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UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON DC 20530

In the Matter of	
L-A-B-R- et al.,	A (REDACTED)
Respondents.	In Removal Proceedings

AMENDED AMICUS CURIAE BRIEF OF THE FEDERATION FOR AMERICAN IMMIGRATION REFORM

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I. INTEREST OF AMICUS CURIAE

The Federation for American Immigration Reform (FAIR) is a nonprofit, public-interest, membership organization of concerned citizens and legal residents who share a common belief that our nation's immigration policies must be reformed to serve the national interest. Specifically, FAIR seeks to improve border security, stop illegal immigration, and promote immigration levels consistent with the national interest. The Board of Immigration Appeals has solicited amicus briefs from FAIR for more than twenty years. *See, e.g.*, *In-re-Q- --M-T-*, 21 I. & N. Dec. 639 (B.I.A. 1996) ("The Board acknowledges with appreciation the brief submitted by amicus curiae [FAIR].").

II. QUESTION PRESENTED

Where Immigration Judges (IJs) grant continuances to provide time for respondents to seek adjudications of collateral matters from other authorities, pursuant to their authority to "grant a motion for continuance for good cause shown," 8 C.F.R. § 1003.29, *see also* 8 C.F.R. § 1240.6, under what circumstances does good cause exist for an Immigration Judge to grant a continuance for a collateral matter to be adjudicated?

III. SUMMARY OF THE FACTS

The Attorney General (AG) has referred the captioned decision by the Board of Immigration Appeals (BIA) to himself for review of the question presented, stayed "the cases" during the pendency of his review, and invited the parties and interested amici to submit amicus briefs on point. *Matter of L-A-B-R-*, 27 I. & N. Dec. 245 (B.I.A. 2018). The AG decision provides no factual information about the subject matter whatsoever.

Counsel for the instant amicus submitted Freedom of Information Act (FOIA) request EOIR 2018-25095 to the Executive Office for Immigration Review (EOIR), requesting copies of

the underlying BIA decision and the IJ order granting the respondent's motion to continue proceedings, in time to respond to the AG's briefing deadline of April 24, 2018.

On April 3, 2018, counsel received a copy of the BIA decision. The decision revealed that an IJ had granted a motion for continuance on August 1, 2017. The BIA declined to exercise jurisdiction, explaining that "the issue of whether the Immigration Judge properly continued proceedings until October 25, 2018 does not present a significant jurisdictional question about the administration of the immigration laws. Nor does it involve a recurring problem in Immigration Judge's handling of cases." Decision at 1.

On April 3, 5, 9, 13 and 17 of 2018, counsel for amicus contacted EOIR's FOIA Service Center to receive status updates regarding the expedited processing of the FOIA request, and was told that it was still being processed. To date, EOIR's FOIA Service Center has not provided counsel for amicus with a copy of the IJ decision. On April 19, 2018, counsel received a letter from the EOIR FOIA Service Center, stating that the expedited request was denied because (despite the AG statement seemingly to the contrary) it did not meet the agency's "threshold" of "an urgency to inform the public regarding actual or alleged Federal Government activities."

IV. SUMMARY OF THE ARGUMENT

The AG seeks to remediate the extraordinary increase in EOIR's removal proceeding backlogs, which metastasized in the decade from FY 2009 to date, as compared to the prior 1999-2008 period. Continuances are the primary docket control tool available to IJs. But the most recent U.S. Government Accountability Office (GAO) study indicates that delays due to continuances granted pending collateral adjudications of petitions for relief by other agencies are

a significant element of the backlog and dysfunctionality in the agency's immigration court system.[1]

No statute expressly authorizes the use of continuances, and the phrase "for good cause shown" is undefined in the regulations authorizing continuances. Due process challenges to IJ denials of continuances have generally failed, but eleven of the twelve federal circuits have issued decisions finding jurisdiction to review EOIR denials for abuse of discretion, circumventing the Immigration and Nationality Act's (INA) court-stripping provisions, a position confirmed by the Supreme Court in *Kucana v. Holder*.

Prior to 2009, there was pervasive disagreement on the adjudicative factors for motions to continue pending collateral adjudications for relief, in theory a highly discretionary agency action. That year the BIA attempted to respond to increasing circuit court criticism of IJ exercises of discretion in these cases by issuing two precedential decisions, which included specific "factors" for IJ consideration, the *Hashmi-Rajah* factors.

Use of the *Hashmi-Rajah* paradigm has completely failed to bring greater efficiency or clarity to the motions practice for continuances. Not only did the removal proceeding backlog immediately swell out of control, but circuits continue to disagree on when and how the immigration courts must apply the *Hashmi-Rajah* analysis.

To restore control over the backlog requires that the continuance regulations be amended to implement a workable definition of good cause that factors in caseload management imperatives while improving the predictability of EOIR's exercise of discretion. Amicus recommends reforms

[1] Notwithstanding the legal and managerial issues that trouble current continuance regulatory policy, the use of continuances is far preferable to the related but entirely non-regulatory administrative closure process. *See Matter of Reynaldo Castro-Tum*, No. A 206-842-910, Amicus Curiae brief of the Federation for American Immigration Reform (AG pending).

that would include the replacement of traditional motions for continuance with form-based requests that will require the alien to demonstrate *prima facie* eligibility for collateral relief. EOIR should explore the feasibility of screening form-based petitions for completeness and timeliness using support or specialist staff, before adjudication by the IJ. Continuances should be routinely denied where an application for relief through family, employment or marriage-based adjustment of status has been denied by the U.S. Citizenship and Immigration Services (USCIS), but an appeal of such denial remains pending. The continuance regulations should expressly allow IJs to deny second and multiple continuances by including quantitative findings that the denied continuance would have pushed the IJ's caseload performance evaluation into an unsatisfactory status under EOIR IJ evaluation policy.

To offset the inherent stringency that reducing the removal proceeding backlog will entail, EOIR should amend its motion to reopen regulations to authorize the use of motions to reopen by aliens denied continuances pending collateral USCIS adjudications.

V. ARGUMENT

A. Background

According to EOIR's CASE database, in the decade from September 2008—the last year of the Bush Administration—to February 2018, the number of backlogged removal cases rose from 186,108 to 684,583—a 268 percent increase. *See Immigration Court Backlog Tool*, Syracuse University, http://trac.syr.edu/phptools/immigration/court_backlog/ (last updated 2018). During that same period, the average number of days required to process an immigration court removal proceeding rose from 430 to 711—a 65 percent increase. *Id.* These sharp increases in backlogs and processing times contrast with the prior 1998-2007 decade, when removal case backlogs

increased from 129,505 to 174,935, and the average number of days to complete proceedings rose from 324 to 413—modest increases of 35 and 27 percent, respectively. *Id.*

In December 2017, the Attorney General directed EOIR to "prioritize completion of cases and develop performance measures" because the "timely and efficient conclusion of cases serves the national interest." Memorandum from the Attorney General Jefferson B. Sessions, Renewing our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest (Dec. 5, 2017). In January 2018, EOIR Director James R. McHenry III directed IJs and immigration court administrators, pursuant to his case management authority under 8 C.F.R. § 1003.0(b)(1)(ii) and (iv), to complete 85 percent of all non-status, non-detained removal cases within 365 days of filing of the Notice to Appear (NTA), adjudicate 85 percent of all motions within 40 days of filing, and complete 95 percent of all hearings on the initial scheduled individual merits hearing date. Memorandum of James R. McHenry III, Case Priorities and Immigration Court Performance Measures (Jan. 17, 2018). In April 2018, Director McHenry announced new performance metrics effective in FY 2019. To obtain a "satisfactory" performance rating, an IJ will have to meet new metrics directly related to the use of continuances that include these requirements:

- 700 cases per fiscal year must be completed, with less than a 15 percent remand rate.
- In 85 percent of non-status, non-detained removal cases, no more than 10 days may elapse from the merits hearing to IJ case completion, unless completion is delayed due to a need to complete background checks.
- In 85 percent of motions matters, no more than 20 days may elapse from IJ receipt of the motion to adjudication of the motion.

- In 95 percent of all cases, an individual merits hearing must be completed on the initial scheduled hearing date, except when the Department of Homeland Security (DHS) does not produce the alien on the hearing date.

Memorandum from James R. McHenry III, Immigration Judge Performance Metrics (April 3, 2018).

B. No statute expressly authorizes the use of continuances in removal proceedings, and the regulatory standard of "for good cause shown" is not defined.

The Attorney General will search in vain for a bright-line test governing when the denial of a continuance becomes unreasonable enough to require reversal. The term "for good cause shown" has no statutory or regulatory definition. No statutory provision of immigration law explicitly confers discretion on an IJ to grant a continuance. The INA grants authority to "[a]n immigration judge [to] conduct [removal] proceedings for deciding the inadmissibility or deportability of an alien." 8 U.S.C. § 1229a(a)(1). This authority might be construed to confer such discretion, if authorization to hear a matter inherently included authority to continue the hearing to another time. But no court nor the BIA itself has so held to date.

The Supreme Court views grants of continuances in Article III trial courts as "traditionally within the discretion of the trial judge." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). While warning in dicta against the risk that "a myopic insistence upon expeditiousness . . . can render the right to defend with counsel an empty formality," the *Ungar* court held that "there are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.*

By regulation, an IJ "may grant" a motion for a "reasonable" adjournment, or a continuance, for "good cause shown." 8 C.F.R. §§ 1003.29, 1240.6 (governing adjournments of

removal proceedings),[2] 1240.45 (governing adjournments of deportation proceedings). An IJ's finding of good cause "is crucial because a continuance . . . allows an applicant to remain in the United States for a period of time without any defined legal immigration status." *Ukpabi v. Mukasey*, 525 F.3d 403, 407-08 (6th Cir. 2008).

Once a removal proceeding has commenced, the IJ has an obligation to resolve it in a "timely and impartial" manner. 8 C.F.R. § 1003.10. IJs are also authorized to "set and extend time limits for the filing of applications [for relief from removal] and related documents." 8 C.F.R. § 1003.31(c). If an application is not filed within such time period, "the opportunity to file that application or document shall be deemed waived." *Id*.; *Arellano-Hernandez v. Holder*, 564 F.3d 906, 911 (8th Cir. 2009). The immigration regulations also provide that failure to comply with biometrics requirements may be deemed an abandonment of the application. 8 C.F.R. § 1003.47(c); *see also* 8 C.F.R. § 1208.10 ("[failure to] comply with processing requirements for biometrics and other biographical information within the time allowed will result in dismissal of the application, unless the applicant demonstrates that such failure was the result of good cause.").

It is well-established that an alien against whom a removal proceeding has commenced has no inherent right to a continuance, but rather bears the burden of showing good cause why a continuance should be granted. *Patel v. U.S. Immigration & Naturalization Serv.*, 803 F.2d 804, 806 (5th Cir. 1986); *Perez-Castillo v. Holder*, 477 Fed. App'x. 166, 167-168 (5th Cir. 2012); *Mazariegos-Paiz v. Holder*, 734 F.3d 57, 66 (1st Cir. 2013).

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[2] *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedure*, 62 Fed. Reg. 10312 (Mar. 6, 1997), first implemented this regulation, then 8 C.F.R. § 240.6. The analysis in the notice does not directly explain the genesis of this regulation, but discusses adjournment of proceedings only in the context of a respondent's right to obtain counsel, and cases where new charges are added to the original NTA after proceedings have commenced. These circumstances do not involve continuances for adjudication of petitions for relief by collateral agencies.

C. Continuances granted to allow collateral adjudications by other agencies contribute significantly to EOIR's large and growing case backlog.

Delays in removal proceeding completions due to continuances for collateral agency adjudications are a very significant factor for the out-of-control growth of the case backlog in the immigration court system. In 2017, the GAO analyzed reasons for case continuances as tracked in the EOIR's CASE management system for fiscal years 2006 through 2015, using four main categories of continuances: (1) respondent-related, (2) IJ-related, (3) DHS-related, and (4) operational-related. *See* U.S. Government Accountability Office, *Immigration Courts: Action Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges* Appendix III (2017) [hereinafter GAO report]. The GAO report broke down its four main categories of continuances into approximately 70 different sub-categories. *Id.*

The great majority of collateral adjudication continuances were initiated by either the IJ or the respondent. Of the 539,072 DHS-related continuances analyzed by the GAO, none is enumerated in a subcategory involving adjudication of collateral matters. *Id.* at Table 14, 128-130. From a total 539,072 IJ-related continuances, 327,549 were "continued from a master calendar to an individual calendar for a merits hearing, usually allowing time to file and process applications for relief before the hearing on the merits." *Id.* at Table 15, 131-132. Of 2,456,186 respondent-initiated continuances granted during the 2006-2015 GAO study period, 326,693 were granted for "DHS adjudication of respondent-initiated petition." *Id.* at Table 13, 125-127. An additional 151,649 were granted to "allow the respondent to submit an application for relief beyond that already submitted," *id.*, but this subcategory does not appear to include continuances for *collateral* adjudications.

Of the 3,734,558 continuances reviewed in the GAO study, review of the subcategories categorized as "operational-related" suggests that only 23 of these 337,694 continuances were

granted to allow for "adjudications of collateral matters from other authorities." *Id.* at Table 16, 133-134. Regrettably, the GAO report does not provide statistics or analysis on *denials* of continuances, nor does it provide separate data for periods of delayed case completion due to collateral agency adjudication continuances.

Although definitions used by EOIR for subcategories tracked in the GAO report are not precise, in more than 650,000 of the 3.73 million continuances granted during the ten-year study period, the ground for "good cause shown" appears to have been an adjudication of a collateral matter by USCIS, or another agency other than EOIR.

D. Circuit court abuse-of-discretion review of denials of continuances for collateral adjudications by other agencies will constrain future EOIR reforms.

Not only are there no statutory or regulatory provisions in immigration law to restrain future limitations by the Attorney General on the use of continuances, there are also—with the possible exception of continuances granted to allow respondents to secure counsel—no significant constitutional impediments to administrative reform of the policies and practices in granting continuances during removal proceedings.

An "IJ traditionally has discretion to avoid unduly protracted proceedings." *Thimran v. Holder*, 599 F.3d 841, 845 (8th Cir. 2010). Neither the BIA nor any circuit court appears to have issued a precedential decision holding that the rejection of a continuance constituted a denial of due process under the Fifth Amendment. Aliens do have a constitutional right to removal proceedings that satisfy the requirements of due process. *Reno v. Flores*, 507 U.S. 292, 306 (1993). But a party who is unable to identify a property or liberty interest cannot successfully assert a due process claim. *Smith v. Ashcroft*, 295 F.3d 425, 429 (4th Cir. 2002). Mere expectation of a statutory benefit is not enough, because only a statute that grants an entitlement and

"meaningfully" limits the discretion of those who provide that entitlement will create a property or liberty interest subject to the Due Process Clause. *Id.* at 429-30.

An alien charged with removability "has no constitutional right to have his proceedings held in abeyance while he attempts, belatedly, to restore his status." *Khan v. U.S. Att'y Gen.*, 448 F.3d 226, 235-236 (3d Cir. 2006). Denial of a continuance does not violate due process where a respondent has failed to demonstrate good cause for the continuance. *Ali v. Gonzales*, 440 F.3d 678, 681 (5th Cir. 2006). Even if an alien in removal proceedings had a hypothetical interest in a discretionary delay in proceedings, the alien then must "show that he was prevented from reasonably presenting his case[,]" *Uspango v. Ashcroft*, 289 F.3d 226, 231 (3d Cir. 2002), and also make "an initial showing of substantial prejudice." *Anwar v. U.S. Immigration & Naturalization Serv.*, 116 F.3d 140, 144 (5th Cir. 1997). The Seventh Circuit has pointed to, *inter alia*, 8 C.F.R. § 1003.2 (providing for a motion to reopen before the BIA), 8 C.F.R. § 1003.23 (providing for a motion to reopen before an IJ), and *Matter of Coelho*, 20 I. & N. Dec. 464, 471-72 (B.I.A. 1992) (describing a motion to remand to an IJ) as evidence that aliens denied continuances are accorded sufficient process by the immigration laws and regulations. *Cadavedo v. Lynch*, 835 F.3d 779, 785 (7th Cir. 2016).

Federal courts, however, have authority to invalidate arbitrary agency action under the Administrative Procedure Act (APA). 5 U.S.C. § 706(2)(A). The BIA and all circuits except the District of Columbia Circuit have issued decisions reviewing denials of continuances by an IJ using an abuse of discretion standard. *See, e.g.*, *Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 377 (3d Cir. 2003) (noting that whether denial of a continuance in an immigration proceeding constitutes an abuse of discretion cannot be decided through the application of bright-line rules); *Lendo v. Gonzale*s, 493 F.3d 439, 441 (4th Cir. 2007); *Masih v. Mukasey*, 536 F.3d 370, 373 (5th Cir. 2008).

An IJ "abuse[s] his discretion in denying a continuance if (1) his decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding or (2) his decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." *Morgan v. Gonzales*, 445 F.3d 549, 551-62 (2d Cir. 2006). The circuits should review an IJ's denial of a request for a continuance "under a highly deferential standard of abuse of discretion," while "bearing in mind that we are loath to micromanage [the IJ's] scheduling decisions any more than when we review such decisions by district judges." *Id.* at 551.

The Supreme Court held in 2010 that motions to reopen, made discretionary by regulation, remained subject to judicial review, despite the court-stripping language in 8 U.S.C. § 1252(a)(2)(b). *Kucana v. Holder* 558 U.S. 233 (2010). The Supreme Court concluded that federal courts have jurisdiction to review denials of motions to reopen deportation proceedings and that such review will be based on an "abuse of discretion" standard. In concluding that regulations governing motions to reopen were not precluded by 8 U.S.C. § 1252(a)(2)(b)(ii), the Court relied upon the longstanding "presumption favoring interpretations of statutes [to] allow judicial review of administrative action." *Id.* at 251-52. Currently, all circuit courts claim jurisdiction to review the "good cause" regulations for continuances under the *Kucana* rationale. Any efforts by the Attorney General to reform the EOIR's good cause continuance practices should thus anticipate appellate review under an abuse of discretion standard.

E. The BIA developed the *Hashmi-Rajah* factors for assessing good cause in response to numerous inconsistent circuit court decisions that found abuse of discretion in denials of continuances.

Since 2009, where an alien seeks a continuance to await a pending visa application and status adjustment, the BIA has applied specific standards to what constitutes "good cause shown." *Sheikh v Holde*r, 696 F.3d 147, 149-150 (1st Cir. 2012).

In *Hashmi,* the alien respondent had been granted five continuances since first conceding removability before an IJ in 2003, all pending adjudication of a family-based I-130 (Petition for Alien Relative). 24 I. & N. Dec. at 790. If granted, an I-130 would have made the otherwise removable alien eligible for adjustment of status. *Id.* at 787. The Third Circuit remanded the case to the BIA, finding that the IJ's 2005 denial of a fifth continuance request was arbitrary and an abuse of discretion, because it was "based solely on case-completion goals" rather than the specific facts and circumstances of the case. *Hashmi v. Att'y Gen. of the U.S.*, 531 F.3d 256, 261 (3d Cir. 2008).

On remand, the BIA panel reaffirmed that "the focus of the [good cause] inquiry is the likelihood that the adjustment application will be granted." *Matter of Hashmi,* 24 I. & N. Dec. at 790 (citing *In re Garcia*, 16 I. & N. Dec. 653, 656-57 (B.I.A. 1978)). But *Hashmi* also implemented a list of five loosely defined factors that IJs "may . . . consider" when determining whether good cause exists to continue removal proceedings:

(1) The government's response to the motion;

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

(3) The alien's statutory eligibility for adjustment of status;

(4) Whether the application for adjustment merits a favorable exercise of discretion; and

(5) The reason for the continuance and other procedural matters.

Id. *Hashmi* emphasized that these factors, while precedential, are "illustrative, not exhaustive." *Id*.

As is directly relevant here, *Hashmi* specifically held that administrative or case management considerations were *ultra vires* factors for denials of continuances: "Compliance with an Immigration Judge's case completion goals . . . is not a proper factor in deciding a continuance request, and Immigration Judges should not cite such goals in decisions relating to continuances." *Id.* at 793-794. *Hashmi* did permit an IJ to consider the party most responsible for delays in the proceedings, and any prior continuances that had been granted. *Id.*

Hashmi also clarified that the first factor—whether DHS had expressed opposition to a motion for continuance—would require that the IJ "ordinarily" should grant the continuance when "the DHS *affirmatively expresses* a lack of opposition . . . ." *Id.* at 791 (emphasis added). But as the Fourth Circuit recently observed, BIA precedent on this point is "far from mandating a continuance where the DHS is [merely] silent." *Maldonado-Guzman v. Sessions*, No. 16-2309, 2017 U.S. App. LEXIS 26873, at *14 (4th Cir. Dec. 28, 2017).

The second *Hashmi* factor reaffirmed in effect a longstanding BIA policy that granting of continuances is limited to situations in which the pending immigration visa is "*prima facie* approvable." *Pedreros v. Keisler*, 503 F.3d 162, 166 (2d Cir. 2007) (citing *In re Garcia*, 16 I. & N. Dec. at 656-657). In *Pedreros*, while marriage to an American citizen was sufficient to establish *prima facie* eligibility for a visa petition, and thus for adjustment of status, once the INS denied the petition on the grounds that the marriage lacked bona fides, *prima facie* eligibility was rebutted, notwithstanding the alien's pending appeal before the BIA. *Id.*

Several months later, the BIA extended application of the *Hashmi* good cause factors to motions for continuances during adjudication of an I-140 employment-based immigrant visa

petition. *Matter of Rajah*, 25 I. &. N. Dec. 127, 135-136 (B.I.A. 2009). Like *Hashmi*, the *Rajah* decision was issued on remand, this time from the Second Circuit. *Rajah v. Mukasey*, 544 F.3d 449 (2d Cir. 2008). The Second Circuit had vacated a BIA order affirming an IJ's denial of the respondent's motion to continue, and remanded the case with instructions to set "standards that reflect various situations of those seeking such continuances." *Id.* at 450.

The BIA has since adapted the *Hashmi-Rajah* paradigm for evaluating motions for a continuance to cases involving U visas. *Matter of Sanchez-Sosa*, 25 I. & N. Dec. 807 (B.I.A. 2012). In *Sanchez-Sosa*, the BIA observed that three of the *Hashmi* factors "relate to the U visa, in particular: (1) the DHS's response to the motion; (2) whether the underlying visa petition is *prima facie* approvable; and (3) the reason for the continuance and other procedural factors." *Id.* at 812-13. The BIA again explained that it was using a multi-factor analytical "framework," rather than a rigid test, to address the undefined regulatory term "good cause." *Id.* at 812. But consideration of a U visa application's merits (or any other single factor) would not be required for every continuance, as long as the IJ provided a rational explanation for his decision. *Id.* at 814-815.

F. Adoption of the *Hashmi-Rajah* paradigm for assessing good cause has failed to bring uniformity or transparency to abuse of discretion review.

Whatever the intentions of the prior administration in imposing the *Hashmi-Rajah* standards on EOIR's highly discretionary continuance regulations, they have failed to make appellate abuse of discretion reviews more predictable. In post-*Hashmi-Rajah* decisions, the circuits have continued to issue conflicting rulings on what constitutes good cause shown, creating circuit splits and uncertainty about whether IJs must support denials with written decisions that analyze all of the *Hashmi-Rajah* factors, or need only invoke a single factor. The circuits have also been in conflict about whether Hashmi's "focus of the inquiry" test, the "probability that relief will be

granted," is a separate element, and, if so, whether it is discretionary or a mandatory prerequisite for approval of the motion.

Where eligibility for status adjustment rests on speculative events, the circuit courts are in general agreement that the BIA may properly deny the continuance. *See Sheikh v. Holder*, 696 F.3d at 150 (1st Cir. 2012) (citing *Thimran v. Holder*, 599 F.3d at 845); *Khan v. Att'y Gen. of the U.S.*, 448 F.3d at 234-235 (3d Cir. 2006); *Hernandez v. Holder*, 606 F.3d 900, 904 (8th Cir. 2010) ("[I]n light of the uncertainty as to when the long-pending . . . regulation will be promulgated, [petitioner was] essentially seeking an indefinite continuance.").

But circuit splits have continued or emerged over what are acceptable indicia that the likelihood of a grant of adjustment was speculative rather than probable.

Pre-*Hashmi-Rajah*, the Second Circuit held that an IJ did not abuse his discretion in declining to grant a continuance where the petitioner "was only at the first step in a long and discretionary process" and relief was "speculative at best." *Elbahja v. Keisler*, 505 F.3d 125, 129 (2d Cir. 2007). After the *Hashmi-Rajah* decision, the Second Circuit upheld the denial of a continuance where an I-130 had been approved for the alien's spouse a week earlier, because the alien himself "did not have a pending employment-or family-based visa petition at the time of his hearing before the IJ." *Villa v. Holder*, 403 Fed. App'x. 599, 601-602 (2d Cir. 2010) (citing *Matter of Rajah*, 25 I. & N. Dec. at 136). Even a "respondent who has a prima facie approvable I-140 and adjustment application may not be able to show good cause for a continuance because visa availability is too remote." *Id.*

The Ninth Circuit found that the BIA did not abuse its discretion in denying a continuance to pursue post-conviction relief and file an I-130 visa petition, where the respondent "waited several years to seek post-conviction relief, and where he did not show he had filed the visa petition

more than a year after he was eventually granted post-conviction relief." *Lopez-Balvaneda v. Sessions*, 707 Fed. App'x. 877, 878 (9th Cir. 2017).

Articulating multiple "factors" has not resolved the restraints on efficient adjudication and backlog reduction imposed by appellate abuse of discretion review. A majority of circuits now insist that IJs consider each of the supposedly "illustrative" extra-statutory *Hashmi* factors, effectively hardening them into agency-specific APA conditions, but with variations that reduce predictability and promote delay. For example, in the Second Circuit an agency has abused its discretion when it denies a motion to continue without "considering the factors articulated in *Hashmi*." *Flores v. Holder*, 779 F.3d 159, 164 (2d Cir. 2015) (citing *Matter of Hashm*i, 24 I. & N. at 790). But according to the same *Flores* panel, "adjudication of a motion to continue should begin with the presumption . . . that discretion should be favorably exercised where a prima facie approvable visa petition and adjustment application have been submitted in the course of an ongoing removal hearing," because "the focus of the inquiry is the apparent ultimate likelihood of success on the adjustment application." *Id*.

The Third Circuit has taken a more complicated approach. The "*Hashmi-Rajah* factors must be considered *every time an alien files* a motion for a continuance based on an application for adjustment of status premised on a pending or approved I-130 or I-140 petition." *Simon v. Holder*, 654 F.3d 440, 443 (3d Cir. 2011) (emphasis added). But the *Simon* panel then tacked on negative factors and required a complete analysis of any other unlisted but "applicable" factors.

First, although *Hashmi* allowed that an IJ "could consider procedural factors, compliance with case completion goals [i]s *not* a proper factor to consider." *Id*. at 442 (citing *Matter of Hashmi*, I. & N. Dec. at 793-794). *Rajah* had "reemphasized that immigration judges *should not rely* upon their completion goals in determining whether good cause exists to grant a continuance."

Id. (citing *Matter of Rajah*, 25 I. & N. Dec. at 136) (emphasis added). Second, "the number and length of prior continuances 'are not alone determinative.'" *Id.* (quoting *Matter of Hashmi*, 24 I. & N. at 794).

Arbitrarily concatenating the *Hashmi* "focus of inquiry" into the BIA's five-factor list, the *Simon* panel held that the third *Hashemi* criterion, "'statutory eligibility for adjustment of status'—of which visa eligibility is a part—is but *one* of five [BIA] criteria to be considered in the calculus of whether to grant a motion for a continuance." *Id.* at 442 (quoting *Matter of Hashmi*, 24 I. & N. at 791). In the same unhelpful vein, the second *Hashmi* factor, visa availability, should "never be the one and only factor considered in a particular case." *Id.* (citing *Matter of Hashmi*, 24 I. & N. Dec. at 791). But "[o]nce an immigration judge considers all of the *Hashmi-Rajah* factors, including visa availability, he or she has the discretion to deny a continuance where visa availability is too speculative; but this should only be done after all of the factors are considered." *Id*. at 442-443. In other words, the bottom line for the *Simon* panel was that an IJ should "'articulate, balance, and explain all these relevant factors, and any others that may be applicable.'" *Id.* at 442 (quoting *Matter of Hashmi*, 24 I. & N. Dec. at 794).

Taking a simpler approach, the Eleventh Circuit treated *Hashmi's* statement that the "focus of the inquiry into the factors is the likelihood of success on the adjustment application" as implying that "the IJ must evaluate the individual facts and circumstances relevant to each case." *Ferreira v. U.S. Att'y Gen.*, 714 F.3d 1240, 1243 (11th Cir. 2013) (citing *Matter of Rajah*, 25 I. & N. Dec. at 136). The Eleventh Circuit found that the BIA's determination that Ferreira "did not show good cause for a continuance was based solely on the fact that 'an immigrant visa was not available and would not be for some time.'" *Ferreira*, 714 F.3d at 1243. The Eleventh Circuit chided the BIA for failing to articulate or weigh all of the *Hashmi-Rajah* factors. *Id.*

In contrast with all of the above circuits, the Tenth Circuit, though acknowledging that BIA precedent *permits* an IJ to continue proceedings in order to await processing of a properly filed visa petition with a current priority date, found that no EOIR or court precedent *requires* an IJ to grant an indefinite continuance so that a petitioner may remain in this country while awaiting eligibility for adjustment of status. *Luevano v. Holder*, 660 F.3d 1207, 1215 (10th Cir. 2009).

Even though circuit courts may only review for abuse of discretion, some circuits inconsistently apply what seem to be due process concerns, seemingly to express hostility to agency attempts to reduce pending proceeding backlogs. *See, e.g.*, *Freire v. Holder*, 647 F.3d 67, 70-71 (2d Cir. 2011) (citing *Clifton v. Holder*, 598 F.3d 486, 494 (8th Cir. 2010)) (holding that the BIA may not deny a continuance simply as "imprudent as a general practice" without evaluating "the merits of granting or denying [the movant] a continuance of his removal proceedings based on the specific facts of this record.").

For its part, the Ninth Circuit has "repeatedly warned" that "a myopic insistence upon expeditiousness" will not justify the denial of a meritorious request for delay, especially where the delay impairs the petitioner's statutory rights [to apply for relief from removal]." *Ahmed v. Holder*, 569 F.3d 1009, 1013 (9th Cir. 2009). "An immigrant's right to have his or her case heard should not be sacrificed because of the immigration judge's heavy caseload." *Id*. at 1014. The Ninth Circuit also considers agency delay under the fifth *Hashmi* factor, to favor the alien respondent. *Malilia v. Holder*, 632 F.3d 598, 607 (9th Cir. 2011) ("It is generally an abuse of discretion to deny an unopposed request for a continuance where the delay is not attributable to the respondent and is needed solely so that an agency ruling likely to be determinative, already timely applied for, can be issued prior to removal.").

Yet other circuits appear to disagree about whether the IJ must consider all the *Hashmi-Rajah* factors when deciding whether to deny a continuance. For example, in the Sixth Circuit, "we have never suggested that the Board abuses its discretion when it refrains from expounding upon each suggested factor—especially when its decision can otherwise be rationally explained." *Duruji v. Lynch*, 630 Fed. App'x 589, 593 (6th Cir. 2015).

In the Fourth Circuit, for an IJ's discretionary decision to be upheld, it "need only be reasoned, not convincing." *Lawrence v. Lynch*, 826 F.3d 198, 203 (4th Cir. 2016). In a subsequent non-precedential decision, the Fourth Circuit considered just two factors, (1) the amount of time respondent took to inform the court of his eligibility to file a collateral visa application "after the event underlying his claim of eligibility," and (2) whether the respondent could seek the collateral visa after a final order of removal and apply to USCIS for a stay of removal while the application was pending. *Maldonado-Guzman*, 2017 U.S. App. LEXIS 26873 at 12-14 (citing 8 U.S.C. § 1227(d)(2006), 8 C.F.R. § 214.14(c)(1)(ii)).

The Eighth Circuit has applied *Hashmi* as the appropriate BIA method to assess good cause shown for a continuance based on a pending I-130 petition. *Choge v. Lynch*, 806 F.3d 438, 442 (8th Cir. 2015). But *Choge* then held that even where an I-130 sponsor's petition had already been granted, it was not an abuse of discretion to deny a continuance based on the respondent alien's failure to fulfill the requirements associated with his I-485 application to adjust status. *Id.*

Even before the BIA articulated the *Hashmi-Rajah* factors in 2009, multiple circuits had held that even with an immigrant visa and labor certification, an application for adjustment of status still needed "the discretionary approval of the Attorney General or his designee," which included an IJ. *Ahmed v. Gonzales*, 447 F.3d 433, 438 (5th Cir. 2006) (holding that to prevent removal, respondent alien had to proceed through a discretionary process by which his status might

eventually be adjusted under 8 U.S.C. § 1255(i)); *accord Khan*, 448 F.3d at 234-235 (3d Cir.); *Lendo*, 493 F.3d at 441 (4th Cir.); *Cordova v. Gonzales*, 245 Fed. App'x. 508, 512-513 (6th Cir. 2007); *Zafar v. U.S. Att'y Gen.*, 461 F.3d 1357, 1363-64 (11th Cir. 2006).

In contrast, the Eleventh and Seventh Circuits found that where an alien has pending, respectively, an I-140 employment-based immigration visa petition or an ETA-750 labor certification, denial of a continuance is an abuse of discretion by the IJ. *Haswanee v. U.S. Att'y Gen.*, 471 F.3d 1212 (11th Cir. 2006); *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004). *Subhan* was also decided on a yet broader abuse of discretion ground: that an IJ's denial of a continuance without stating a reasoned basis for the decision itself constituted an abuse of discretion. *Subhan*, 383 F.3d at 593.

Clearly, as a case management tool, the *Hashmi-Rajah* approach to adjudication of good cause continuances has failed to bring uniformity or predictability to review by the circuit courts for abuse of discretion. While the lack of a regulatory definition of "for good cause shown" may have opened the door to judicial micro-management of EOIR continuances, the BIA's solution has only added to the dysfunctionality of agency practices, as documented in the GAO report.

G. The way EOIR adjudicates requests for continuances while aliens seek relief from EOIR itself or from trial courts for criminal convictions should be considered when crafting a solution to backlogs caused by continuances for collateral adjudication by USCIS.

Unlike the cases where continuances are sought pending collateral adjudication by USCIS, the circuit courts have tended to uphold denials of continuances to allow respondents to obtain collateral relief from inadmissibility for criminal behavior. The reason is that, in the latter context, the *Hashmi* factors play a greatly reduced role.

For example, in an appeal where the IJ had found a lack of credibility due to inconsistences between a respondent's testimony to the immigration court and statements in a prior criminal plea

bargain, the Seventh Circuit found no colorable legal or constitutional issue regarding the IJ's denial of a continuance, and thus no jurisdiction to review that denial, even though the respondent claimed that the IJ and BIA had failed to apply the *Hashmi* factors: "[R]epeated references to *Hashmi* do not confer jurisdiction upon this court" because "mere reference to a legal standard or a constitutional provision . . . does not convert a discretionary decision into a reviewable legal or constitutional question." *Teneng v. Holder*, 602 Fed. App'x. 340, 345 (7th Cir. 2015). DHS's lack of opposition to his motion was "unavailing, as *Hashmi* makes clear that the IJ's decision should be guided … by 'the apparent ultimate likelihood of success on the adjustment application.'" *Id.* (quoting *Matter of Hashmi*, 24 I. & N. Dec. at 790).

Where an alien respondent argued that the BIA had failed to properly apply the *Hashmi* factors, the Seventh Circuit upheld denial of a request for a fourth continuance without reviewing those factors, as the possibility of a pardon for the respondent's conviction for a crime involving moral turpitude (CIMT) or a favorable ruling regarding a § 212(h) waiver of inadmissibility were "far too speculative." *Arnobit v. Lynch*, 667 Fed. App'x. 554, 555 (7th Cir. 2016). Significantly, the IJ agreed to reopen the matter if the post-conviction relief at issue actually materialized in the future. *Id.*

As these cases illustrate, appeals courts are much more reluctant to find good cause for continuance of proceedings to remove criminal aliens, as opposed to non-criminal aliens. Indeed, since a pending collateral attack does not affect the finality of a criminal conviction for immigration purposes, it has no bearing on an alien's removability and thus is not "good cause" for a continuance. *United States v. Wilson*, 240 Fed. Appx. 139, 144 (7th Cir. 2007) (citing *In Re De Leon-Ruiz*, 21 I. & N. Dec. 154, 156-57 (B.I.A. 1996)).

While an alien may have the right to pursue appellate or collateral relief for an aggravated felony conviction under various provisions of state and federal law, the government need not wait until all these avenues are exhausted before deporting him. *United States v. Adame-Orozco*, 607 F.3d 647, 652-653 (10th Cir. 2010). Under 8 U.S.C. § 1227(a)(2)(A)(iii), an alien who was "convicted of an aggravated felony at any time after admission is deportable." *Id*. 8 U.S.C. § 1101(a)(48)(A) defines a "conviction" to mean, among other things, "a formal judgment of guilt." From this, "it follows that an alien is lawfully deportable as soon as a formal judgment of guilt is entered by a trial court. Indeed, Congress adopted its § 1101(a)(48)(A) definition of 'conviction' in 1996 specifically to supplant a prior BIA interpretation that had required deportation to wait until direct appellate review (though never collateral review) of the conviction was exhausted or waived." *Id*. (citing *Moosa v. Immigration & Naturalization Serv.*, 171 F.3d 994, 1000-02 (5th Cir. 1999)).

The Fifth Circuit has held that a pending collateral attack on a conviction did not justify continuance of the removal proceedings or disturb the finality of the conviction for immigration purposes. Emphasizing that a state drug conviction had not been vacated *at the time of* the removal proceeding, the Fifth Circuit held that the alien could not seek to delay the proceeding in order to gain time to attack the validity of his underlying state conviction. *Perez-Castillo v. Holder*, 477 Fed. App'x. 166, 168 (5th Cir. 2012) (citing *Cabral v. Holder*, 632 F.3d 886, 890 (5th Cir. 2011)).

Similarly, as the Fifth Circuit has observed, a more bright line test than the *Hashmi* factors should govern denials of continuances where an application for relief was pending with the immigration court itself. *Velazquez-Dias v. Holder*, 550 Fed. App'x. 249, 249-250 (5th Cir. 2013) (holding that a motion for an extension of time filed on the date that application for cancellation of removal was due did not provide the IJ with a reason for the alien's failure to comply with the

deadline). Under 8 C.F.R. § 1003.47(b)(5)(c) & (d), an alien's failure to file a cancellation of removal application (EOIR-42B), including all supporting documentation, biometrics, and fees within the time allowed by an IJ's order constitutes abandonment of the application. Per 8 C.F.R. § 1003.47(c), an IJ may dismiss the application unless the alien demonstrates that his failure to file the necessary documents was the result of good cause; thus, absent such a showing, an alien who failed to file a timely application could not establish *prima facie* eligibility for a continuance. *Velazquez-Dias*, 550 Fed. App'x. at 250.

H. Conclusion and Recommendations: Sustainable backlog reduction will require both restrictive amendments to the continuance regulations and related administrative changes to EOIR procedures.

As the analysis above shows, use of the *Hashmi-Rajah* paradigm has completely failed to bring greater efficiency or transparency to motions practice for continuances at EOIR. Not only did the removal proceeding backlog immediately swell out of control after these two decisions were issued, but circuit courts continue to disagree on when and how IJs must apply a *Hashmi-Rajah* analysis.

To restore control over the backlog will require amendment of the continuance regulations, with the objective of implementing a workable definition of good cause that factors in caseload management imperatives while improving the predictability of EOIR's exercise of discretion in this extra-statutory context. A more effective regulation could retain the longstanding principle from *Matter of Garcia* that the focus of a continuance adjudication should be the probability that adjustment of status will be granted, but would use a heightened "highly probable" or similar standard, and perhaps incorporate the "*prima facie* eligibility" language from *Hashmi*.

The Attorney General should in any case abandon the five-factor *Hashmi-Rajah* test as unworkable and counterproductive in practice. But given that the circuit courts will likely continue

to apply similar "factors" in abuse of discretion challenges, the AG should recommend that EOIR consider replacement of traditional motions for continuance with form-based requests. A form-based approach would require the alien himself to demonstrate *prima facie* eligibility for collateral relief at the earliest possible moment, by addressing each BIA good cause factor for which the cognizant circuit court requires an individualized review. This approach would accommodate flexibility in content were the circuits to continue to differ among themselves in their abuse of discretion jurisdictional standards.

Form-based requests for continuances should include documentation for any petitions for collateral agency relief that were filed prior to a continuance hearing. EOIR should explore the use of law clerks or paralegal specialists to initially screen form-based petitions for completeness, and to ensure that they were filed at the first reasonable opportunity.

In an amended regulation or administrative practice, continuances should be routinely denied where an application for relief through family, employment, or marriage-based adjustment of status has been denied by USCIS, but an appeal of such denial remains pending. In these situations, the *prima facie* assumption that relief is available will have been rebutted. The amended continuance regulation should make clear that continuances to obtain relief from criminal convictions, including grants of U visas, are disfavored, as are continuances where unlawfully present aliens have not yet obtained a waiver of inadmissibility. *See Torres v. Sessions*, No. 17-3659, 2018 U.S. App. LEXIS 7626, *4 (6th Cir. Mar. 26, 2018) (holding that that in order to show *prima facie* eligibility for relief, an *unlawfully present* alien in removal proceedings would also need to show that Form I-601A, an application to request a provisional unlawful presence waiver under 8 C.F.R. § 212.7(e), had been filed).

Amended continuance regulations should expressly allow IJs to deny second and multiple continuances by including quantitative findings that the denied continuance would have pushed the IJ's caseload performance evaluation into an unsatisfactory status under EOIR IJ evaluation policy. As the GAO report demonstrates, a sustainable reduction in removal proceeding backlogs is unlikely to be achieved if the incidence of multiple continuances, which dramatically inflate the time-to-completion statistics, is not curtailed.

To offset the inherent circuit court scrutiny that reducing the removal proceeding backlog will entail, EOIR should amend its motion to reopen regulations to allow the use of motions to reopen by aliens denied continuances pending collateral USCIS adjudications. Regulations should clearly allow reopening at any time, provided that the alien is actually granted the adjustment of status on which a denied continuance request had been based. Reopening should be expressly allowed even after physical removal of the alien, provided, of course, that the motion to reopen establishes that any remaining grounds of inadmissibility have been waived. Because motions to reopen based on newly available evidence are granted the highest deference by the Supreme Court, *see, e.g.*, *Immigration & Naturalization Serv. v. Rios-Pineda*, 471 U.S. 444 (1985), this change in EOIR regulation and policy would reduce potential due process challenges to denials of continuances and avoid the problems that granting non-statutory "stays" of final removal orders would entail.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on April 24, 2018, I submitted the foregoing amicus curiae brief via electronic mail, and sent three printed copies of the brief via first class mail, to the Office of the Attorney General, United States Department of Justice. The AG and BIA decisions fail to identify the parties to this matter or their addresses. Repeated attempts to obtain this information through FOIA requests to EOIR by counsel for FAIR have been unsuccessful.

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