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**EOIR Docket No. 19-0410; RIN 1125-AB03**

**Public Comment of the Immigration Reform Law Institute Re: Good Cause for a Continuance in Immigration Proceedings**

Dear Assistant Director Reid,

The Immigration Reform Law Institute ("IRLI") submits the following public comment to the Department of Justice ("Department"), Executive Office for Immigration Review ("EOIR") in response to the Department's Notice of Proposed Rulemaking ("NPRM") as published in the Federal Register on November 27, 2020. *See Good Cause for a Continuance in Immigration Proceedings*, (85 Fed. Reg. 75,925-941).

IRLI is a nonprofit public interest law organization that exists to defend individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to monitor and hold accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws. IRLI also provides expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

IRLI fully supports the Department's proposed amendment to the regulation governing continuances in immigration proceedings. The proposed regulation would codify and clarify the standards applicable to continuance requests that both the Attorney General and the Board of Immigration Appeals ("Board") have articulated in various precedential decisions. The proposed regulation would also address continuances in scenarios about which neither the Attorney

General nor the Board has yet published standards or guidance. The proposed regulation provides standards and guidelines for adjudicating requests for continuances in four common situations: continuances related to collateral immigration applications outside of EOIR's jurisdiction; continuances related to an alien's representation; continuances on an immigration judge's own motion; and continuances of a merits hearing. In addition to setting forth a comprehensive definition of good cause under various situations, the proposed regulation would limit an immigration judge's discretion to grant a continuance in circumstances in which "good cause" is not shown and would limit the length of any allowable continuance in most circumstances.

Although IRLI fully endorses the NPRM as a whole, it respectfully submits comments on the following topics of particular importance.[1]

## I. Continuances in General

IRLI supports the proposed regulation because it will promote consistency, fairness, and efficiency in removal proceedings. The proposed rule retains the "good cause" standard for continuances while fleshing out the meaning of that term by identifying both factors to be considered in adjudicating requests for continuances and circumstances that fall outside the meaning of "good cause." The general factors to be considered in assessing whether "good cause" exists have been identified in various precedential decisions and will be familiar to both practitioners and adjudicators.[2] The general provisions in the proposed regulation also clarify that "good cause" may only be found where the requested continuance would "materially affect" the outcome of the removal proceeding.[3] Because parole, deferred action, and the exercise of prosecutorial discretion by DHS have no bearing on whether an alien is removable as charged or is eligible of relief under the Immigration and Nationality Act ("INA") (the two overarching

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[1] IRLI would like to point out that there appears to be a typographical error in proposed 8 C.F.R. § 1003.29(a) as printed in the NPRM. In paragraph (a), the proposed regulation refers to "section 208(d)(5)(iii) of the Act," but it appears the reference should be to "section 208(d)(5)**(A)**(iii) of the Act." *See* 85 Fed. Reg. at 75,940 (emphasis added).

[2] *Compare* 8 C.F.R. § 1003.29(b)(i)-(v) (proposed) *with Matter of Hashmi*, 24 I&N Dec. 785, 790 (BIA 2009) (setting forth six factors to be considered when adjudicating a request for a continuance, including: (1) the Department of Homeland Security's ("DHS") response to the motion to continue; (2) whether the underlying visa petition is *prima facie* approvable; (3) the respondent's statutory eligibility for adjustment of status; (4) whether the respondent's application for adjustment of status merits a favorable exercise of discretion; (5) the reason for the continuance; and (6) any other relevant procedural factors), *and Matter of L–A–B–R–*, 27 I&N Dec. 405, 413 (A.G. 2018) ("The immigration judge should also consider whether the alien has exercised reasonable diligence in pursuing that relief, DHS's position on the motion, the length of the requested continuance, and the procedural history of the case.").

[3] *See* 8 C.F.R. § 1003.29(b)(2)(i) (proposed).

matters that EOIR is tasked with adjudicating), a continuance in order to allow an alien to pursue those forms of relief cannot constitute "good cause" to delay removal proceedings.[4] Finally, the proposed general provisions of the proposed regulation precludes a "good cause" determination if a continuance would cause the immigration court to exceed a statutory or regulatory deadline unless the continuance would fall within any statutory or regulatory exception to the deadline.[5] IRLI supports the adoption of the general provisions of the proposed regulation because it will consolidate the governing principles set forth in various precedential decisions in one easily referenced regulation and will promote consistency and fairness in immigration proceedings.

## II. Continuances Related to Collateral Immigration Proceedings

IRLI supports the guidance provided in the proposed regulation relating to continuances in the context of collateral immigration proceedings. The guidelines established by the proposed regulation relating to visa availability will promote administrative efficiency as well as consistency and fairness in removal proceedings. Under current law, "good cause" cannot be demonstrated if the continuance request is based upon the pursuit of an immigration visa and the availability of that visa is "too remote" (or so remote as to render ultimate relief "speculative").[6] The proposed regulation would establish clear guidance on when visa availability is sufficiently imminent to constitute "good cause" by requiring a visa be available within six months of the continuance request.

With respect to immigrant visas, the proposed regulation requires the visa petition have a "priority date six months or less from the immediate action application date provided in the Visa Bulletin published by the Department of State for the month in which the continuance request is made."[7] Although advancement of the immediate action application date provided in the Visa Bulletin is irregular and does not always advance on a month-to-month basis, the Visa Bulletin is the only reasonable measure of when a specific type of immigrant visa will become available.[8]

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[4] *See* 8 C.F.R. § 1003.29(b)(2)(ii) (proposed)

[5] *See* 8 C.F.R. § 1003.29(b)(2)(iii) (proposed)

[6] *See*, *e.g.*, *Matter of L–A–B–R–*, 27 I&N Dec. at 418 ("[G]ood cause does not exist if the alien's visa priority date is too remote to raise the prospect of adjustment of status above the speculative level."); *Matter of Rajah*, 25 I&N Dec. at 136 ("A respondent who has a *prima facie* approvable [employment-based visa petition] and adjustment application may not be able to show good cause for a continuance because visa availability is too remote.").

[7] 8 C.F.R. § 1003.29(b)(3)(i)(A)(2) (proposed).

[8] Immigrant visas that are subject to a numerical limitation are made available on a first-come, first-served basis. The priority date is the date on which an immigrant visa petition or application is first filed and establishes the applicants place in line for visa issuance. The Visa Bulletin, which is published monthly, indicates the priority date for which visas are available. Hence, once a priority date becomes "current," that is, once visas are available for immediate issuance for applicants in that visa category, all applicants with a priority date equal to or prior to

Accordingly, reference to the Visa Bulletin is the best available measure of when a visa priority date will become current and a visa is therefore immediately available.

The proposed regulation also requires that the immigration judge have jurisdiction over any application to adjust status based upon the underlying immigrant visa petition.[9] This requirement recognizes that it would be futile for the immigration judge to continue a case based upon a mere possibility that the alien might obtain relief from removal that the immigration judge is without authority to award. Allowing immigration judges to continue such cases for which they can take no action other than to continue proceedings for an uncertain and unknown amount of time is tantamount to an indefinite stay of proceedings and a waste of scarce adjudicatory resources. As the Department notes in the NPRM, instead of seeking a continuance of removal proceedings in such cases, an alien may seek a stay of removal from the DHS to allow the visa application and any application for relief from removal to be adjudicated.[10] IRLI believes that the regulation strikes the right balance between adjudicatory efficiency and any minimal benefit to an alien seeking to delay the adjudication of his case by the immigration judge.

With respect to non-immigrant visas, the proposed regulation simply requires both the final approval of the visa petition within six months of the request for a continuance and that the receipt of the visa vitiate all grounds of removability with which the alien has been charged.[11] These two requirements ensure that the receipt of the non-immigrant visa would materially affect the outcome of the proceeding and that such relief from removal is not so remote as to be speculative. After all, if receipt of the non-immigrant visa would not vitiate all grounds of removability, it would not materially affect the outcome of the proceedings.

Finally, the proposed regulation permits an immigration judge to grant a continuance to await the adjudication of a non-visa application by DHS over which DHS has initial jurisdiction where, *inter alia*, removability has already been determined, there are no other applications pending before the immigration judge, and the non-approval of the application would transfer jurisdiction to the immigration judge to review and adjudicate the application anew.[12] These limitations would promote efficiency and fairness in immigration proceedings. There is no point in continuing the proceeding if removability has not yet been determined because if the alien is not removable, the proceeding should be terminated, not continued. Similarly, if an application for relief from removal remains pending before the immigration judge in addition to any non-visa

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the date published in the Visa Bulletin may apply to receive the approved visa or, if in the United States, apply to adjust status.

[9] 8 C.F.R. § 1003.29(b)(3)(i)(C) (proposed).

[10] *See* 85 Fed. Reg. at 75,934 & n.12; *see also* 8 C.F.R. § 241.6(a) (permitting an alien under a final order of removal to request a stay of removal).

[11] *See* 8 C.F.R. § 1003.29(b)(3)(iii)(A) & (B) (proposed).

[12] *See* 8 C.F.R. § 1003.29(b)(3)(v) (proposed).

application before DHS, the proper course of action is to proceed with the adjudication of the application that the immigration judge has authority to decide. Permitting an alien to postpone the adjudication of one form of relief while pursuing another merely prolongs the proceedings. In contrast, if an alien has established *prima facie* eligibility for a non-visa benefit application over which DHS has original jurisdiction, but which may be renewed before an immigration judge if not approved by DHS, then the Department has an interest in having the non-visa benefit adjudicated before proceeding with the alien's case because the immigration judge would ultimately be called upon to adjudicate that benefit once DHS has denied it. A continuance in such circumstances would be more efficient and preserve scarce resources.

### III. Continuances Related to an Alien's Representation

IRLI fully supports the proposed regulation governing continuances related to an alien's representation by counsel. Every alien has the statutory right to counsel at no expense to the government.[13] This statutory right is qualified by Congress's further judgment that ten days is an adequate amount of time for an alien to obtain counsel.[14] Prior to initiating removal proceedings by filing a Notice to Appear with the immigration court, DHS must serve an alien with the Notice to Appear. The Notice to Appear informs the alien that he or she may be represented by counsel before the immigration court and that no hearing will be scheduled within ten days to allow the alien sufficient time to secure such counsel.[15] When DHS serves an alien with a Notice to Appear, it is also required to serve the alien with a list of qualified individuals who have indicated their availability to represent aliens before the immigration court pro bono.[16] Thus, an alien who has been placed in removal proceedings will have been informed of their right to representation, have been provided with a list of attorneys or other qualified individuals to represent aliens before the immigration court pro bono, and will have a period of at least ten days before his or her first hearing before an immigration judge in which to obtain counsel. Congress has determined that this 10-day period between the service of the Notice to Appear and the first scheduled removal proceeding before an immigration judge is an adequate period of time for the alien to retain counsel.

The proposed regulation respects Congress's judgment in setting the 10-day deadline by clarifying that an immigration judge is not required to grant a continuance if an alien fails to retain counsel within that statutory period.[17] Nevertheless, the proposed regulation allows an

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[13] *See* 8 U.S.C. § 1362.

[14] *See* 8 U.S.C. § 1229(b).

[15] *See* 8 U.S.C. § 1229(a)(1)(E), (b)(2).

[16] *See id.*

[17] *See* 8 C.F.R. § 1003.29(b)(4)(i) (proposed). *See also* 8 U.S.C. § 1229(b)(3) ("Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an

immigration judge to grant a continuance for a reasonable time up to 30 days to allow an alien to retain counsel if the initial hearing is scheduled sooner than 30 days from the service date of the Notice to Appear.[18] Thus, the proposed regulation is more forgiving than Congress's 10-day window in which to retain counsel.

The proposed regulation comports with fundamental fairness and due process. Although Congress's 10-day period for the retention of counsel has been overlooked in litigation regarding the denial of further continuances for an alien to seek representation, at least two courts of appeals have held that one month's time is sufficient time for an alien to retain counsel and for counsel to prepare for the alien's hearing.[19] By permitting one continuance of up to 30 days for cases scheduled within 30 days of the service of the Notice to Appear, the proposed regulation allows adequate opportunity for aliens to retain counsel. Further, the proposed regulation also allows an immigration judge to grant a further continuance of up to 14 days to permit retained counsel time to prepare prior to pleading to the allegations and charges in a Notice to Appear.[20] In short, the proposed regulation fully comports with both the INA and fundamental fairness, and therefore IRLI fully supports adoption of the proposed regulation.

IRLI notes, however, that as drafted, the proposed regulation creates some tension between paragraphs (b)(4)(v), (b)(4)(vi), and (b)(6). Under paragraphs (b)(4)(v) and (b)(4)(vi), an immigration judge is only permitted to grant a continuance of up to 14 days if there is a scheduling conflict or if an alien's counsel fails to appear at a hearing. In contrast, under paragraph (b)(6), which governs continuances of a merits hearing, the proposed regulation states that any continuance of a merits hearing under the same circumstances "should be granted for no more than 30 days."

IRLI believes that the 14-day limit on continuances under paragraphs (b)(4)(v) and (vi) is appropriate for master calendar hearings but is either unworkable or undesirable for continuances of merits hearings. As the Department observed in the NPRM, merits hearings are "typically scheduled far in advance" and "often involve interpreters or third-party witnesses whose

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alien [in removal proceedings] if the [10-day] time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.").

[18] *See* 8 C.F.R. § 1003.29(b)(4)(ii) (proposed).

[19] *See Hidalgo-Disla v. INS*, 52 F.3d 444, 445-47 (2d Cir. 1995) (finding no error when the immigration judge proceeded, without express waiver, after granting two continuances totaling 26 days to obtain representation); *Ghajar v. INS*, 652 F.2d 1347, 1348-49 (9th Cir. 1981) ("Ghajar's assertion that she was denied due process because she was not granted a second continuance to allow her attorney further time to prepare for the deportation hearing is without merit. . . . One full month elapsed between the date of the show cause order and the date on which the hearing ultimately took place. . . . The immigration judge did not abuse his discretion in refusing to grant a second continuance.")

[20] *See* 8 C.F.R. § 1003.29(b)(4)(iv) (proposed).

schedules have been carefully accommodated."[21] The continuance of such merits hearings therefore "necessarily has a significant adverse ripple effect on the ability to schedule other hearings across an immigration judge's docket."[22] In recognition of these factors, the Department has provided more flexibility for continuances of merits hearings, stating that any such continuances "should be granted for no more than 30 days."[23] In order to clarify the tension between paragraphs (b)(4)(v), (b)(4)(vi) and (b), IRLI suggests that the Department re-draft paragraphs (b)(4)(v) and (vi) to clarify that paragraph (b)(6) governs the continuance period for merits hearings.

## IV. Continuances on an Immigration Judge's Own Motion

The proposed regulation would limit an immigration judge's discretion to grant continuances on his or her own motion. As the Department acknowledges in the NPRM, there is no current, consistent practice among immigration judges regarding either the number or length of continuances in immigration proceedings.[24] In addition, as of October 2020, there were more than 1.2 million cases pending before EOIR and only 520 immigration judges to adjudicate these cases.[25] In addition to identifying multiple circumstances in which an immigration judge should continue a case on his or her own motion, the proposed regulation establishes a catch-all provision providing authority for an immigration judge to continue a case in situations in which unforeseen exceptional or extraordinary circumstances beyond the control of the alien, the alien's representative, government counsel, or the immigration judge arise. Because limiting the circumstances in which an immigration judge may grant a continuance will promote adjudicatory efficiency and fairness in removal proceedings, IRLI supports the proposed regulation.

## V. Continuances of Merits Hearings

IRLI agrees that continuances of merits hearing should be strongly disfavored.[26] As noted above, the continuance of merits hearings generally has a significant adverse ripple effect on the

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[21] 85 Fed. Reg. at 75,938 (quoting EOIR OPPM 17–01).

[22] *Id.*

[23] 8 C.F.R. § 1003.29(b)(6) (proposed).

[24] *See* 85 Fed. Reg. at 75,936 n.19. Although the Department references only the inconsistency of practice among immigration judges with respect to continuances to seek representation, the proposed regulation will promote consistency across all contexts in which continuances may be sought.

[25] *See* 85 Fed. Reg. at 75,929-930; *see also* EOIR, *Immigration Judge Hiring* (Oct. 2020), available at https://www.justice.gov/eoir/page/file/1242156/download (last visited Dec. 18, 2020); EOIR, *Pending Cases, New Cases, and Total Completions* (Oct. 13, 2020), available at https://www.justice.gov/eoir/page/file/1242166/download (last visited Dec. 18, 2020).

[26] IRLI reiterates its comments relating to the tension between paragraphs (b)(4)(v), (b)(4)(vi) and (b)(6) discussed above in section III.

ability to schedule other hearings across an immigration judge's docket. Because such hearings are typically scheduled far in advance and because slots for individual merits hearings cannot be easily filled by other cases, IRLI supports the more flexible language in the proposed regulation providing that any continuance of a merits hearing "should be" for no more than 30 days. This language would permit the flexibility necessary to avoid an unnecessarily detrimental ripple effect on a court's docket. Nevertheless, the Department may wish to consider adding an outer boundary to the immigration judge's discretion in scheduling a continued merits hearing. For instance, the Department could add language to paragraph (b)(6) specifying that any continued merits hearing must be scheduled no later than the first open merits hearing slot in the immigration judge's docket.

In conclusion, the proposed regulation would standardize motions practice in this area. Such consistency would benefit all stakeholders in immigration proceedings by making procedural expectations both clear and consistent across all cases in removal proceedings. The proposed regulation would also promote fairness and efficiency by reducing unnecessary delays in an immigration court system that is currently overwhelmed by the number of cases pending before it. Because adopting the proposed regulation would promote the expeditious and efficient adjudication of cases in the immigration courts, IRLI strongly supports the proposed rule.

Respectfully submitted,

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by Matt A. Crapo