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US IMMIGRATION & NATIONALITY LAW

MAKING THE LAW UP AS HE GOES: SESSIONS REFERS ANOTHER CASE TO HIMSELF, THIS TIME ON MOTIONS FOR CONTINUANCE

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Attorney General Jeff Sessions has yet again referred an immigration case to himself for review in *Matter of L-A-B-R-* et al, 27 I&N Dec. 245 (AG 2018). This time, AG Sessions asks:

An Immigration Judge is authorized to "grant a motion for continuance for good cause shown." 8 C.F.R. § 1003.29 (2017); see also id. § 1240.6 (2017) (authorizing an Immigration Judge to "grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application"). In these cases, Immigration Judges granted continuances to provide time for respondents to seek adjudications of collateral matters from other authorities. Under what circumstances does "good cause" exist for an Immigration Judge to grant a continuance for a collateral matter to be adjudicated?

As noted, 8 C.F.R. § 1003.29 empowers Immigration Judges (IJs) to grant motions for continuance "for good caution shown." 8 C.F.R. § 1240.6, by contrast, allows IJs to grant reasonable adjournments either at their discretion, or "for good cause" upon request by one of the parties. Typically, these motions are filed by either the Respondent or the Department of Homeland Security (DHS) for a number of reasons. For example, the Respondent may motion for a continuance when they are awaiting adjudication of a case outside of Immigration Court, such as a pending I-130 or I-140 petition with USCIS or even an outside criminal or family law case that has bearing on the removal proceedings. Similarly, the government attorney for DHS may motion for a continuance when the attorney has an unexpected emergency, time conflict with the hearing date, or simply needs more time to prepare.

The BIA has sensibly addressed motions for continuance in several cases authorizing IJs to grant them when there is when there was a pending immigrant petition with the USCIS. In *Matter of Hashimi*, 24 I&N Dec. 785 (BIA 2009), for example, the IJ granted the respondent four continuances on his removal proceedings to allow for USCIS to adjudicate his family-based immigrant visa petition. The IJ denied the respondent's fifth motion to continue because he was expected to meet the Department of Justice's "case completion goals," which required completing cases within a reasonable period of time. The Third Circuit determined that the IJ's denial based on case-completion goals was arbitrary and an abuse of discretion. On remand, the BIA discussed relevant factors when "determining whether respondent should be allowed to continue ongoing removal proceedings pending the final adjudication of an I-130" filed concurrently with an adjustment of status application, given the conflicting needs of finality of removal proceedings and allowing the opportunity for respondent to apply for relief. Citing to *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978), the BIA stated that although the IJ should exercise favorable discretion when there is prima facie eligibility for a visa petition, this does not require that a continuance be granted in every case. The BIA held that in determining whether to continue proceedings where there is a pending visa petition, the IJ should consider a variety of factors, including, but not limited to: (1) the DHS response to the motion; (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 other procedural factors. The focus is the apparent ultimate likelihood of success on the adjustment application. The IJ needs some basis to examine the viability of the underlying visa petition, the respondent's statutory eligibility for adjustment, and the merits of the adjustment application. This may require the respondent to submit evidence, such as the visa petition, the adjustment application, any prior visa petitions denials, and any other supporting documentation. The BIA sustained the respondent's appeal and remanded the record to the Immigration Judge to consider the factors and determine whether a continuance was warranted.

In *Matter of Rajah,* 25 I&N Dec. 127 (BIA 2009), the respondent was placed in removal proceedings after his employer filed for labor certification on his behalf. Over the period of 18 months, the respondent was granted 10

continuances for a variety of reasons, including to obtain counsel and prepare the case and to determine the status of the labor certification. The IJ denied the final motion to continue based on the pending labor certification because he "concluded that the respondent had had 'sufficient time' to obtain an approved labor certification." While the matter was pending before the Second Circuit, the labor certification was approved but then later expired due to the respondent's employer not filing a visa petition. On remand, the issue before the BIA was to provide a "reasoned set of standards explicating when continuances for labor certification are within the 'range of permissible decisions' available to an , and when they are not." *Id.* at 129. The BIA held that as a general rule in the employment context, discretion in granting a motion to continue ongoing removal proceedings should be favorably exercised where there is a prima facie approvable visa petition and adjustment application. Furthermore, in determining whether good cause exists for a continuance in removal proceedings to await the adjudication of a pending employment-based visa petition or labor certification, an "Immigration Judge should first determine the alien's place in the adjustment of status process and then consider and balance" the factors identified in *Matter of Hashmi* and any other relevant considerations. For example, a labor certification no longer being valid, and other similar types of evidence, might affect the case on remand or in the context of a motion to reopen. Furthermore, the BIA held that the pendency of a labor certification generally is not sufficient to grant a continuance in the absence of additional persuasive factors. Here, the BIA determined that remand was not warranted based on the new evidence that the labor certification, which was approved, had expired and there was no pending visa petition. While the respondent was a grandfathered alien who could have potentially been eligible for INA § 245(i) treatment, because there was no pending labor certification, the respondent could not establish prima facie eligibility for adjustment of status under INA § 245(i)(2)(A)-(B). The appeal was dismissed.

In *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), an IJ repeatedly continued a removal hearing pending the filing and adjudication of a family-based immigrant visa petition. During the final hearing, despite DHS's opposition, the IJ granted the respondent's motion to administrative closure, and the DHS filed an interlocutory appeal. The issue here was whether an IJ or the BIA has the authority to administratively close a case when one of the parties to the

proceeding opposes. The BIA determined that there was fault in the general rule stated in *Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996) that "a case may not be administratively closed if opposed by either party." The BIA, in overruling *Matter of Gutierrez*, held that affording absolute deference to a party's objection is improper and that the IJ or the BIA, in the exercise of independent judgement and discretion, has the authority to administratively close a case, regardless of party opposition, if it is otherwise appropriate under the circumstances. The BIA further held that when evaluating a request for administrative closure, the IJ should 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 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 IJ or the appeal is reinstated before the Board. In Avetisyan's case, the visa petition had been pending for a long time through no apparent fault of the respondent or her husband, and there was no obvious impediment to the approval of the visa petition or ability of the respondent to successfully apply for adjustment of status. The BIA determined that the circumstances supported the exercise of the IJ's authority to administratively close the case.

In *Matter of Castro-Tum*, 27 I&N Dec. 187 (A.G. 2018), AG Sessions referred *Avetisyan* to himself questioning whether there was any authority for IJs or the BIA to administratively close cases. Even if AG Sessions was able to overrule *Ayetisyan* and deny IJs the ability to administratively close cases, it was hoped that their ability to grant continuances would not be undermined. After all, there is explicit authority pursuant to 8 C.F.R. § 1003.29 for an IJ to grant a continuance for good cause. Depriving an IJ that ability, especially when there is an application pending that would allow the respondent to obtain permanent residency and moot the removal proceeding, would lead to a complete and total evisceration of *Ayetisyan*. Sessions can only achieve this if the basis to continue proceedings under *Hashmi* and *Rajah* are also overturned.

It is clear AG Session seeks to discourage motions for continuance as a way to maximize the deportations of noncitizens even if they have a meritorious

pending applications for permanent residency that would otherwise thwart their deportations. In the Department of Justice's *Backgrounder on EOIR Strategic Caseload Reduction Plan*, for example, Sessions blames IJs' low productivity levels and rising backlogs on "representatives of illegal aliens have purposely used tactics designed to delay the adjudication of their clients' cases" such as motions for continuance. Moreover, in the July 2017 EOIR *Operating Policies and Procedures Memorandum 17-01: Continuances*, IJs were urged to limit the grant of continuances, stating that "the delays caused by granting multiple and lengthy continuances, when multiplied across the entire immigration court system, exacerbate already crowded immigration dockets."

But limiting continuances in the name of efficiency is a smokescreen. Discouraging motions for continuances will not make delays go away in the immigration court system. Respondents will appeal the denial of continuances into the courts of appeal of each circuit, which will result in remands back to the immigration courts in addition to clogging the circuits. This used to be the case prior to *Hashmi* and *Rajah*, where remands from the circuit court resulted in the further clogging up of immigration dockets. Moreover, if the USCIS processes cases in a tardy manner, and respondents in removal are unable to legitimately seek a continuance, there will be an increasing number of mandamus lawsuits against the agency to compel USCIS to process the case more expeditiously. The BIA's reasoning in *Hashmi*, *Rajah* and *Avetisyan* was based on common sense and fairness. If there was a reasonable basis for a respondents in removal proceeding to demonstrate that they would ultimately get permanent residency but for a delay in processing of the visa petition or the priority date not being current, why deprive respondents of permanent residency by deporting them? The federal courts understood this too, and will continue to do so if we do so if respondents cannot get continuances for good cause in removal proceedings.

Thus, in *Subhan v. Ashcroft*, 383 F.3d 591 (2004), the Seventh Circuit found that an IJ had abused his discretion when the ground for the continuance was a pending labor certification. The Court noted that the IJ's denial was based simply on the fact that the labor authorities had not yet acted rather than issues particularized to the petitioner's circumstances such as the lack of bona fides of the labor certification or other grounds pertaining to national security or criminal issues. In another Seventh Circuit decision, *Ahmed v. Gonzales*, 467 F.3d 669 (2006), the court went even further than *Subhan* in holding that the IJ's

denial of a continuance ignored the fact that the petitioner was the "grandfathered" beneficiary under INA 245(i) of an I-130 petition even though the petitioner had yet to have a labor certification filed on his behalf. Of course, some courts upheld an IJ's decision to deny continuance if the respondent's underlying applications were not meritorious, see e.g. *Morgan v. Gonzales,* 445 F.3d 549 (2006), but the frameworks established in *Hashmi* and *Rajah* for providing for a continuance based on the merits of the underlying applications for permanent residence are sound and should not be upset. They provide IJs with discretion to grant continuances, and at the same time, authorize IJs to deny continuances when the pending request for permanent residency lacks merit.

There is no need for Sessions to undermine a framework that is working, and also less need to further erode the independence of IJs to judiciously exercise discretion based on their own sense of fairness and efficiency. Decisions to not grant continuances of IJs have been upheld by federal courts post-*Hashmi* and *Rajah* when the priority date was a long way away or when an I-601 waiver supporting an adjustment was denied and its appeal was pending. *See e.g. Luevano v. Holder,* 660 F.3d 1207 (2011); *Kwak v. Holder*, 607 F.3d 1140 (2010). On the other hand, IJs' decisions that did not follow the *Hashmi* and *Rajah* factors have been overturned. *See e.g., Ferrera v. AG,* No. 11-14074 (11th Cir. 2013); *Simon v. Holder*, 654 F.3d 440 (2011). This is clear evidence that the system is working and does not need Sessions' interference. *Avetisyan* along with *Hashmi* and *Rajah* also view the immigration system as a whole with all its warts and imperfections. These decisions take into account the inefficiencies resulting in delays of approving I-130s and I-140s, along with retrogression in priority dates. If the immigration system worked more efficiently, there would be less need to place people in removal proceedings. But if people are placed in removal proceedings as a result of these inefficiencies, why not continue their proceedings, or even temporarily close their proceedings, until such time that they can obtain the benefit and terminate proceedings – which should not have been started in the first place? If Sessions is unable to see it this way when he reconsiders BIA decisions to undermine *Avetisyan*, *Hashmi* and *Rajah*, he is not doing so to create efficiency but to further his animus and hostility against immigrants.

(The authors thank Eleyteria Diakopoulous for her assistance in providing research for this article. Ms. Diakopoulous is a student at Brooklyn Law School and is

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