



U.S. Department of Justice
Executive Office for Immigration Review

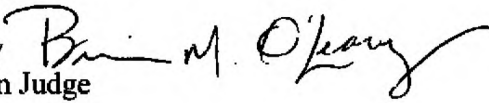
Office of the Chief Immigration Judge

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March 7, 2013

MEMORANDUM

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

FROM: Brian M. O'Leary 
Chief Immigration Judge

SUBJECT: Operating Policies and Procedures Memorandum 13-01:
Continuances and Administrative Closure

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I. Introduction

This Operating Policies and Procedures Memorandum (OPPM) supersedes and replaces OPPM 94-6. This OPPM provides additional background and guidance on continuances and administrative closure. Nothing in this OPPM is intended to replace independent research, the application of case law and regulations in individual cases, or the decisional independence of Immigration Judges as defined in 8 C.F.R. § 1003.10. In addition, decisions on motions for continuance and for administrative closure remain discretionary determinations within the province of the presiding judge, and nothing contained herein should be interpreted as mandating a particular outcome in any specific case.

The role of the Immigration Court, like any other tribunal, is to resolve disputes. Judges must ensure that our resources are applied to that purpose. Requests for continuances are routine and customary in litigation, including in immigration cases. Many such requests are for legitimate and/or unforeseen reasons. However, it is beyond dispute that multiple continuances result in delay in the individual case, and when viewed across the entire immigration court system, exacerbate our already crowded dockets. Multiple hearings in a case, especially at the

individual calendar, require administrative time and resources for the preparation of notices to the parties, often involve contract interpreters, and use docket time that could otherwise have been applied to case resolution.

Requests for administrative closure, while less frequent, should be granted in appropriate circumstances. Since our resources are limited, those resources must be applied to situations where there is an actual dispute between the parties. Administrative closure is a legitimate method of removing a case from the court's active docket, and preserving limited adjudicative resources. However, administrative closure cannot be used simply to remove a case from the court docket.

This OPPM is intended to provide guidance to assist Immigration Judges with fair and efficient docket management practices relating to these types of requests. Appropriate use of the standards governing continuances and administrative closure can help judges focus the courts' scarce resources in an efficient manner.

II. Continuances

The legal standard for continuances is contained in 8 C.F.R. § 1003.29. That section provides as follows: "The Immigration Judge may grant a motion for continuance for good cause shown." In *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983), the Board of Immigration Appeals (BIA) reviewed a request for a continuance in exclusion proceedings to obtain additional evidence. The BIA held that a continuance should be granted only upon a showing that the inability to proceed occurred despite a diligent good-faith effort to be ready to proceed and that any additional evidence sought is probative, noncumulative, and significantly favorable to the respondent. *Id.* at 356. Moreover, the BIA will not reverse an Immigration Judge's decision denying a motion for continuance unless the respondent establishes that the denial caused him or her actual prejudice and harm, and that the denial materially affected the outcome of the case. *Id.* at 356-57. Finally, the BIA noted that "[b]are, unsupported allegations are insufficient; the alien must specifically articulate 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. More recently, the BIA decided *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). In that case, the BIA set forth five factors to determine if good cause exists to continue a case involving an application for adjustment of status premised on a pending visa petition. They are "(1) the Department of Homeland Security'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 merits a favorable exercise of discretion; and (5) the reason for the continuance and any other relevant procedural factors." *Id.* at 790.

The circuit courts have also opined on continuances. *See, e.g., Cui v. Mukasey*, 538 F.3d 1289 (9th Cir. 2008). In general, case law provides that administrative efficiency is among the factors that may be considered when ruling on motions for continuance. *See, e.g.,* Ira J. Kurzban, *Immigration Law Sourcebook*, Chapter 3, section X.T.5.g (13th ed. 2012). Thus, while administrative efficiency cannot be the sole factor considered, it remains sound docket management to seriously consider administrative efficiency and the effect of multiple continuances on the efficient administration of justice. To that end, it remains the

general policy that, absent good cause shown, no more than two continuances should be granted by an Immigration Judge to an alien for the purpose of obtaining legal representation. If there are additional requests for continuances, it is appropriate for Immigration Judges to inquire as to efforts made by a respondent to secure representation and other relevant information to determine whether additional continuances are warranted. Immigration Judges will enter on the Immigration Judge Worksheet the circumstance(s) that resulted in the granting of more than two continuances to an alien for the purpose of obtaining legal representation.¹

In addition, continuance motions are filed by the Department of Homeland Security (DHS) to allow time to complete background investigations and security checks. DHS should be ready at a merits hearing with the results of these checks, but 8 C.F.R. § 1003.47 prevents an Immigration Judge from granting applications for relief without such checks being complete. Multiple requests for continuance for this purpose should be carefully considered by the Immigration Judge. Once again, it is appropriate for Immigration Judges to inquire as to the progress of ongoing background investigations and security checks. Immigration Judges will enter on the Immigration Judge Worksheet the circumstance(s) that resulted in the granting of more than two continuances to allow DHS time to complete background investigations and security checks.

Other requests for continuances are governed by similar considerations. The appropriate number of continuances that should be granted, and the length of those continuances, will be based on the specific factors presented in the case.

III. Administrative Closure

Administrative closure is a docketing tool that has existed for decades. It is considered a type of completion in our docketing system, and results in the case being closed. Either party may request to “reactivate” the case through the filing of a motion to recalendar.

Previously, BIA precedent was interpreted to require the government’s consent to the entry of an administrative closure order. *Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996). More recently, the BIA revisited the issue of administrative closure. See *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012). In that case, the BIA overruled *Gutierrez* and held that Immigration Judges may administratively close removal proceedings, even if a party opposes, if it is otherwise appropriate to do so under the circumstances. *Id.* at 694. As the BIA noted, “the decision to administratively close proceedings (as opposed to the decision to commence proceedings) involves an assessment of factors that are particularly relevant to the efficient management of resources of the Immigration Courts” (citations omitted). *Id.* at 695. In determining whether administrative closure is appropriate, the BIA opined as follows:

[I]t is appropriate for an Immigration Judge . . . to weigh all relevant factors presented in the case, including but not limited to: (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other

¹ See also OPPM 08-01 entitled *Guidelines for Facilitating Pro Bono Legal Services*, relating to continuances to accommodate pro bono matters.

action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is recalendared before the Immigration Judge

Id. at 696. The BIA specifically noted that the efficient use of court resources is a legitimate purpose of administrative closure.

Recently, the Second Circuit Court of Appeals issued an order entitled *In re Immigration Petitions for Review Pending in U.S. Court of Appeals for the Second Circuit*, 702 F.3d 160 (2d Cir. 2012). In light of a stipulated remand in which the DHS's Immigration and Customs Enforcement component determined in its sole and unreviewable discretion that a particular case was a low priority removal case and that, therefore, under the present circumstances, the petitioner would not be removed in the foreseeable future, the court announced a policy of tolling all immigration matters before the court to allow the alien an opportunity to move to dismiss and remand to the BIA. Specifically, the court provided as follows:

[There are] more than a thousand cases in our Court that are actually or potentially subject to a future decision by the Government as to whether it will or can remove petitioners if their petitions are denied. As we have previously observed, it is wasteful to commit judicial resources to immigration cases when circumstances suggest that, if the Government prevails, it is unlikely to promptly effect the petitioner's removal. This state of affairs undermines the Court's ability to allocate effectively its limited resources and determine whether adjudication of the petition will be merely an empty exercise tantamount to issuing an advisory opinion.

Id. at 160-61 (footnotes and internal quotations omitted).

The reasoning that undergirds the Second Circuit's opinion is equally applicable to the Immigration Court. With the foregoing in mind, and consistent with the entirety of the *Avetisyan* decision, Immigration Judges are strongly encouraged to utilize administrative closure in appropriate cases. Administrative closure under the standards set forth in *Avetisyan* provides judges with a powerful tool to help them manage their dockets, by helping to focus resources on those matters that are ripe for resolution. Given the large caseloads in our courts, judges should consider making full use of that authority.

Two specific scenarios where judges are encouraged to consider using the authority provided by *Avetisyan* are cases in which an underlying petition is involved (*see* factor #3 of *Avetisyan*) and cases in which the DHS and the respondent agree on the possibility of alternate case resolution. With regard to the former, taking up valuable judge and court time on a case where a visa petition may be pending at DHS makes little sense, and Immigration Judges should consider whether administrative closure in such instances is desirable. With regard to the latter, judges should focus on cases where there is an active dispute. A case where both parties support resolving the matter outside of immigration court proceedings is not one that generally should remain on the court's docket. Examples of such cases include those where DHS has decided to

exercise prosecutorial discretion (PD), and those involving deferred action for childhood arrivals (DACA).

IV. Conclusion

The legal maxim that “justice delayed is justice denied” is often repeated. However, it is a reality in any court system that fundamental fairness and due process require that legal proceedings be postponed in appropriate circumstances. This OPPM provides guidance on handling motions for continuance and motions for administrative closure. If you have any questions regarding this OPPM, please contact your Assistant Chief Immigration Judge.