



## U.S. Department of Justice

Executive Office for Immigration Review

*Office of the Chief Immigration Judge*

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Chief Immigration Judge

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July 31, 2017

### MEMORANDUM

TO: All Immigration Judges  
All Court Administrators  
All Attorney Advisors and Judicial Law Clerks  
All Immigration Court Staff

FROM: MaryBeth Keller   
Chief Immigration Judge

SUBJECT: Operating Policies and Procedures Memorandum 17-01: *Continuances*

This Operating Policies and Procedures Memorandum (OPPM) supplements and amends OPPM 13-01. It is intended to provide guidance to assist Immigration Judges with fair and efficient docket management relating to the use of continuances. It is not intended to limit the discretion of an Immigration Judge, and nothing herein should be construed as mandating a particular outcome in any specific case. Rather, its purpose is to provide guidance on the fair and efficient handling of motions for continuance in order to ensure that adjudicatory inefficiencies do not exacerbate the current backlog of pending cases nor contribute to the denial of justice for respondents and the public.

This OPPM also reminds Immigration Judges that in all situations in which a continuance is granted at a hearing, they must make the reason(s) for the adjournment clear on the record, by stating the reasons orally or by setting forth in writing the reason(s) in an order. In all cases, the judge should also annotate the case worksheet on the left side of the Record of Proceedings with the corresponding adjournment code. The Court Administrators and court staff must ensure that each adjournment code is accurately entered into CASE.

The number of pending cases before immigration courts currently exceeds 600,000. Although multiple factors may have contributed to this case load, Immigration Judges must ensure that lower productivity and adjudicatory inefficiency do not further exacerbate this situation. To that end, it is more important than ever that Immigration Judges ensure that our resources are used efficiently.

In particular, the delays caused by granting multiple and lengthy continuances, when multiplied across the entire immigration court system, exacerbate already crowded immigration dockets. In 2012, the Office of the Inspector General of the U.S. Department of Justice found that “frequent and lengthy continuances” were a significant contributing factor to increased case processing times and that over half of all cases surveyed had one or more continuances, with an average in those cases of four continuances and 368 days of continuance, per case. U.S. Department of Justice, Office of Inspector General, *Management of Immigration Cases and Appeals by the Executive Office for Immigration Review* (Oct. 2012), <https://oig.justice.gov/reports/2012/e1301.pdf>. A recent report by the U.S. Government Accountability Office showed that the use of continuances in immigration proceedings increased 23% between fiscal years 2006 and 2015. U.S. Government Accountability Office, *Immigration Courts, Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges* (June 2017), <https://www.gao.gov/assets/690/685022.pdf>. Furthermore, despite an increase in the hiring of Immigration Judges, initial case completion numbers in Fiscal Year 2016 were essentially the same as in Fiscal Year 2012, and recent overall case completion numbers have declined notably compared to the numbers from Fiscal Years 2004 to 2011. U.S. Department of Justice, Executive Office for Immigration Review, *Statistics Yearbooks FY 2004-FY 2016*, <https://www.justice.gov/eoir/statistical-year-book>.

In addition to complicating the resolution of individual cases by prolonging the time between hearings, multiple continuances can strain overall court resources, including administrative and interpreter resources, and consume docket time that could otherwise be used to resolve additional cases. Therefore, it is critically important that Immigration Judges use continuances appropriately and only where warranted for good cause or by authority established by case law.

The Immigration and Nationality Act (INA) generally does not establish any specific “right” to a continuance in immigration proceedings. Rather, the availability of continuances is primarily governed by 8 C.F.R. § 1003.29, which provides that an “immigration judge may grant a motion for continuance for good cause shown.” In certain circumstances, case law further refines the regulatory definition of good cause and informs consideration of specific types of continuance requests, including requests to obtain additional evidence and requests to continue proceedings to await adjudication by U.S. Citizenship and Immigration Services (USCIS) of a relevant petition. In other situations, because the reasons for requesting a continuance vary widely, an assessment of good cause will depend on the specific factors of each case. Nevertheless, in general, the reason and support for the request as well as any opposition to it, the timing of the request, the respondent’s detention status, the complexity of the case, the number and length of any prior continuances, and concerns for administrative efficiency are all appropriate factors to be considered in determining whether to grant a continuance and for how long.

Overall, while administrative efficiency cannot be the only factor considered by an Immigration Judge with regard to a motion for continuance, it is sound docket management to carefully consider administrative efficiency, case delays, and the effects of multiple continuances on the efficient administration of justice in the immigration courts. This consideration is even more salient in cases where the respondent is detained. In all cases, an Immigration Judge must carefully consider not just the number of continuances granted, but also the length of such continuances. Most importantly, Immigration Judges should not routinely or automatically grant continuances absent a showing of good cause or a clear case law basis.

Further, although the appropriate use of continuances serves to protect due process, which Immigration Judges must safeguard above all, there is also a strong incentive by respondents in immigration proceedings to abuse continuances, and Immigration Judges must be equally vigilant in rooting out continuance requests that serve only as dilatory tactics. As the Supreme Court has recognized, “[o]ne illegally present in the United States who wishes to remain already has a substantial incentive to prolong litigation in order to delay physical deportation for as long as possible.” *INS v. Rios-Pineda*, 471 U.S. 444, 450 (1985). Moreover, “as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.” *INS v. Doherty*, 502 U.S. 314, 323 (1992). Continuance requests that seek only to prolong

a removable alien's presence in the United States serve neither the public's interest nor the interests of justice, including the related interests of other aliens with meritorious claims whose cases may be delayed collaterally. Thus, as a general matter, continuance requests solely for dilatory purposes should not be countenanced by Immigration Judges.

With these principles in mind, there are several specific recurring categories of continuance requests, all of which may cause significant docketing and administrative efficiency concerns, which warrant additional guidance:

*A. Continuances to Obtain Counsel*

With regard to granting a continuance to give a respondent the opportunity to obtain legal counsel, it remains general policy that at least one continuance should be granted for that purpose. Such a continuance should be of reasonable length, but it is appropriate for Immigration Judges to consider the overall context of the case in determining that length, particularly when all respondents are initially provided a list of pro bono legal service providers in accordance with 8 C.F.R. § 1240.10(a)(2). For each additional request for a continuance, the Immigration Judge should inquire as to the respondent's diligence in securing representation and other relevant information to determine whether there is good cause for a further continuance and, if so, the length of any such continuance.

*B. Continuances for Attorney Preparation*

Although continuances to allow recently retained counsel to become familiar with a case prior to the scheduling of an individual merits hearing are common, subsequent requests for preparation time should be reviewed carefully, especially given that the time between a master calendar hearing and an individual merits hearing, which often exceeds one year in a non-detained case, already encompasses substantial time for preparation. It is also appropriate for Immigration Judges to consider the overall complexity of the case in determining the appropriateness and length of any continuance for attorney preparation time, as well as the number and length of prior continuances for preparation time. 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. "A practitioner's workload must be

controlled and managed so that each matter can be handled competently.” 8 C.F.R. § 1003.102(q)(1). Thus, for a practitioner who takes on more cases than he or she can responsibly and professionally handle, necessitating the need for multiple continuances across multiple cases, it may also be appropriate for an Immigration Judge to consider referral to EOIR disciplinary counsel for further action and possible sanction for a violation of 8 C.F.R. § 1003.102.

### *C. Continuances of Merits Hearings*

Of particular importance are requests to continue an individual merits hearing that has already been scheduled. Such hearings are typically scheduled far in advance, which provides ample opportunity for preparation time, and often involve interpreters or third-party witnesses whose schedules have been carefully accommodated. Moreover, slots for individual merits hearings cannot be easily filled by other cases, especially if the decision to continue the hearing is made close in time to the scheduled date. Although some continuances of individual merits hearings are unavoidable, 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. For a continuance request made well in advance of the scheduled date of the hearing, an Immigration Judge should adjudicate that request expeditiously and, if granted, should endeavor to fill that hearing slot with another individual merits hearing after providing sufficient notice. Further, because an individual merits hearing is typically scheduled far in advance and generally only after considering the availability of a respondent’s representative, a request for a continuance based on a scheduling conflict with a respondent’s representative that arose after the individual merits hearing has been calendared should be rare and should be considered very carefully. In sum, Immigration Judges generally should not continue individual merits hearings absent a genuine showing of good cause or a clear case law basis.

### *D. Continuances Requested By DHS*

Continuance requests made by a trial attorney of the U.S. Department of Homeland Security (DHS) should also be comparatively rare. For continuance requests made by DHS to allow time to complete background investigations and security checks or to allow time to obtain a

respondent's file, it is appropriate for the Immigration Judge to inquire on the record about the ongoing process for obtaining background and security checks or for obtaining the alien's file.

As OPPM 13-01 notes, the legal maxim that "justice delayed is justice denied" is a common refrain in the context of immigration proceedings. Although fundamental fairness and due process require that legal proceedings be postponed in appropriate circumstances, Immigration Judges must also be mindful of the effects of frequent and lengthy continuances, particularly when they are not supported by good cause, on the efficient administration of justice for both respondents and the public.

If you have any questions regarding this OPPM, please contact your Assistant Chief Immigration Judge.