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DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003, 1240

[EOIR 19-0410; Dir. Order No. 02-2021]

RIN 1125-AB03

Good Cause for a Continuance in Immigration Proceedings

AGENCY: The Executive Office for Immigration Review, Department of Justice

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice ("Department" or "DOJ") is proposing to define "good cause," in the context of continuances, adjournments, and postponements, in its immigration regulations.

DATES: Written or electronic comments must be submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Written comments postmarked on or before that date will be considered timely. The electronic Federal Docket Management System will accept comments until midnight Eastern Time on that date.

ADDRESSES: If you wish to provide comment regarding this rulemaking, you must submit comments, identified by the agency name and reference RIN 1125-AB03 or EOIR Docket No. 198-0410, by one of the two methods below.

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the website instructions for submitting comments.

• *Mail:* Paper comments that duplicate an electronic submission are unnecessary. If you wish to submit a paper comment in lieu of electronic submission, please direct the mail/shipment to: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041. To ensure proper handling,

please reference the agency name and RIN 1125-AB03 or EOIR Docket No. 19-0410 on your correspondence. Mailed items must be postmarked or otherwise indicate a shipping date on or before the submission deadline.

FOR FURTHER INFORMATION CONTACT: Lauren Alder Reid, Assistant Director, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041, telephone (703) 305-0289 (not a toll-free call).

I. PUBLIC PARTICIPATION

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule via the one of the methods and by the deadline stated above. All comments must be submitted in English, or accompanied by an English translation. The Department also invites comments that relate to the economic, environmental, or federalism effects that might result from this rule. Comments that will provide the most assistance to the Department in developing these procedures will reference a specific portion of the rule; explain the reason for any recommended change; and include data, information, or authority that support such recommended change.

Please note that all comments received are considered part of the public record and made available for public inspection at www.regulations.gov. Such information includes personally identifying information (such as your name, address, etc.) voluntarily submitted by the commenter. If you want to submit personally identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase "PERSONALLY IDENTIFIABLE INFORMATION" in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must prominently identify the confidential business information to be redacted within the comment. If a comment has so much

confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on www.regulations.gov.

Personally identifying information located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. The Departments may withhold from public viewing information provided in comments that they determine may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of http://www.regulations.gov. To inspect the agency's public docket file in person, you must make an appointment with the agency. Please see the "For Further Information Contact" paragraph above for agency contact information.

II. EXECUTIVE SUMMARY

The Department of Justice proposes to amend its regulations in title 8 to provide a clearer definition of "good cause" and the situations in which it is shown to warrant a postponement, continuance, or adjournment in immigration proceedings. Existing regulations do not provide guidance as to what qualifies as "good cause," but only provide that "good cause" is the standard to be applied when determining whether a postponement, continuance, or adjournment is appropriate. *Cf.* 8 CFR 1003.29. This ambiguity has left the Board of Immigration Appeals (the "Board" or "BIA") and federal courts to interpret the term on a case-by-case basis. Over time, the Board has articulated standards applicable to continuance requests arising in various contexts. Some aspects of these standards, however, would benefit from further clarification, as the Board's case law does not address every context where continuance requests typically arise. Moreover, it would simplify matters to have the applicable standards for continuances located in a single regulation. To address continuances in a more comprehensive and systematic manner, this proposed rule would revise 8 CFR 1003.29 and codify standards for what constitutes "good cause" in different scenarios, including many of the factors the case law defines.

First, the proposed rule at 8 CFR 1003.29(b)(1) would define "good cause" to require the requesting party to demonstrate a particular and justifiable need for a continuance, and to make clear that the burden is on the requesting party. It would further provide that immigration judges should consider five specified non-exhaustive factors when determining whether good cause exists.

Second, the proposed rule at 8 CFR 1003.29(b)(2) would codify scenarios in which "good cause" is not shown. These would include where the continuance: would not materially affect the outcome of the proceedings; is requested by a party who has not demonstrated a likelihood of obtaining relief in a collateral matter, where such relief is the basis for the request; is in order to seek parole, deferred action, or the exercise of prosecutorial discretion by the Department of Homeland Security ("DHS"); or would cause the immigration court to exceed a statutory or regulatory deadline, unless an exception applies or the movant demonstrates good cause.

Third, the rule would further build on the general standards regarding good cause and codify standards or guidelines for adjudicating requests for continuances in four common situations: continuances related to collateral immigration applications outside of the Executive Office for Immigration Review's ("EOIR") jurisdiction; continuances related to an alien's representation; continuances on an immigration judge's own motion; and continuances of a merits hearing.

III. BACKGROUND

An immigration judge "may grant a motion for continuance for good cause shown." 8 CFR 1003.29. The "continuance for good cause shown" language was initially added to the regulations in 1987 to codify existing practices and to "restate[] in simpler terms the discretionary authority of Immigration Judges to grant continuances for good cause shown found in 8 CFR 242.13." Aliens and Nationality; Rules of Procedure for Proceedings Before

Immigration Judges, 52 FR 2931, 2934 (Jan. 29, 1987);[1] *see also* Orders To Show Cause and Warrants of Arrest, 28 FR 9504, 9504–05 (Aug. 30, 1963) (codifying 8 CFR 242.13 (postponement and adjournment of hearing in exclusion proceedings)); *Matter of Sibrun*, 18 I&N Dec. 354, 355–58 (BIA 1983) (discussing factors for consideration regarding a motion for continuance in exclusion proceedings).

Although the "good cause" standard has been used for over 100 years, *see, e.g.*, *Rice v. Ames*, 180 U.S. 371, 376 (1901) (discussing an Illinois statute that authorized justices of the peace and examining magistrates to grant continuances "on consent of the parties or on any good cause shown.") (internal quotation marks omitted)), and is a standard applied in the Immigration and Nationality Act ("INA" or the "Act"), INA 243(a)(3), 8 U.S.C. 1253(a)(3) (authorizing district courts to, for good cause, suspend the sentence and order the release of an alien who has failed to comply with a removal order),[2] the term does not have a settled meaning in law. *See Matter of L-A-B-R-*, 27 I&N Dec. 405, 412 (A.G. 2018) (comparing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992) ("extraordinary circumstances [are] a close correlate of good cause"), with *Hall v. Sec'y of Health, Educ. & Welfare*, 602 F.2d 1372, 1377 (9th Cir. 1979) ("Good cause is . . . not a difficult standard to meet.")).

Neither the INA nor its implementing regulations presently define "good cause"or how the standard may be met in immigration proceedings.[3] Absent such a statutory or regulatory definition, the parameters of "good cause" for continuances have developed over time through

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[1] In 1987, the relevant regulation was codified at 8 CFR 3.27. *See* 52 FR at 2934. DOJ subsequently redesignated 8 CFR 3.27 as 8 CFR 3.29 in 1992. *See* Executive Office for Immigration Review; Rules of Procedures, 57 FR 11568, 11569 (Apr. 6, 1992). Following the creation of the Department of Homeland Security in 2003 after the passage of the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, EOIR's regulations were moved from chapter I of title 8 of the CFR to chapter V, and 8 CFR 3.29 was accordingly redesignated as 8 CFR 1003.29. *See* Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9824, 9830 (Feb. 28, 2003).

[2] "Good cause" also is used as a standard for evaluating the appropriateness of actions elsewhere in EOIR's regulations. *See, e.g.*, 8 CFR 1003.3 (extension of briefing schedule); 8 CFR 1003.20 (change of venue); 8 CFR 1003.25 (waiver of the presence of the parties).

[3] One provision of the INA does provide a multi-factor definition of "good cause" in the context of a district court's authority to suspend a criminal sentence imposed after a conviction of an alien for failing to take steps to execute a removal order. *See* INA 243(a)(3), 8 U.S.C. 1253(a)(3). Although that particular definition is not applicable to immigration proceedings and its factors have little bearing on whether good cause exists for a continuance in such proceedings, it does demonstrate the default approach courts have taken when evaluating "good cause" as the relevant standard without a precise definition. *See Matter of L-A-B-R-*, 27 I&N Dec. at 412–13.

case law. *See, e.g.*, *Matter of L-N-Y-*, 27 I&N Dec. 755, 759–60 (BIA 2020) (a speculative and indefinite continuance request due to uncertainty surrounding when a collateral visa request will be resolved does not demonstrate good cause); *Matter of L-A-B-R-*, 27 I&N Dec. at 413–19 (clarifying framework for "good cause standard" when a respondent requests a continuance to pursue collateral relief); *Matter of Hashmi*, 24 I&N Dec. 785, 790 (BIA 2009) (setting forth factors for consideration when determining whether there is "good cause" for a continuance so that an alien may pursue adjustment of status before the United States Citizenship and Immigration Services ("USCIS")); *Matter of Rajah*, 25 I&N Dec. 127, 130, 135–38 (BIA 2009) (extending the *Hashmi* good cause framework to respondents seeking employment-based visas and related relief); In general, case law sets forth multi-factor balancing approaches to the good cause standard for motions for a continuance under 8 CFR 1003.29.[4] This rule proposes to codify those parameters and add requirements and clarifications where needed.

In *Matter of Sibrun*, the Board noted that there was little guidance on standards for motions to continue in immigration proceedings and turned to standards for continuances in federal criminal procedure at that time. 18 I&N Dec. at 355–356. The BIA determined that "an alien at least must make a reasonable showing that the lack of preparation occurred despite a diligent good faith effort to be ready to proceed and that any additional evidence he seeks to present is probative, noncumulative, and significantly favorable to the alien." *Id.* The BIA also concluded that "[b]are, unsupported allegations" would not be sufficient to establish good cause and that the alien was responsible for "specifically articulat[ing] the particular facts involved or evidence which he would have presented and otherwise fully explain how denial of his motion fundamentally changed the result reached." *Id.* at 357.

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[4] Additionally, the Attorney General has recognized that the same multi-factor test set forth by case law for continuances applies in the context of adjournments or postponements requested by the parties. *See Matter of L-A-B-R-*, 27 I&N Dec. at 407 n.1 ("The Board and the parties agree that the same good cause standard governs continuances under section 1240.6. I operate on the same understanding . . . ."); 8 CFR 1240.6 ("After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service."); *see also* 8 CFR 1240.45 (adjournments or postponements in the context of exclusion proceedings).

After *Matter of Sibrun*, many published decisions evaluating the good cause standard in immigration proceedings involved continuances to afford an alien with the time and opportunity to pursue collateral relief. *See*, *e.g.*, *Matter of Sanchez Sosa*, 25 I&N Dec. 807, 812–13 (BIA 2012) (outlining factors for consideration in evaluating whether a continuance request to await the adjudication of a U-visa application demonstrates good cause); *Matter of Rajah*, 25 I&N Dec. at 135–38 (applying the factors in *Matter of Hashmi* to evaluation of whether a continuance request to await the adjudication of an employment-based immigrant visa petition demonstrates good cause); *Matter of Hashmi*, 24 I&N Dec. at 790 (outlining factors for consideration in evaluating whether a continuance request to await the adjudication of a family-based immigrant visa petition demonstrates good cause). In *Matter of Hashmi*, the BIA set forth six non-exhaustive factors for determining whether there is good cause for a continuance to accommodate a collateral matter, including: the DHS response to the motion to continue; whether the underlying visa petition is prima facie approvable; the respondent's statutory eligibility for adjustment of status; whether the respondent's application for adjustment of status merits a favorable exercise of discretion; the reason for the continuance; and any other relevant procedural factors. 24 I&N Dec. at 790.

Specifically, in *Matter of Hashmi*, the respondent had requested a continuance so that USCIS could have additional time and opportunity to adjudicate the Form I-130, Petition for Alien Relative, filed on the respondent's behalf, which, if granted, would have rendered the respondent prima facie eligible for adjustment of status. *See id.* at 787; *see also Matter of Garcia*, 16 I&N Dec. 653, 657 (BIA 1978) (stating that an immigration judge should favorably exercise discretion where a prima facie approvable visa petition and adjustment application have been submitted in the course of removal hearings), *modified on other grounds by Matter of Arthur*, 20 I&N Dec. 475 (BIA 1992); *see generally* INA 245(a), 8 U.S.C. 1255(a) (requiring, in part, that an applicant be eligible to receive an immigrant visa).

The BIA later extended the *Hashmi* framework to continuance requests related to other types of collateral proceedings, such as employment-based visas and U-visas. *See Matter of Sanchez Sosa*, 25 I&N Dec. at 812–13; *Matter of L-N-Y-*, 27 I&N Dec. at 757; *Matter of Rajah*, 25 I&N Dec. at 130. Notably, in *Matter of Sanchez Sosa*, the BIA determined that the movant must demonstrate that the requested continuance is "for a reasonable period of time." 25 I&N Dec. at 815.

In *Matter of L-A-B-R-*, the Attorney General clarified the framework governing continuances to accommodate a collateral matter. Specifically, the Attorney General determined that where a provision uses the term "good cause," but does not define it, immigration judges and the BIA should conduct a multi-factor balancing analysis. *See* 27 I&N Dec. at 413. The Attorney General stated that "[t]he good-cause standard [for continuances] requires consideration and balancing of all relevant factors in assessing a motion for continuance to accommodate a collateral matter" and noted that such an approach "comports with both the INA and the prevailing treatment of good-cause standards, and has received the approval of several federal courts of appeals." *Id*. (collecting cases).

The Attorney General further explained, however, that not all factors relevant to the "good-cause assessment" in the context of continuances should be weighted equally. *Id.* Rather, the adjudicator "must focus principally on two factors" including "the likelihood that the alien will receive the collateral relief" and "whether the relief will materially affect the outcome of the removal proceedings." *Id.* Additionally, the Attorney General directed that the adjudicator should consider "whether the alien has exercised reasonable diligence in pursuing [collateral] relief, DHS's position on the motion, the length of the requested continuance, and the procedural history of the case." *Id.* The Attorney General elaborated that "[i]t may also be appropriate to consider the length of the continuance requested, the number of hearings held and continuances granted previously, and the timing of the continuance motion . . . ." *Id.* at 415. The Attorney

General further stated that the burden to establish good cause is on the party seeking the continuance. *See id.* at 413.

Recently, the BIA has stressed that overall prima facie eligibility for relief is not dispositive regarding a motion for continuance where other factors weigh against continuing the proceedings. *See Matter of L-N-Y-*, 27 I&N Dec. at 758. Specifically, the BIA determined that an alien who had demonstrated prima facie eligibility for a U visa did not demonstrate good cause for a continuance where the alien did not exercise due diligence in applying for the U visa, DHS opposed the continuance, and a continuance would undermine administrative efficiency. *See id.* When evaluating administrative efficiency, the BIA considered the uncertainty as to when the U visa would be approved or become available. *See id.* at 759. The BIA also directed immigration judges to "consider whether an alien is detained in determining the length and number of continuances that are appropriate" in light of the alien's liberty interest and the Government's interest "to reasonably limit the expense of detention." *Id.*

Notably, almost every approach to defining "good cause," in the context of an alien awaiting a collateral adjudication by DHS or for a visa to become current, highlights the importance of visa availability in assessing "good cause." *See, e.g.*, *Matter of L-A-B-R-*, 27 I&N Dec. at 418 ("Similarly, because adjustment of status typically requires an immediately available visa, INA 245(a), 8 U.S.C. 1255(a), good cause does not exist if the alien's visa priority date is too remote to raise the prospect of adjustment of status above the speculative level."); *Matter of Rajah*, 25 I&N Dec. at 136 ("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.").[5] This approach comports with longstanding Board case law. *See*

[5] Although *Matter of Hashmi* did not address visa availability per se because the respondent in that case would have a visa immediately available upon approval of a Form I-130, the Board did note that statutory eligibility for adjustment of status was an important element to consider in evaluating a continuance request, *see Matter of Hashmi*, 24 I&N Dec. at 792, and an immediately-available visa at the time an adjustment of status application is filed is a statutory requirement to adjust status. *See* INA 245(a)(3), (i)(2)(B), 8 U.S.C. 1255(a)(3), (i)(2)(B). Similarly, the BIA had no occasion to address visa availability in *Matter of Sanchez Sosa* because the annual statutory cap on U visas had not been reached at the time of the decision in June 2012, and a U visa appears to have

Matter of Quintero, 18 I&N Dec. 348, 350 (BIA 1982) ("In any case, the fact that the respondent has an approved visa petition does not entitle him to delay the completion of deportation proceedings pending availability of a visa number."), *aff'd sub nom. Quintero-Martinez v. INS*, 745 F.2d 67 (9th Cir. 1984) (unpublished). It has also been endorsed by federal courts. *See, e.g.*, *Chacku v. U.S. Att'y Gen.*, 555 F.3d 1281, 1286 (11th Cir. 2008) (finding that no good cause was shown for a continuance where the alien's priority date was years in advance of current visa availability). No case law, however, defines how close or remote visa availability must be to establish good cause.

IV. PROPOSED CHANGES

A. General Considerations

As many stakeholders and experts have recognized, improper uses of continuances lead to unnecessary case delays that do not benefit a respondent with a valid claim,[6] DHS, or EOIR. *See, e.g.*, U.S. Government Accountability Office, *Immigration Courts: Actions Needed to*

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been available to the respondent at that time. *Compare* INA 214(p)(2)(A), 8 U.S.C. 1184(p)(2)(A) (establishing an annual limit of 10,000 U visas per fiscal year), *with* USCIS, *Victims of Trafficking Form I-914 (T) and Victims of Crime Form I-918 (U) Visa Statistics (FY 2002-August 2012)*,Oct. 4, 2012, *available at* https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914T-I918U-visastatistics-2012-aug.csv (last visited Nov. 18, 2020) (reflecting the approval of 5825 U visa applications in fiscal year 2009, 10,073 U visa applications in fiscal year 2010, 10,088 U visa applications in fiscal year 2011, and 8688 U visa applications through the end of June 2012). The Department notes that in accordance with applicable law, USCIS approves no more than 10,000 principal petitions for U nonimmigrant status each year. Previously reported data suggesting a higher number of principal petition approvals may be due to system error, duplicate counting of replacement employment authorization documents, or other systems processing error. *See* USCIS, *Number of Form I-198, Petition for U Nonimmigrant Status By Fiscal Year, Quarter, and Case Status: Fiscal Years 2009-2020* Apr. 2020, *available at* https://www.uscis.gov/sites/default/files/document/data/I918u_visastatistics_fy2020_qtr2.pdf (last visited Nov. 18, 2020).

[6] As the Supreme Court has recognized, "[o]ne illegally present in the United States who wishes to remain . . . has a substantial incentive to prolong litigation in order to delay physical deportation for as long as possible." *INS v. Rios-Pineda*, 471 U.S. 444, 450 (1985). Thus, many aliens obtain a perverse benefit from the delays in immigration proceedings. Nevertheless, unnecessary delays do harm aliens with valid claims. *See* Human Rights First, *The U.S. Immigration Court: A Balooning Backlog that Requires Action* 5,Mar. 15, 2016, *available at* https://www.humanrightsfirst.org/sites/default/files/HRF-Court-Backlog-Brief.pdf ("Some unauthorized migrants may benefit from the delays and remain longer in the country than they should, but those with legitimate grounds for relief from removal, such as many asylum seekers, remain in limbo for unnecessarily long periods.'") (quoting Institute for the Study of International Migration, Georgetown University, *Detention and Removal: What now and What Next?: Report on an experts' roundtable Georgetown University, Washington D.C.*, at 13 (2014)) *available at* https://isim.georgetown.edu/wp-content/uploads/sites/17/2019/08/DetentionRemovalv10-1.pdf (last visited Nov. 18, 2020). In short, unnecessary delays harm the government's interest in efficient adjudications and the enforcement of the laws, an alien's interest in the timely resolution of his or her case, especially if the alien has a valid claim for relief, and the public's interest in the prompt administration of justice.

Reduce Case Backlog and Address Long-Standing Management and Operational Challenges 27, June 2017, *available at* https://www.gao.gov/assets/690/685022.pdf (last visited Nov. 18, 2020) ("DHS attorneys, experts, and other stakeholders we spoke with stated that immigration judges' frequent use of continuances resulted in delays and increased case lengths that contributed to the backlog."). Consequently, the Department believes it is of critical importance to ensure that continuances in immigration court proceedings are granted only for actual good cause in a consistent and coherent manner, and it is proposing to amend its regulations accordingly.

As neither the INA nor 8 CFR 1003.29 articulate a clear definition of "good cause," the Board and the Attorney General have pronounced multi-factored tests for adjudicators to use to determine whether to grant or deny a motion for a continuance. *See, e.g.*, *Matter of L-N-Y-*, 27 I&N Dec. at 758; *Matter of L-A-B-R-*, 27 I&N Dec. at 413–19; *Matter of Rajah*, 25 I&N Dec. at 130, 135–38; *Matter of Hashmi*, 24 I&N Dec. at 790; *Matter of Sibrun*, 18 I&N Dec. at 355–58. In these decisions, the Board and the Attorney General sought to articulate or expound upon a standard by which "good cause" could be judged.

The proposed rule adopts the essence of this standard while clarifying the instances in which a continuance would or would not be warranted in the exercise of discretion. Further, it retains many of the primary considerations of previous agency policies. For example, in accordance with *Matter of L-A-B-R-*, the proposed rule would have decisionmakers consider the likelihood that the alien would obtain collateral relief and whether the relief would materially affect the outcome of the proceeding as primary considerations for whether good cause is shown, and establishes that good cause has not been shown where the relief sought would not materially affect the outcome. *Compare Matter of L-A-B-R-*, 27 I&N Dec. at 413–19 (indicating that immigration judges must "focus principally on two factors: (1) the likelihood that the alien will receive the collateral relief, and (2) whether the relief will materially affect the outcome of the removal proceedings[,]" among other considerations), *with* 8 CFR 1003.29(b)(2)(i) (proposed).

The proposed rule would also establish a non-exhaustive list of factors for an immigration judge to consider whether a particular and justifiable need for a continuance has been met, using many of the factors applied by the Board in *Matter of Hashmi* and by the Attorney General in *Matter of L-A-B-R-*. *Compare Matter of Hashmi*, 24 I&N Dec. at 790 (laying out six factors, including but not limited to: (1) DHS's response to the motion to continue; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent's statutory eligibility for adjustment of status; (4) whether the respondent's application for adjustment 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. at 413 ("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."), *with* 8 CFR 1003.29(b)(1)(i)–(iv) (proposed).

Further, the proposed rule maintains the general "due diligence" standard, as well as the movant's burden of proof, as factors for an immigration judge to consider. *Compare Matter of Sibrun*, 18 I&N Dec. at 355–57 (stating that "an alien at least must make a reasonable showing that the lack of preparation occurred despite a diligent good faith effort to be ready to proceed and that any additional evidence he seeks to present is probative, noncumulative, and significantly favorable to the alien" and that the alien is responsible for "specifically articulat[ing] the particular facts involved or evidence which he would have presented, and otherwise fully explain[ing] how denial of his motion fundamentally changed the result reached"), *with* 8 CFR 1003.29(b)(1), (b)(1)(i) (proposed).

Also, the provision of the proposed rule which limits a good cause determination where the continuance relates to collateral immigration applications is in line with precedent stating that if visa availability is too remote, a continuance may not be warranted. *Compare* 8 CFR 1003.29(b)(3)(i)(A), (ii) (proposed), *with Matter of L-A-B-R-*, 27 I&N Dec. at 418 ("Similarly,

because adjustment of status typically requires an immediately available visa, INA § 245(a), 8 U.S.C. § 1255(a), good cause does not exist if the alien's visa priority date is too remote to raise the prospect of adjustment of status above the speculative level."), *Matter of Rajah*, 25 I&N Dec. at 136 ("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."), *and Matter of Quintero*, 18 I&N Dec. at 350 ("Likewise, the immigration judge's refusal to continue the hearing until a visa number was available was proper because he may neither terminate nor indefinitely adjourn the proceedings in order to delay an alien's deportation."). Thus, the elements of the proposed rule are grounded in previous agency rulings and precedents regarding continuances for good cause in immigration proceedings.

In addition, the Attorney General recognized in *Matter of L-A-B-R-* that the good cause standard is often misapplied or misconstrued in immigration proceedings, leading to the overuse of continuances. *See* 27 I&N Dec. at 411. Whereas continuances may "'promote efficient case management,'" *see id.* at 407 (quoting *United States v. Tanner*, 544 F.3d 793, 795 (7th Cir. 2008)), the overuse of continuances undercuts their purpose and leads to the unnecessary delay of immigration proceedings, *see id.* at 411. By articulating a clearly-defined good cause standard, the Department believes that it will be less likely to be misapplied or misconstrued.

Finally, an amorphous standard invites inconsistent practices among immigration judges and inconsistent results among similarly-situated aliens. EOIR currently has over 500 immigration judges *see* EOIR, *Immigration Judge Hiring* (Oct. 2020), *available at* https://www.justice.gov/eoir/page/file/1242156/download (last visited Nov. 18, 2020), and currently there is no consistent practice among them regarding many types of frequently-requested continuances. Thus, aliens and their representatives seeking similar types of continuances—e.g., time to seek representation or preparation time—often receive varying decisions on both the length and number of continuances they receive based upon each individual immigration judge's own personal understanding of good cause. Further, the

current—and comparatively inefficient—case-by-case nature of determining good cause, the lack of a clear definition of the term, and its consideration through an open-ended and largely subjective lens by immigration judges, and the necessarily interlocutory posture for addressing continuances that were incorrectly granted, all make the subject of good cause for a continuance ripe for rulemaking. *See Lopez v. Davis*, 531 U.S. 230, 244 (2001) (observing that agency "is not required continually to revisit 'issues that may be established fairly and efficienctly in a single rule making proceeding'" (quoting *Hecker v. Campbell*, 461 U.S. 458, 467 (1983))); *Marin-Rodriguez v. Holder*, 612 F.3d 591, 593 (7th Cir. 2010) ("An agency may exercise discretion categorically, by regulation, and is not limited to making discretionary decisions one case at a time under open-ended standards.").

For these reasons and concerns, the Department proposes, within its authority and discretion, a new rule more clearly defining when continuances are warranted in immigration court proceedings—and when such requests warrant denial in the exercise of discretion—because it believes it is of critical importance to ensure that continuances are granted only for actual good cause in a consistent and coherent manner.

While federal courts have discussed current 8 CFR 1003.29, no federal court has limited the reading of the current regulation to one specific interpretation of "good cause" or ruled out particular interpretations of that term as inconsistent with the INA. In fact, courts have, when discussing whether good cause existed, often cited the Department's existing frameworks favorably. *See, e.g.*, *Toure v. Barr*, 926 F.3d 403, 407–08 (7th Cir. 2019) (discussing and using both the *Matter of L-A-B-R-* and *Hashmi* frameworks); *Flores v. Holder*, 779 F.3d 159, 164 (2d Cir. 2015) (discussing and using the *Hashmi* factors); *Ferreira v. U.S. Att'y Gen.*, 714 F.3d 1240, 1243 (11th Cir. 2013) (discussing and using the Board-proposed factors from *Hashmi* and *Rajah*).

Even where courts have considered their own multi-factor tests, those courts have not expressly indicated that their framework is intended to be the only way to analyze whether good

cause exists, indicating instead that "there are no bright-line rules . . . ." *Cui v. Mukasey*, 538 F.3d 1289, 1295 (9th Cir. 2008). *See also, e.g.*, *Ahmed v. Holder*, 569 F.3d 1009, 1012 (9th Cir. 2009);; *Baires v. INS*, 856 F.2d 89, 92–93 (9th Cir. 1988). Further, all courts continue to maintain the general proposition that although certain factors may be considered, "[t]he decision to grant or deny the continuance is within 'the sound discretion of the judge and will not be overturned except on a showing of clear abuse,'" indicating that decisions evaluating good cause do not purport to make definitive interpretations that would otherwise leave no room for agency discretion. *Ahmed*, 569 F.3d at 1012 (quoting *Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1247 (9th Cir. 2008)); *see also C.J.L.G. v. Barr*, 923 F.3d 622, 629 (9th Cir. 2019); *Cruz Rendon v. Holder*, 603 F.3d 1104, 1110 (9th Cir. 2010). In short, no court has proclaimed a definitive and comprehensive interpretation of when good cause exists under 8 CFR 1003.29.

B. The Proposed Rule

In *Matter of L-A-B-R-*, the Attorney General recognized that the "good cause" standard is often misapplied in immigration proceedings, resulting in the overuse of continuances. *See* 27 I&N Dec. at 411 ("The overuse of continuances in the immigration courts is a significant and recurring problem."). Continuances are an "important management tool for adjudicators," intended to promote efficiency by allowing for more time in a case where "it [would] be wasteful and inefficient to plow ahead immediately" due to certain developments in the case, such as illness of a key participant. *Id.* at 407. However, the overuse of continuances undermines their purpose and may result in needless delay of immigration proceedings. *See id.* at 411 ("Far from being minor procedural matters, unnecessary continuances undermine the detailed statutory and regulatory scheme established under the INA.").

Additionally, the Attorney General recognized that good cause imposes a clear limitation on the immigration judge's discretion. *Id.* at 407 (stating that "[t]he good-cause standard is not a mere formality that permits immigration judges to grant continuances for any reason or no reason at all."). The "good cause" standard provides "an important check on immigration judges'

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." *Id.* at 406.

In light of the unnecessary delays caused by the improper use of continuances, the past misinterpretations and misapplications of the "good cause" standard with respect to continuances, and the limiting effect of good cause on an immigration judge's discretion, the Department proposes a clearer, more uniform standard to be applied when considering good cause for continuances in immigration proceedings. Under the proposed rule, good cause generally could be shown when a party demonstrates a particular and justifiable need for a continuance. The proposed rule would provide immigration judges and the BIA with a clear standard by which to determine whether a continuance is warranted based on good cause. The Department proposes to place this standard in 8 CFR 1003.29, which contains the current "good cause" provision.

Paragraph (a) of the proposed rule's changes to 8 CFR 1003.29 would expand upon the language of the current regulation, permitting an immigration judge to grant a motion for a continuance for good cause shown, provided that the requirements of paragraph (b) are met and that the continuance would not cause the adjudication of an asylum application by an immigration judge to exceed 180 days in the absence of exceptional circumstances. Paragraph (b) of 8 CFR 1003.29, as proposed, would provide the minimum standard that must be met in order for good cause to exist to grant a motion for a continuance. Consistent with current practice, the proposed standard would make clear that the burden of demonstrating good cause is on the party who is requesting that the court take action or that the court excuse a prior action. *See id.*; *see also Matter of L-A-B-R-*, 27 I&N Dec. at 413 ("In assessing these factors, the immigration judge should also remain mindful that as the party seeking the continuance, the alien bears the burden of establishing good cause.").

The proposed standard would require that, to establish good cause, a requesting party must be able to offer a particular reason for his or her request under the "particular . . . need for the continuance" requirement of paragraph (b). This requirement would codify the specificity contemplated by the existing good cause framework. *See Matter of Sibrun*, 18 I&N Dec. at 357 ("[T]he alien must specifically articulate the particular facts involved or evidence which he would have presented . . . . Finally, all three reasons which counsel advances suffer a common defect: they are but bare, unsupported allegations lacking the required specific articulation of particularized facts and evidence."). In other words, a party who seeks an action that requires a demonstration of good cause would be required to show a specific basis for the requested action and not merely a generalized desire.

In addition, the proposed standard would require that, to establish good cause, a requesting party's reason for making the request must be "justifiable." Whether a reason for a request is ultimately justifiable would depend on specific fairness and efficiency considerations at issue in the particular context, *see Matter of L-N-Y-*, 27 I&N Dec. at 759 ("Considering and balancing the relevant primary and secondary factors in this case, we agree with the Immigration Judge that there was no 'good cause' to continue the respondent's proceedings to further await the adjudication of his U nonimmigrant visa petition."). The immigration judge should lay out such considerations on the record, keeping with current practices. *See, e.g.*, *id.* at 757–60. Thus, although the proposed definition would set forth a generally applicable standard for good cause in the context of continuances, adjournments, and postponements (collectively "continuances"[7]), an immigration judge's or the BIA's determination of whether or not an action is justifiable would ultimately be decided on a case-by-case basis. *See Matter of L-A-B-R-*, 27 I&N Dec. at

[7] The regulations use the terms continuances, adjournments, and postponements largely interchangeably, and the same "good cause" standard governs both continuances under 8 CFR 1003.29 and postponements and adjournments under 8 CFR 1240.6 and 1240.45. *Matter of L-A-B-R-*, 27 I&N Dec. at 407 n.1. To eliminate any residual confusion, the proposed rule consolidates the location of this standard into one regulation, 8 CFR 1003.29, and makes conforming edits to 8 CFR 1240.6 and 1240.45 accordingly. Further, the proposed rule is not intended to define good cause as it is used in any other context outside of 8 CFR 1003.29.

412 ("I conclude that under 8 C.F.R. § 1003.29, immigration courts should continue to apply a multifactor test to assess whether good cause exists for a continuance for a collateral proceeding . . . ."). Further, the justifiability requirement would be in keeping with existing practice. *See, e.g.*, *id.* at 415 ("Because a delay in an immigration proceeding imposes a burden on the immigration judge, DHS, and other aliens pursuing prompt hearings, the respondent seeking to avoid a disposition must demonstrate that he has a well-founded justification for such relief.").

Moreover, in some instances, an alien remains eligible for relief even after a removal order has been entered, *see e.g.*, 8 CFR 214.14(c)(1)(ii), or removal has been effectuated, *see e.g.*, *Matter of L-N-Y-*, 27 I&N Dec. at 760 ("Moreover, as the Immigration Judge noted, the respondent may continue to pursue his U visa, even after he is removed."). *See also Garcia v. Dep't of Homeland Sec.*, No. 19-01265, 2019 WL 7290556, at *6 (N.D. Ill. Dec. 30, 2019) (unpublished) ("The governing regulations anticipate that petitioners for U-visas may not be present in the United States when their petitions are adjudicated or could be removed from the United States during the pendency of the petitions."); *accord Alvarez-Espino v. Barr*, 959 F.3d 813, 818 (7th Cir. 2020) ("USCIS will process the [U visa] application whether or not Alvarez-Espino has a final order of removal against him. . . . Because Alvarez-Espino can continue to pursue every immigration benefit he seeks, the Board did not abuse its discretion in denying his motion for remand or for a continuance."). In such instances, the mere conceivability of relief prior to the issuance of a removal order would hardly establish good cause for delaying the proceedings, because no continuance would be necessary to preserve the alien's ability to pursue the collateral matter with another agency. Thus, an alien in such circumstances could not demonstrate a particular and justifiable need for the continuance because the alien could continue to pursue whatever collateral matter he seeks regardless of whether the continuance is granted.

To demonstrate good cause for a continuance under the proposed rule, an alien who seeks a continuance would first have to clearly specify his or her reason for requesting it. *See Matter*

of Sibrun, 18 I&N Dec. at 357 ("[T]he alien must specifically articulate the particular facts involved or evidence which he would have presented . . . ."). Next, the alien would have to show that the continuance is warranted by a particular and justifiable need. *See id*. at 356–57 ("Second, for purposes of appeal, even where an alien has made this minimum required showing, an immigration judge's decision denying the motion for continuance will not be reversed unless the alien establishes that that denial caused him actual prejudice and harm and materially affected the outcome of his case."); *cf. Matter of Garcia-Reyes*, 19 I&N Dec. 830, 832 (BIA 1988) (no good cause for a continuance to demonstrate rehabilitation when "[t]here was no showing that the respondent was eligible for any form of relief from deportation for which rehabilitation would be relevant").

With over 1.2 million cases currently pending, EOIR, *Pending Cases, New Cases, and Total Completions* (July 14, 2020), *available at* https://www.justice.gov/eoir/page/file/1242166/download (last visited Nov. 18, 2020), it is imperative that the Department ensures that immigration cases are completed in a timely manner. *See also* EOIR, Memorandum from the Attorney General to the EOIR, *Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest*, at 2 (Dec. 5, 2017), *available at* https://www.justice.gov/eoir/file/1041196/download (last visited Nov. 18, 2020) ("The timely and efficient conclusion of cases serves the national interest. Unwarranted delays and delayed decision making do not."). Because continuances place stress on one of EOIR's scarcest resources—docket time—and in light of the growing pressures created by new cases driven by continued influxes of illegal immigration, the Department believes it is essential to ensure that continuances are used properly and in a consistent manner. *See* U.S. Government Accountability Office, *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges* (June 1, 2017) at 27, 68, 69 *available at* https://www.gao.gov/assets/690/685022.pdf (last visited Nov. 18, 2020) ("DHS attorneys, experts, and other stakeholders we spoke with stated that immigration judges' frequent use of

continuances resulted in delays and increased case lengths that contributed to the backlog. . . . Our analysis . . . showed that the use of continuances has grown over time and that, on average, cases that experience more continuances take longer to complete. . . . We also found that the percentage of completed cases which had multiple continuances increased . . . and that, on average, cases with multiples continuances took longer to complete than cases with no or fewer continuances.").

The Department does not foresee circumstances under which a continuance would be justifiable if an alien is unlikely to receive the collateral relief requested or, if granted, the collateral relief would not materially affect the outcome of the removal proceedings, and these two factors would continue to serve as important considerations for adjudicators.[8] *See Matter of L-A-B-R-*, 27 I&N Dec. at 413.

However, a continuance would most likely not be justifiable solely because a collateral matter "could conceivably provide relief from removal." *Matter of L-A-B-R-*, 27 I&N Dec. at 414. Indeed, if this were the standard for good cause, then every continuance request for a collateral matter would demonstrate good cause, because most such requests posit at least a theoretical possibility of obtaining relief. The standard in proposed paragraph (b)(2)(i) comports with the recent direction of the Attorney General that motions for continuances should be granted

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[8] "As with any balancing analysis requiring consideration of multiple factors, a respondent's strength on certain factors may compensate for a weaker showing on others." *Matter of L-A-B-R-*, 27 I&N Dec. at 417. For example, "[a] respondent who makes a compelling case that he will receive collateral relief and successfully adjust status may receive a continuance even if, for instance, he has already received previous continuances." *Id.* However, "because the respondent's likelihood of success in the collateral matter is paramount, a truly weak showing on that front may be dispositive." *Id.* Additionally, "[i]n some cases, it will be impossible or too uncertain that the respondent will succeed in the collateral proceeding itself." *Id.* Consistent with the idea that a "compelling" case that an alien will receive collateral relief may warrant a continuance, *Matter of L-A-B-R-*, 27 I&N Dec. at 417, the Department proposes to apply a "clear and convincing" evidentiary standard in assessing whether a respondent has made a sufficient showing of the likelihood of obtaining collateral relief in order to obtain a continuance based on a collateral matter. Such a standard recognizes that neither a prima facie showing of eligibility for relief, *Matter of L-N-Y-,* 27 I&N Dec. at 757–58, nor the mere conceivability of possible relief, *Matter of L-A-B-R-*, 27 I&N Dec. at 414, is dispositive regarding whether a continuance should be granted. It is also consistent with the statutory standard for eligibility for one of the most common collateral matters arising in immigration proceedings, a request to continue the case of an alien who has married a United States citizen or lawful permanent resident while in removal proceedings in order to await the adjudication of an immigrant visa petition based on the marriage. *See* INA 245(e), 8 U.S.C. 1255(e) (requiring proof by "clear and convincing evidence" of a bona fide marriage during removal proceedings between an alien and a United States citizen or lawful permanent resident in order for the alien to avoid having to reside outside the United States for two years before the immigrant visa petition can be approved).

only sparingly. *See Matter of L-A-B-R-*, 27 I&N Dec. at 407 (asserting that, in the course of ordinary litigation, the burden placed on proceedings "counsels against continuances except for compelling reasons") (citing *Morris v. Slappy*, 461 U.S. 1, 11 (1983)). Although these two factors are important, most continuance requests to allow for collateral matters allege a likelihood of obtaining the collateral relief, and nearly all such requests posit that the collateral matter would materially impact the proceedings—otherwise there would be no need to seek the collateral matter. Thus, the proposed rule notes that although these two factors are significant, adjudicators should also consider other factors: "(i) The amount of time the movant has had to prepare for the hearing and whether the movant has exercised due diligence to ensure preparedness for that hearing; (ii) The length and purpose of the requested continuance, including whether the reason for the requested continuance is dilatory or contrived; (iii) Whether the motion is opposed and the basis for the opposition, though the opponent does not bear the burden of demonstrating an absence or lack of good cause; (iv) Implications for administrative efficiency; and (v) Any other relevant factors for consideration." *Compare id.*, *with Matter of L-A-B-R-*, 27 I&N Dec. at 413 ("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.").

A continuance would most likely not be justifiable where the alien "appears to be seeking interim relief as a way of delaying the ultimate disposition of the case" or has not taken practicable measures to proceed at the scheduled hearing, such as "pursuing collateral relief in advance of the noticed hearing date." *Matter of L-A-B-R-*, 27 I&N Dec. at 413. A continuance would also not likely be justifiable where the alien expresses an intention to file for collateral relief at a future date or where the alien has unreasonably delayed filing for collateral relief. *Id.* at 416. Through the proposed rule, the Department indicates that, subject to an exception, a request for a continuance in order to later apply for a visa generally would not constitute good cause. To the contrary, an alien should generally exercise diligence in any activity that forms the

basis of the continuance request, and a lack of such diligence undermines a putative showing of good cause. *Cf. Mazariegos-Paiz v. Holder*, 734 F.3d 57, 66 (1st Cir. 2013) ("Parties have an obligation to exercise due diligence in marshaling evidence. Viewed in this light, the IJ's denial of the petitioner's mid-trial request for a continuance was not an abuse of discretion."); *Perez-Mirachal v. Att'y Gen.*, 275 F. App'x 141, 144 (3d Cir. 2008) (unpublished) ("We conclude that the Immigration Judge did not abuse his discretion in denying the motion for a continuance. At the time the motion for continuance was filed, Perez-Mirachal had not yet filed any motions challenging his conviction in the criminal court."); *Matter of Sibrun*, 18 I&N Dec. at 357–58 ("Accordingly, we find that counsel has failed to establish that after more than 3 months of representing the applicant she reasonably could not have been prepared to proceed . . . .").

The proposed rule also would clarify that seeking collateral action in the form of an exercise of prosecutorial discretion, which is solely within the purview of DHS and is beyond the authority of the immigration judge to grant, does not warrant continuing the proceedings. *See* 8 CFR 1003.29(b)(2)(ii). There is no need to continue a case in order to seek parole, deferred action, or the exercise of prosecutorial discretion by DHS, because such actions are far beyond the authority of an immigration judge to grant and may be granted by DHS at any time regardless of whether immigration proceedings are pending. *See also Matter of W-Y-U-*, 27 I&N Dec. 17, 19 (BIA 2017) ("The role of the Immigration Courts and the Board is to adjudicate whether an alien is removable and eligible for relief from removal in cases brought by the DHS. We lack the authority to review the DHS's decision to institute proceedings, which involves the exercise of prosecutorial discretion.") (citing *Matter of G-N-C-*, 22 I&N Dec. 281, 284 (BIA 1998)), *overruled by Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018);[9] *see, e.g.*, *Matter of*

[9] *Matter of Castro-Tum* itself has been abrogated within the Fourth and Seventh Circuits, though it continues to apply to immigration proceedings outside those circuits. *See Romero v. Barr*, 937 F.3d 282, 292–94 (4th Cir. 2019); *Morales v. Barr*, 963 F.3d 629, 639–40 (7th Cir. 2020). The Department also recently proposed rulemaking to codify the principle, consistent with both *Matter of Castro-Tum* and other regulations, that immigration judges and appellate immigration judges lack free-floating authority to administratively close cases. *See* Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 FR 52491, 52503-04 (Aug. 26, 2020).

Quintero, 18 I&N Dec. at 350 ("Furthermore, since the respondent can request deferred action status at any stage in the proceedings, the immigration judge did not err in refusing to adjourn the hearing to allow him to pursue that relief."); *cf.Matter of Yazdani*, 17 I&N Dec. 626, 630 (BIA 1981) (same). Since the exercise of prosecutorial discretion is a matter within the exclusive jurisdiction of the DHS, it follows that in considering administrative closure, an immigration judge cannot review whether an alien falls within the DHS's enforcement priorities or will actually be removed from the United States. *See Matter of Quintero*, 18 I&N Dec. at 350 (stating that "deferred action status is a function of the District Director's prosecutorial authority," which neither Immigration Judges nor the Board can review); *cf. Matter of P-C-M-*, 20 I&N Dec. 432, 434 (BIA 1991) (stating that the likelihood that an alien will be deported is not a factor to be considered in a bond determination), *overruled on other grounds by Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980) ("Once deportation proceedings are commenced, the immigration judge must order deportation if the evidence supports the charge.").

Further, the Department remains committed to ensuring that adjudicators follow statutory directives, including relevant timelines reflecting clear Congressional expectations that certain types of cases would be adjudicated within clear time parameters. *See, e.g.*, INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii) (stating that "in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed"). To that end, the proposed rule would clarify that good cause is not established when a continuance request would cause an immigration court to exceed a statutory or regulatory adjudication deadline, unless the request meets any exception to those deadlines.

The proposed rule also addresses common contexts for continuance requests in order to provide adjudicators with clearer standards and guidance. For instance, the proposed rule discusses continuances based on collateral immigration applications, proposing that "a

continuance request to allow an alien or a petitioner to apply for an immigrant visa or to wait for an immigrant visa for which the alien is the beneficiary to become available" generally would not demonstrate good cause.

This default standard is in line with the current framework, which provides that because adjustment of status generally requires an immediately available visa, good cause does not exist if the alien's priority date or visa eligibility is too remote. *See, e.g.*, *Matter of L-A-B-R-*, 27 I&N Dec. at 418 ("Similarly, because adjustment of status typically requires an immediately available visa, INA 245(a), 8 U.S.C. 1255(a), good cause does not exist if the alien's visa priority date is too remote to raise the prospect of adjustment of status above the speculative level."); *Matter of Quintero*, 18 I&N Dec. at 350 ("[T]he fact that the respondent has an approved visa petition does not entitle him to delay the completion of deportation proceedings pending availability of a visa number.").

Notwithstanding the general rule, the Department recognizes there may be situations in which it is appropriate to continue a case to await the adjudication of an immigrant visa petition by USCIS. Consequently, the proposed rule contains an exception that may establish good cause. To fall within the exception, the motion for a continuance would need to satisfy the three elements of that exception. *Id.*

First, the proposed rule requires the approval of the visa application or petition to provide "an immediately-available visa to the alien" or "a visa to the alien with 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," in recognition that an application for adjustment of status generally requires an immediately available visa at the time an application is filed. *See*, *e.g.*, INA 245(a)(3), (i)(2)(B), 8 U.S.C. 1255(a)(3), (i)(2)(B).

Acknowleding that certain circumstances the likelihood of an immigrant visa being available is no longer remote or speculative, even if it is not quite immediately available. Case law has not defined how near or remote visa availability should be to support a finding of good

cause, however. *Matter of L-A-B-R-*, 27 I&N Dec. at 418 ("Similarly, because adjustment of status typically requires an immediately available visa, INA 245(a), 8 U.S.C. 1255(a), good cause does not exist if the alien's visa priority date is too remote to raise the prospect of adjustment of status above the speculative level."); *Matter of Rajah*, 25 I&N Dec. at 136 ("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."); *Matter of Quintero*, 18 I&N Dec. at 350 ("In any case, the fact that the respondent has an approved visa petition does not entitle him to delay the completion of deportation proceedings pending availability of a visa number."). Consequently, individual adjudicators may take different views regarding how remote is too remote to warrant a continuance, which in turn may lead to inconsistent results for otherwise similarly-situated aliens. Thus, the proposed rule would establish a clear, uniform boundary for remoteness based on the Visa Bulletin published every month by the Department of State. *See* 22 CFR 42.51(b) (providing for the allocation of immigrant visa numbers by the Department of State). Although the priority dates in the Visa Bulletin do not always move at predictable intervals, the Department believes that using a date six months or less from the priority date reflected in the Visa Bulletin for filing visa applications[10] for the month in which the continuance request is made represents the clearest and most appropriate boundary for assessing remoteness for purposes of determining whether good cause exists. In particular, using a date no later than six months after the priority date calculated by the Department of State "justifying immediate action in the application process," *see, e.g.*, U.S. Department of State, *Visa Bulletin for September 2020, No. 38 vol. X*, *available at* https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-

[10] The Visa Bulletin contains two charts of priority dates for each broad category of visas, family-based and employment-based. *See, e.g.*, U.S. Department of State, *Visa Bulletin for September 2020, No. 38 vol. X*, *available at* https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-september-2020.html (last visited Oct. 26, 2020). The first chart lists final action dates, i.e., visas with a priority date earlier than the date on the final action chart are available. The second chart reflects dates for filing visa applications within a timeframe justifying immediate action in the application process. The dates in the second chart are generally later than the first, and applicants for immigrant visas who have a priority date earlier than the application date in the second chart may assemble and submit required documents to the Department of State's National Visa Center.

september-2020.html (last visited Oct. 26, 2020), as the cutoff for assessing remoteness strikes the right balance between providing a reasonable opportunity for an alien to obtain visa-based relief and avoiding indeterminate delays based on visas that may not be current for a significant period of time.

Second, to establish good cause for a continuance related to an immigrant visa, an alien would need to demonstrate a *prima facie* eligibility for that visa and, if applicable, for adjustment of status and any necessary waiver(s) based on the visa approval, including establishing reason, as a matter of discretion, for adjustment of status and granting of any necessary waivers. This requirement is in line with the Department's past frameworks, which considered "whether the underlying visa petition [wa]s prima facie approvable." *Matter of L-A-B-R-*, 27 I&N Dec. at 414 ("Three of the five main good-cause factors enumerated in *Hashmi* and *Rajah* pertained to the likelihood of these efforts' success: 'whether the underlying visa petition is prima facie approvable[.]'"); *see also Matter of Rajah*, 25 I&N Dec. at 130 (citing the factors in *Matter of Hashmi*, including prima facie approvability of the underlying visa petition, in assessing whether a continuance is warranted to await the adjudication of a pending employment-based visa petition); *Matter of Hashmi*, 24 I&N Dec. at 790 ("In determining whether to continue proceedings to afford the respondent an opportunity to apply for adjustment of status premised on a pending visa petition, a variety of factors may be considered, including . . . whether the underlying visa petition is prima facie approvable[.]").

Third, to establish good cause for a continuance related to an immigrant visa, the request must establish that the immigration judge has jurisdiction over any application for adjustment of status, including any necessary waivers in conjunction with that application, based on approval of the underlying visa. This requirement recognizes both the futility and the waste of scarce resources associated with continuing a case for an issue over which an immigration judge ultimately lacks any authority to provide relief, as well as the reality, discussed *supra*, that many forms of relief remain available to aliens even if their removal proceedings have concluded. *See*,

e.g., *Alvarez-Espino*, 959 F.3d at 818 ("USCIS will process the [U-visa] application whether or not Alvarez-Espino has a final order of removal against him. . . . Because Alvarez-Espino can continue to pursue every immigration benefit he seeks [outside of removal proceedings], the Board did not abuse its discretion in denying his motion for remand or for a continuance.").

The Board has previously recognized that many reasons militate against granting a motion to reopen based on an underlying application over which an immigration judge and the Board lack jurisdiction:

> As a practical matter, Immigration Judges and the Board have limited and finite adjudicative and administrative resources, and those resources are best allocated to matters over which we do have jurisdiction. Among the costs of reopening final proceedings in cases such as the one before us, where we have no [authority] over the underlying relief requested, are the practical and administrative difficulties associated with maintaining open cases that would rely on outside considerations and would become part of already-crowded dockets. Immigration Judges, for example, would be required to schedule and oversee matters over which they play no substantive role, because the cases would once again be on their docket. If the application is ultimately denied, the Immigration Judge is placed in the position of having to enter a further order or decision that simply sets forth information provided by others, assuming such information is actually provided to the Immigration Judge in a timely manner. There would be nothing to preclude the respondent from filing an appeal to the Board from such an order, unnecessarily adding to our pending case load, and despite the fact that we would have no review authority over aspects of that decision.

Matter of Yauri, 25 I&N Dec. 103, 110–11 (BIA 2009).[11]

Although the Board recognized that these considerations may be different for pending proceedings, it did so, in part, with the understanding that the Department would engage in

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[11]The Department notes that in *Singh v. Holder*, 771 F.3d 647 (9th Cir. 2014), the Ninth Circuit held that the Board possessed sua sponte authority to reopen a proceeding involving an application over which it lacked jurisdiction and to effectively grant a stay of removal, notwithstanding its decision in *Matter of Yauri*. *See Singh*, 771 F.3d at 652. *Singh*, however, did not address the Board's determination in *Yauri* that it would not exercise its discretion—even with its sua sponte authority—to reopen cases involving applications over which it lacked authority. *Compare id*. at 653 ("Because the BIA denied Singh's motion only for lack of authority, we grant the petition and remand to the BIA."), *with Matter of Yauri*, 25 I&N Dec. at 110 ("Finally, and separately from any question of jurisdiction, with regard to untimely or number-barred motions to reopen, we conclude that sua sponte reopening of exclusion, deportation, or removal proceedings pending a third party's adjudication of an underlying application that is not itself within our [authority] ordinarily would not be warranted as a matter of discretion.")). *Singh* also did not address the availability of a stay of removal from DHS in circumstances in which DHS has sole authority over the application at issue. *See generally* 8 CFR 241.6. *Singh* is binding only within the Ninth Circuit, and its jurisdictional holding regarding the Board is inapplicable to the proposed rule. Moreover, the Department does not find its reasoning persuasive enough to graft onto the proposed rule so as to establish immigration judge authority to indefinitely stay removal proceedings.

rulemaking on the issue, which the proposed rule now does. *Id*. at 111 n.8. Consequently, it did not purport to settle the issue of the appropriateness of continuances in situations in which the immigration judge lacks jurisdiction over the underlying application. *Id*. ("Thus, while we acknowledge the arguments raised surrounding the question whether proceedings can or should be continued when an arriving alien's adjustment application is pending with the USCIS, our decision in this case does not resolve that issue."). Moreover, as the Board noted, an alien with an application pending before DHS may request a stay of removal, if necessary, to await the adjudication of a collateral application. *See id*. at 112; 8 CFR 241.6(a). The potential availability of a stay of removal from DHS further diminishes any need to keep immigration proceedings open in circumstances in which an immigration judge or the Board can take no action on a collateral application.

Allowing immigration judges to continue cases for applications over which they lack jurisdiction—and, thus, for which they can take no action other than to continue proceedings for an uncertain and unknown amount of time—is also tantamount to granting either deferred action, an indefinite continuance, an exercise of prosecutorial discretion, or an indefinite stay of proceedings, especially because there is no prohibition on an alien filing repeated applications. Such action is contrary to established case law. *See Matter of Silva-Rodriguez*, 20 I&N Dec. 448, 449–50 (BIA 1992) (undue delay by an immigration judge may frustrate or circumvent statutory purpose of prompt immigration proceedings); *Matter of Quintero*, 18 I&N Dec. at 350 (an immigration judge "may neither terminate nor indefinitely adjourn the proceedings in order to delay an alien's deportation" and "[o]nce deportation proceedings have been initiated by the District Director, the immigration judge may not review the wisdom of the District Director's action, but must execute his duty to determine whether the deportation charge is sustained by the requisite evidence in an expeditious manner."); *Matter of Roussis*, 18 I&N Dec. 256, 258 (BIA 1982) ("It has long been held that when enforcement officials. . . choose to initiate proceedings against an alien and to prosecute those proceedings to a conclusion, the immigration judge is

obligated to order deportation if the evidence supports a finding of deportability on the ground charged."); *see also Matter of Yazdani*, 17 I&N Dec. 626, 630 (BIA 1991) ("However, so long as the enforcement officials . . .choose to initiate proceedings against an alien and to prosecute those proceedings to a conclusion, the immigration judge and the Board must order deportation if the evidence supports a finding of deportability on the ground charged."). It also infringes on DHS's authority to enforce the immigration laws, *see generally* INA 103(a)(1), 8 U.S.C. 1103(a)(1), and DHS's prosecutorial discretion to determine which cases should proceed and which ones should be terminated or paused for a significant amount of time. *See Matter of Quintero*, 18 I&N Dec. at 350 ("Consequently, the prosecutorial discretion exercised in granting deferred action status is committed exclusively to [now DHS] enforcement officials. . . . Inasmuch as deferred action status is a function of the District Director's prosecutorial authority, neither the immigration judge nor the Board may grant such status or review a decision of the District Director to deny it."); *cf. Lopez-Telles v. INS*, 564 F.2d 1302, 1304 (9th Cir. 1977) ("Rather, these decisions plainly hold that the immigration judge is without discretionary authority to terminate deportation proceedings so long as enforcement officials . . . choose to initiate proceedings against a deportable alien and prosecute those proceedings to a conclusion. The immigration judge is not empowered to review the wisdom of the [now DHS] in instituting the proceedings. . . . This division between the functions of the immigration judge and those of [now DHS] enforcement officials is quite plausible and has been undeviatingly adhered to by the [now DHS].").

In short, the Department finds that the practical resource concerns associated with reopening proceedings for applications over which an immigration judge lacks jurisdiction apply equally to continuance requests in the same circumstances and that those concerns outweigh any minimal potential benefit to an alien in seeking a stay of pending proceedings from an immigration judge, particularly because aliens may seek a stay of removal from DHS if

necessary.[12] *Cf. Matter of Yauri*, 25 I&N Dec. at 111 ("Given our lack of jurisdiction over this category of adjustment applications, and because a process exists for requesting a stay from the DHS, the administrative and practical costs of reopening weigh heavily in our discretionary analysis.").

The proposed rule discusses other restrictions related to this general rule for immigrant visas and the noted exception. For instance, the approval of a visa petition or application contemplated in the general rule and the exception does not include interim relief, *prima facie* determinations, parole, deferred action, bona fide determinations or any similar dispositions short of final approval of the visa application or petition because these are examples of disposition[s] short of final approval that do not demonstrate good cause. These restrictions are in line with the general admonition against continuances based on relief that is speculative. *See, e.g.*, *Matter of L-A-B-R-*, 27 I&N Dec. at 418 ("Similarly, because adjustment of status typically requires an immediately available visa, INA 245(a), 8 U.S.C. 1255(a), good cause does not exist if the alien's visa priority date is too remote to raise the prospect of adjustment of status above the speculative level."); *Matter of Quintero*, 18 I&N Dec. at 350 ("[T]he fact that the respondent has an approved visa petition does not entitle him to delay the completion of deportation proceedings pending availability of a visa number").

Further, the proposed rule would also provide that an immigration judge may not grant a continuance to an alien in removal proceedings based on a visa application or petition based on a marriage entered into during any pending administrative or judicial proceedings regarding the alien's right to be admitted or remain in the United States, including during the pending removal proceedings, unless the alien establishes by clear and convincing evidence that the marriage was

[12] The Department notes that an immigration judge's decision is generally subject to appeal, 8 CFR 1003.1(b)(3), that the current median time to decide a typical appeal is 323 days, *see Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 FR 52491, 52508 n.39 (Aug. 26, 2020), and that most aliens who are not in custody during their removal proceedings are not immediately detained by DHS once those proceedings conclude. Thus, even without a continuance from an immigration judge, most, if not all, aliens will have ample time to obtain a decision on any collateral application before even needing to seek a stay of removal.

entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of the petition or application. This restriction, which reflects the statutory prohibition in section 245(e) of the Act, 8 U.S.C. 1255(e), on granting adjustment of status based on marriages entered into during immigration proceedings unless the alien establishes, *inter alia*, that the marriage was entered into in good faith, also adheres to precedent regarding the need to establish prima facie eligibility for relief in order to obtain a continuance for a collateral matter related to that relief. *See Matter of L-A-B-R-*, 27 I&N Dec. at 413–18; *cf. Matter of Velarde-Pacheco*, 23 I&N Dec. 253, 256 (BIA 2002) ("[A] properly filed motion to reopen may be granted, in the exercise of discretion, to provide an opportunity to pursue an application for adjustment where . . . the motion presents clear and convincing evidence indicating a strong likelihood that the respondent's marriage is bona fide . . . ."), *modified on other grounds by Matter of Lamus-Pava*, 25 I&N Dec. 61 (BIA 2009). It would further acknowledge that potential fraud or dilatory tactics go to the viability of the visa petition and the ultimate discretionary consideration of any subsequent application, such that a continuance may be unwarranted because the relief is too speculative or even prohibited outright. *See Matter of Hashmi*, 34 I&N Dec. at 792 ("If other visa petitions filed on the respondent's behalf have been denied, those petitions and the USCIS's determinations could also be presented and considered. These prior filings or other evidence of potential fraud or dilatory tactics may impact the viability of the visa petition underlying the motion."); *see also Pedreros v. Keisler*, 503 F.3d 162, 166 (2d Cir. 2007) (finding no abuse of discretion when a continuance was denied because there was "no basis to conclude that the denial of the I-130 petition had any likelihood of being overturned on appeal"); *Morgan v. Gonzales*, 445 F.3d 549, 552 (2d Cir. 2006) (finding that there was no abuse of discretion when a continuance was denied for the

adjudication of a second visa petition when the first "stemm[ed] from a marriage that had already been determined to lack *bona fides*").

In addition to the general rule and exception regarding continuances based on immigrant visa applications or petitions, the proposed rule contains a similar general rule and exception for non-immigrant visas, such as a U visa, premised on similar concerns. A continuance request to apply for a non-immigrant visa or to wait for a non-immigrant visa to become available, including any applicable waiver, would not demonstrate good cause unless the receipt of the non-immigrant visa, including any applicable waiver, vitiates or would vitiate all grounds of removability with which the alien has been charged and the alien demonstrates that final approval of the visa application or petition and receipt of the actual visa, including approval and receipt of any applicable waiver, has occurred or will occur within six months of the request for a continuance. As with continuance requests based on immigrant visas, the receipt of interim relief, prima facie determinations, parole, deferred action, bona fide determinations or any similar dispositions short of approval of the actual visa application or petition would not constitute receipt of the actual visa or evidence that the actual visa will be received within six months of the request for a continuance. These provisions also align with the general admonition against continuances to await collateral matters that are speculative or remote. *See Matter of L-A-B-R-*, 27 I&N Dec. at 418.[13]

The proposed rule also would address continuance requests regarding discrete collateral non-visa adjudications by DHS—e.g., the adjudication of an asylum application filed with DHS by an alien who has been determined to be a genuine unaccompanied alien child in proceedings pursuant to section 208(b)(3)(C) of the Act, 8 U.S.C. 1158(b)(3)(C), the adjudication of a Form

[13] As discussed *supra*, *Matter of Sanchez Sosa*, 25 I&N Dec. 807, had no occasion to consider the impact of the remoteness of a non-immigrant visa on the alien's continuance request. The other factors considered by the Board in *Matter of Sanchez Sosa* in determining the appropriateness of a continuance to await a non-immigrant visa are generally subsumed within the proposed rule. Accordingly, the proposed rule does not deviate from *Matter of Sanchez Sosa*, but rather clarifies it in the context of non-immigrant visas whose availability is remote.

I-751 waiver filed with DHS under *Matter of Stowers*, 22 I&N Dec. 605 (BIA 1999)[14], or the adjudication of an application for Temporary Protected Status ("TPS") by an alien in removal proceedings at the time a country is designated for TPS unless the charging document, if established, would render the alien ineligible for TPS, 8 CFR 1244.7(d). In these circumstances, DHS has initial jurisdiction over the application at issue for an alien in immigration proceedings, and if DHS does not grant it, it can be renewed before the immigration judge. Consequently, an immigration judge may grant such a continuance if (A) the alien has been found removable as charged; (B) the alien has established prima facie eligibility for the underlying benefit; (C) the alien has provided evidence that the application has been filed with DHS and remains pending with DHS; (D) DHS has initial jurisdiction over the application at issue even for an alien in immigration proceedings; (E) there are no other applications pending before the immigration judge; and (F) the non-approval of the application would transfer jurisdiction to the immigration judge to review and adjudicate the application. This part of the proposed rule would not only recognize the existence of various applications over which DHS and the Department share jurisdiction, but also that DHS exercises initial jurisdiction even while the alien is in removal proceedings before the Department, and it promotes the efficient movement of cases on EOIR's docket. It also exemplifies a situation where "an impending factual development [would] alter the course of the case," such that it would be "wasteful and inefficient to plow ahead immediately." *Matter of L-A-B-R-*, 27 I&N Dec. at 407. 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 on its own.

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[14] Aliens who receive lawful permanent resident status on a conditional basis pursuant to section 216 of the Act, 8 U.S.C. 1186a, are required to file a petition on Form I-751 to remove the conditions within two years of the anniversary of obtaining that status. INA 216(d)(2)(A), 8 U.S.C. 1186a(d)(2)(A). Aliens who cannot meet the petition requirements may file for a waiver of them under certain circumstances, which is also filed on Form I-751. *Id*.; 1186a(c)(4). DHS has initial jurisdiction over the waiver application, and if DHS does not approve it, it may be renewed before an immigration judge. Longstanding Board case law holds that where an alien is prima facie eligible for a Form I-751 waiver, the alien's proceedings should be continued to allow DHS to adjudicate it. *See Matter of Stowers*, 22 I&N at 613–14.

The proposed rule also addresses another context for continuance requests, those related to matters of an alien's representation. Nearly two-thirds of all respondents in removal proceedings have representation, and nearly ninety percent of those seeking asylum have representation, *see* EOIR, *Current Representation Rates* (Apr. 15, 2020), *available at* https://www.justice.gov/eoir/page/file/1062991/download; thus, it is important for the Department to ensure that representation does not undermine the orderly procedure of the immigration courts and is not a hindrance to fair and timely adjudications. Moreover, just as a criminal defendant "may not manipulate his right to counsel to undermine the orderly procedure of the courts or subvert the administration of justice," *United States v. Thibodeaux*, 758 F.2d 199, 201 (7th Cir. 1985), so, too, an alien in civil immigration proceedings cannot manipulate his statutory right to counsel at no expense to the government, INA 292, 8 U.S.C. 1362, or any associated due process rights recognized by circuit courts to delay proceedings or subvert the administration of justice by immigration courts, *cf. Gomez-Medina v. Holder*, 687 F.3d 33, 38 (1st Cir. 2012) ("There is also a strong interest in not allowing manipulations of the [immigration] system in order to cause delay."); *United States v. Poston*, 902 F.2d 90, 96 (D.C. Cir. 1990) (Thomas, J.) ("[T]he right to counsel cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same. The public has a strong interest in the prompt, effective, and efficient administration of justice; the public's interest in the dispensation of justice that is not unreasonably delayed has great force." (citations and internal quotation marks omitted)). To that end, the proposed rule would lay out six contexts for guiding adjudicators in determining whether a continuance related to representation establishes good cause.

First, the proposed rule provides, "[a]n immigration judge is not required to grant a continuance to any alien in removal proceedings to secure representation if the time period described in section 239(b)(1) of the [INA] has elapsed and the alien has failed to secure counsel." Second, an immigration judge, would be able to, in his or her discretion, grant one

continuance for not more than 30 days to allow an alien to secure representation if the date of the alien's initial hearing occurs less than 30 days after the Notice to Appear's service date and the alien demonstrates that dilidgence in seeking representation since that date. Consistent with section 239(b) of the Act, 8 U.S.C. 1229(b), those two proposed provisions contemplate that the Act already grants respondents a reasonable amount of time to secure counsel prior to the first hearing, but that additional time may be necessary in discrete instances.[15] *Cf. Hidalgo-Disla v. INS*, 52 F.3d 444, 447 (2d Cir. 1995) (finding an immigration judge's decision to proceed with a hearing after providing an alien 26 days to seek counsel was not erroneous and dismissing as frivolous an appeal asserting that it was); *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.").

Indeed, nothing in that part of the Act prohibits "the Attorney General from proceeding against an alien pursuant to section 240 [8. U.S.C. 1229a] if the time period described in paragraph (1) [i.e. ten days between the service of a Notice to Appear and the first hearing] has elapsed and the alien has failed to secure counsel." INA 239(b)(3), 8 U.S.C. 1229(b)(3). Thus, although aliens possess a statutory right to representation at no expense to the government, *see* INA 292, 8 U.S.C. 1362, that right is qualified by Congress's further determination that a period

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[15] These proposed rule also adopts a feature of a prior regulation that governed immigration court proceedings for approximately 30 years and limited aliens to one continuance to seek representation unless "sufficient cause" for more time was shown. *See* 8 CFR 242.13 (1986) ("A continuance of the hearing for the purpose of allowing the respondent to obtain representation shall not be granted more than once, unless sufficient cause for the granting of more time is shown."). No reason was given for departing from that limitation in the mid-1980s, and there is no indication that it was unworkable. *See Aliens and Nationality; Rules of Proceedings Before Immigration Judges*, 50 FR 51693 (Dec. 19, 1985) and 52 FR 2931 (Jan. 29, 1987) (proposing and then finalizing, without substantive discussion, a change to the language in 8 CFR 242.13 to eliminate the general limitation of only one continuance for an alien to seek representation). Moreover, in light of the subsequent enactment of section 239(b)(3) of the Act, 8 U.S.C. 1229(b)(3), the Department believes returning to a variation of the prior system best effectuates the intent and purpose of the representation-related provisions of the Act by recognizing that the Act grants a reasonable amount of time to secure representation but that additional time may be necessary in limited circumstances.

of ten days after an alien has been served with a Notice to Appear is a sufficient time to allow the alien to seek such representation before the intial hearing date in removal proceedings, *see* INA 239(b), 8 U.S.C. 1229(b). Although Congress's determination in INA 239(b)(3), 8 U.S.C. 1229(b)(3), may have been overlooked in litigation regarding the denial of further continuances for an alien to seek representation, the Department declines to ignore the clear statutory text of that section in the instant NPRM.

Currently, aliens in removal proceedings generally have ample time to seek representation if they exercise diligence.[16] For a detained case, the median time between service of the NTA on an alien and filing it with an immigration court is 11 days and the median time between the receipt of the NTA by an immigration court and the first hearing is 27 days; for a non-detained case, the comparable medians are 41 and 226 days, respectively. Thus, most aliens already have a reasonable and realistic amount of time to obtain representation. *Cf. Matter of C-B-*, 25 I&N Dec. 888, 889–90 (BIA 2015) (aliens should receive a fair opportunity to secure counsel).[17] Nevertheless, the Department recognizes that in limited circumstances, an alien

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[16] The Department recognizes that not all aliens will obtain representation even though they have ample time to seek it. For example, some aliens do not secure representation because they do not wish to pay the fee charged by a potential representative. *Cf. Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004) ("It would be nonsensical to recognize a constitutional entitlement to a continuance based on counsel's withdrawal when petitioners themselves are responsible for the withdrawal [due to failing to pay counsel]."). Further, many representatives, due to ethical or professional responsibility obligations, will not take cases of aliens who are ineligible for any relief or protection from removal (e.g., an alien with an aggravated felony drug trafficking conviction who has no fear of persecution or torture in his or her home country) because they do not wish to charge money for representation when representation will not affect the outcome of the proceeding. These situations illustrate only that some aliens may not ultimately secure counsel for reasons common to issues of representation in all civil cases—i.e., the cost of the representation and the strength of the case—not that aliens do not generally have ample time to seek representation. *See United States v. Torres-Sanchez*, 68 F.3d 227, 231 (8th Cir. 1995) ("Although Torres-Sanchez expressed some frustration over his attempt to obtain counsel, that frustration, in our view of the record, stemmed from his realization that he faced the inevitable consequence of deportation, not from a lack of opportunity to retain counsel. In any event, the mere inability to obtain counsel does not constitute a violation of due process.").

[17] The Board has not defined what a reasonable and realistic amount of time is for purposes of obtaining representation, and the respondent in *Matter of C-B-* was given only eight days between the issuance of an NTA and his first hearing, in apparent contravention of section 239(b)(1) of the Act, 8 U.S.C. 1229(b)(1). *See Matter of C-B-*, 25 I&N Dec. at 889. Nevertheless, *Matter of C-B-* cannot be interpreted to contradict the Act, and the Act clearly indicates that 10 days between the service of an NTA and the first hearing is a sufficient amount of time to obtain representation. *See* INA 239(b)(3), 8 U.S.C. 1229(b)(3). Accordingly, the proposed rule is not in tension with *Matter of C-B-* and does not deviate from recognizing the statutory parameters for providing time for a respondent to obtain representation.

exercising diligence may need additional time.[18] Thus, if an alien's hearing occurs less than 30 days after the service of the Notice to Appear, and the alien demonstrates that he or she was diligent in securing counsel, the proposed rule provides that a continuance of up to 30 days may be warranted.[19]

Third, the proposed rule would provide that good cause may not be found on the basis of a representative's assertion that his or her workload or obligations in other cases prevent preparation because professional responsibility obligations require that representatives do not take on no more cases than they can handle. *See* Operating Policies and Procedures Memorandum (OPPM) 17-01, *Continuances* (Jul. 31, 2017) at 5–6 ("In addition, frequent or multiple requests for additional preparation time based on a practitioner's workload concerns related to large numbers of other pending cases should be rare and warrant careful review."). The regulations already require representatives to provide competent and diligent representation for their clients, and it would not constitute good cause if a representative is not abiding by those requirements. *See, e.g.*, 8 CFR 1003.102(o) (deeming the failure to provide competent representation to a client grounds for discipline), 1003.102(q) (deeming the failure to act with reasonable diligence and promptness in representing a client grounds for discipline).

Fourth, under the proposed rule, an immigration judge will not be permitted to grant more than one continuance in removal proceedings for preparation time that is separate from the normal preparation time between hearings. Further, any such continuance solely for preparation

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[18] The rule does not countenance additional time, however, in situations where an alien initially chooses to proceed without counsel and then belatedly reconsiders that decision after being found removable. *See Michel v. INS*, 206 F.3d 253, 259 (2d Cir. 2000) ("We cannot require the IJ to postpone a proceeding every time a party believes that the hearing is going badly, and, as a result, seeks to re-think his or her decision to forego representation.").

[19] There is no current, consistent practice among immigration judges regarding either the number or length of continuances to seek representation. Accordingly, the proposed rule would also standardize motions practice in this area based on a recognition that most aliens have already received a significant amount of time to seek counsel prior to their first hearing but that in discrete instances, additional time may be necessary. Such standardization will benefit both practitioners and adjudicators by making procedural expectations both clear and consistent across all cases in removal proceedings. It will also ensure that aliens are not dilatory in seeking representation. Moreover, the Department believes an additional continuance of up to 30 days constitutes a reasonable amount of additional time for diligent aliens to continue seeking representation, because it would give a diligent alien potentially up to 40 days total to seek representation after being served with an NTA, which is in line with the minimum median total amount of time currently, 38 days.

may be granted prior to pleading to the allegations and charges in a Notice to Appear, but will not be granted for more than 14 days. This proposed rule recognizes that a significant amount of preparation time is already built into immigration proceedings, especially between a master calendar hearing and an individual merits hearing. *See, e.g.*, *Paris-Mendez v. Barr*, 814 F. App'x 247, 250 (9th Cir. 2020) (unpublished) ("First, [respondent's] counsel decided not to prepare for an individualized hearing on September 20, 2016 until a few days prior, when she had five months to do so. Clearly, this did not justify a continuance."); *Islam v. U.S. Att'y Gen*., 748 F. App'x 961, 963 (11th Cir. 2018) (unpublished) ("The morning of Islam's removal hearing, attorney Zubaida Iqbal moved for a continuance on the ground that she had been hired the day before and needed time to prepare, but Iqbal had entered a notice of appearance in Islam's proceeding [two months earlier] and represented him at his bond hearing. And Iqbal's motion to continue was identical to the one she filed before Islam's bond hearing. The immigration judge did not abuse his discretion by refusing to further delay Islam's removal hearing when Iqbal failed to appear at the hearing or to explain in her motion why a continuance was necessary when she was familiar with Islam's case and the documents relating to his applications for relief."); *Aguilar Delgado v. Gonzales*, 139 F. App'x 851, 853 (9th Cir. 2005) (unpublished) ("The agency did not abuse its discretion by denying a continuance, however, as it had given him fourteen months from his initial hearing where he appeared with counsel to prepare his case, and Aguilar Delgado chose to fire his attorney immediately preceding the hearing.").

Consistent with an attorney's ethical duties of competence and diligence, 8 CFR 1003.102(o) and (q), additional time for putative and generalized "preparation" contributes to unnecessary delay and raises questions about the true purpose of the requested delay. Moreover, many instances of an alleged lack of preparation are actually due to the respondent's behavior, and the withholding of information by a respondent from his or her representative leading to that representative's lack of preparedness does not demonstrate good cause. *See, e.g.*, *Paris-Mendez*, 814 F. App'x at 250–51 ("Second, with respect to the assertion that the petitioner's counsel

learned for the first time on the morning of the hearing that the petitioner identified himself as a Jehovah's Witness and that he allegedly suffered persecution in Mexico because of his religion, it is puzzling that the petitioner's counsel was so informed at the last minute, when she had previously helped the petitioner with completing his Form I-589 . . . ."); *Ahmed v. Gonzales*, 185 F. App'x 665, 666 (9th Cir. 2006) (unpublished) ("Moreover, it was Ahmed's fault that his new attorney was not prepared. He hired her just before the hearing and did not inform her that the INS had revoked his visa."); *see also Ghajar v. INS*, 652 F.2d at 1348–49 ("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").

Nevertheless, the Department recognizes that in rare cases, an attorney may need additional time to prepare to plead to the charges in the NTA, and the proposed rule would allow a continuance of up to 14 days to do that.[20]

Fifth, the proposed rule would provide that good cause will not be found due to a representative's scheduling conflict in another court if that conflict that existed at the time the immigration judge scheduled the hearing in open court and the representative did not raise it at

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[20] The proposed rule recognizes that substantial preparation time is already built into the current framework of immigration proceedings. For example, an attorney who contests charges of removability may be given time to brief the charges or the case may be set for a hearing on the charges, and the proposed rule does not limit the time immigration judges allow for briefing schedules or the scheduling of hearings related to contested charges of removability. Accordingly, representatives who contest grounds of removability will likely have additional time to address the charges, though that time will not fall under the rubric of a continuance for attorney preparation. Similarly, the normal time between a master calendar hearing and an individual merits hearing should provide an attorney ample time for preparation, as the attorney will have already presented a prima facie case for relief in order to obtain a merits hearing date in the first instance. There is no current, consistent practice among immigration judges regarding either the number or length of so-called "attorney prep" continuances. Accordingly, the proposed rule would also standardize motions practice in this area based on a recognition that the natural procedural progression of a case already contains a significant amount of built-in preparation time, that most typical preparatory activities—e.g., writing briefs, contesting removability, filing applications or motions to terminate proceedings, and assembling evidence—occur during this time and outside of a court hearing, and that representatives may submit written pleadings and applications for relief without the need for a hearing to do so. Such standardization will benefit both practitioners and adjudicators by making procedural expectations both clear and consistent across all cases in removal proceedings. It will also ensure that hearing time is not wasted considering activities that are normally performed during the time between scheduled hearings and that representatives do not engage in dilatory tactics simply to prolong proceedings as much as possible. Although the current framework already contains substantial preparation time for either contesting removability or pursuing an application for relief, the Department nevertheless recognizes that it cannot account for every single scenario in which an attorney may allege a need for preparation time. Accordingly, in rare cases outside of the typical scenarios outlined above, the proposed rule recognizes an immigration judge's ability to grant an additional continuance for attorney preparation time of up to 14 days, which is a reasonable amount of time for a diligent and competent attorney to assess an issue beyond those otherwise contemplated in this proposed rule.

the time. This change supports the standard that a practitioner's workload must be controlled and managed so that each matter can be handled competently, 8 CFR 1003.102(q). If the representative's scheduling conflict in another court arises after the immigration hearing in removal proceedings was scheduled, an immigration judge may grant a continuance (of no more than 14 days) only if that conflict involves the court appointment of a representative to a case and the immigration judge was notified of the conflict in a timely manner.

The proposed rule recognizes that in certain jurisdictions representatives may be appointed as criminal defense attorneys through a panel process in furtherance of a criminal defendant's constitutional right to representation. *See, e.g.*, 18 U.S.C. 3006A. Understanding that the constitutional rights of criminal defendants outweigh the inconvenience to the civil nature of immigration proceedings occasioned by a scheduling conflict and that criminal trials, especially of detained defendants, generally take precedence over civil proceedings, *see, e.g.*, United States Courts, *FAQs: Filing a Case*, https://www.uscourts.gov/faqs-filing-case#faq-When-will-the-court-reach-a-decision-in-my-case? (last visited Nov. 5, 2020) (the scheduling of criminal cases is assigned a higher priority than the scheduling of civil cases in federal court), the proposed rule would contain an exception such that good cause may be found for a conflict that arises after an immigration hearing is scheduled due to the appointment of a respondent's representative in a criminal case, provided that the attorney timely notifies the immigration court of the conflict.[21]

This proposed rule recognizes the disregard shown to immigration courts by practitioners who either misleadingly inform the immigration judge that they do not have a conflict when scheduling a future hearing or take on cases in other courts after the immigration court hearing has been scheduled knowing that a conflict exists. Such disregard for the time of an immigration

[21] The proposed rule also recognizes that attorneys may also be appointed in discrete types of civil proceedings, e.g. habeas proceedings. Accordingly, the rule is not limited to appointments in criminal cases and contains an exception for a conflict arising due to a subsequent appointment in any type of case, provided that the attorney timely notifies the immigration court of the conflict.

judge and the resources of the immigration court does not demonstrate good cause.[22] Sixth, if the respondent's representative fails to appear for a scheduled hearing, the proposed rule would provide that the immigration judge may grant a continuance of no more than 14 days. This provision recognizes that, while representatives are expected to attend their clients' hearings, *see id.* 1003.102(l), 1003.102(o), 1003.102(q), 1003.102(r), a respondent should not necessarily be penalized for his or her representative's failure to appear. Therefore, a continuance in these instances may be warranted, though it should be only for a limited duration of 14 days to ensure that an alien's case does not become stale due to any undue delay.

The proposed rule would also address continuances made on an immigration judge's own motion. In doing so, it would recognize that although there are multiple circumstances in which an immigration judge should continue a case on his or her own motion, those circumstances are closely circumscribed and should generally be rare. It also recognizes that the good cause standard "plainly confines the discretion of immigration judges to grant continuances. . .[r]ather than giving 'unfettered discretion to grant or deny a continuance.'" *Matter of L-A-B-R-*, 27 I&N Dec. at 407 (quoting *Ahmed*, 569 F.3d at 1014). Thus, the proposed rule would generally preclude an immigration judge from granting a continuance on his or her own motion except in clearly-specified circumstances[23].

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[22] The proposed rule recognizes that cases are sometimes scheduled outside of open court. In such situations, the limitation on good cause due to a scheduling conflict by a representative outlined in the proposed rule would not apply, though any continuance request in such a situation would still have to affirmatively demonstrate good cause. Moreover, the representative would need to file the continuance request within 14 days of the issuance of the scheduling notice by the immigration court.

[23] These circumstances would include those in which a continuance is required pursuant to 8 CFR 1003.47; there is evidence of serious illness of the alien, representative, or immigration judge, or serious illness or death of the spouse, child, or parent of the alien, representative, or immigration judge; the immigration judge is otherwise absent and no other immigration judge is available to preside over the hearing; there are technical difficulties with the immigration court's computer, recording system, or video teleconferencing system that prevent the case from being heard or recorded; the Department of Homeland Security or the Department of Health and Human Services fails to produce a detained alien for the hearing; an interpreter is necessary for the hearing, but is unavailable or unqualified; the record of proceedings is unavailable; the respondent did not appear at a hearing due to detention by a law enforcement entity, or due to a deficient notice and service of a new notice of hearing can correct the deficiency; the immigration judge began a hearing but was unable to complete it due to no fault of the parties; the court is closed for hearings at the time of the hearing; or unforeseen exceptional or extraordinary circumstances beyond the control of the alien, the alien's representative, government counsel, or the immigration judge.

All of these enumerated reasons are obvious instances where it would be unreasonable or impossible for an immigration judge to proceed with a hearing and, thus, warrant a continuance. *See, e.g.*, *Matter of L-A-B-R-*, 27 I&N at 407 ("There are times when the prudent use of continuances may advance the efficient enforcement of the immigration laws. . . . *When a key participant falls ill, for instance*, . . . it can be wasteful and inefficient to plow ahead immediately.") (emphasis added); *cf. Matter of W-A-F-C-*, 26 I&N Dec. 880, 882–83 (BIA 2016) (holding that where DHS seeks to re-serve a respondent to effect a notice to appear that was defective under the regulatory requirements for serving minors under the age of 14, a continuance should be granted for that purpose).

Additionally, this list includes a catch-all provision providing authority for an immigration judge to sua sponte continue a case in situations in which unforeseen exceptional or extraordinary circumstances[24] beyond the control of the alien, the alien's representative, government counsel, or the immigration judge arise. The Department recognizes that no regulation can account for every possible scenario in which a continuance may be appropriate notwithstanding the provisions outlined in the proposed rule and that in rare cases, a continuance may be warranted for reasons wholly beyond the control of the parties and the immigration judge. Consequently, the proposed rule provides a catch-all mechanism for an immigration judge to grant a continuance in such rare circumstances.

Finally, the proposed rule discusses continuances of merits hearings, including merits hearings on applications for relief or protection and merits hearings on contested charges of removability. Under the proposed rule, continuances of merits hearings are strongly disfavored,

[24] The use of "unforeseen exceptional or extraordinary circumstances" as a standard for rare scenarios not falling into any other category is not intended to reflect statutory or regulatory definitions of those terms used in other contexts. *See, e.g.*, INA 240(e)(1), 8 U.S.C. 1229a(e)(1); 8 CFR 1208.4(a)(5). Rather, it reflects the rare nature of such fact patterns that would warrant a continuance notwithstanding any other regulatory provision. Thus, this standard could warrant a continuance notwithstanding other provisions in truly rare or unique situations where an attorney faced a genuinely unforeseeable workload issue or a respondent faced an atypical need for additional time to obtain counsel (e.g., prior counsel has engaged in unethical or unprofessional behavior preventing the respondent from obtaining new counsel).

and should only be granted in specific circumstances or upon motion by either party. *Accord* EOIR OPPM 17-01 ("Such [merits] hearings are typically scheduled far in advance, which provides ample opportunity for preparation time, and often involve interpreters or third-party witnesses whose schedules have been carefully accommodated. Moreover, slots for individual merits hearings cannot be easily filled by other cases, especially if the decision to continue the hearing is made close in time to the scheduled date. Although some continuances of individual merits hearings are unavoidable, especially in situations involving an unexpected illness or death, the continuance of an individual merits hearing necessarily has a significant adverse ripple effect on the ability to schedule other hearings across an immigration judge's docket. Thus, such a request should be reviewed very carefully, especially if it is made close in time to the hearing.").

The proposed rule contemplates that, following the scheduling of a merits hearing, parties have ample time to prepare for the hearing and that they should be ready to proceed at that date. If a motion for a continuance were granted in such an instance, the need to reschedule would unnecessarily delay the adjudication of the respondent's case. While there are circumstances in which a continuance is warranted, the proposed rule would embody a primary desire to not continue merits hearings. To do so would be to unduly disregard EOIR's mission of adjudicating cases expeditiously and efficiently, as well as to potentially undermine consideration of an application for relief for an alien whose case is already prepared for the hearing and whose evidence may otherwise go stale during any continuance. Accordingly, the proposed rule would note that continuances of merits hearings should only be granted in compelling circumstances outlined in the proposed rule, including unforeseen exceptional or extraordinary circumstances based on a motion by either party, and should be granted for no more than 30 days. An additional continuance of that length is a reasonable amount of time to address the issue that necessitated the continuance while also ensuring that evidence does not go stale or that the parties' preparation for the merits hearing is not otherwise vitiated.

V. REGULATORY REQUIREMENTS

A. Regulatory Flexibility Act

The Department has reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and has determined that this rule will not have a significant economic impact on a substantial number of small entities. The proposed rule would not regulate "small entities" as that term is defined in 5 U.S.C. 601(6). Only individuals, rather than entities, are placed in immigration proceedings, and only immigration judges, not entities, adjudicate requests for continuances.

B. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

C. Congressional Review Act

This rule is not a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

D. Executive Order 12866 and Executive Order 13563

The Office of Information and Regulatory Affairs of the Office of Management and Budget ("OMB") has determined that this proposed rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866. It will neither result in an annual effect on the economy greater than $100 million nor adversely affect the economy or sectors of the economy. It does not pertain to entitlements, grants, user fees, or loan programs, nor does it raise novel legal or policy issues. It does not create inconsistencies or interfere with actions taken by other

agencies. Accordingly, this rule is not a significant regulatory action subject to review by OMB pursuant to Executive Order 12866.

Executive Order 13563 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of using the best available methods to quantify costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 13563.

The proposed rule would provide additional clarity for adjudicators across many issues arising from the most types of requests for a continuance in immigration proceedings. Although the proposed regulation would provide clearer guidance for adjudicators in considering continuance requests, it does not change the nature or scope of the role of an immigration judge during immigration proceedings. Immigration judges are already trained to consider all relevant legal issues in assessing a request for a continuance, and the proposed rule does not propose any changes that would make adjudicating such requests more challenging than they currently are. If anything, the proposed rule would make adjudicating motions for a continuance easier and more efficient by providing clearer standards than the current, amorphous "good cause" standard. Accordingly, the Department does not expect the proposed changes to increase the adjudication time for immigration court proceedings.

The Department notes that the proposed changes may result in fewer continuances being granted; but, because such requests are inherently fact-specific, because there may be multiple reasons behind a continuance request, and because the Department does not granularly track multiple bases for a continuance, the Department cannot quantify precisely the expected decrease. Moreover, the denial of a continuance says little about the ultimate outcome of an alien's proceedings which depends on particular facts and an individual alien's eligibility for

relief or protection, including relief that may be granted even after proceedings have concluded. Thus, the impact of the proposed rule on the outcomes of particular cases cannot be modeled with any degree of precision. Nevertheless, in general, the Department expects the proposed rule to result in fewer continuances which would enhance the efficiency of immigration proceedings in the aggregate, benefit aliens with valid claims who would otherwise have to wait longer to receive relief or protection, and vindicate the government and the public's interests in the prompt administration of justice. Similarly, a reduction in multiple, lengthy continuances may also provide some benefit to attorneys, particularly pro bono attorneys, who would not need to commit to representation for several years if the hearing process worked more efficiently. *See, e.g.*, Human Rights First, *The U.S. Immigration Court* at 5 ("In a February 2016 survey conducted by Human Rights First of 24 pro bono coordinators at many of the nation's major law firms, nearly 75 percent of pro bono professionals indicated that delays at the immigration court are a significant or very significant negative factor in their ability to take on a pro bono case for legal representation before the court."). Thus, for the reasons explained above, the expected costs of this proposed rule are likely to be de minimis, whereas the benefits to all parties, though not precisely quantifiable, are significant.

E. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

This rule does not propose new or revisions to existing "collection[s] of information" as that term is defined under the Paperwork Reduction Act of 1995, Pub. L. 104-13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320.

List of Subjects

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal Services, Organization and functions (Government agencies)

8 CFR Part 1240

Administrative practice and procedure, Aliens

Accordingly, for the reasons set forth in the preamble, and by the authority vested in the Director, Executive Office for Immigration Review, by the Attorney General Order Number 4910-2020, the Department proposes to amend chapter V of title 8 of the Code of Federal Regulations as follows:

Title 8 of the Code of Federal Regulations

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 19491953 Comp., p. 1002; section 203 of Pub. L. 105-100, 111 Stat. 2196-200; sections 1506 and 1510 of Pub. L. 106-386, 114 Stat. 1527-29, 1531-32; section 1505 of Pub. L. 106-554, 114 Stat. 2763A-326 to -328.

2. Revise § 1003.29 to read as follows:

§ 1003.29 Continuances.

(a) Subject to paragraph (b), the immigration judge may grant a motion for continuance for good cause shown, provided that nothing in this section shall authorize a continuance that causes the adjudication of an asylum application by an immigration judge to exceed 180 days in the absence of exceptional circumstances, consistent with section 208(d)(5)(iii) of the Act and 8 CFR 1003.10(b).

(b) (1) *In general*. Subject to paragraphs (2) through (6), good cause is shown when a movant demonstrates a particular and justifiable need for the continuance. To determine whether good cause has been established, an immigration judge should consider the following non-exhaustive list of factors:

(i) The amount of time the movant has had to prepare for the hearing and whether the movant has exercised due diligence to ensure preparedness for that hearing;

(ii) The length and purpose of the requested continuance, including whether the reason for the requested continuance is dilatory or contrived;

(iii) Whether the motion is opposedand the basis for the opposition, though the opponent does not bear the burden of demonstrating an absence or lack of good cause;

(iv) Implications for administrative efficiency; and

(v) Any other relevant factors for consideration.

(2) *Good cause not shown*. (i) Good cause for a continuance is not shown when the continuance would not materially affect the outcome of removal proceedings or, for a continuance request based on a collateral matter, when the alien has not demonstrated by clear and convincing evidence a likelihood of obtaining relief on the collateral matter.

(ii) A request for a continuance in order to seek parole, deferred action, or the exercise of prosecutorial discretion by DHS does not demonstrate good cause.

(iii) A request for a continuance that would cause an immigration court to exceed a statutory or regulatory adjudication deadline does not demonstrate good cause unless the request meets the standard of any statutory or regulatory exception to the deadline.

(3) *Continuances of removal proceedings related to collateral immigration applications*. (i) Subject to paragraph (b)(3)(ii) of this section, a continuance request to allow an alien or a petitioner to apply for an immigrant visa or to wait for an immigrant visa for which the alien is the beneficiary to become available does not demonstrate good cause unless:

(A) (*1*) The approval of the visa application or petition provides or would provide an immediately-available visa to the alien, or

(*2*) The approval of the visa application or petition provides or would provide a visa to the alien with 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;

(B) The alien has demonstrated prima facie eligibility for the underlying visa and, if applicable, for adjustment of status and any necessary waiver(s) based on the approval of that visa, including establishing that the alien would warrant adjustment of status and any necessary waiver(s) as a matter of discretion; and

(C) The immigration judge has jurisdiction over any application for adjustment of status, including any necessary waiver(s) in conjunction with that application, based on approval of the underlying visa.

(ii) (A) For purposes of paragraph (b)(3)(i) of this section, approval of a visa petition or application does not include interim relief, prima facie determinations, parole, deferred action, bona fide determinations or any similar dispositions short of final approval of the visa application or petition. The seeking of any of these dispositions or of any disposition short of final approval of the visa application or petition does not demonstrate good cause.

(B) Notwithstanding paragraph (b)(3)(i) of this section, an immigration judge may not grant a continuance to an alien in removal proceedings based on a visa application or petition based on a marriage entered into during any pending administrative or judicial proceedings regarding the alien's right to be admitted or remain in the United States, including during the pending removal proceedings, unless the alien establishes by clear and convincing evidence to the satisfaction of the immigration judge that the marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or

other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of the petition or application.

(iii) Subject to paragraph (b)(3)(iv) of this section, a continuance request to apply for a non-immigrant visa or to wait for a non-immigrant visa to become available, including any applicable waiver, in removal proceedings does not demonstrate good cause unless

(A) Receipt of the non-immigrant visa, including any applicable waiver, vitiates or would vitiate all grounds of removability with which the alien has been charged; and

(B) The alien demonstrates that final approval of the visa application or petition and receipt of the actual visa, including approval and receipt of any applicable waiver, has occurred or will occur within six months of the request for a continuance.

(iv) For purposes of paragraph (b)(3)(iii) of this section, the receipt of interim relief, prima facie determinations, parole, deferred action, bona fide determinations or any similar dispositions short of approval of the actual visa application or petition does not constitute receipt of the actual visa or evidence that the actual visa will be received within six months of the request for a continuance

(v) An immigration judge may grant a continuance in removal proceedings to await the adjudication of a non-visa application by DHS over which DHS has initial jurisdiction in the following circumstances:

(A) The alien has been found removable as charged;

(B) The alien has established prima facie eligibility for the underlying benefit;

(C) The alien has provided evidence that the application has been filed with DHS and remains pending with DHS;

(D) DHS has initial jurisdiction over the application at issue even for an alien in immigration proceedings;

(E) There are no other applications pending before the immigration judge; and

(F) The non-approval of the application would transfer jurisdiction to the immigration judge to review and adjudicate the application.

(4) *Continuances related to an alien's representation*. (i) Subject to paragraph (b)(4)(ii) of this section, an immigration judge is not required to grant a continuance to any alien in removal proceedings to secure representation if the time period described in section 239(b)(1) of the Act has elapsed and the alien has failed to secure counsel.

(ii) In the immigration judge's discretion, an immigration judge may grant one continuance to an alien in removal proceedings to secure representation if the date of the alien's initial hearing occurs less than 30 days after the date the alien was served with a Notice to Appear and the alien demonstrates that the alien has been diligent in seeking representation since that date. Such a continuance shall be for a reasonable period of time but shall not exceed 30 days.

(iii) Because representatives are presumed to take on no more cases than they can handle in accordance with professional responsibility obligations of diligence and competence, a representative's assertions about his or her workload or obligations in other cases do not constitute good cause.

(iv) An immigration judge shall grant no more than one continuance in removal proceedings to an alien or his representative for preparation time, separate from the normal preparation time between hearings. Such a continuance may be granted solely for preparation prior to pleading to the allegations and charges in a Notice to Appear. Such continuance shall be granted for no more than 14 days.

(v) A representative's scheduling conflict in another court that existed at the time the immigration judge scheduled the hearing in removal proceedings for which the representative seeks a continuance and that the representative did not disclose at the time the hearing was scheduled does not constitute good cause, unless the immigration judge scheduled the case outside of open court. An immigration judge may grant a continuance due to a representative's

scheduling conflict in another court arising after the immigration hearing in removal proceedings was scheduled in open court, but only if it involves the court appointment of a representative to a case and the immigration judge was notified of the conflict in a timely manner. Such continuance shall be granted for no more than 14 days. A representative requesting a continuance of a hearing scheduled outside of open court due to a scheduling conflict in another court that existed at the time the immigration court hearing notice was issued must file a motion for a continuance with 14 days of the issuance of the immigration court hearing notice.

(vi) Upon motion by a respondent in removal proceedings, an immigration judge may grant a continuance of no more than 14 days in a case in which the respondent's representative failed to appear for a scheduled hearing.

(5) *Continuances on an immigration judge's own motion*. An immigration judge may not grant a continuance on his or her own motion, except in the following circumstances:

(i) A continuance is required pursuant to § 1003.47;

(ii) There is evidence of serious illness of the alien or serious illness or death of the spouse, child, or parent of the alien;

(iii) There is evidence of serious illness or death of the alien's representative or serious illness or death of the spouse, child, or parent of the alien's representative;

(iv) There is a serious illness of the immigration judge or serious illness or death of the spouse, child, or parent of the immigration judge;

(v) The immigration judge is absent and no other immigration judge is available to preside over the hearing;

(vi) There are technical difficulties with the immigration court's computer, recording system, or video teleconferencing system that prevent the case from being heard or recorded;

(vii) The Department of Homeland Security or the Department of Health and Human Services fails to produce a detained alien for the hearing;

(viii) An interpreter is necessary for the hearing and either an interpreter is unavailable or the interpreter present is unqualified;

(ix) The record of proceedings is unavailable;

(x) The respondent did not appear at a hearing because the respondent was detained by a law enforcement entity;

(xi) The respondent did not appear at a hearing due to a deficient notice and service of a new notice of hearing can correct the deficiency;

(xii) The immigration judge began a hearing but was unable to complete it due to no fault of the parties;

(xiii) The court is closed at the time of the hearing; or

(xiv) Unforeseen exceptional or extraordinary circumstances beyond the control of the alien, the alien's representative, government counsel, or the immigration judge require a continuance.

(6) *Continuances of merits hearings*. A continuance of a merits hearing on an alien's application for relief or protection from removal or a merits hearing on a contested charge of removability prior to or on the date of the hearing is strongly disfavored. Such continuances should only be granted in circumstances otherwise listed in paragraphs (b)(4)(v), (vi), or, upon motion by either party, paragraph (b)(5) of this section, and should be granted for no more than 30 days.

PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

3. The authority for part 1240 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1182, 1186a, 1186b, 1225, 1226, 1227, 1228, 1229a, 1229b, 1229c, 1252 note, 1361, 1362; secs. 202 and 203, Pub. L. 105-100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105-277 (112 Stat. 2681).

4. Revise § 1240.6 to read as follows:

§ 1240.6 Postponement and adjournment of hearing.

Adjournments in removal proceedings are governed by the provisions of 8 CFR 1003.29(b).

5. Revise § 1240.45 to read as follows:

§ 1240.45 Postponement and adjournment of hearing.

Adjournments in deportation proceedings are governed by the provisions of 8 CFR 1003.29(b).

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Department of Justice

[FR Doc. 2020-25931 Filed: 11/25/2020 8:45 am; Publication Date: 11/27/2020]