is that a state juvenile court has determined that it is not in the child’s best interest to be returned to the country of origin.⁹⁷ Typically, the juvenile court has also granted custody or guardianship to an adult caregiver in the United States with whom the court has determined it is in the child’s best interest to reside permanently. It would be contrary to the child’s best interest, and the court-ordered placement, to order a child’s removal to a country where the juvenile court has determined the child would be unsafe and uncared for, solely because of a visa backlog. Further, when DHS approves an SIJS petition, it “consents to the grant of special immigrant juvenile status,” INA § 101(a)(27)(J)(iii), and recognizes that the juvenile court’s findings—including its assessment of the child’s best interest—are supported by a reasonable factual basis, thus deferring to the state court’s expertise on the child’s need to remain safely in the United States. A removal order would defy the juvenile court’s assessment and expertise. Two U.S. courts of appeal decisions have noted the congressional intent behind the SIJS statute to allow certain vulnerable children to “*remain safely in the country* with a means to apply for LPR status.”⁹⁸

Practitioners could also seek termination upon approval of the Form I-360 prior to requesting a continuance or as an alternative request to a continuance. In cases where the NTA charge is for being present in the United States without having been admitted or paroled under INA § 212(a)(6)(A)(i), practitioners might argue that the automatic grant of parole upon approval of Form I-360 resolves the charge of inadmissibility. *See* INA § 245(h)(1) (SIJS beneficiaries are deemed paroled and INA § 212(a)(6)(A) “shall not apply” in determining their admissibility as an immigrant). Termination would comply with the regulatory mandate that the court fairly and expeditiously resolve cases before it, 8 CFR §§ 1003.12, 1003.10(b), promote administrative efficiency and judicial economy, and conserve scarce court resources.⁹⁹ In anticipation of making these arguments upon Form I-360 approval, practitioners should consider whether denying the allegations and charge(s) at the outset and putting DHS to its burden of proof is in the

⁹⁶ 27 I&N Dec. at 413, 415.

⁹⁷ INA § 101(a)(27)(J)(ii).

⁹⁸ *Garcia v. Holder*, 659 F.3d 1261, 1271 (9th Cir. 2011) (emphasis added); *accord Osorio-Martinez v. Att’y Gen.*, 893 F.3d 153, 167, 172 (3d Cir. 2018) (noting SIJS beneficiaries’ “significant ties” to the United States and ruling that expedited removal would “render SIJ status a nullity” and would be based on a ground of inadmissibility “from which Petitioners are expressly exempted by virtue of their SIJ status”). Further support for the argument that Congress intended SIJS beneficiaries to be able to remain in the United States while awaiting adjustment of status is found in the TVPRA, Pub. L. No. 110-457, 122 Stat. 5044, which enacted important and child-protective changes to the INA. The title of the subsection of the statute discussing SIJS protections is “*Permanent Protection for Certain At-Risk Children*.” TVPRA § 235(d) (emphasis added). *See Yates v. United States*, 135 S. Ct. 1074, 1083 (2015) (recognizing that although statutory “headings are not commanding,” they may provide important “cues” about congressional intent).

⁹⁹ *See Matter of Castro-Tum*, 27 I&N Dec. 271, 292 (A.G. 2018) (emphasizing the interest in achieving a final disposition in cases before the court, directing that “[c]ases that should not go forward should be terminated (either with or without prejudice), or dismissed, provided they meet the relevant legal standard,” and praising termination as a tool that “ensure[s] finality,” reduces the “number of cases orphaned within the immigration courts,” and “encourage[s] more accountability, by resulting in a final, transparent order from the IJ who ends the case”). Termination based on inability to sustain the charge of removability, as discussed here, is not precluded by the Attorney General’s recent decision restricting IJs’ ability to terminate cases, *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018).

respondent's interests. If the IJ sustains the charge, the practitioner could note for the record that the respondent will not be subject to the charge if and when Form I-360 is approved, by operation of law.

C. Seeking a Continuance to Pursue U Nonimmigrant Status

Certain victims of crime who cooperate with law enforcement may be eligible to apply for U nonimmigrant status in the United States.¹⁰⁰ There are several steps in this process. The applicant must first obtain a law enforcement certification indicating that he or she has cooperated or is cooperating with law enforcement. The applicant then files a petition, Form I-918, with USCIS, which has exclusive jurisdiction over U nonimmigrant status adjudications, accompanied where necessary by a request for a waiver of inadmissibility on Form I-192.¹⁰¹ It is currently taking USCIS about four years to adjudicate U nonimmigrant status petitions.¹⁰² Once USCIS deems the petition approvable, the applicant is placed on a waiting list and granted deferred action.¹⁰³ With an annual 10,000 cap on U nonimmigrant status grants, it is taking many years for those on the waiting list to be granted U nonimmigrant status. After three years residing in the United States with U nonimmigrant status, an individual can apply for adjustment of status with USCIS.¹⁰⁴

For respondents who have not yet filed the U nonimmigrant status petition with USCIS, practitioners should consider submitting a copy of the signed Form I-918, Supplement B (U Nonimmigrant Status Certification), known as the law enforcement certification (LEC), as proof of the predicate step for filing the U nonimmigrant status petition. If the practitioner does not yet have a signed LEC, then consider submitting a copy of the certification request made to the law enforcement agency with investigative jurisdiction.¹⁰⁵ If the IJ doubts or is confused by the U nonimmigrant status petition process, consider submitting a copy of *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012), which sets forth factors to be considered when seeking a continuance while awaiting the adjudication of a U nonimmigrant status petition, as well as a detailed brief about the respondent's eligibility for U nonimmigrant status, including why grounds of inadmissibility are waivable in the case.

In requesting a continuance to allow USCIS to adjudicate the U nonimmigrant status request, petitioners can argue that *Sanchez Sosa* is the governing standard for establishing good cause for a continuance in U cases, since *L-A-B-R-* acknowledged this earlier decision and did not overrule it. *Sanchez Sosa* directs that “[a]s a general rule, there is a rebuttable presumption that an alien who has filed a *prima facie* approvable application with USCIS will warrant a favorable exercise

¹⁰⁰ INA § 101(a)(15)(U). U nonimmigrant status is also referred to as a “U visa.”

¹⁰¹ 8 CFR § 214.14(c).

¹⁰² USCIS, Case Processing Times, <https://egov.uscis.gov/processing-times/> (last visited Nov. 30, 2018).

¹⁰³ See 8 CFR § 214.14(d)(2); USCIS, Victims of Criminal Activity: U Nonimmigrant Status (last reviewed/updated June 12, 2018),

<https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status>.

¹⁰⁴ INA § 245(m).

¹⁰⁵ Note, however, that *Sanchez Sosa* states, “Ordinarily, the alien would not be able to show good cause if the LEC has not been approved, absent DHS support or other circumstances that the Immigration Judge finds compelling.” 25 I&N Dec. at 814.

of discretion for a continuance for a reasonable period of time.”¹⁰⁶ Under *Sanchez Sosa*, in evaluating a continuance request by a U nonimmigrant status petitioner, an IJ should consider DHS’s position, whether the petition is *prima facie* approvable, the reason for the continuance, and other procedural factors.¹⁰⁷ *Sanchez Sosa* directs that if DHS does not oppose a continuance, ordinarily the IJ should continue the case “in the absence of unusual, clearly identified, and supported reasons for not doing so.”¹⁰⁸ If DHS opposes the continuance “or further inquiry is otherwise warranted, ‘the focus of the inquiry is the likelihood of success’ on the visa petition.”¹⁰⁹ *L-A-B-R-* appears to take a less deferential view of DHS’s lack of opposition.¹¹⁰ But practitioners can argue that since the more favorable *Sanchez Sosa* standard controls in U nonimmigrant status cases, DHS’s non-opposition, where present, is sufficient grounds for a continuance.

In evaluating *prima facie* eligibility, the IJ should consider the “nature of the injury inflicted, the duration of the harm, and the severity of the perpetrator’s conduct.”¹¹¹ Furthermore, *Sanchez Sosa* directs that the IJ should ensure that the criminal activity is a qualifying crime and that the petitioner is not culpable, and should evaluate whether the petitioner has been helpful to law enforcement as shown by a signed LEC.¹¹²

U nonimmigrant status petitioners should submit proof of filing with USCIS and other evidence sufficient for the IJ to make a *prima facie* determination. Some advocates may prefer not to submit, or to redact, portions of the underlying USCIS filing for privacy reasons; however, they should find out what the particular IJ will require for a continuance to avoid a removal order for failure to establish good cause.¹¹³ *Sanchez Sosa* directs that generally respondents “should provide the IJ with copies of [the filed application forms] and relevant supporting documents, including a waiver of inadmissibility on Form I-192, if applicable” as well as a USCIS receipt notice.¹¹⁴ If the respondent has a criminal history or conduct that triggers inadmissibility grounds, practitioners should also be prepared to provide evidence to show that the respondent is eligible for a waiver of inadmissibility and that it is likely to be granted.¹¹⁵ Some U.S. courts of appeal have recognized immigration court jurisdiction to consider waivers of inadmissibility

¹⁰⁶ *Id.* at 815.

¹⁰⁷ *Id.* at 812-13.

¹⁰⁸ *Sanchez Sosa*, 25 I&N Dec. at 813 (quoting *Matter of Hashmi*, 24 I&N Dec. 785, 791 (BIA 2009)).

¹⁰⁹ *Sanchez Sosa*, 25 I&N Dec. at 813 (quoting *Matter of Rajah*, 25 I&N Dec. 127, 130 (BIA 2009)).

¹¹⁰ 27 I&N Dec. at 416 (IJs “need not treat as controlling DHS’s consent” to a continuance and the good cause standard has no exception for unopposed motions).

¹¹¹ *Sanchez Sosa*, 25 I&N Dec. at 813.

¹¹² *Id.*

¹¹³ See, e.g., *Ismael Velasquez-Leyva*, A201 073 680, 2017 WL 6555153, at *1 (BIA Oct. 11, 2017) (unpublished) (sustaining continuance denial for lack of sufficient documentary evidence, where respondent had declined to submit certain evidence citing privacy concerns, agreeing with the IJ “that the table of contents page summarizing the claimed domestic violence is not evidence”).

¹¹⁴ *Sanchez Sosa*, 25 I&N Dec. at 814.

¹¹⁵ *Id. Compare Duane Grant*, A099-743-627 (BIA Jan. 4, 2018) (unpublished), https://www.scribd.com/document/369894335/Duane-Grant-A099-743-627-BIA-Jan-4-2018?secret_password=6itPyDwbZs7IyZUURogn (remanding because the IJ did not sufficiently consider whether respondent’s serious crimes met the extraordinary circumstances standard for a waiver), *with Jose Gabriel Reyes Lopez*, A206-550-863, 2017 WL 8787210, at *3 (BIA Dec. 21, 2017) (unpublished) (upholding continuance denial based on failure to establish a *prima facie* case where IJ “found it unlikely that the USCIS would favorably exercise its discretion on the respondent’s application for a waiver given his criminal history” of multiple DUIs).

under INA § 212(d)(3)(A) for individuals seeking U nonimmigrant status.¹¹⁶ The granting of a waiver by an IJ could be used as evidence in support of a continuance because it goes toward the principle *L-A-B-R*- factors of likelihood of success and that the U adjudication will materially affect the outcome of the removal proceedings.

Practitioners should also present any other relevant factors weighing in favor of a continuance.¹¹⁷ While *Sanchez Sosa* and *L-A-B-R*- note that the number of previous continuances and the length of the continuance requested are among relevant considerations, those factors cannot be the sole consideration, and *prima facie* eligibility should remain the primary factor. For example, in *Sanchez Sosa*, the U nonimmigrant status petition had apparently been pending for years by the time of the BIA's decision, and yet the BIA remanded the case for the IJ to consider all relevant factors in evaluating the continuance request.¹¹⁸ Often U nonimmigrant status petitioners' need for multiple or lengthy continuances will be due solely to the USCIS backlog and case processing delays, as current case processing times are about 49 months at the time of this writing.¹¹⁹ If the respondent shows he or she has filed a complete, approvable petition, "then any delay not attributable to the alien 'augurs in favor of a continuance.'"¹²⁰ Practitioners could also argue that Congress's purposes in creating U nonimmigrant status—to strengthen law enforcement's ability to detect, investigate, and prosecute crimes and to offer protection to victims—counsels in favor of a continuance.¹²¹

Practitioners should also consider making a motion to place the case on the status docket, *see* part IV.B below, if the immigration court where the respondent is in proceedings has a status docket. Where there is a U nonimmigrant status petition pending, placing a respondent's case on the status docket will allow USCIS to make a determination on the petition over which it has exclusive jurisdiction and will not consume valuable immigration court resources. Placement on the status docket will also allow respondents the opportunity to continue to cooperate with law enforcement on ongoing investigations or prosecutions, which can take years to complete.

¹¹⁶ *See, e.g., Meridor v. Att'y Gen.*, 891 F.3d 1302 (11th Cir. 2018); *Baez-Sanchez v. Sessions*, 872 F.3d 854 (7th Cir. 2017); *L.D.G. v. Holder*, 744 F.3d 1022 (7th Cir. 2014). *But see Sunday v. Att'y Gen.*, 832 F.3d 211 (3d Cir. 2016); *Matter of Khan*, 26 I&N Dec. 797 (BIA 2016).

¹¹⁷ *See L-A-B-R-*, 27 I&N Dec. at 413, 415; *Sanchez Sosa*, 25 I&N Dec. at 812-15.

¹¹⁸ According to the facts laid out in *Sanchez Sosa*, at the hearing before the IJ in November 2005, respondents' counsel stated the "U visa request had recently been submitted," and upon the Ninth Circuit's remand to the BIA, "respondents' counsel submitted a declaration indicating that the U visa request remains pending before the USCIS." 25 I&N Dec. at 816. Note that the record in *Sanchez Sosa* did not include the U nonimmigrant petition or receipt notice, but the BIA indicated that on remand respondents should be given the "opportunity to provide copies of and proof regarding the filing of their application with the USCIS and to otherwise meet the criteria established in this decision." *Id.*

¹¹⁹ *See* USCIS, Case Processing Times, *supra* note 102.

¹²⁰ *Sanchez Sosa*, 25 I&N Dec. at 814 (quoting *Matter of Hashmi*, 24 I&N Dec. 785, 793 (BIA 2009)); *accord Malilia v. Holder*, 632 F.3d 598, 606 (9th Cir. 2011) ("[D]elays in the USCIS approval process are no reason to deny an otherwise reasonable continuance request."); *see also Sonia Esther Gomez Alfaro*, A094-286-173 (BIA July 31, 2018) (unpublished), https://www.scribd.com/document/386774960/Sonia-Esther-Gomez-Alfaro-A094-286-173-BIA-July-31-2018?secret_password=m7rcnazHBfCZSutUsxz5 (U nonimmigrant backlog alone is not a sufficient reason to deny continuance); *Edgar Marcelo Alvarado Turcio*, A201-109-166 (BIA May 22, 2018) (unpublished), https://www.scribd.com/document/382793810/Edgar-Marcelo-Alvarado-Turcio-A201-109-166-BIA-May-22-2018?secret_password=DaznWfBPesn7UCF9BmTk.

¹²¹ *See Sanchez Sosa*, 25 I&N Dec. at 809.

U nonimmigrant status petitioners could also seek termination of proceedings notwithstanding *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018). The regulations specifically contemplate termination while USCIS adjudicates the U nonimmigrant status petition, stating that the Immigration and Customs Enforcement (ICE) attorney “may agree, as a matter of discretion, to file, at the request of the alien petitioner, a joint motion to terminate proceedings without prejudice.”¹²² If the ICE Office of Chief Counsel (OCC) attorney refuses to exercise discretion to join in a termination motion based on a pending U nonimmigrant status petition, the practitioner could remind him or her that a 2009 memorandum from Peter Vincent, ICE’s Principal Legal Advisor at the time, specifically directs DHS to seek a continuance to allow USCIS to provide a *prima facie* determination and where USCIS makes such a determination, “the OCC should consider administratively closing the case or seek to terminate proceedings pending final adjudication of the petition.”¹²³ ICE confirmed in October 2017 that the Vincent memo was still in effect.¹²⁴

Those U nonimmigrant status petitioners who have received deferred action from USCIS could argue that deferred action requires ICE OCC to move to dismiss the case because USCIS is the agency with U nonimmigrant status expertise and a contradictory determination by ICE OCC would place the two agencies within DHS at odds. Finally, even if the IJ orders removal and the U nonimmigrant status petitioner ultimately receives a final order of removal, he or she could seek a stay of removal with ICE to allow the U nonimmigrant status petition to be adjudicated.¹²⁵

D. Seeking a Continuance to Pursue T Nonimmigrant Status

Certain victims of trafficking may seek T nonimmigrant status.¹²⁶ Similar to petitions for U nonimmigrant status, T nonimmigrant status applicants must demonstrate they have assisted or are willing to assist law enforcement (subject to some exceptions), must apply for the status with USCIS which has exclusive jurisdiction over the application, and may seek adjustment of status three years after T nonimmigrant status has been granted.¹²⁷

To qualify for T nonimmigrant status, a respondent must be a victim of a severe form of trafficking in persons (which may include sex or labor trafficking), have complied with any reasonable request from a law enforcement agency for assistance in the investigation or prosecution of human trafficking, and have suffered extreme hardship involving unusual and severe harm if removed from the United States.¹²⁸ The predicate step for seeking T

¹²² 8 CFR § 214.14(c)(1)(i).

¹²³ Memorandum from Peter S. Vincent, Principal Legal Advisor, ICE Office of the Principal Legal Advisor, Guidance Regarding U Nonimmigrant Status (U Visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal, at 2 (Sept. 25, 2009), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/u-visa-applicants.pdf> [hereinafter “ICE U Visa Memo”].

¹²⁴ American Immigration Lawyers Association, *Chasing Down the Rumors: Shift in ICE ERO Policy, Pending U Visa Applications* (updated Nov. 3, 2017), AILA Doc. No. 16112144, <https://www.aila.org/infonet>.

¹²⁵ See 8 CFR § 214.14(c)(1)(ii); *Sanchez Sosa*, 25 I&N Dec. at 815 n.10; ICE U Visa Memo, *supra* note 123 (directing ICE to request *prima facie* determination from USCIS after receiving a stay request and that ICE should “favorably view an alien’s request for a stay of removal if USCIS has determined that the alien has established *prima facie* eligibility for a U visa”).

¹²⁶ INA § 101(a)(15)(T). T nonimmigrant status is also referred to as a “T visa.”

¹²⁷ *Id.*; see also 8 CFR § 214.11; INA § 245(l) (statute regarding adjustment of status for victims of trafficking).

¹²⁸ INA § 101(a)(15)(T).

nonimmigrant status is reporting one's trafficking to law enforcement.¹²⁹ Respondents eligible for T nonimmigrant status can submit a copy of a signed Form I-914 Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, as evidence of assistance to law enforcement, or may submit other credible evidence that he or she meets the cooperation requirement.¹³⁰

Independent of the T nonimmigrant status application process, law enforcement agencies may seek "Continued Presence" for trafficking victims as a form of temporary immigration relief.¹³¹ Continued Presence is authorized by ICE Homeland Security Investigations (HSI) Parole and Law Enforcement Program Unit (LEPU).¹³² Respondents who have received Continued Presence and are seeking T status may wish to request that HSI reach out to OCC to express support for the motion to continue. Practitioners could consider drafting a letter in support of the motion to continue for HSI to sign. Along with the continuance motion, respondents can provide to the immigration court the signed letter of support from HSI, if issued, or a copy of the signed Continued Presence application submitted by HSI to the LEPU.

In seeking a continuance to allow for adjudication of a T nonimmigrant status application by USCIS, practitioners can argue that a continuance is warranted under *L-A-B-R-* by showing that the respondent is likely to be granted T status, which would materially affect the outcome of the removal proceedings. A grant of T nonimmigrant status would affect the outcome of removal proceedings because it would provide the respondent with a lawful status, grounds in most cases to terminate the removal proceedings. To show the likelihood that the T application will be granted, practitioners may want to argue that *Sanchez Sosa's prima facie* standard is relevant in the T nonimmigrant status context, as unpublished BIA cases have concluded.¹³³ *L-A-B-R-* did not overrule *Sanchez Sosa*, which directs that in the U nonimmigrant status context a respondent should "generally should provide the [IJ] with copies of [the filed application forms] and relevant supporting documents, including a waiver of inadmissibility on Form I-192, if applicable," as well as "a receipt indicating that the petition has been submitted to the USCIS."¹³⁴ If the respondent shows he or she has filed a complete application and it appears to meet the necessary criteria, "then any delay not attributable to the alien 'augurs in favor of a continuance.'"¹³⁵

Thus, T nonimmigrant status applicants should submit proof of filing with USCIS, as well as evidence sufficient for the IJ to make a *prima facie* determination. Some advocates may prefer not to submit, or to redact, portions of the underlying USCIS filing for privacy and safety reasons; however, they should find out what the particular IJ may require for a continuance in

¹²⁹ Cooperation is not required in two situations: 1) if the victim is under the age of 18, or (2) if the victim has experienced physical or psychological trauma that prevents him or her from complying with a reasonable request. INA § 101(a)(15)(T)(i)(III).

¹³⁰ USCIS, U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies (Jan. 4, 2016), https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf.

¹³¹ *Id.*

¹³² *Id.*

¹³³ See, e.g., *Maximino Jeronimo Hernandez*, A206-007-597, 2014 WL 4966406, at *3 n.4 (BIA Aug. 28, 2014) (unpublished).

¹³⁴ *Matter of Sanchez Sosa*, 25 I&N Dec. 807, 814 (BIA 2012).

¹³⁵ *Id.* (quoting *Matter of Hashmi*, 24 I&N Dec. 785, 793 (BIA 2009)).

order to avoid a removal order for failure to establish good cause.¹³⁶ If the respondent has a criminal history or conduct that triggers inadmissibility, practitioners should be prepared to provide evidence to show that the applicant is eligible for a waiver of inadmissibility and that it is likely to be granted.¹³⁷

Practitioners can also argue that other special factors weigh in favor of a continuance request to permit adjudication of the T application.¹³⁸ First, in order to be eligible for T nonimmigrant status, the applicant must be “physically present in the United States.”¹³⁹ Second, a T nonimmigrant status applicant must show that he or she would suffer “extreme hardship involving unusual and severe harm” if removed.¹⁴⁰ An IJ’s denial of a continuance to pursue T nonimmigrant status which he or she is statutorily entitled to seek would thwart congressional intent as evidenced by these provisions that define eligibility based on the individual’s presence in the United States and ability to show that he or she would suffer if not allowed to remain. These factors specific to the T nonimmigrant status process weigh heavily in favor of a continuance.¹⁴¹

Practitioners should also consider making a motion to place the case on the status docket, *see* part IV.B below, if the immigration court where the respondent is in proceedings has a status docket. Placing a T nonimmigrant status case on the status docket will allow USCIS to make a determination on the application over which it has exclusive jurisdiction and will not consume valuable immigration court resources. Allowing the T nonimmigrant status application to go forward will also implement Congress’s intent to provide incentives to non-citizens to help bring human traffickers to justice.¹⁴² To bolster this point, practitioners could also ask the relevant law enforcement agency or prosecutor’s office for a letter supporting the continuance request.

The T nonimmigrant status regulations provide other potential options for those in removal proceedings. They authorize IJs to administratively close removal proceedings while the T nonimmigrant status application is adjudicated by USCIS, stating that “[w]ith the concurrence of Service counsel, a victim of a severe form of trafficking in persons in proceedings before an immigration judge or the [BIA] may request that the proceedings be administratively closed (or that a motion to reopen or motion to reconsider be indefinitely continued) in order to allow the alien to pursue an application for T nonimmigrant status with the Service” when the individual

¹³⁶ *See, e.g., Janet Salgado*, A216-143-164, 2018 WL 3416264, at *1–2 (BIA May 16, 2018) (unpublished) (affirming continuance denial for respondent with pending T application, noting that the respondent had not filed a complete copy of the application as the IJ had requested).

¹³⁷ *Sanchez Sosa*, 25 I&N Dec. at 814; *cf. Marcial Natividad-Rivera*, A201-161-810, 2014 WL 1401577, at *1 (BIA Mar. 18, 2014) (unpublished) (affirming continuance denial for various reasons and noting that respondent had a felony smuggling conviction and had not shown he was *prima facie* eligible for a waiver).

¹³⁸ *See L-A-B-R-*, 27 I&N Dec. at 813, 815 (IJ must consider all relevant factors).

¹³⁹ INA § 101(a)(15)(T)(i)(II); 8 CFR §§ 214.11(b)(2), 214.11(g) (an individual who is removed from the United States after the trafficking act is generally “deemed not to be present in the United States”).

¹⁴⁰ INA § 101(a)(15)(T)(i)(IV); 8 CFR § 214.11(b)(4).

¹⁴¹ Moreover, unlike U nonimmigrant status, there is not a current backlog in granting T nonimmigrant status once approved, so a respondent could request a shorter continuance than in the U nonimmigrant status context.

¹⁴² *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102, 114 Stat. 1464 (purposes and findings).

appears eligible.¹⁴³ While the Attorney General ruled in *Matter of Castro-Tum* that IJs generally lack authority to administratively close cases, he noted certain exceptions, such as where Department of Justice (DOJ) regulations, including the T nonimmigrant status regulations, specifically authorize administrative closure.¹⁴⁴ The DHS regulations also contemplate termination while a T nonimmigrant status application is pending, stating that “[i]n its discretion, DHS may agree to the alien’s request to file . . . a joint motion to . . . terminate proceedings without prejudice . . . while an application for T nonimmigrant status is adjudicated by USCIS.”¹⁴⁵ For these reasons it would be wise for practitioners to approach ICE OCC and request their agreement on termination or at a minimum administrative closure or a continuance.

Even if the IJ orders removal, a T nonimmigrant status applicant can obtain an automatic stay of removal if USCIS makes a *bona fide* determination about the pending application.¹⁴⁶ Given this regulation, practitioners may argue that it would not be efficient or appropriate for DHS to expend resources on seeking removal for an individual who has been trafficked, has assisted law enforcement, has submitted a T nonimmigrant status application that USCIS has accepted, and whom Congress intended to protect.

E. Seeking a Continuance to Pursue a VAWA Self-Petition

Certain non-citizens in abusive marriages with, or who are children of, U.S. citizens or LPRs can self-petition under the Violence Against Women Act (VAWA), allowing them to achieve the benefits of family-based immigration without having to rely on an abusive family member to petition on their behalf.¹⁴⁷ This self-petition is made on Form I-360 and USCIS has exclusive jurisdiction over it.

Practitioners representing respondents in removal proceedings seeking relief through a VAWA self-petition may seek a continuance to allow for adjudication of the petition by USCIS. Practitioners can argue that a continuance is warranted under *L-A-B-R-* by showing the likelihood of approval of the self-petition, and that approval would materially affect the outcome of the removal proceedings. To show likelihood of approval, practitioners should submit evidence in support of the continuance request, which might include a proof of filing with USCIS, a copy of the Form I-360 self-petition, supporting evidence filed with Form I-360, and a

¹⁴³ 8 CFR § 1214.2(a). The BIA in unpublished decisions has interpreted this regulation to require DHS consent before administrative closure can be granted. *See, e.g., Maximino Jeronimo Hernandez*, A206-007-597, 2014 WL 4966406, at *2 (BIA Aug. 28, 2014) (unpublished); *Maria Levy Hinayhinay*, A099-625-117, 2010 WL 4509769, at *1 (BIA Oct. 25, 2010) (unpublished); *see also* 8 CFR § 214.11(d)(1)(i); New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, 67 Fed. Reg. 4784, 4792 (Jan. 31, 2002) (stating that DHS will consider consenting “only if there is a good reason to believe that the alien will be able to satisfy the eligibility requirements for the T status, including admissibility”).

¹⁴⁴ *Matter of Castro-Tum*, 27 I&N Dec. 271, 277-28 (A.G. 2018).

¹⁴⁵ 8 CFR § 214.11(d)(1)(i).

¹⁴⁶ 8 CFR § 214.11(d)(1)(ii).

¹⁴⁷ INA §§ 204(a)(1)(A)(iii)-(vii); *see also* INA § 101(a)(51). Note that for a parent of an abused child to be eligible to self-petition, the parent must have been married (or believed they were married as described in the statute) to the abusive U.S. citizen or LPR spouse at the time of the abuse. INA § 204(a)(1)(A)(iii)(I). In addition, parents of an abusive U.S. citizen may also qualify to self-petition. INA § 204(a)(1)(A)(vii).

prima facie determination from USCIS if it exists.¹⁴⁸ Some advocates may prefer not to submit, or to redact, portions of the underlying USCIS filing for privacy reasons; however, they should find out what the particular IJ will require for a continuance in order to avoid a removal order for failure to establish good cause.¹⁴⁹

To demonstrate likelihood that the VAWA self-petition approval would materially affect the outcome of removal proceedings, practitioners should show why the respondent is statutorily eligible for adjustment of status and why the adjustment application is likely to be granted as a matter of discretion. Practitioners could remind the IJ that certain grounds of inadmissibility do not apply to VAWA self-petitioners seeking adjustment of status, and others can be waived. Practitioners could also argue that the humanitarian purpose behind Congress's creation of VAWA relief is another "relevant factor" that the IJ must consider in evaluating good cause for a continuance.¹⁵⁰ Under this argument, it would contravene congressional intent not to allow eligible abused immigrants to pursue a statutorily created immigration protection while in removal proceedings.

Practitioners should also consider making a motion to place the case on the status docket, *see* part IV.B below, if the immigration court where the respondent is in proceedings has a status docket. Placing a VAWA case on the status docket will allow USCIS to make a determination on the self-petition over which it has exclusive jurisdiction and will conserve valuable immigration court resources. Allowing the VAWA self-petition to go forward will also implement Congress's intent to provide incentives to non-citizens to seek protection from abusers.¹⁵¹ If those in abusive relationships believe they will be removed while a VAWA self-petition is pending, abuse survivors are more likely to remain in the abusive and dangerous relationship, thereby thwarting the intended purpose of the bipartisan VAWA statute.

In addition to, or instead of, seeking a continuance, VAWA self-petitioners could also seek termination or dismissal of removal proceedings under one or more theories. First, respondents with an NTA charge under INA § 212(a)(6)(A)(i), for being present in the United States without admission or parole, could deny the charge and argue that they fall within the exception found at

¹⁴⁸ *See L-A-B-R-*, 27 I&N Dec. at 418; *Matter of Hashmi*, 24 I&N Dec. 785, 791 (BIA 2009); *see also O-P-S-*, AXXX-XXX-565 (BIA Dec. 6, 2017) (unpublished), <https://www.scribd.com/document/367643907/O-P-S-AXXX-XXX-565-BIA-Dec-6-2017> (reopening warranted concluding that respondent had made *prima facie* showing, having submitted evidence including the USCIS *prima facie* determination, a copy of the filed Form I-360, and evidence of abuse by U.S. citizen spouse); *C-C-G-*, AXXX-XX-045 (BIA May 11, 2015) (unpublished), <https://www.scribd.com/document/266017722/C-C-G-AXXX-XXX-045-BIA-May-11-2015> (reopening warranted where respondent made *prima facie* showing with motion by submitting evidence including proof of I-360 filing, police report, psychosocial report, and good moral character affidavits).

¹⁴⁹ *Cf. Jesus Horacio Nevarez-Sierra*, A200-821-776, 2015 WL 5996713, at *1 (BIA Sept. 17, 2015) (unpublished) (upholding continuance denial despite pending VAWA I-360 petition and copy of I-360 filed, concluding that *prima facie* showing had not been made because the respondent had not submitted evidence of marriage, abuser's immigration status, or "any particularized complaints relating to abuse or extreme cruelty").

¹⁵⁰ *L-A-B-R-*, 27 I&N Dec. at 813, 815.

¹⁵¹ *See Matter of Pangan-Sis*, 27 I&N Dec. 130 (BIA 2017) (discussing legislative history of VAWA as a remedy for situations in which abused alien spouses were reluctant to leave their U.S. citizen or LPR abuser for fear of losing their potential to adjust their status); *Matter of A-M-*, 25 I&N Dec. 66, 72 (BIA 2009) (discussing legislative purpose behind VAWA including "to permit battered spouses to leave their abusers without fear of deportation or other immigration consequences").

INA § 212(a)(6)(A)(ii). That provision says that clause (A)(i) does not apply to VAWA self-petitioners¹⁵² who have been battered or subjected to extreme cruelty by certain individuals, or whose child has been battered or subjected to extreme cruelty by certain individuals, where there was a substantial connection between the battery or cruelty and the respondent's unlawful entry into the United States. Second, respondents with pending VAWA self-petitions could request a motion to dismiss from DHS. There are agency memos that date back to the Obama administration that directed DHS to dismiss certain cases where there was a pending application or petition with USCIS,¹⁵³ and to exercise prosecutorial discretion in cases involving crime and abuse victims.¹⁵⁴ It is unclear whether, and in what situations, the agency still follows these directives, but it may be worthwhile to approach DHS to seek dismissal or at the very least non-opposition to a continuance.¹⁵⁵

F. Seeking a Continuance to Pursue Asylum with USCIS for an Unaccompanied Child

Practitioners representing unaccompanied children respondents in removal proceedings may seek a continuance to allow for adjudication of an asylum application by USCIS. By statute, USCIS has initial jurisdiction over asylum applications filed by unaccompanied children in removal proceedings.¹⁵⁶ In fact, the BIA has recognized that this provision confers a “statutory right” on unaccompanied children.¹⁵⁷ Where there is agreement that a respondent is subject to USCIS's initial jurisdiction,¹⁵⁸ the only mechanisms short of termination or dismissal that would give

¹⁵² Defined at INA § 101(a)(51) to include those who qualify for relief under various VAWA statutory provisions.
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¹⁵⁴ See memoranda cited in note 61 *supra*.

¹⁵⁵ See, e.g., AILA/ICE Liaison Meeting Minutes, at 3 (Oct. 26, 2017), AILA Doc. No. 18011132, www.aila.org/infonet (confirming that as of January 8, 2018, the ICE Victims Memo (*supra* note 61) is still in effect but noting that all discretionary decisions must be made consistent with the President's executive orders and the Secretary's memoranda).

¹⁵⁶ INA § 208(b)(3)(C).

¹⁵⁷ *Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. 168, 172 (BIA 2017) (“Only unaccompanied alien children have a statutory right to initial consideration of an asylum application by the DHS, and it is undisputed that the respondents do not fall within this class.”).

¹⁵⁸ In *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018), the BIA held that IJs have initial jurisdiction over asylum applications of respondents who turn 18 years old before filing the asylum application, even if the respondent was previously determined to be an unaccompanied child. The validity of this ruling may be challenged and is in conflict with USCIS policy about initial asylum jurisdiction. See Memorandum from Ted Kim, Acting Chief, Asylum Division, USCIS, Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children (May 28, 2013), <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf> (providing that USCIS exercises its initial jurisdiction where a DHS determination that a child is an unaccompanied child remains in place on the date of filing, even if the child has since turned 18 or reunified with a parent or guardian). The question of how and at what juncture an “unaccompanied alien child” determination should be made is beyond the scope of this practice advisory. For additional resources on this point, see for example CLINIC, *A Practice Advisory on Strategies to Combat Government Efforts to Terminate Unaccompanied Children Determinations* (May 2017), <https://cliniclegal.org/resources/practice-advisory-strategies-combat-government-efforts-terminate-unaccompanied-children> and CLINIC, *Immigration Judges' Authority to Review “Unaccompanied Alien Child” (UAC) Determinations*, <https://cliniclegal.org/resources/immigration-judges-authority-review-unaccompanied-alien-child-uac-determinations>.

effect to this statutory jurisdictional mandate are continuances (or administrative closure¹⁵⁹) of the proceedings while USCIS adjudicates the asylum application.¹⁶⁰ The practitioner could argue that a pending asylum application filed with USCIS by an unaccompanied child is *per se* good cause for a continuance and the IJ has no authority to further evaluate the application for likelihood of success or *prima facie* eligibility because USCIS has exclusive initial jurisdiction and the IJ's statutory authority over the asylum application arises only if and when USCIS refers the matter to the immigration court. In other words, a continuance for an unaccompanied child who has filed or wishes to file for asylum is not a discretionary consideration for the IJ, but rather the statute requires that the IJ grant such continuances to allow the child to vindicate his or her statutory right to seek asylum with USCIS in the first instance.¹⁶¹

Even assuming *arguendo* that the *L-A-B-R*- framework is applicable to the context of unaccompanied child asylum applicants, practitioners can argue (in the alternative) that a continuance is warranted because the respondent is likely to receive an asylum adjudication by USCIS based on the pendency of the asylum case with USCIS. Whether the USCIS adjudication is positive or negative, the result would materially affect the outcome of the removal proceedings. A grant of asylum would constitute grounds to terminate the removal proceedings.¹⁶² A denial would also affect the outcome of the removal proceeding because it would cause the IJ to gain jurisdiction to adjudicate the asylum application. The practitioner can demonstrate good cause for a continuance by providing proof that the asylum application has been filed with USCIS.¹⁶³

Practitioners can also argue that the IJ must consider other relevant factors that come into play in cases of unaccompanied child asylum seekers.¹⁶⁴ One relevant factor in this context is the respondent's minority and vulnerabilities inherent in being a child asylum seeker. The Attorney General in *Matter of Castro-Tum* called continuances a "superior alternative" for "cases involving particularly vulnerable respondents" and gave the example of respondent minors seeking alternative forms of relief, noting that continuances give judges the ability to "pause proceedings" and "monitor the relief process while ensuring that the case does not get lost."¹⁶⁵

¹⁵⁹ The Attorney General in *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), ruled that IJs lack general authority to administratively close cases; however, practitioners may still wish to seek administrative closure in the alternative arguing that this case was wrongly decided in order to preserve the issue for appeal. See CLINIC *Castro-Tum* Practice Pointer, *supra* note 10.

¹⁶⁰ See INA § 208(b)(3)(C) (stating that asylum officers "shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child" (emphasis added)).

¹⁶¹ If it is in the respondent's interest, the practitioner could also make a written request to the Asylum Office Director where the asylum application is pending to expedite the interview since the applicant is in removal proceedings, and those proceedings cannot move forward until USCIS interviews the applicant and adjudicates the application.

¹⁶² See INA § 208(c)(1)(A).

¹⁶³ Cf. *J-H-R-M-*, AXXX-XXX-862, 2016 WL 6392663, at *1 (BIA Sept. 7, 2016) (unpublished) (reversing denial of continuance and finding that good cause had been established where unaccompanied child respondent had indicated his intention to file an application for asylum).

¹⁶⁴ See *L-A-B-R-*, 27 I&N Dec. at 813, 815.

¹⁶⁵ *Matter of Castro-Tum*, 27 I&N Dec. 271, 293 n.13 (A.G. 2018).

G. Seeking a Continuance to Pursue Adjustment of Status with USCIS for an “Arriving Alien”

Generally, USCIS has exclusive jurisdiction over all adjustment of status applications for “arriving aliens.”¹⁶⁶ “Arriving aliens” include those who were paroled into the United States temporarily for urgent humanitarian reasons or significant public benefit.¹⁶⁷ While USCIS generally has exclusive jurisdiction¹⁶⁸ over adjustment of status applications by “arriving aliens,” immigration courts still have jurisdiction over the INA § 240 removal proceedings in cases of “arriving aliens.” Thus, for example, USCIS would have exclusive jurisdiction to adjudicate a marriage-based adjustment application for an individual who is designated an “arriving alien,” even though he or she is in removal proceedings. For this reason, practitioners with “arriving alien” clients must seek continuances that comply with *L-A-B-R*- while the adjustment of status application is pending with USCIS. Practitioners can argue that a continuance is warranted under *L-A-B-R*- by showing the likelihood of success before USCIS, and that approval would materially affect the outcome of the removal proceedings. To show likelihood of approval, practitioners should submit evidence in support of the continuance request, which might include a copy of the visa petition, the Form I-485, and required supporting documents. It is important to remember that because USCIS has exclusive jurisdiction over adjustment applications by “arriving aliens,” if USCIS denies the application for adjustment, the respondent cannot pursue adjustment of status before the IJ.¹⁶⁹ This means that adjustment before USCIS is the only opportunity to obtain this relief, so practitioners should submit a complete adjustment application and work diligently to obtain a continuance to allow USCIS to adjudicate the adjustment application. Practitioners whose clients are pursuing adjustment with USCIS could also move to have the removal proceedings placed on the status docket, *see* part IV.B below, if one exists in the court where the respondent is in proceedings.

H. Seeking a Continuance to Pursue Adjustment with USCIS of an “Arriving Alien” Under the Cuban Adjustment Act

Cuban natives or citizens (and their qualifying relatives)¹⁷⁰ who made it to U.S. soil and were paroled into the United States pursuant to INA § 212(d)(5) are among those categorized as “arriving aliens.”¹⁷¹ While many “arriving aliens” seek adjustment of status as immediate

¹⁶⁶ 8 CFR § 1245.2(a)(1)(ii).

¹⁶⁷ INA § 212(d)(5).

¹⁶⁸ There is one narrow exception that provides that an IJ has jurisdiction over adjustment applications when: (1) the application was “properly filed” with USCIS while the “arriving alien” was in the United States; (2) the individual departed from and returned to the United States pursuant to the terms of a grant of advance parole to pursue the previously filed application for adjustment of status; (3) the application for adjustment of status was denied by USCIS; and (4) DHS placed the “arriving alien” in removal proceedings either upon return to the United States or after USCIS denied the application. *See* 8 CFR § 1245.2(a)(1)(ii); *see also* *Matter of Martinez-Montalvo*, 24 I&N Dec. 778 (BIA 2009) (superseding *Matter of Artigas*, 23 I&N Dec. 99 (BIA 2001)).

¹⁶⁹ For more information on “arriving alien” adjustment, see American Immigration Council, *Practice Advisory: “Arriving Aliens” and Adjustment of Status* (updated Nov. 2015), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/ar_alien.pdf.

¹⁷⁰ *Matter of Quijada-Cota*, 13 I&N Dec. 740, 741 (BIA 1971).

¹⁷¹ *See* Memorandum from Doris Meissner, Comm’r, Immigration & Naturalization Serv., Eligibility for Permanent Residence Under the Cuban Adjustment Act Despite Having Arrived at a Place Other

relatives, the Cuban Adjustment Act (CAA) of November 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161, as amended, allows Cuban nationals or citizens who were inspected and admitted or paroled into the United States to adjust status notwithstanding the absence of an immediate relative relationship and approved Form I-130.¹⁷² IJs do not generally have jurisdiction to adjudicate CAA applications of Cuban nationals or citizens who were paroled into the United States.¹⁷³

The CAA provides that a native¹⁷⁴ or citizen of Cuba who has been inspected and admitted or paroled¹⁷⁵ into the United States, has been physically present in the United States for at least one year, and is admissible to the United States for lawful permanent residence may adjust status. Consistent with the recognition that the CAA is humanitarian relief, the bars to adjustment enumerated in INA § 245(c) do not apply to Cubans applying for adjustment of status under the CAA.¹⁷⁶

In passing the CAA, Congress recognized Cubans as being similar to political refugees requiring humanitarian relief that included generous adjustment of status and family unity benefits. Those eligible for CAA adjustment of status may thus have additional advantages and arguments for seeking a continuance pursuant to *L-A-B-R*. First, the “collateral” matter in the “arriving alien” CAA context is the adjustment of status application itself, not an underlying petition or application with which IJs are unfamiliar. Because IJs are familiar with adjustment of status applications, IJs should be better able to determine the likelihood that USCIS will approve the adjustment of status application. However, when it comes to the discretionary assessment, the practitioner could argue that since the IJ does not have jurisdiction over the adjustment application, the IJ lacks authority to deny a continuance on the grounds that USCIS will likely deny as a matter of discretion. Furthermore, the BIA has held that, in weighing the discretionary factors, the intent of the CAA and the political situation in Cuba must be considered and, in so doing, would tilt toward a finding of favorable discretion.¹⁷⁷ Second, if USCIS approves the “collateral” matter, the respondent will immediately obtain LPR status, which should lead to termination of the proceedings. The Attorney General’s example in *L-A-B-R* of a respondent’s visa priority date being “too remote to raise the prospect of adjustment of status above the speculative level”¹⁷⁸ is therefore inapplicable in the CAA context.

than a Designated Port-of-Entry (Apr. 19, 1999), AILA Doc. No. 99043080, <http://www.aila.org/infonet>; DHS, Fact Sheet: Changes to Parole and Expedited Removal Policies Affecting Cuban Nationals (Jan. 12, 2017), <https://www.dhs.gov/sites/default/files/publications/DHS%20Fact%20Sheet%20FINAL.pdf>.

¹⁷² Compare INA § 245(a) (requiring in pertinent part that an immigrant visa be “immediately available”) with section 1 of the CAA (having no comparable language).

¹⁷³ See part III.G *supra* (discussing jurisdiction over adjustment applications for “arriving aliens”).

¹⁷⁴ See *Matter of Masson*, 12 I&N Dec. 699 (BIA 1968) (holding that a citizen of Haiti who was born in Cuba is eligible for adjustment).

¹⁷⁵ Cuban nationals or citizens present without inspection must seek parole from DHS per INA § 212(d)(5)(A) prior to pursuing adjustment of status. See USCIS, Green Card for a Cuban Native or Citizen (last reviewed/updated Jan. 10, 2018), <https://www.uscis.gov/greencard/caa>.

¹⁷⁶ See, e.g., *Matter of Sanabria*, 12 I&N Dec. 396 (R.C. 1967).

¹⁷⁷ *Matter of Mesa*, 12 I&N Dec. 432 (Dep. Asst. Comm’r, 1967) (“It is axiomatic that laws remedial in nature, such as the Act under discussion, should be construed liberally.”); see also *United States v. Dominguez*, 661 F.3d 1051 (11th Cir. 2011).

¹⁷⁸ *L-A-B-R*-, 27 I&N Dec. at 418.

Practitioners may also seek a motion to dismiss from DHS. In the past, DHS was often willing to seek dismissal on behalf of those eligible to adjust under the CAA given the longstanding United States recognition of Cubans as similar to political refugees.

I. Pursuing Post-Conviction Relief

One of the respondents in *L-A-B-R-*, Mr. McCalla, sought continuances to pursue post-conviction relief.¹⁷⁹ The *L-A-B-R-* decision highlighted a collateral attack on a criminal conviction as an example of a “collateral” matter that would not provide good cause for a continuance.¹⁸⁰ The Attorney General reasoned that courts have found post-conviction relief to be “too ‘tentative’ and ‘speculative.’”¹⁸¹ In unpublished BIA decisions in which the respondent has appealed a denial of a continuance to seek post-conviction relief, the BIA has generally dismissed the appeal noting that “the decision to grant or deny a continuance, if good cause is shown, is within the sound discretion of the [IJ], and that decision will not be overturned on appeal unless it appears that the respondent was deprived of a full and fair hearing.”¹⁸² Practitioners will therefore likely find that post *L-A-B-R-*, IJs will often not be willing to provide a continuance to await adjudication of post-conviction relief.

In *Matter of J. M. Acosta*, 27 I&N Dec. 420 (BIA 2018), the BIA held that a conviction is not final for immigration purposes until the time for filing an initial direct appeal has passed and during the pendency of any direct appeal related to the merits of the conviction, even if the appeal was late-filed, so long as it was accepted by the state court as properly filed under state law. In pursuing relief from state court convictions, practitioners should therefore be sure to investigate whether there is any possibility under state law to pursue a direct appeal, even if it is late-filed, rather than pursuing post-conviction relief, since an IJ is more likely to continue removal proceedings for a direct appeal if the result of the appeal could materially impact the proceedings.¹⁸³

In any event, practitioners should consider an initial strategy of challenging the alleged criminal grounds of removability for respondents subject to INA § 237 grounds, thus placing the burden on DHS to prove that the respondent is removable as charged pursuant to the categorical approach.¹⁸⁴ This strategy of forcing DHS to meet its burden of proof could result in termination

¹⁷⁹ *Id.* at 410.

¹⁸⁰ *Id.* at 417.

¹⁸¹ *Id.* (quoting *Palma-Martinez v. Lynch*, 785 F.3d 1147, 1150 (7th Cir. 2015)).

¹⁸² See, e.g., *Christian Paul Alarcon-Toro*, A046-112-654, 2010 WL 5635163 (BIA Dec. 8, 2010) (unpublished); *Winston Roy Campbell*, A026-656-699, 2009 WL 5443987 (BIA Dec. 23, 2009) (unpublished); *Matter of Villarreal-Zuniga*, 23 I&N Dec. 886, 891-92 (BIA 2006) (finding the IJ acted within his sound discretion when he denied a continuance where the denial of the continuance did not prejudice respondent or “materially affect the ultimate outcome of his case.”).

¹⁸³ Under *Matter of J.M. Acosta*, if the conviction on direct appeal is the only charge of inadmissibility or deportability in the removal proceedings, the practitioner should move to terminate because the conviction is not final and DHS cannot sustain the charges. However, if the respondent is inadmissible or deportable on another basis, and the outcome of the pending criminal proceedings may materially impact respondent’s eligibility for relief, *J. M. Acosta* provides a strong basis for a continuance in immigration court.

¹⁸⁴ INA § 240(c)(3)(A); 8 CFR § 1240.8(a).

or at least could slow the proceedings,¹⁸⁵ which would allow the respondent more time to pursue post-conviction relief without having to seek a continuance from the IJ to do so.

If DHS meets its burden and the respondent is unable to obtain a continuance while pursuing post-conviction relief, he or she should pursue whatever removal relief options may be available in light of the conviction. For example, even those with felony convictions may be eligible for withholding of removal under INA § 241 or protection under the Convention Against Torture if they have a fear of persecution or torture in the home country. The practitioner should pursue any available relief before the IJ while also pursuing post-conviction relief. Of course, the practitioner should present the best case before the IJ and preserve all issues for appeal.

If the IJ sustains the ground of removability, denies relief, or finds that no relief is available, and denies a continuance for purposes of seeking post-conviction relief, practitioners should consider appealing all issues while the respondent continues to pursue post-conviction relief.¹⁸⁶ If, while the appeal is pending with the BIA or the court of appeals, post-conviction relief results in a vacatur or different sentence that no longer renders the respondent removable, or results in new eligibility for relief, the practitioner should seek reopening and remand.¹⁸⁷ If before the BIA, the practitioner should provide evidence of the vacatur or different sentence with the motion to remand.¹⁸⁸ If before the court of appeals, the practitioner should seek to hold the petition for review in abeyance with the court while pursuing a motion to reopen with the BIA that includes evidence of the vacatur or different sentence. The practitioner should establish that the vacatur is material to the respondent's eligibility for relief or that the vacatur renders the charge of

¹⁸⁵ If DHS does not have the evidence to support its charge(s) at the master calendar hearing when pleadings are taken, the practitioner could move to terminate proceedings. Even if the IJ denies termination and grants DHS a continuance to obtain the evidence necessary to meet its burden of proof, practitioners should ensure that the documentation DHS submits to meet its burden of proof is proper. *See, e.g.*, INA § 240(c)(3)(B) (describing what documents constitute proof of a criminal conviction); 8 CFR § 1003.41; Immigrant Legal Resource Center, § N3 *The Record of Conviction* (Jan. 2013), https://www.ilrc.org/sites/default/files/resources/n.3-record_of_conviction_0.pdf.

¹⁸⁶ *See, e.g.*, *Carlos Alves*, A043-384-941, 2010 WL 1747409 (BIA Apr. 14, 2010) (unpublished) (remanding for the IJ to clarify his reasons for sustaining the aggravated felony removal charge, declining to “resolve the issue of whether the respondent should have been granted a continuance,” and noting that the IJ “had in fact given the respondent several continuances to await the outcome of his post-conviction motions and that, in any event, the respondent can now present any evidence related to criminal court actions at his remanded proceedings”).

¹⁸⁷ *See, e.g.*, *Francisco Jose Alvarez Troncoso*, A057-287-860, 2011 WL 230762 (BIA Jan. 6, 2011) (unpublished) (reopening and remanding in light of grant of motion to withdraw guilty plea and order a new trial by a Massachusetts state court and noting the question now is whether there is “any conviction rendering the respondent . . . removable,” and if respondent is removable, whether there is any conviction that precludes eligibility for relief).

¹⁸⁸ *See Matter of Sanchez Sosa*, 25 I&N Dec. 807, 816 (BIA 2012) (“However, this declaration [from the attorney] does not constitute proof that the materials were ever filed and that the application is actually pending before the USCIS.”); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980) (recognizing that counsel’s arguments are not evidence).

removability invalid.¹⁸⁹ Practitioners should ensure that any motion to reopen complies with all the requirements for such motions.¹⁹⁰

IV. Other Considerations and Practice Tips for Successful Immigration Court Advocacy After *Matter of L-A-B-R-*

A. Length of Continuances in the Wake of *Matter of L-A-B-R-*

The decision in *L-A-B-R-* does not specify what is a reasonable length of time for a continuance, and the length of time a respondent needs will vary greatly depending on the reason for the requested continuance. The regulations give IJs the authority to grant “a reasonable adjournment.”¹⁹¹ In some situations a practitioner may only need a continuance of several weeks for preparation; in others it may take several years for USCIS to adjudicate a “collateral” matter. In some courts, the backlogs¹⁹² are so long that simply adjourning to another master calendar hearing may mean that the respondent will receive a continuance of over a year. In other courts, continuances may generally be for only a month or two.

While *L-A-B-R-* does not address how long continuances should be, it does state that one of the factors IJs should take into consideration in determining whether to grant a continuance at all is the length of time requested.¹⁹³ Following *L-A-B-R-*, practitioners should expect to have to make a reasoned calculation of the length of time needed for the “collateral” matter when requesting a continuance by, for example, submitting evidence about the relief requested and processing times by USCIS. In cases where the “collateral” benefit will be adjudicated relatively quickly, such as an immediate relative Form I-130 petition that is already pending, the respondent could seek a continuance for the length of USCIS’s stated processing time. For cases where the USCIS backlog is very long, practitioners should consider making a motion to transfer the case to the court’s status docket, if the court has one, as discussed in part IV.B below. If the practitioner is seeking a longer continuance than is usual in the court where the case is being heard, it will be necessary to thoroughly document the reason for the continuance and the need for the length of time. *L-A-B-R-* states, “the likelihood that the alien will receive the pursued collateral relief and that such relief will materially affect the outcome of the removal proceedings is the primary

¹⁸⁹ For example, the practitioner should ensure that the state court’s decision in the post-conviction case tackled a procedural or substantive defect in the underlying proceedings. See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (holding that if a court vacates a criminal conviction solely to render the non-citizen eligible for immigration relief, rather than because of a substantive or procedural defect, the conviction is not eliminated for immigration purposes); *Matter of Marquez Conde*, 27 I&N Dec. 251 (BIA 2018) (reaffirming and applying *Matter of Pickering* on a nationwide basis, sustaining the respondent’s appeal because the conviction had been vacated based on a substantive defect, and remanding to the IJ for consideration of application for cancellation of removal and any other form of relief).

¹⁹⁰ Information about standards for motions to reopen is beyond the scope of this practice advisory. For further information on motions to reopen, see, for example, CLINIC, *Practice Advisory: Motions to Reopen for DACA Recipients with Removal Orders* (Mar. 13, 2018), <https://cliniclegal.org/resources/motions-reopen-daca-recipients-removal-orders>; American Immigration Council, *The Basics of Motions to Reopen EOIR-Issued Removal Orders* (Feb. 7, 2018), https://www.americanimmigrationcouncil.org/practice_advisory/basics-motions-reopen-eoir-issued-removal-orders.

¹⁹¹ 8 CFR § 1240.6.

¹⁹² See TRAC, *Growth in Immigration Court Backlog Varies Markedly by State* (Aug. 29, 2018), <http://trac.syr.edu/immigration/reports/526/>.

¹⁹³ *L-A-B-R-*, 27 I&N Dec. at 415.

consideration in this context”¹⁹⁴ Practitioners should therefore emphasize that if the respondent is likely to succeed in the “collateral” application, IJs should grant continuances, even if waiting for the adjudication of the benefit will require lengthy or multiple continuances.

B. Immigration Court Status Dockets

In 2017, some immigration courts began to implement status dockets to track cases where the respondent is pursuing an immigration benefit over which the immigration court does not have jurisdiction. Significantly, the case completion benchmarks in the IJ performance metrics specify that the metrics are for “non-status” cases.¹⁹⁵ This appears to signify that status docket cases would not be counted towards IJs’ case completion requirements, so the pressure IJs may feel to complete “non-status” cases may not extend to those cases placed on the status docket.¹⁹⁶ To date, EOIR has not released any nationwide public guidance¹⁹⁷ on how these dockets are intended to work, and practices appear to vary from court to court. Generally speaking, cases where a petition or application is pending with USCIS (or where the respondent awaits a current priority date) may be eligible for placement on the status docket, depending the local court’s practices. Practices may vary from jurisdiction to jurisdiction, but, in general, respondents’ counsel must update the court on the progress of pending applications by a date specified by the court in order to remain on the status docket.

Practitioners should learn from colleagues practicing in a particular court or from local immigration court personnel whether a status docket is available and, if so, how the status docket functions in the jurisdiction. With the Attorney General practically ending administrative closure in *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), ending an IJ’s authority to dismiss or terminate many cases in *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018), and disincentivizing continuances in *L-A-B-R-*, the status docket may be the best option for many respondents who await a pending benefit with USCIS or are pursuing other “collateral” matters that will affect the outcome of the proceedings.

C. Addressing Diligence in Continuance Requests After *Matter of L-A-B-R-*

Where the respondent appears to be seeking a continuance as a way of delaying the ultimate disposition of the case, *L-A-B-R-* instructs IJs not to grant a continuance.¹⁹⁸ Throughout *L-A-B-R-*

¹⁹⁴ *Id.*

¹⁹⁵ EOIR Performance Plan, *supra* note 29.

¹⁹⁶ In response to a Freedom of Information Act request filed by CLINIC, a PowerPoint slide from a presentation titled, “Immigration Judge Performance Measures Overview” was provided which states: “A status case: (1) has a 42B application with a reserved decision or an ‘RD’ case identifier, (2) has a Franco Litigation (‘FL’) or Status Docket (‘DS’) case identifier, and/or (3) has a hearing with an accurately-used ‘7A’ or ‘7B’ adjournment code.” CLINIC, *EOIR FOIA Disclosures on New IJ Numeric Performance Standards*, <https://cliniclegal.org/resources/eoir-foia-disclosures-new-ij-numeric-performance-standards>. The “7A” and “7B” codes referenced in the slide are for “A DHS Application Process - Alien Initiated Adjourned to allow the adjudication of an application pending with DHS” (7A) and “DHS Application Process - DHS Initiated Adjourned to allow the adjudication of an application pending with DHS” (7B). *See* Memorandum from MaryBeth Keller, Chief IJ, EOIR, Operating Policies and Procedures Memorandum 17-02: Definitions and Use of Adjournment, Call-up, and Case Identification Codes (Oct. 5, 2017), <https://www.justice.gov/eoir/file/oppm17-02/download>.

¹⁹⁷ *Id.*

¹⁹⁸ *L-A-B-R-* 27 I&N Dec. at 415.

the Attorney General implies that respondents seek continuances as a “dilatory tactic” to abuse the immigration process.¹⁹⁹ In this context, the Attorney General discusses the secondary “good cause” factor of a respondent’s diligence in seeking “collateral” relief. The Attorney General notes that “it is reasonable to require the respondent to have ‘exercise[d] due diligence’ in pursuing collateral relief in advance of the noticed hearing date” and that “the IJ should not grant a continuance merely because the respondent expresses the intention to file for collateral relief at some future date or where the respondent appears to have unreasonably delayed filing for collateral relief until shortly before the noticed hearing.”²⁰⁰

All three *L-A-B-R*- respondents, Mr. L-A-B-R, Ms. Somphet, and Mr. McCalla, filed their “collateral” matters after being placed in removal proceedings.²⁰¹ In cases where the respondent was pursuing a benefit with USCIS or post-conviction relief prior to being placed in proceedings, the practitioners should distinguish the facts of the case from those of *L-A-B-R*. The practitioner has a strong argument that the “collateral” relief is not being pursued as a “dilatory” tactic if the respondent had already applied prior to commencement of proceedings. With the USCIS NTA policy memorandum issued on June 28, 2018, it is likely that more individuals applying with USCIS for a benefit may be placed in removal proceedings (and possibly detained) where “the application or petition is denied and the alien is removable.”²⁰² On the other hand, if the respondent does not seek “collateral” relief until after being placed in removal proceedings, it may be helpful for the practitioner to include a statement from the respondent explaining why he or she did not previously seek relief. This statement could include lack of awareness of eligibility for any relief, lack of legal counsel, or previous lack of eligibility for that relief.

The respondent’s continuance motion should address the issue of whether he or she has demonstrated reasonable diligence in pursuing adjudication of the “collateral” benefit. In other words, the motion should specify relevant information, such as when any qualifying relationship was formed that established eligibility to file the petition, when the petition or application was filed or is expected to be filed, and what steps were taken to respond to any requests for further evidence. In light of *L-A-B-R*, evidence of a mere intention to file a petition or application at some future date will likely be unpersuasive when seeking a continuance. Similarly, the continuance request will likely be denied if the respondent appears to have unreasonably delayed filing the petition or application until shortly before the noticed hearing. The practitioner should always submit a copy of the Form I-797, Notice of Action, showing the date of receipt, where it is available. While proof of mailing the “collateral” relief to USCIS is better than no proof of filing, whenever possible, practitioners should allow enough time between filing with USCIS and the master calendar hearing to receive a Form I-797, Notice of Action, from USCIS. For example, mailing an application or petition to USCIS two days before the hearing may not be seen as “good cause” for a motion to continue in the absence of reasons and supporting evidence

¹⁹⁹ *Id.* at 407.

²⁰⁰ *Id.* at 415-16.

²⁰¹ *Id.* at 409-10.

²⁰² USCIS, Policy Memorandum: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>; see USCIS, Notice to Appear Policy Memorandum (last reviewed/updated Nov. 27, 2018), <https://www.uscis.gov/legal-resources/notice-appear-policy-memorandum>.

about why the application or petition could not be filed sooner.²⁰³ And a continuance motion will likely be denied if a prior application had been filed and denied and there are no relevant changed circumstances, such as filing the prior petition or application *pro se* and the current petition or application being filed by counsel.²⁰⁴

Practitioners should continue to stress that delays that are caused by USCIS should not be held against the respondent and cite to *Matter of Hashmi*, which states that any delay in adjudication “that is not attributable to the respondent augurs in favor of a continuance.”²⁰⁵ Where relevant, the motion should also indicate the current processing time for petitions filed in the particular category, since continuances that are deemed to be unreasonably long are likely to be denied.

D. Addressing Discretion in Continuance Requests After *Matter of L-A-B-R-*

Most forms of permanent relief are discretionary, as dictated by the word “may” in the various statutes. For example, section 245(a) of the INA states, “The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner *may* be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence” (emphasis added). This means that USCIS or an IJ will only grant relief if the applicant merits a favorable exercise of discretion in addition to meeting statutory eligibility.

Although USCIS has sole jurisdiction over most “collateral” matters that precede adjustment of status, the Attorney General stated in *L-A-B-R-* that “the IJ must deny a continuance if he concludes that, even if USCIS approved the respondent’s visa petition, he would deny adjustment of status as a discretionary matter or because the respondent is statutorily ineligible for adjustment.”²⁰⁶ With this statement, the Attorney General seems to suggest to IJs that they should consider assessing whether it is likely that discretion will dictate denying the adjustment of status even in the early stages of the process when the underlying petition or application is merely pending with USCIS. This means that some IJs may assess whether a respondent’s past conduct disqualifies him or her from adjustment of status as a matter of discretion when considering a motion to continue. The practitioner should remind the IJ that in undertaking this assessment, he or she must carefully and deliberately weigh the favorable and adverse factors presented to decide whether on balance the totality of the evidence indicates that the respondent has adequately demonstrated that he or she warrants a favorable exercise of discretion. In other words, per the discretion balancing test, the IJ must give a reasoned explanation for denying any

²⁰³ See, e.g., *Apolonia Altagracia Bautista D Cotto*, A075-004-507, 2010 WL 2846323 (BIA June 23, 2010) (unpublished) (mailing a visa petition just two days before the hearing is not “good cause” for a continuance).

²⁰⁴ See, e.g., *Garcia v. Lynch*, 798 F.3d 876, 881 (9th Cir. 2015) (IJ’s denial of a continuance was not unreasonable where he had previously continued the proceedings three times for various procedural reasons and where the petitioner’s fourth request for a continuance was to seek post-conviction relief that he previously sought, but had been unsuccessful because of his own failure to complete a program that would have resulted in expungement of his conviction); *Morgan v. Gonzales*, 445 F.3d 549, 552 (2d Cir. 2006) (finding that the IJ appropriately exercised discretion in denying a motion for a continuance noting that the petitioner “had no right to the adjudication of a second I-130 petition stemming from a marriage that had already been determined to lack *bona fides*.”).

²⁰⁵ 24 I&N Dec. 785, 793 (BIA 2009).

²⁰⁶ 27 I&N Dec. at 418.

continuance based on the conclusion that the respondent does not merit adjustment as a matter of discretion.²⁰⁷

Given the balancing test required by a discretionary assessment of an adjustment application, it will be imperative for the practitioner to present the IJ with favorable documentary evidence showing that the respondent should and will likely be granted adjustment of status as a discretionary matter. This documentary evidence could include photos of the respondent in the community and declarations of support from family and members of the community. If DHS presents allegations of negative factors, the practitioner should consider moving for an evidentiary hearing to assess the discretionary factors and present rebuttal witnesses at that hearing. The practitioner could argue that the respondent should have the opportunity to rebut DHS's allegations through testimony, and that a denial of a continuance without this opportunity will deprive the respondent of a full and fair hearing.²⁰⁸

In *L-A-B-R-*, the Attorney General favorably cites *Malik v. Mukasey*, 546 F.3d 890 (7th Cir. 2008) in suggesting that IJs should assess the statutory and discretionary merits of a future adjustment of status application in considering continuance requests. In *Malik*, a Pakistani family was pretending to be Indian citizens of Islamic faith and filed asylum applications alleging to have faced religious discrimination in India. The family filed the asylum applications with the help of an individual who became the focus of a Joint Terrorism Task Force investigation. When confronted with the lies, the two adult brothers withdrew their asylum applications and subsequently married U.S. citizens who then filed Form I-130 visa petitions before removal proceedings commenced. The brothers asked for a continuance to allow USCIS to adjudicate the Forms I-130, but the IJ denied the continuance because the brothers had not provided any evidence that the marriages were *bona fide*, thus failing to prove that they were statutorily eligible for adjustment. Further, the IJ found that as a matter of discretion they would be denied because they lied during the asylum interview. The U.S. Court of Appeals for the Seventh Circuit agreed with the IJ and the BIA that the brothers did not qualify for relief, neither statutorily because they did not meet the clear and convincing standard that they had *bona fide* marriages, nor as a matter of discretion because of their deliberate lies.²⁰⁹

The practitioner should highlight the unique and unusually unsympathetic facts of the *Malik* case, distinguishing it from his or her own case, to demonstrate why a discretionary denial would not be warranted in his or her case. In cases where negative discretionary factors are less severe than those in *Malik*, the practitioner should explain that the Attorney General relied on *Malik* in

²⁰⁷ See *Matter of S-H-*, 23 I&N Dec. 462, 466 (BIA 2002) (noting the importance that IJs “include in their decisions clear and complete findings of fact that are supported by the record and are in compliance with controlling law”). While *L-A-B-R-* does not specifically state that IJs must give a reasoned decision for denying a continuance, practitioners should argue that the IJ is required to provide a reason for a continuance denial based on his or her conclusion that the respondent would not prevail on adjustment of status, because failure to give a reason would thwart the adjustment statute, relief that “cannot be pursued once the alien has been removed from the United States.” *Subhan v. Ashcroft*, 383 F.3d 591, 595 (7th Cir. 2004).

²⁰⁸ See *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987) (the decision to grant or deny a continuance is within the discretion of the Immigration Judge, if good cause is shown, and that decision will not be overturned on appeal unless it appears that the respondent was deprived of a full and fair hearing).

²⁰⁹ *Malik v. Mukasey*, 546 F.3d at 892.

L-A-B-R-, and that the negative factors for the IJ to consider in granting the practitioner’s case are not so severe. The practitioner should also highlight all positive discretionary factors in the respondent’s case to argue that the respondent will be eligible for adjustment.

E. Alternatives to a Continuance: Termination and Administrative Closure

In some situations, the practitioner can move to terminate rather than move for a continuance. For example, if the respondent is not actually removable as charged, or if the charging document is defective, termination may be warranted. After the U.S. Supreme Court issued its decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), many practitioners have made motions to terminate arguing that the immigration court never acquired jurisdiction because the charging document lacked statutorily required information.²¹⁰ On August 31, 2018, the BIA issued *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), which holds that the *Pereira* decision should be interpreted narrowly to apply only to the stop-time rule in cancellation cases, and a defective NTA does not deprive the immigration court of jurisdiction over the case. This issue will need to be resolved by the federal courts and may return to the Supreme Court in the future. Practitioners should therefore continue to move to terminate based on defective NTAs and rely on *Pereira* to preserve the issue for appeal (where doing so is in the client’s interests), although they should understand that IJs will be bound by *Bermudez-Cota* and it is unlikely they will grant termination based on the reasoning in *Pereira* unless a federal court overrules *Bermudez-Cota*.²¹¹

Practitioners should also consider filing motions to suppress evidence and terminate proceedings in appropriate cases. For example, the regulations provide that other than in cases of expedited removal, a non-citizen who is arrested without a warrant and placed in removal proceedings must be “advised of the reasons for his or her arrest and the right to be represented at no expense to the Government,” as well as that “any statement made may be used against him or her in a subsequent proceeding.”²¹² The BIA has held that where these procedures are not followed and prejudice to the respondent resulted, the proceedings can be terminated.²¹³

²¹⁰ The *Pereira* decision states that “[a] notice that does not inform a non-citizen when and where to appear for removal proceedings is not a ‘notice to appear under section 1229(a).’” 138 S. Ct. at 2110. For more information on strategies in light of this decision see American Immigration Council and CLINIC, *Practice Advisory: Strategies and Considerations in the Wake of Pereira v. Sessions*, (July 20, 2018), <https://cliniclegal.org/resources/practice-advisory-strategies-and-considerations-wake-pereira-v-sessions>.

²¹¹ Practitioners may also try to distinguish *Bermudez-Cota*. The BIA noted in the decision that the facts in *Bermudez-Cota* were different from those in *Pereira* in that Mr. Bermudez-Cota did appear in court and did not suffer any prejudice from being served with an NTA that lacked the required time and place of hearing. If the particular facts of another case more clearly parallel those of *Pereira*, where the respondent did not receive notice and did not participate in the proceedings, practitioners should explain why the reasoning of *Pereira* should apply in the case before the court.

²¹² 8 CFR § 287.3(c).

²¹³ *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980). *Garcia-Flores* adopts a two-part test in situations where the government does not follow its own regulations. The IJ must determine that the “regulation in question must serve a ‘purpose of benefit to the alien,’” and that the “‘violation prejudiced interests of the alien which were protected by the regulation.’” *Id.* at 328 (citations omitted). As ICE enforcement becomes more aggressive, practitioners should review applicable regulations and consider suppression arguments.

In cases where pleadings have not yet been taken, practitioners should also consider denying the allegations and charges in the NTA. DHS bears the burden of proof to demonstrate alienage²¹⁴ and to prove charges of deportability under INA § 237 for those who have been admitted to the United States.²¹⁵ By not conceding alienage or other NTA charges, the respondent may force DHS to request a continuance to seek evidence to meet its burden, or could achieve termination of the proceedings if DHS cannot meet its burden. The respondent could argue that since DHS brought the charges, if the agency is not prepared to go forward to prove the charges in the NTA, the proceedings should be terminated rather than continued.²¹⁶

Another alternative to moving to terminate or continue is moving for administrative closure. With the Attorney General's decision in *Matter of Castro-Tum*, the possibility of administrative closure now only exists in the limited circumstances laid out in the case, where expressly authorized by DOJ regulations or binding judicial settlement agreements.²¹⁷ It is worth noting that the Attorney General opines favorably about continuances in dicta in *Castro-Tum*.²¹⁸ It may be helpful to cite this language in seeking continuances.

Likewise, the Attorney General issued a decision further constricting IJs' control over their dockets in *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 463 (A.G. 2018). In that decision, the Attorney General held that IJs "may not terminate or dismiss those proceedings for reasons other than those expressly set out in the relevant regulations or where DHS has failed to sustain the charges of removability."²¹⁹ In the first of the two consolidated cases, Ms. S-O-G- was subject to a prior order of removal. Once DHS realized its error in issuing a new NTA, it moved to terminate proceedings because the NTA had been "improvidently issued," and the IJ terminated the proceedings. The BIA and the Attorney General upheld this decision. By way of contrast, the Attorney General overturned the decision of the IJ, upheld by the BIA, to terminate Ms. F-D-B-'s proceedings. Ms. F-D-B- had entered the United States without inspection, and had obtained an approved Form I-130 and an approved provisional waiver. The IJ granted her motion to terminate proceedings to allow her to consular process abroad finding that there was no reason to keep the case on the court's crowded docket. The BIA affirmed under the particular facts of the case. The Attorney General reversed this decision and held that "the relevant statutes and

²¹⁴ *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923).

²¹⁵ See INA § 240(c)(3)(a).

²¹⁶ See *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 463 (A.G. 2018) (recognizing termination as appropriate where DHS fails to sustain the charges of removability).

²¹⁷ *Matter of Castro-Tum*, 27 I&N Dec 271, 274, 293 (A.G. 2018). When in the client's interest, practitioners should continue to make arguments for administrative closure and termination, preserving those issues for appeal and in the event any of the Attorney General's decisions are struck down by federal courts. See CLINIC *Castro-Tum* Practice Pointer, *supra* note 10.

²¹⁸ *Castro-Tum*, 27 I&N Dec. at 293 n.13 (stating that "continuances are a superior alternative to administrative closure for cases involving particularly vulnerable respondents. The good-cause standard, when properly applied, gives judges sufficient discretion to pause proceedings in individual cases while also preventing undue delays. For example, a continuance may allow an [IJ] to oversee an alien minor's progress in obtaining appropriate alternative forms of relief. By holding periodic hearings, the [IJ] can monitor the relief process while ensuring that the case does not get lost.").

²¹⁹ *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. at 463. For an analysis of this decision, see National Immigration Project, *Practice Alert: Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018) (Oct. 10, 2018), http://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2018_10Oct_MatterofSOG.pdf.

regulations do not give immigration judges the discretionary authority to dismiss or terminate removal proceedings after those proceedings have begun.”²²⁰ Instead, the Attorney General states that IJs may only dismiss proceedings on motion by DHS when the NTA was “improvidently issued” or upon DHS’s motion indicating that circumstances have changed and it is “no longer in the best interest of the government” to continue with proceedings.²²¹

In light of *S-O-G- & F-D-B-*, even in cases with compelling facts, IJs will be constrained to deny motions to terminate on discretionary grounds. With *Castro-Tum* foreclosing administrative closure, and *S-O-G- & F-D-B-* preventing termination as a means to control the docket, the only docketing control left to IJs is continuances, and these must comply with *L-A-B-R-*.

F. Representing Detained Clients Seeking Continuances in Light of *Matter of L-A-B-R-*

Detained respondents may face particular difficulties in obtaining continuances after *L-A-B-R-*. With the decision’s emphasis on “efficiency,” practitioners will have to make a very strong case to obtain a long continuance for a detained client. Two primary reasons a detained respondent would need a long continuance would be to (1) pursue post-conviction relief, or (2) await USCIS adjudication of a pending application or petition. A detained respondent might also need a continuance to form or memorialize a relationship that would make the respondent statutorily eligible for cancellation of removal or for certain other relief.²²²

1. Pursuing Post-Conviction Relief for Detained Clients

Obtaining a continuance to seek post-conviction relief is discussed in part III.I above. The same considerations will be at issue for detained respondents, but the practitioner will have to make a more compelling case that the relief is likely to be granted and that it will affect the outcome of the case because EOIR policy requires IJs to prioritize detained cases.²²³ If the respondent has a colorable claim for immigration relief, such as withholding of removal or protection under the Convention Against Torture, pursuing that relief and a possible appeal if denied may help the respondent continue to fight removal while his or her application for post-conviction relief is pending. Of course, it will be important for the practitioner to discuss the likelihood of success on the post-conviction relief and on the appeal of the denied relief so that the respondent can make an informed decision about whether he or she wants to remain in detention and continue to fight the case.

²²⁰ *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. at 466.

²²¹ *Id.* Under the Trump administration, DHS rarely exercises discretion, but in truly compelling cases, it may be worth approaching the ICE OCC attorney in an effort to convince him or her that it is not in the government’s best interest to continue prosecuting the case.

²²² Detained respondents with U.S. citizen partners who they plan to marry should consider submitting a request in writing to DHS for a marriage ceremony in the facility.

²²³ See Memorandum from MaryBeth Keller, Chief Immigration Judge, EOIR, Case Processing Priorities (Jan. 31, 2017), <https://www.justice.gov/sites/default/files/pages/attachments/2017/01/31/caseprocessingpriorities.pdf>.

2. Awaiting USCIS Adjudication of a Pending Application or Petition

Detained individuals may seek a continuance to await USCIS adjudication of a pending application or petition. However, the IJ may subject the continuance request to greater scrutiny given the countervailing factors that added time in detention increases taxpayer costs, as well as EOIR's prioritization of detained cases.²²⁴ As discussed in part IV.C above, respondents may be more likely to succeed in a request for a continuance if the benefit application was pending prior to the respondent being placed in removal proceedings and detained. One aim of *L-A-B-R-* appears to be preventing respondents from seeking continuances simply to delay their cases. Practitioners can argue that in the detention context, respondents have little incentive to delay their cases when doing so will result in a longer loss of liberty.

Since none of the consolidated cases in *L-A-B-R-* involve detained respondents, practitioners could seek to distinguish the case and argue that IJs should instead seek guidance from EOIR's OPPM 17-01.²²⁵ Prior to *L-A-B-R-*, Chief Immigration Judge MaryBeth Keller in OPPM 17-01 placed greater weight on overall fairness, recognizing that "administrative efficiency cannot be the only factor considered by an Immigration Judge with regard to a motion for continuance"²²⁶ and that the guidance is "not intended to limit the discretion of an Immigration Judge."²²⁷ Moreover, the Chief Immigration Judge points out, "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."²²⁸ Practitioners could point out that in the detained context, the respondent does not benefit from so-called "dilatory tactics" since the respondent's liberty is restricted. Thus, there is no incentive for a detained respondent to request multiple continuances unless he or she has a strong claim for relief that will change the outcome of the proceedings.

It may be difficult to obtain a sufficient number or length of continuances for USCIS to adjudicate the pending application or petition and avoid removal in the accelerated setting of detained proceedings. Practitioners should consider contacting USCIS to notify the agency of the respondent's detention status and request that the application or petition be expedited, and then subsequently inform the IJ that an expedite request was made to show diligence in pursuing relief.²²⁹ Practitioners should be prepared to address the effect of the grounds of inadmissibility or deportability that are the reason the respondent is being detained on the respondent's eligibility for relief.

²²⁴ *Id.*

²²⁵ OPPM 17-01, *supra* note 35.

²²⁶ *Id.* at 3.

²²⁷ *Id.* at 1.

²²⁸ *Id.* at 3.

²²⁹ USCIS Policy Manual, Chapter 12, Requests to Expedite Applications or Petitions, <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume1-PartA-Chapter12.html> (last updated Oct. 30, 2018).

G. Thinking Ahead: Making the Best Record for Appellate Review of an IJ's Continuance Denial

If a practitioner believes the IJ's refusal to grant a continuance will prejudice the case, it is very important to preserve the issue for appeal to the BIA²³⁰ and, if unsuccessful, to the U.S. court of appeals.²³¹ This means that, where possible, the practitioner should make the motion for a continuance in writing and fully document the need for the continuance, the practitioner's diligence in attempting to complete the needed task, and the likelihood the continuance will positively affect the outcome of the case. As discussed above, practitioners should attach evidence of their efforts to move the case forward, such as receipts for "collateral" applications with USCIS, proof of appearance at any USCIS interview, or proof of timely responses to any USCIS requests for evidence. Practitioners should no longer approach continuance requests as routine, but rather should see them as arguments for which they must build a record for appeal.

1. Ensuring the Record Is Complete If the IJ Goes Off the Record

Some practitioners have reported that IJs have gone off the record during master and individual hearings. In light of *L-A-B-R-*, practitioners must ensure that the record is complete and preserved to ensure the best chances on appeal. Section 240(b)(4)(C) of the INA states that "a complete record shall be kept of all testimony and evidence produced at the proceeding." The regulations provide that "[t]he hearing shall be recorded verbatim except for statements made off the record with the permission of the IJ."²³² Operating Policies and Procedures Memorandum [OPPM] 03-06, "Procedures for Going Off-Record During Proceedings," instructs IJs to limit all off-record dialogue.²³³ If a practitioner moves for a continuance and the IJ goes off the record, the practitioner should note that the statements were made off the record and request that the IJ follow OPPM 03-06. If the IJ does not follow OPPM 03-06, the practitioner should wait for the IJ to go back on the record, summarize what happened off the record, and note the objection into the record citing INA § 240(b)(4)(C), 8 CFR § 1240.9, and OPPM 03-06. If the IJ does not go back on the record because the hearing has concluded, the practitioner should submit the objection in writing assuming the record is not closed.

²³⁰ The BIA reviews *de novo* issues regarding whether the parties have met the relevant burden of proof, and issues of discretion and judgment. 8 CFR § 1003.1(d)(3)(ii). BIA precedents ask whether the respondent was prejudiced due to the denial of a continuance. See *Matter of Villarreal-Zuniga*, 23 I&N Dec. 886, 891-92 (BIA 2006); *Matter of Luviano*, 21 I&N Dec. 235, 237 (BIA 1996) (reversed on other grounds) (citing *Matter of Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987)); *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983) (the alien must show that actual prejudice materially affecting the outcome of the case resulted from the denial of the continuance). The prejudice requirement derives from the IJ's duty to uphold respondents' due process right to a full and fair hearing. *Luviano*, 21 I&N Dec. at 237.

²³¹ The U.S. courts of appeal generally review a denial of a continuance pursuant to the abuse of discretion standard. For a discussion on how each U.S. court of appeals applies the abuse of discretion standard, see American Immigration Council, *Practice Advisory: Motions for a Continuance* (Sept. 7, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/motions_for_a_continuance_practice_advisory.pdf.

²³² 8 CFR § 1240.9.

²³³ Memorandum from the Office of the Chief Immigration Judge, EOIR, Operating Policies and Procedures Memorandum [OPPM] 03-06: Procedures for Going Off-Record During Proceedings (Oct. 10, 2003), <https://www.justice.gov/sites/default/files/eoir/legacy/2003/10/15/03-06.pdf>.

In the Notice of Appeal to the BIA, the practitioner should explain that a portion of the hearing was not recorded or transcribed because the IJ went off the record and describe what transpired when the practitioner confronted the IJ. The practitioner should request a new hearing, citing the need to have a complete record in light of *L-A-B-R*'s requirements that the respondent submit evidence in support of the motion and the IJ's need to determine whether the respondent demonstrated good cause for a continuance. At the very least, the BIA should return the record to an IJ for further action, which includes issuing a new decision containing the reasons for denying the motion to continue.

If an IJ is known to go off the record, practitioners should consider bringing someone to witness the hearing. Although a declaration from the practitioner should suffice, having a third party provide a declaration confirming the off-the-record statements and the practitioner's attempts, if any, to have the IJ comply with OPPM 03-06 may carry more weight on appeal than an attorney declaration. This declaration would be submitted as an attachment to the appeal brief/motion to remand, together with a motion to assign the case to a different IJ, if needed, based on independent evidence of improper IJ behavior.²³⁴

2. Interlocutory Appeals

The BIA Practice Manual states that interlocutory appeals are disfavored, noting that “[t]he Board does not normally entertain interlocutory appeals and generally limits interlocutory appeals to instances involving either important jurisdictional questions regarding the administration of the immigration laws or recurring questions in the handling of cases by [IJs].”²³⁵ In *L-A-B-R*, the Attorney General notes that DHS unsuccessfully filed interlocutory appeals in several cases where DHS felt that IJs had unreasonably granted continuances to respondents.²³⁶ Given the outcome of *L-A-B-R*, it is likely that DHS will be emboldened to aggressively appeal grants of continuances and that the BIA will be more likely to consider such appeals.²³⁷ IJs may feel particularly vulnerable to such appeals as the EOIR performance standards require a remand rate of no more than 15 percent from appeals to the BIA or courts of appeal in order for judges to maintain a satisfactory performance record.²³⁸

While counsel for respondents can and should file interlocutory appeals of denied continuances, the case will necessarily be moving forward with the IJ if the continuance is denied. The practitioner should do his or her best in presenting the case for whatever relief the respondent is seeking before the IJ, while making whatever efforts he or she can to diligently pursue the

²³⁴ For further suggestions on how to respond to inappropriate behavior by IJs, see CLINIC, *Immigration Court Practitioner's Guide: Responding To Inappropriate Immigration Judge Conduct* (July 2017), https://cliniclegal.org/sites/default/files/responding_to_inappropriate_immigration_judge_conduct_1.pdf.

²³⁵ BIA Practice Manual, Chapter 4, Section 4.14(c) (last revised July 27, 2015), <https://www.justice.gov/eoir/file/431306/download> (citing *Matter of K-*, 20 I&N Dec. 418 (BIA 1991)).

²³⁶ 27 I&N Dec. at 411.

²³⁷ Indeed, the Attorney General appears to encourage the BIA to grant interlocutory appeals on continuances for the purpose of denying them if the record is not clear on the grounds for granting the continuance. “The absence of any reasoned explanation for the grant of a continuance may, were the Board to entertain an interlocutory appeal, leave the Board no choice but to vacate the order granting the continuance if evidence supporting good cause is not clear from the record.” *L-A-B-R*, 27 I&N Dec. at 418-419.

²³⁸ EOIR Performance Plan, *supra* note 29.

“collateral” benefit before USCIS and get into the record evidence of how the denied continuance would prejudice the respondent.

3. *Appeal at the Conclusion of the Case*

If the BIA refuses to hear the interlocutory appeal, the practitioner may only be able to appeal the denied continuance after the removal hearing concludes and the respondent is denied relief. The BIA reviews an IJ’s denial of a continuance *de novo*.²³⁹ The respondent can continue to pursue the “collateral” matter with USCIS while appealing the IJ’s decision to the BIA, or even after the BIA issues an adverse decision. If USCIS approves the relief while an appeal to the BIA is pending, the practitioner can file a motion to remand citing the material, previously unavailable evidence of the USCIS approval.

For example, a respondent might have a weak but colorable asylum claim before the immigration court and a strong SIJS case pending before USCIS. If the IJ denies a continuance for USCIS to adjudicate Form I-360 or for the priority date to become current, the respondent may need to go forward with the asylum claim. If the respondent is unsuccessful with that claim, the practitioner can then appeal both the denial of asylum and the denial of the continuance. If, while the appeal is pending, there are changes in the status of the SIJS case with USCIS—for example, if the priority date becomes current—the practitioner should then move the BIA to remand the case for the applicant to pursue adjustment of status before the IJ.

The practitioner should also be prepared to appeal to the U.S. court of appeals by filing a petition for review if the BIA denies the appeal. Courts of appeal generally review denials of continuances under an abuse of discretion standard.²⁴⁰ If the practitioner files a petition for review with the relevant U.S. court of appeals, there is no automatic stay of removal, so the practitioner should consider seeking a judicial stay of removal if removal becomes imminent. The practitioner may also seek a stay directly from ICE, but ICE is rarely granting such stays under the current administration.²⁴¹ If USCIS approves the relief while a petition for review is pending with a court of appeals, the practitioner could file a motion to reopen with the BIA, assuming all requirements for such motions were satisfied,²⁴² and ask the court of appeals to hold the petition for review in abeyance pending the BIA’s adjudication of the motion to reopen.

²³⁹ See 8 CFR § 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*.”).

²⁴⁰ See, e.g., *Flores v. Holder*, 779 F.3d 159, 164 (2d Cir. 2015). While the jurisdictional bar found at INA § 242(a)(2)(B)(ii) should not apply to review of continuance denials since the regulations rather than the statute specify the discretionary authority for continuances, see *Kucana v. Holder*, 558 U.S. 233 (2010), practitioners should be cognizant of other jurisdictional bars that might be asserted, e.g., INA § 242(a)(2)(C).

²⁴¹ For general information on seeking stays, see CLINIC, *Practice Advisory: Stays of Removal for DACA Recipients with Removal Orders* (Mar. 9, 2018), <https://cliniclegal.org/resources/clone-daca-related-practice-advisories>.

²⁴² A discussion of motions to remand and the requirements, including time and number limitations, for motions to reopen is beyond the scope of this practice advisory. For more information on such motions, see resources cited in note 190 *supra*.

H. Other General Practice Tips for Continuance Requests to Pursue “Collateral” Matters After *Matter of L-A-B-R-*

Practitioners may also consider the following general tips in seeking continuances:

- *Review supporting documentation carefully*—Practitioners should bear in mind that any documentation that is submitted in support of the continuance request will become part of the respondent’s file with DHS. It is therefore important to review the documentation carefully and be sure that nothing contradicts prior submissions or contains information that might prejudice future applications for adjustment of status or naturalization.
- *Review and cite to USCIS case processing times*—When seeking a continuance to pursue a benefit with USCIS, practitioners should ask for a specific amount of time for a continuance that can be justified to the court based on USCIS’s own case processing times for that benefit.²⁴³ For example, the higher end of processing goals for adjustment applications pending with the Miami, Florida USCIS District Office is currently 25.5 months.²⁴⁴ In light of the USCIS processing goals, a continuance that correlates with this timeframe will promote “administrative efficiency” and does not reflect a “dilatatory tactic” by the respondent.²⁴⁵ Also, if an appeal becomes necessary, or if DHS appeals, it will be helpful to have a documented reason for the length of time requested.
- *Review and include USCIS checklists*—In September 2018, USCIS released checklists for many of the benefits it adjudicates. When seeking a continuance based on a petition or application filed with USCIS, practitioners can include with the motion for a continuance the relevant checklist, and the supporting evidence filed with USCIS that shows the respondent has submitted the required evidence for the USCIS-issued benefit. Practitioners should bear in mind that IJs may not be familiar with the requirements for USCIS benefits and should therefore educate the IJ with the continuance motion.
- *Ground arguments in the statute and the regulations and a constitutional right to due process*—In making a record for a future appeal, it is important to include arguments as of right, as opposed to solely discretionary arguments. Demonstrate the respondent’s statutory eligibility for relief and argue that denying the respondent a continuance will result in the denial of his or her right under the statute to present evidence, INA § 240(b)(4)(B), and his or her right under the specific relief statute to pursue that relief. Practitioners should argue that the IJ’s continuance decision cannot subvert the intent of Congress to create a pathway to obtaining permanent status while remaining in the United States and that the IJ may not interpret the “good cause” regulation to permit denial of a continuance where doing so would thwart the purpose of the applicable statute. Practitioners could also consider arguments that a continuance is required to comport with the respondent’s due process rights. Due process arguments may be especially strong where one DHS sub-agency (ICE) is aggressively pursuing removal when delays by another DHS sub-agency (USCIS) prevent the respondent from obtaining

²⁴³ USCIS, Case Processing Times, <https://egov.uscis.gov/processing-times/> (last visited Dec. 1, 2018).

²⁴⁴ *Id.*

²⁴⁵ *L-A-B-R-*, 27 I&N at 416, 407.

relief or where an IJ denied the respondent the opportunity to present evidence that might have established good cause for a continuance.²⁴⁶

- *Relatedly, emphasize statutory language over regulatory language where possible*—In instances where the respondent has a statutory right or benefit, cite to the statute and explain that a continuance is required to allow the person to pursue the statutory benefit, rather than conceding that the only relevant authority is the discretionary good cause regulation.
- *Get all arguments on the record*—In a short period of time, the Attorney General has made unprecedented changes to immigration court procedure through his appellate decisions. Many of these decisions will be challenged in federal court. Thus practitioners should be sure to get all legal arguments in the record even if the request seems futile.²⁴⁷ For example, practitioners should continue to put requests for administrative closure and termination on the record, with an eye towards possible litigation on these issues.
- *Argue the specific factors in each case*—Practitioners should not feel constrained only by the five factors specifically listed in the *L-A-B-R-* decision; instead they should put “all relevant factors” into the continuance request, including factors that are specific to the type of relief being sought and those specific to the respondent’s personal circumstances, where relevant. There may be additional statutory or regulatory arguments about why a continuance must be granted based on the type of relief being sought or other factors, such as, for example, a respondent’s mental disability. Although relying solely on humanitarian factors will not provide as strong a record on appeal, if there are particularly sympathetic humanitarian factors in the case, practitioners should present and document them in any requests to DHS and in any motions before the IJ. DHS may be more likely to exercise discretion and the IJ may be more likely to exercise positive discretion in a continuance if the respondent can demonstrate a particularized hardship if the continuance is not granted.
- *Distinguish the respondent’s case from the three cases underpinning L-A-B-R—L-A-B-R-* includes three consolidated cases with three different fact patterns. Practitioners should review the facts in the consolidated decision and, where possible, distinguish the facts in the case before the IJ. In two of the three cases the Attorney General consolidated, the respondent had not applied for the “collateral” benefit until after being placed in removal proceedings. In the third case, the respondent’s application with USCIS had already been denied prior to being placed in proceedings. If the respondent’s application was pending with USCIS at the time he or she was placed in proceedings, the practitioner should distinguish those facts from the facts in *L-A-B-R-*.
- *Include in the proposed order the reasons a continuance is warranted under the L-A-B-R- framework*—Although this is not common practice in immigration court, it is common in state and federal court for a litigant to draft a proposed order. Given the time pressures

²⁴⁶ See, e.g., *Irorere v. Att’y Gen.*, 327 Fed. App’x 350, 353 (3rd Cir. 2009) (unpublished) (holding that petitioner was not given meaningful opportunity to show good cause and extenuating circumstances for failing to timely file I-751 petition to remove conditional status following marriage to U.S. citizen, as required by due process and that “[n]otwithstanding the BIA’s description of events, the transcript of the hearing reflects that the IJ interrupted Irorere’s presentation mid-sentence, after only a few words, and did not allow any further argument or evidence. Instead, the IJ indicated that he had already reached his decision in the case, advised Irorere to appeal to the BIA if he so wished, and proceeded to issue the oral decision.”).

²⁴⁷ See *Matter of J-Y-C-*, 24 I&N Dec. 260, 261 n.1 (BIA 2007) (“Because the respondent failed to raise the claim below, it is not appropriate for us to consider it for the first time on appeal.”).

imposed on IJs by the performance quotas and the fact that the *L-A-B-R* decision requires IJs to provide specific reasons for granting a continuance request, anything that a practitioner can do to make the IJ's job easier should be considered.

- *Look for ways to use the Trump administration's own language*—The Attorney General suggested to newly hired IJs that they be “imaginative and inventive” in clearing the backlogs on their dockets.²⁴⁸ Practitioners, too, must be creative in fighting back against attacks on due process. In fact, in *Hashmi*, the BIA explained that the list of factors was “illustrative, not exhaustive,”²⁴⁹ and *L-A-B-R* cited this language favorably.²⁵⁰ Practitioners may want to consider making arguments grounded in the language used by the administration to justify arguments for a continuance. For example, the President and Attorney General have consistently talked about the “rule of law” in general and specifically in the realm of immigration enforcement.²⁵¹ Practitioners may argue that discretionary denials that do not comport with congressional intent are not effectuating the law as written. For example, in U and T nonimmigrant status cases, practitioners can emphasize that the intent behind the statutes is to promote non-citizen cooperation with law enforcement. Prioritizing court docketing “efficiency” over laws that are designed to help prosecute criminals is at odds with law enforcement goals.
- *File a Motion to Reopen and Remand with the BIA If USCIS Approves the Application or Petition*—In *Matter of Kotte*, the BIA reasoned that the respondent who lacked an approved Form I-130 “has available to him the remedy of a motion to reopen should future events in connection with his visa petition render such action appropriate.”²⁵²
- *Seek Intervention to Resolve Delays in the Pending USCIS Matter*—In cases where the respondent may be removed before USCIS renders a decision, seek intervention from the AILA liaison (for AILA member practitioners), USCIS Ombudsman, or a congressional liaison. Doing so may speed up the USCIS adjudication and also can be used to demonstrate to the IJ that the respondent is doing everything possible to have the case timely adjudicated. If the respondent's application is pending beyond ordinary processing times, or if the processing times themselves are unreasonable, do inquiries with USCIS, and consider filing a federal mandamus or Administrative Procedure Act action, which may result in USCIS scheduling an interview in a backlogged case or adjudicating a pending application or petition.²⁵³

²⁴⁸ Attorney General Jefferson Beauregard Sessions III, Remarks to the Largest Class of Immigration Judges in History for the Executive Office for Immigration Review (EOIR) (Sep. 10, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history>.

²⁴⁹ *Hashmi*, 24 I&N Dec. at 290.

²⁵⁰ *L-A-B-R*-, 27 I&N Dec. at 408.

²⁵¹ See, e.g., Fact Sheet; President Donald J. Trump Is Upholding the Rule of Law and Ensuring Consequences for Those Who Illegally Cross Our Border (Nov. 9, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-upholding-rule-law-ensuring-consequences-illegally-cross-border/>; Press Release, DOJ, Return to Rule of Law in Trump Administration Marked by Increase in Key Immigration Statistics (Aug. 8, 2017), <https://www.justice.gov/opa/pr/return-rule-law-trump-administration-marked-increase-key-immigration-statistics>.

²⁵² *Matter of Kotte*, 16 I&N Dec. 449, 452 (BIA 1978); see also *Frederick Ansa Quartey*, A096-642-201, 2014 WL 4259402 (BIA July 30, 2014) (unpublished) (IJ denied request for continuance and ordered removal, and during appeal, respondent's spouse became a U.S. citizen and respondent thus became adjustment eligible and therefore the BIA remanded the proceedings).

²⁵³ See American Immigration Council, *Practice Advisory: Mandamus Actions: Avoiding Dismissal and Proving the Case* (Mar. 2017),

V. Conclusion

As the Trump administration frequently touts the importance of the rule of law, the Attorney General continues to issue decisions overturning precedent and eliminating longstanding legal pathways for non-citizens to obtain relief. Immigration practitioners can and should fight for continuances in immigration court on their clients' behalf where they are necessary for the respondent to obtain relief. *L-A-B-R-* did not fundamentally alter the legal standard for obtaining continuances, but it does place a greater burden on respondents to document the need for the continuance and its likely effect on the outcome of the case. Practitioners will therefore have to put more effort into documenting every request for a continuance to make the case to the IJ and lay the groundwork for an appeal.



The Catholic Legal Immigration Network, or CLINIC, advocates for humane and just immigration policy. Its network of nonprofit immigration programs— more than 350 organizations in 47 states and the District of Columbia—is the largest in the nation.

Building on the foundation of CLINIC’s BIA Pro Bono Project, CLINIC launched the Defending Vulnerable Populations (DVP) Project in response to growing anti-immigrant sentiment and policy measures that hurt immigrant families. The project’s primary objective is to increase the number of fully accredited representatives and attorneys who are qualified to represent immigrants in immigration court proceedings. To accomplish this, the DVP Project conducts court skills trainings for both nonprofit agency staff (accredited representatives and attorneys) and pro bono attorneys; develops practice materials to assist legal representatives; advocates against retrogressive policy changes; and expands public awareness on issues faced by vulnerable immigrants. By increasing access to competent, affordable representation, the project’s initiatives focus on protecting the most vulnerable immigrants—those at immediate risk of deportation.

The DVP Project offers a variety of written resources including timely practice advisories and guides on removal defense strategies, amicus briefs before the BIA and U.S. courts of appeal, pro se materials to empower the immigrant community, and reports. Examples of these include a series of practice advisories specific to DACA recipients, a practice advisory on strategies and considerations in light of the Supreme Court’s decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), a guide on how to obtain a client’s release from immigration detention, amicus briefs on the “serious nonpolitical crime” bar to asylum as it relates to youth and on the definition of a minor for purposes of the asylum one-year filing deadline, an article in Spanish and English on how to get back one’s immigration bond money, and a report entitled “Denied a Day in Court: In Absentia Removals and Families Fleeing Persecution.”

These resources and others are available on the [DVP Project webpage](#).