



Immigration Law Advisor

August 2008 A Monthly Legal Publication of the Executive Office for Immigration Review Vol 2. No.8

The Immigration Law Advisor is a professional monthly newsletter produced by the Executive Office for Immigration Review. The purpose of the publication is to disseminate judicial, administrative, regulatory, and legislative developments in immigration law pertinent to the mission of the Immigration Courts and Board of Immigration Appeals. It is intended only to be an educational resource for the use of employees of the Executive Office for Immigration Review.

In this issue...

Page 1: Feature Article:

Second Chances: Motions for Continuances under Matters of Garcia, Velarde, and Kotte

Page 6: Federal Court Activity

Page 9: BIA Precedent Decisions

Page 10: Regulatory Update

Page 12: ADDENDUM

Second Chances: Motions for Continuances under Matters of Garcia, Velarde, and Kotte

by Teresa Donovan and Anne Greer

Introduction

Immigration Judges and the Board of Immigration Appeals frequently face the issue whether to continue or reopen a matter while the Department of Homeland Security ("DHS") adjudicates a family- or employment-based visa petition. A significant body of case law has emerged from the United States Courts of Appeals following the Board's publication of *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978), and *Matter of Kotte*, 16 I&N Dec. 449 (BIA 1978), which address continuance and reopening requests in the family and employment contexts, respectively. The circuit court case law contains patterns that form a useful framework of analysis for resolving this issue. These patterns also apply to the narrower category of family-based adjustments under *Matter of Velarde-Pacheo*, 23 I&N Dec. 253 (BIA 2002), regarding reopening for marriages entered into after the commencement of removal proceedings.

This article first outlines the procedural steps in procuring adjustment of status in the family and employment contexts. Next, the article examines governing circuit court law and identifies relevant factors to be balanced and articulated in deciding whether to allow additional time for the DHS adjudication, or, alternatively, to proceed with the case, similar to other discretionary analyses. In adjudicating motions for continuances or reopening to allow respondents time to obtain a family or employment visa for adjustment, adjudicators are well served to first identify the stage attained in the adjustment application process and then address all relevant concerns in their decisions.¹ Because of the significant interest at stake--the chance to attain lawful permanent resident status--circuit courts pay close attention to these cases.

Procedural Steps in Family-Based and Employment-Based Adjustment Applications

The family-based visa petition underlying an adjustment application--A two-step process underlies the family-based adjustment application. First, the United States citizen ("USC") or lawful permanent resident ("LPR") petitioner files a Petition for Alien Relative ("I-130") on behalf of his or her qualifying family member ("beneficiary") with the DHS. The petitioner must establish his or her own USC or LPR status and the bona fides of the claimed relationship to the beneficiary and must show that the family relationship meets the statutory requirements. The petitioner must also provide a binding affidavit of support as specified under section 213A of the Immigration and Nationality Act, 8 U.S.C. § 1183a. A pending or approved I-130 does not entitle the beneficiary to work or reside in the United States.

Once the I-130 is approved and an immigrant visa is immediately available, the alien may apply for adjustment of status under sections 245(a) or (i) of the Act, 8 U.S.C. §§1255(a) or (i). Because there is no limit on the number of visas issued to immediate relatives (parents, spouses, and children of USCs), as defined in section 201(b)(2)(A)(i) of the Act, 8 U.S.C. § 1151(b)(2)(A)(i), they can always establish visa availability. However, there is an annual limit on the number of visas issued to aliens in the preference categories under section 203(a) of the Act, 8 U.S.C. § 1153(a). The Department of State ("DOS") tracks visa availability in its monthly Visa Bulletin. A visa is immediately available when the alien's *priority date* is *earlier* than the specified allocation cut-off number shown on the current Visa Bulletin. *See* 8 C.F.R. § 1245.1(g)(1). The alien's *priority date* is fixed when the I-130 is *filed* with the DHS. *See* 8 C.F.R. § 1245.1(g)(2). A change in the alien's age or marital status and the petitioner's naturalization can automatically convert an alien's preference classification as specified in a valid approved I-130, although the priority date remains the same. *See* 8 C.F.R. § 204.2(i).

An alien may file the I-130 and the Application to Register Permanent Residence or Adjust Status ("I-485"), concurrently if an immigrant visa is immediately available at the time of filing the application. *See* 8 C.F.R. § 1245.2(a)(2)(B). The I-485 is filed with the DHS, but if an alien is in removal proceedings, it is filed with the Immigration Judge. *See* 8 C.F.R. § 1245.2(a).

The employment-based visa petition underlying an adjustment application--A three-step process underlies the employment-based adjustment application. The scope of this article is limited to the two employment-based immigrant visa categories set forth at section 203(b)(2) of the Act for aliens who are professionals with advanced degrees or who are of exceptional ability ("EB-2") and at section 203(b)(3)(A)(i) for skilled workers, (A)(ii) for professionals, and (A)(iii) for other workers ("EB-3").² An alien seeking an immigrant visa as an EB-2 or EB-3 worker must have an employer who has extended an offer of employment and is willing to file an Application for Permanent Employment Certification (Form ETA 9098, formerly ETA-750) ("labor certification") with the Department of Labor ("DOL"), and an Immigrant Petition for Alien Worker ("I-140") with the DHS, on the alien's behalf.

An alien's employer or prospective employer initiates the immigrant visa process by filing a labor certification with the DOL. The 10-page labor certification application details the job offered, the minimum job requirements, the offered wage, the recruitment information, and the alien's education and work experience. The alien must possess the minimum job requirements at the time the labor certification is *filed*. The education and experience required for the position (set forth at Part H of the application) determines the alien's immigrant visa classification (EB-2 or EB-3). For example, an alien seeking a labor certification for a job requiring 2 years of training or experience will be classified as an EB-3 skilled worker under section 203(b)(3)(A)(i) of the Act.

The DOL will only approve a labor certification when a test of the labor market shows that there are not sufficient United States workers available for the job and that the employment of the alien will not adversely affect similarly situated United States workers. *See* section 212(a)(5) of the Act, 8 U.S.C. §1182(a)(5). Therefore, before filing the labor certification, an employer is required to conduct a recruitment campaign to test the local labor market. If the employer finds a minimally qualified United States worker who is willing to accept the job offer, the labor certification cannot be filed. When an employer files the labor certification he attests, *inter alia*, that he has advertised the job opportunity in compliance with DOL regulations, that the job has been and is open to any United

States worker, and that any United States workers who applied for the job were rejected for lawful job-related reasons. Although the employer does not submit evidence of his advertising and recruitment campaign to the DOL, he is required to retain such documentation in the event of a DOL audit. The DOL conducts random audits of employers' labor certifications for quality control purposes. A pending or approved labor certification does not entitle the alien to live or work in the United States.

Last year, the DOL issued a final rule, effective July 16, 2007, making two significant changes to the labor certification process. *See* 71 Fed. Reg. 27,904 (May 17, 2007), (codified at 20 C.F.R. §§ 30(b), 656.11). Historically, employers could substitute the alien named in the labor certification with another alien while the labor certification or I-140 was pending. The 2007 rule prohibits employers from substituting alien workers. Also, labor certifications now have an expiration date. Employers have 180 days from the date a labor certification is approved to file the corresponding I-140.

Once the labor certification is approved, the employer (petitioner) files the I-140 with the DHS on the alien's (beneficiary's) behalf. The alien's visa classification (EB-2 or EB-3) is specified on Part 2 of the I-140. The petitioner must provide documentation establishing that the employment relationship meets the statutory requirements. The petitioner must submit the approved labor certification as well as evidence showing that at the time the labor certification was filed he had the ability to pay the offered wage and the alien possessed the required education and experience for the job offered. *See* 8 C.F.R. §§ 204.5(a), (c), (g), (k), (l); *see also Hoosier Care v. Chertoff*, 482 F.3d 987 (7th Cir. 2007)(clarifying the division of responsibilities between DHS and DOL in adjudicating I-140s and labor certifications). A pending or approved I-140 does not entitle the alien to live or work in the United States.

Third, once the I-140 is approved and a visa is immediately available, the alien can apply for adjustment of status. As with the family-based immigrants, an I-140 may be filed concurrently with the I-485 if an immigrant visa number is immediately available at the time of filing the application. *See* 8 C.F.R. § 1245.2(a)(2)(B). Concurrent filing has not always been available to aliens in the employment preference categories.³

If the priority date is not current, then the I-140 is filed as a stand-alone petition (the I-485 can then be filed as soon as the alien's priority date has been reached, even if the I-140 is still pending). Visa availability is determined in the same manner as the family-based cases. All employment preference categories are subject to numerical restrictions. For EB-2 and EB-3 workers, the priority date is fixed when the labor certification is *filed* with the DOL. *See* 8 C.F.R. §§ 204.1(c), 204.5(d). An alien who is the beneficiary of more than one approved I-140 is entitled to the earliest priority date. *See* 8 C.F.R. § 204.5(e). As with the family-based immigrants, the I-485 is filed with the DHS, unless the alien is in removal proceedings.

Adjustment of status under section 245 of the Act--For purposes of this article we consider the core adjustment of status provision, section 245 of the Act. Adjustment of status entitles an alien to work and reside in the United States because it accords lawful permanent resident status. In removal proceedings, an Immigration Judge may, in the exercise of administrative discretion, grant an alien's adjustment application under section 245(a) of the Act, if an alien establishes that s/he: (1) has been inspected and admitted or paroled into the United States; (2) makes an application; (3) is eligible to receive an immigrant visa that is immediately available at the time the application is filed; (4) is not statutorily barred; and (5) is admissible to the United States.

Section 245(i) of the Act was originally enacted as a 3-year provision (effective October 1, 1994, to September 30, 1997). After years of wrestling with whether to permanently extend section 245(i), Congress enacted a grandfather clause to allow certain aliens to continue to benefit from the provision. A grandfather clause is defined as "a statutory or regulatory clause that exempts a class of persons . . . because of circumstances existing before the new rule or regulation takes effect." *Black's Law Dictionary* 706 (7th ed. 1999).

Pursuant to section 245(i) of the Act, an alien (including a section 203(d) derivative beneficiary) who is (1) ineligible for adjustment under section 245(a) of the Act because s/he entered without inspection, or (2) disqualified under section 245(c) of the Act, may nevertheless adjust status [i.e., become a grandfathered alien] if s/he is the beneficiary of a visa petition or labor certification that was filed on or before April 30, 2001. To

be eligible for grandfather status, the alien's pre-April 30, 2001, filing must have been *approvable when filed* (that is, properly filed, meritorious in fact, and nonfrivolous). *See Matter of Jara Riero*, 24 I&N Dec. 267 (BIA 2007) (analyzing the term "approvable when filed"); 8 C.F.R. § 1245.10(a)(3). For visa petitions or labor certifications filed after January 14, 1998, and before April 30, 2001, the alien must have been physically present in the United States on December 21, 2000. *See* section 245(i)(1)(C) of the Act.

Possessing a pre-April 30, 2001, filing alone does not make an alien eligible for section 245(i) adjustment. Like other adjustment applicants, the alien must be eligible to receive an immigrant visa, and an immigrant visa must be immediately available. *See* sections 245(i)(2)(A), (B) of the Act; *Zafar v. U.S. Att'y Gen.*, 461 F.3d 1357, 1363 (11th Cir. 2006) (discussing the relationship between possessing a pre-April 30, 2001, filing and adjustment eligibility). The Seventh Circuit described grandfathered aliens as being in "limbo," because they are "*entitled ... to apply* for adjustment," but only when an immigrant visa becomes available. *Ahmed v. Gonzales*, 465 F.3d 806, 808 (7th Cir. 2006). A grandfathered alien can use a pre-April 30, 2001, filing to qualify for section 245(i) treatment and another visa petition or labor certification to establish visa eligibility and availability. *See, e.g., Matter of Jara Riero, supra.*

Sometimes visa numbers regress to such an extent that an immigrant visa is available when an alien filed the I-485, but not when the DHS adjudicates the I-485. This situation highlights the difference between visa availability and the allocation of an immigrant visa. *See Hernandez v. Ashcroft*, 345 F.3d 824, 844 n.21 (9th Cir. 2003). Pursuant to INS Operations Instructions ("OI") 245.4(a)(6), "applications for adjustment of status filed with visa availability, which cannot be approved solely because a visa number is not available at the time of processing, should be held in abeyance pending the allocation of a visa number." *Matter of Torres*, 19 I&N Dec. 371, 376 n.3 (BIA 1986). The Board gave effect to this OI in the context of deportation proceedings and later in the context of removal proceedings. *See Merchant v. U.S. Att'y Gen.*, 461 F.3d 1375, 1379 n.7 (11th Cir. 2006). *Matter of Briones*, 24 I&N Dec. 355, 372 n.3 (BIA 2007) *Matter of Ho*, 15 I&N Dec. 692 (BIA 1976). In *Matter of Ko*, 15 I&N Dec. 695 (BIA 1976), the Board found that the respondent's adjustment application could not be held in abeyance pursuant to OI 245.4(a)(6),

because his ineligibility for adjustment of status was not *solely* based on the lack of a visa number.

In *Masih v. Mukasey*, ___F.3d___, 2008 WL 2747462 (5th Cir. July 16, 2008), the Fifth Circuit addressed a respondent's adjustment eligibility where the visa numbers had regressed. In that case, the Board granted the respondent's motion to remand based on his approved I-140 and pending I-485, which had been filed when a visa was immediately available. However, by the time the case was back before the Immigration Judge, the EB-3 visas had regressed and a visa was no longer available. The Immigration Judge denied the respondent's request for a continuance or to hold the case in abeyance because an immigrant visa was no longer available. The Board affirmed the Immigration Judge's decision. The Fifth Circuit remanded the case finding that both the Immigration Judge and the Board had failed to consider the application of OI 245.4(a)(6) and the holding in *Matter of Ho, supra.*

In addition to establishing statutory eligibility for adjustment of status, the alien must demonstrate that a favorable exercise of discretion is warranted. *See Matter of Blas*, 15 I&N Dec. 626 (BIA 1974; A.G. 1976); *Matter of Arai*, 13 I&N Dec. 494 (BIA 1974). Factors considered in the exercise of discretion include but are not limited to: the existence of family ties in the United States; the length of residence in the United States; the hardship of traveling abroad; and a preconceived intent to immigrate at the time of entering as a nonimmigrant. *See Matter of Ibrahim*, 18 I&N Dec. 55 (BIA 1981) (absent other adverse factors, an adjustment application should generally be granted in the exercise of discretion, notwithstanding an alien's entry as a nonimmigrant with a preconceived intent to remain).

Governing Board Precedent Decisions in *Garcia*, *Velarde*, and *Kotte*

Matter of Garcia--In *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978), provides for the granting of a continuance or a motion to reopen pending adjudication of a prima facie approvable visa petition filed simultaneously with an adjustment application under then 8 C.F.R. § 245.2(a)(2) (currently codified under 8 C.F.R. §§ 245.2(a)(2)(B) and 1245.2(a)(2)(B)). In *Garcia*, the respondent requested reopening of his deportation proceedings pending INS adjudication of a visa petition filed by his USC wife simultaneously with the respondent's application to

adjust status. *Garcia* aimed to allow a respondent, as the likely beneficiary of a visa petition conferring immediate eligibility for adjustment of status, an opportunity to await the outcome of the visa petition decision. *Garcia* focused on the likelihood of success on the merits of the visa petition, which would result in “a substantial claim to relief from deportation under section 245 of the Act.” *Garcia*, 16 I&N Dec. at 656.

The circuit courts reacted favorably to *Garcia*, supporting its presumption that discretion be favorably exercised in appropriate cases to await resolution of the ancillary visa petition. Nonetheless, the circuit courts also recognize that *Garcia* “did not create an inflexible rule, requiring an IJ to continue deportation proceedings, regardless of the merits of the pending visa petition.” *Onyeme v. INS*, 146 F.3d 227, 233 (4th Cir. 1998).

Matter of Velarde--Subsequent to *Garcia*, the law changed to render aliens, who married after the initiation of removal proceedings, presumptively ineligible for adjustment of status. The statutory change responded to concern about fraudulent marriages designed to avoid deportation. The Board modified *Garcia* in *Matter of Arthur*, 20 I&N Dec. 475 (BIA 1992), to preclude the granting of motions to reopen based upon pending visa petitions predicated on marriages entered into after the commencement of immigration proceedings. In *Matter of Velarde-Pacheo*, 23 I&N Dec. 253 (BIA 2003), the Board modified *Arthur* to allow granting a motion to reopen in these circumstances when: 1) the motion is timely filed; 2) the motion is not number barred; 3) the motion is not otherwise procedurally barred, including under *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996) (barring aliens who do not meet voluntary departure deadline from certain forms of relief absent exceptional circumstances); 4) clear and convincing evidence supports the bona fides of the marriage; and 5) the Government does not oppose the motion.

In *Velarde*, the respondent was ordered removed in 1997. The respondent married a USC in 1999, and a child was born of the marriage. The Board dismissed his appeal in 2001. He filed a motion to reopen based on the pending immediate relative visa petition and simultaneously filed an application to adjust status under section 245(i) of the Act. The respondent presented supporting documentation evidencing the bona fides of his marriage with his motion to reopen. The Board granted the motion which met the five listed criteria. As

with *Garcia*, the circuit courts have reacted favorably to the Board’s analytical framework in *Velarde*. See, e.g., *Malhi v. INS*, 336 F.3d 989 (3d Cir. 2005).

Matter of Kotte--In *Matter of Kotte*, 16 I&N Dec. 449 (BIA 1978), which was decided prior to *Garcia*, the respondent appealed an Immigration Judge’s denial of his second continuance request based on a pending I-140, filed prior to the initiation of deportation proceedings. He argued that due to newly amended regulations, he was *entitled* to a continuance until his pending visa petition was adjudicated.⁴ The Board disagreed and found nothing in the law or regulations that required an Immigration Judge to continue proceedings on the basis of a *pending* I-140. In unpublished decisions the Board regularly cites to *Kotte* for the proposition that an alien is not *entitled* to a continuance or reopening based on a pending I-140.

The Board clarified its *Kotte* decision in *Garcia*. The Board explained that implicit in its *Kotte* decision “is the corollary proposition that an immigration judge may, in his discretion, grant a continuance or reopen a deportation hearing pending final adjudication of the [visa] petition.” *Garcia*, 16 I&N Dec. at 656. The Board held that a continuance or reopening should not be denied *solely* because the underlying visa petition is not approved. In both these cases the Board was interpreting newly promulgated regulations permitting, inter alia, the immigrant visa petition and the adjustment application to be filed concurrently. Thus, *Kotte* may also be cited for the proposition that a continuance or reopening can be premised on a *pending* I-140.

Kotte received little attention from the circuit courts perhaps because its holding was subsumed in *Garcia*. In *Merchant v. U.S. Att’y Gen.*, *supra*, at 1379 n.5 (11th Cir. 2006), the Eleventh Circuit, apparently the only circuit court to cite *Kotte*, observed that *Kotte* is “of doubtful relevance” because it predates the enactment of section 245(i) and the DHS now permits concurrent filing. However, neither the enactment of section 245(i) nor concurrent filing cast doubt on *Kotte*. Section 245(a) of the Act, in effect at the time *Kotte* was issued, contained the very same language as sections 245(i)(2)(A) and (B) of the Act, which were analyzed by the court in *Merchant*. Concurrent filing was available to *Kotte*, as it was to *Merchant*. Granted, motions to reopen are now subject to time and number limitations.

continued on page 16

FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR JULY 2008

By John Guendelsberger

The United States Courts of Appeals issued 412 decisions in July 2008 in cases appealed from the Board. The courts affirmed the Board in 358 cases and reversed or remanded in 54 for an overall reversal rate of 13.1% compared to last month's 15.6%. There were no reversals from the First and Fourth Circuits. We saw our first reversal of the year from the Eighth Circuit.

The chart below provides the results from each circuit for July 2008 based on electronic database reports of published and unpublished decisions.

| Circuit | Total | Affirmed | Reversed | % |
|---------|-------|----------|----------|------|
| 1st | 12 | 12 | 0 | 0.0 |
| 2nd | 66 | 61 | 5 | 7.6 |
| 3rd | 35 | 32 | 3 | 8.6 |
| 4th | 16 | 16 | 0 | 0.0 |
| 5th | 12 | 11 | 1 | 8.3 |
| 6th | 8 | 7 | 1 | 12.5 |
| 7th | 16 | 13 | 3 | 18.8 |
| 8th | 12 | 11 | 1 | 8.3 |
| 9th | 209 | 172 | 37 | 17.7 |
| 10th | 6 | 4 | 2 | 33.3 |
| 11th | 20 | 19 | 1 | 5.0 |
| All: | 412 | 358 | 54 | 13.1 |

The Ninth Circuit issued over half of the total decisions this month and accounted for nearly 70% of the reversals or remands. Second Circuit decisions were well below the usual number with few reversals.

The Ninth Circuit reversed or remanded in 37 of its 209 decisions (17.7%). Reversals in asylum cases involved adverse credibility (4 cases), level of harm for past persecution (3), nexus (3), relocation (1), and a 1994 asylum claim rejected as untimely filed. Two Indonesian cases were remanded to further address "disfavored group" arguments made under *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004). Several remands involved the physical presence requirement for cancellation of removal

including issues of imputation of a parent's physical presence to a child and break in presence under *Tapia*. In a number of cases involving criminal grounds of removal the court found fault with application of the modified categorical approach to offenses found to be aggravated felonies or crimes of moral turpitude. The court reversed a Board denial of a request to reissue a decision and also reversed denials of motions to reopen based on ineffective assistance of counsel and changed country conditions.

The Second Circuit reversed in three asylum cases finding a flawed credibility determination in one, insufficient analysis of the particular social group claim in another, and insufficient reasoning to support the finding of changed country conditions to rebut the presumption of a well-founded fear in the third. It reversed a denial of a motion to reopen in an in absentia proceeding involving a minor and remanded to further address due diligence in a motion based on ineffective assistance of counsel.

The chart below shows the combined results for the first 7 months of 2008 arranged by circuit from highest to lowest rate of reversal.

| Circuit | Total | Affirmed | Reversed | % |
|---------|-------|----------|----------|------|
| 7th | 66 | 52 | 14 | 21.2 |
| 9th | 1120 | 904 | 216 | 19.3 |
| 2nd | 681 | 582 | 99 | 14.5 |
| 6th | 58 | 50 | 8 | 13.8 |
| 3rd | 314 | 289 | 25 | 8.0 |
| 10th | 38 | 35 | 3 | 7.9 |
| 11th | 126 | 117 | 9 | 7.1 |
| 5th | 81 | 78 | 3 | 3.7 |
| 4th | 85 | 83 | 2 | 2.4 |
| 8th | 49 | 48 | 1 | 2.0 |
| 1st | 56 | 55 | 1 | 1.8 |
| All: | 2674 | 2293 | 381 | 14.2 |

By way of comparison, at this point in calendar year 2007 there were 485 reversals or remands out of 3086 total decisions (15.7%). The ordering of the circuits by rate of reversal is about the same as in 2007 with the exception of the Eighth Circuit which ranked second at this point in 2007 with reversals in 13 of 54 cases (24%) compared to this year in which it has reversed in only one of its 49 cases (2 %).

John Guendelsberger is Senior Counsel to the Board Chairman, and is serving as a Temporary Board Member.

RECENT COURT DECISIONS

Second Circuit

Jin v. Mukasey, __F. 3d__, 2008 WL 3540347 (2d Cir. Aug. 15, 2008): The Second Circuit dismissed the appeals of four petitioners from the People's Republic of China who sought to file successive asylum applications based on U.S.-born children. All four petitioners filed their motions more than 90 days after receiving final orders of removal. The court granted *Chevron* deference to the Board's decision in *Matter of C-W-L-*, which held that a successive asylum application may only be filed as part of a motion to reopen pursuant to the requirements of 8 C.F.R. § 1003.2(c)(3)(ii). Such regulation requires a showing of changed circumstances in the asylum applicant's country of nationality, and cannot be based solely on the changed personal circumstances cited by the instant petitioners.

Third Circuit

Wong v. Att'y Gen., __F.3d__, 2008 WL 3852363 (3d Cir. Aug. 20, 2008): The petitioner, a Catholic Indonesian of Chinese descent, sought review of the Board's decision denying her application for asylum, withholding of removal, and relief under the CAT. The alien argued that the Board failed to consider the entire record in assessing the objective basis for her fear of persecution, applied the incorrect legal standard in analyzing her claim, erred in introducing the concept of relocation within Indonesia, and misinterpreted her argument regarding her husband's asylee status. While the record did indicate that Chinese Christians in Indonesia were victims of harassment and intimidation, the appellate court could not say that they were subject to a pattern or practice of persecution. Although 2003 and 2004 U.S. State Department reports documented ongoing harassment of Chinese Indonesians and isolated incidents of anti-Christian violence, the reports did not indicate that such violence was widespread or systemic. In fact, discrimination and harassment of ethnic

Chinese Indonesians had declined and the Indonesian government had taken steps to promote religious, racial, and ethnic tolerance and to reduce interreligious violence. The alien's remaining arguments that the Board incorrectly introduced the concept of relocation within Indonesia and failed to consider the importance of her husband's grant of asylum were also unpersuasive.

Fourth Circuit

Anim v. Mukasey, __F. 3d__, 2008 WL 3272047 (4th Cir. Aug. 11, 2008): The Fourth Circuit granted the respondent's appeal and vacated the Board's affirmance of an Immigration Judge's denial of asylum from Cameroon. The Immigration Judge reached an adverse credibility determination largely on the basis of a consular letter stating that a government official in Cameroon had told a consular investigator that three police convocations offered by the respondent were in fact forgeries. The court found the consular inquiry to have violated the respondent's confidentiality under 8 C.F.R. § 208.6. The court found the letter's lack of detail to render it unreliable, and to also permit the reasonable inference that the respondent's name was disclosed to the Cameroon official who was queried. The court thus found that the regulatory violation entitled the respondent to the opportunity to establish a new claim for asylum based upon the breach itself. The record was remanded for a new hearing.

Seventh Circuit

Aid v. Mukasey, __F. 3d__, 2008 WL 2941240 (7th Cir. Aug. 1, 2008): The Seventh Circuit dismissed the respondent's appeal of an Immigration Judge's denial (which the Board affirmed) of his application for withholding of removal from Algeria. The respondent claimed that in 1993, terrorists would take supplies from his hardware store, until he eventually closed the store and relocated to the city. He began a new business there, and hired his brother-in-law. In 1994, while on a business trip to Switzerland, he was approached by an Algerian who sought his assistance in buying a car, telling him he must help them now if he wants them to forget what he did in Algeria. In 1995, his brother-in-law was killed in a drive-by shooting. The Immigration Judge found the respondent credible, but denied relief, finding no nexus to a protected ground, and also citing improved conditions in Algeria and the fact that his family members have remained unharmed and unthreatened in Algeria. The respondent argued on appeal that he had established that his fear was politically motivated, citing in particular statements of one of the terrorists. The court noted that

the statements expressed the political opinion of the terrorist, but not that of the respondent, as required by statute. Noting that reasonable minds may differ with the Immigration Judge's decision, the evidence did not compel reversal.

Eighth Circuit

Gumaneh v. Mukasey, __ F. 3d __, 2008 WL 2938860 (8th Cir. Aug. 1, 2008): The Eighth Circuit denied the appeal of a female respondent from the Gambia, who based her asylum and withholding of removal applications on her fear that her two USC daughters would be subjected to FGM in her country. The court ruled that it lacked jurisdiction to review the Immigration Judge's determination that the asylum application was untimely, and that the respondent failed to file within a reasonable time of her changed circumstances. The court rejected the respondent's withholding claim, and joined the Fourth and Seventh Circuits in ruling that an applicant may not establish a derivative claim for withholding of removal based upon her child's fear of persecution.

Rafiyev v. Mukasey, __ F. 3d __, 2008 WL 2967006 (8th Cir. Aug. 5, 2008): The court decided two petitions. First, it denied the respondent's appeal from the Board's affirmance of an Immigration Judge's decision denying asylum from Azerbaijan and finding the asylum application to be frivolous. The respondent's second appeal was from the Board's denial of his motion to reopen based upon his claim of ineffective assistance of counsel. The court held that there is no Constitutional basis for an ineffective assistance claim in immigration proceedings, which are civil and thus do not guarantee a constitutional right to counsel. However, the court noted that the Board did not address the issue of whether there is a purely administrative right to effective counsel in immigration proceedings, and remanded to the Board to address the issue in the first instance.

Ninth Circuit

Lopez-Rodriguez v. Mukasey, __ F. 3d __, 2008 WL 3168847 (9th Cir. Aug. 8, 2008): The Ninth Circuit reversed the Board's summary affirmance of an Immigration Judge's denial of respondent's motion to suppress. Acting on a tip that the respondent fraudulently assumed the identity of a U.S. citizen, INS agents visited her home without a warrant, entered without consent, and did not identify themselves until arresting the respondent after she had admitted her alienage. The agents did not testify before the Immigration Judge, who fully credited

the respondent's account. The Immigration Judge found a Fourth Amendment violation, but determined that it was not egregious enough to warrant suppression. The circuit court disagreed, distinguishing case law involving the detention and questioning of workers about their citizenship status at the workplace (*i.e.*, *Benitez-Mendez v. INS*) from the instant case, which occurred inside the respondent's home. Stating that "few principles in criminal procedure are as well established as the maxim that 'the Fourth Amendment has drawn a firm line at the house,'" the court found an egregious violation warranting suppression. *Id.* at *5. As the Government offered no independent evidence of alienage, the case was remanded.

Choin v. Mukasey, __ F.3d __, 2008 WL 3307143 (9th Cir. Aug. 12, 2008): The court sustained the appeal of a respondent whose adjustment application was denied due to her divorce from her petitioner husband prior to her adjustment interview. The respondent had entered the U.S. as a K-1 fiancée, and had married within 90 days of arrival. After filing her adjustment petition, she waited 2½ years for an interview. The respondent was divorced 5 days short of 2 years from the date the adjustment application was filed with the former INS. Her adjustment application was subsequently denied, and she was placed into removal proceedings. The Immigration Judge also denied her adjustment application pursuant to INA § 245(d), which states that a K visa holder may only adjust status as a result of the marriage to the U.S. citizen who filed the K visa petition. The Board affirmed and also dismissed a subsequent motion to reconsider. The court rejected the Government's interpretation of the language of § 245(d), holding that the statute requires that the qualifying marriage be entered in good faith, and not that a petition which was valid at the time of filing be voided if the marriage ends in divorce 2 years later while the adjustment application "languishes in the agency's file cabinet." *Id.* at *4. The court found the case analogous to *Freeman v. Gonzales*, 444 F. 3d 1031 (9th Cir. 2006), in which it held that an adjustment application was not automatically voided by the death of the petitioner spouse prior to the adjustment interview.

Eleventh Circuit

Quinchia v. U.S. Att'y Gen., __ F. 3d __, 2008 WL 3072595 (11th Cir. Aug. 7, 2008): The Eleventh Circuit vacated the Board's decision, which upheld an Immigration Judge's determination that the respondent was ineligible for a 212(h) waiver because he lacked the requisite 7 years of

continuous lawful residence. In reaching their decision, the court held that the single member, non-precedential Board decision did not merit *Chevron* deference. The court noted that they have granted *Chevron* deference to single member Board decisions affirming without opinion (“AWO”), but distinguished such AWOs (which relied on existing Board or Federal court precedent) from the present case, which relied on no existing precedent. Citing the need for “clear and uniform” guidance on the issue in question (i.e. whether the period of lawful permanent residence commences upon the filing of an application for adjustment of status, or upon the date of actual adjustment), the court remanded for the Board for the issuance of a precedent decision.

BIA PRECEDENT DECISIONS

In *Matter of Saysana*, 24 I&N Dec. 602 (BIA 2008), the Board ruled that section 236(c)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c)(1), “does not support limiting the non-DHS custodial setting solely to criminal custody tied to the basis for detention under that section.” Here, the respondent was charged as deportable under section 237(a)(2)(A)(iii) as an alien “convicted of an aggravated felony,” based on a 1990 conviction for indecent assault and battery under Massachusetts law. *Id.* In 2005, the respondent was arrested under Massachusetts law for failure to register as a sex offender, a charge which was subsequently dismissed. In a bond hearing, the Immigration Judge found that the respondent was not subject to mandatory detention under 236(c)(1) following his release from custody as, in the Board’s words, “the respondent’s arrest did not constitute criminal custody that occurred after the expiration of the Transition Period Custody Rules (‘TPCR’).” *Id.* at 603. The Immigration Judge based this on a conclusion that “the offense was ‘tantamount to a regulatory offense’ that did not lead to a conviction.” *Id.* The Immigration Judge ordered the respondent released on \$3500 bond, and the Department of Homeland Security appealed.

In its decision, the Board found “clearly erroneous” the Immigration Judge’s conclusion that the respondent was not in “custody” for purposes of section 236(c)(1) because the offense was a “regulatory offense” and did not involve a conviction. However, a separate issue was identified: “whether the post-TPCR ‘release’ from a non-DHS custodial setting under section 303(b)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 . . . must be directly tied to the basis for detention under sections 236(c)(1)(A)-(D) of the Act.”

Id. at 603-04. In other words, whether the respondent was “released” from custody for purposes of 236(c)(1) (thus triggering the mandatory detention provision) given that the offense for which he was detained was not the aggravated felony for which he was charged as deportable. As explained below, the Board concluded that mandatory detention applies in this scenario.

In its decision, the Board first stated that

[t]he ‘released’ language of section 236(c)(i) of the Act is not expressly tied to any other language that would clarify whether it refers to release from criminal custody, DHS custody, or some other form of detention. However, we have interpreted this language to include a release from a non-DHS custodial setting after the expiration of the [TPCR] . . .

Id. The Board further stated that

[a] reading of the statute as a whole does not suggest that Congress intended to further limit the non-DHS custodial setting to criminal custody pursuant to a conviction for a crime rendering an alien removable. . . . Thus, we find that the language and scope of section 236(c)(1) of the Act do not support limiting the non-DHS custodial setting solely to criminal custody that is related to, or that arises from, the basis for detention under that section.

Id. at 605.

Since, in the Board’s view, section 236(c)(1) mandates detention for aggravated felons after they are “released” regardless of whether the detention resulted from the aggravated felony or some other offense, the Board found that the respondent was subject to mandatory detention under section 236(c)(1) even though the detention from which he was released did not result from his aggravated felony.

In *Matter of Ramirez-Vargas*, 24 I&N Dec. 599 (BIA 2008), the Board ruled that “the period during which the respondent resided as an unemancipated minor child . . . [cannot] be imputed to the respondent in order to satisfy the 7-year resident requirement for cancellation

of removal under section 240A(a)(2) of the [Immigration and Nationality] Act,” 8 U.S.C. § 1229b(a)(2). *Id.* at 600. Here, the respondent first lived in the United States “as an unemancipated minor child with his lawful permanent resident father.” *Id.* On March 14, 1997, the respondent became a lawful permanent resident. On December 10, 2003, the respondent committed a controlled substance violation, for which he was found to be deportable. The Immigration Judge granted cancellation of removal on the grounds that the respondent satisfied the 7-year residency requirement. The Immigration Judge reasoned that, under *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), the respondent’s father’s period of lawful permanent residence was imputed to the respondent. The Immigration Judge concluded that he was bound by *Cuevas-Gaspar* notwithstanding the fact that, after the Ninth Circuit’s decision was published, the Board issued *Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007), where, as the Board stated in its decision here, it “rejected the Ninth Circuit’s interpretation and found that the lawful permanent residence of a parent could not be imputed to a child in determining whether the child acquired the necessary years of residence.” *Id.* The Department of Homeland Security appealed.

In ruling in favor of DHS, the Board chose to follow its own *Matter of Escobar* rule rather than the Ninth Circuit’s *Cuevas-Gaspar* rule. The Board explained in *Gonzales v. Department of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007), the Ninth Circuit “held in similar circumstances that it must give ‘Chevron deference’ to an agency’s statutory interpretation that conflicts with [the court’s] own earlier interpretation.” The Ninth Circuit’s *Gonzales* decision, in turn, was based on the Supreme Court’s decision in *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). The Board concluded that, under these decisions, “[w]e . . . consider ourselves bound by our more recent precedent in *Matter of Escobar*,” rather than the Ninth Circuit’s prior decision in *Cuevas-Gaspar*. *Id.* at 601.

REGULATORY UPDATE

73 Fed. Reg. 47,606 (Aug. 14, 2008)

DEPARTMENT OF HOMELAND SECURITY

Extension of the Designation of Sudan for Temporary Protected Status; Automatic Extension of Employment Authorization Documentation for Sudanese TPS Beneficiaries

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This Notice announces that the Secretary of Homeland Security has extended the designation of Sudan for temporary protected status (TPS) for 18 months, from its current expiration date of November 2, 2008 through May 2, 2010. This Notice also sets forth procedures necessary for nationals of Sudan (or aliens having no nationality who last habitually resided in Sudan) with TPS to re-register with U.S. Citizenship and Immigration Services (USCIS) and to apply for an extension of their employment authorization documents (EADs) for the additional 18-month period. Re-registration is limited to persons who have previously registered for TPS under the designation of Sudan and whose applications have been granted or remain pending. Certain nationals of Sudan (or aliens having no nationality who last habitually resided in Sudan) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions.

Given the timeframes involved with processing TPS re-registration applications, the Department of Homeland Security (DHS) recognizes the possibility that all re-registrants may not receive new EADs until after their current EADs expire on November 2, 2008. Accordingly, this Notice automatically extends the validity of EADs issued under the TPS designation of Sudan for six months, through May 2, 2009, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended. USCIS will issue new EADs with the May 2, 2010 expiration date to eligible TPS beneficiaries who timely re-register and apply for EADs.

DATES: The extension of the TPS designation of Sudan is effective November 3, 2008, and will remain in effect through May 2, 2010. The 60-day re-registration period begins August 14, 2008, and will remain in effect until October 14, 2008. To facilitate processing of applications, applicants are strongly encouraged to file as soon as possible after the start of the 60-day re-registration period beginning on August 14, 2008.

73 Fed. Reg. 49,230 (Aug. 20, 2008)

DEPARTMENT OF STATE

In the Matter of the Review of the Designation of Real Irish Republican Army as a Foreign Terrorist

Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the circumstances that were the basis for the 2003 re-designation of the Real Irish Republican Army as a foreign terrorist organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation.

Therefore, I hereby determine that the designation of the Real Irish Republican Army as a foreign terrorist organization, pursuant to Section 219 of the Immigration and Nationality Act, as amended (8 U.S.C. 1189), shall be maintained.

John D. Negroponte,
Deputy Secretary of State, Department of State.

73 Fed. Reg. 49,109 (Aug. 20, 2008)
DEPARTMENT OF HOMELAND SECURITY
8 CFR Parts 204, 214 and 215

Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers

AGENCY: U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security is proposing to amend its regulations affecting temporary nonagricultural workers within the H-2B nonimmigrant classification and their U.S. employers. This proposed rule would modify current limitations with respect to petitions for unnamed H-2B workers and the period of time that an H-2B worker must remain outside the United States before he or she would be eligible to seek certain nonimmigrant status again. In addition, to better ensure the integrity of the H-2B program, this rule proposes to: Require employer attestations; preclude the imposition of fees by employers on prospective H-2B workers; require reimbursement of fees paid by H-2B workers to recruiters; preclude the change of the employment start date after the grant of the temporary labor certification; eliminate the process whereby H-2B petitions may be approved notwithstanding the absence

of a valid temporary labor certification; require employer notifications when H-2B workers fail to show up for work, are terminated, or abscond from the worksite; require certain H-2B workers departing the United States to participate in a temporary worker visa exit pilot program; delegate authority to enforce the terms of the H-2B petition to the Secretary of Labor (in the event the Department and the Department of Labor (DOL) work out a mutually agreeable delegation of enforcement authority from the Department to DOL); and bar nationals of countries consistently refusing or unreasonably delaying repatriation of their nationals from obtaining H-2B status. This rule also proposes to change the definition of "temporary employment" to recognize that such employment could last up to three years. This proposed rule would encourage and facilitate the lawful employment of eligible foreign temporary non-agricultural workers, while continuing to safeguard the rights of workers.

DATES: Written comments must be submitted on or before September 19, 2008, in order to be assured of consideration.

73 Fed. Reg. 49,091 (Aug. 20, 2008)
DEPARTMENT OF STATE
22 CFR Part 41

Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended: Fingerprinting

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: This final rule amends the Department of State's regulations relating to the application for a nonimmigrant visa, to generally require all applicants, with certain exceptions, to provide a set of ten scanned fingerprints as part of the application process. The scanning of ten fingerprints of nonimmigrant visa applicants has already been implemented. For the purposes of verifying and confirming identity, conducting background checks, and to ensure that an applicant has not received a visa or entered into the United States under a different name, the Department of State may use the fingerprints in order to ascertain from the appropriate authorities whether they have information pertinent to the applicant's eligibility to receive a visa and for other purposes consistent with applicable law, regulations, and Department policy.

DATES: This rule is effective on August 20, 2008.

ADDENDUM: Bond Proceedings Before Immigration Judges and the Board of Immigration Appeals

Following the submission for publication of last month's feature article, "Bond Proceedings Before Immigration Judges and the Board of Immigration Appeals," the United States Court of Appeals for the Ninth Circuit issued two significant decisions, which impact bond proceedings before Immigration Judges and the Board. In both cases, *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008), and *Casas-Castrillon v. Department of Homeland Security*, __F.3d__, 2008 WL 2902026 (9th Cir. July 25, 2008), the Ninth Circuit undertook an analysis of where the alien, who remained detained following the issuance of a final administrative order of removal, fell within the "statutory framework of detention authority" provided by sections 236 and 241 of the Immigration and Nationality Act, 8 U.S.C. §§ 1226 and 1231. In both *Prieto-Romero* and *Casas Castrillon*, the court emphasized that where an alien falls within this statutory scheme is significant because it "can affect whether [the alien's] detention is mandatory or discretionary, as well as the kind of review process available to him if he wishes to contest the necessity of his detention." *Prieto-Romero*, 534 F.3d at 1057; *Casas-Castrillon*, 2008 WL 2902026, at *1. In each case, the Ninth Circuit determined that the alien's detention was governed by section 236(a) of the Act.

In *Prieto-Romero*, the Ninth Circuit considered an alien's appeal from a district court's order denying his petition for habeas corpus. The petitioner in *Prieto-Romero* was a lawful permanent resident alien, and native and citizen of Mexico, who had been detained in the custody of the Department of Homeland Security ("DHS") for more than 3 years while he sought administrative and judicial review of his order of removal. At the time of the Ninth Circuit's decision in *Prieto-Romero*, the petitioner's petition for review of his final administrative order of removal remained pending and a stay of removal granted by the Ninth Circuit remained in effect.

The petitioner was initially taken into custody by the DHS pursuant to section 236(a) of the Act following the initiation of removal proceedings. During the course of those proceedings, an Immigration Judge ultimately determined that the petitioner presented a flight risk and that a discretionary release from custody under section 236(a) of the Act was not warranted. Following the entry of a final administrative order of removal in the petitioner's case, the DHS conducted a file custody

review and determined that the petitioner should remain in custody pending a decision on his petition for review. The petitioner thereafter filed a petition for habeas corpus with the Federal district court, arguing that his continued detention violated his procedural and substantive due process rights and was not authorized by statute. The district court ordered the DHS to afford the petitioner a bond hearing before an Immigration Judge, in which the petitioner would bear the burden of proof, and in which the Immigration Judge was to make an individualized determination as to whether the petitioner was a danger to the community or a flight risk. In accordance with the district court's order, the petitioner was afforded such a hearing, at which the Immigration Judge set a bond of \$15,000, which the petitioner was unable to pay. The district court subsequently denied the petition for habeas corpus, and the petitioner appealed to the Ninth Circuit, arguing that his detention was "prolonged and indefinite" and therefore not authorized by any statute. *See id.* The Ninth Circuit affirmed the district court's decision. *Id.* at 1056.

After undertaking an analysis of where the petitioner fell within the "statutory framework of detention authority" provided by sections 236 and 241 of the Act, the Ninth Circuit determined that the petitioner's detention was governed by section 236(a) of the Act. *Id.* at 1057-62. Recognizing that the petitioner's removal order was administratively final but relying on the fact that the petitioner's removal order had been stayed pending a decision on his petition for review, the Ninth Circuit reasoned that section 236 governs the petitioner's detention in that it authorizes the Attorney General to detain an alien "pending a decision on whether the alien is to be removed from the United States." *Id.* at 1057-58 (citing 8 U.S.C. § 236(a)). The court determined that it is "reasonable to consider the judicial review of a removal order as part of the process of making an ultimate 'decision' as to whether an alien 'is to be removed.'" *Id.* at 1059.

The Ninth Circuit rejected the Government's contention that the petitioner's detention was governed by section 241 of the Act. *Id.* at 1059-61. Analyzing the plain language of the statute and citing sections 241(a)(2) and (6) of the Act, the Ninth Circuit stated that there are only two circumstances under which an alien's detention is authorized under section 241(a) of the Act, "during the removal period" and "beyond the removal period." *Id.* at 1059; section 241(a)(2) of the Act (providing, in relevant

part, that “[d]uring the removal period, the Attorney General *shall* detain the alien” (emphasis added)); section 241(a)(6) of the Act (providing, in pertinent part, that where an alien falls within certain categories specified in the statute, the Attorney General “*may*” detain the alien “*beyond the removal period*” (emphasis added)). The Ninth Circuit also cited to section 241(a)(1)(B) of the Act, which provides that the “removal period” does not begin until the “*latest*” of the following dates:

- (i) The date the order of removal becomes administratively final.
- (ii) *If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court’s final order.*
- (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

Prieto-Romero, 534 F.3d at 1059.

The court determined that section 241(a) of the Act does not authorize the detention of aliens before the “removal period” commences and that the plain language of section 241(a) of the Act does not afford detention authority over aliens, such as the petitioner, who are subject to an “administratively--but not judicially--final” order of removal and have been granted a stay of removal. *Id.* at 1060. The court clarified that where an alien files a petition for review and the reviewing court declines to grant a stay of removal, the “removal period” commences immediately upon the entry of an administratively final order of removal in accordance with section 241(a)(1)(B) of the Act. *Id.*

The Ninth Circuit rejected the suggestion that it should accord *Chevron* deference to the Board’s construction of section 241 of the Act, as set forth in *Matter of Joseph*, 22 I&N Dec. 660, 668 (BIA 1999) (stating that “a separate statutory and regulatory scheme” governs “the detention and release of aliens after an administratively final order” and citing section 241 of the Act). *Id.* at 1061; *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). The court stated that the Board did not have occasion in *Matter of Joseph* to evaluate whether the commencement of detention authority under section 241(a) was delayed by the filing of a timely petition for review and the entry of a stay of removal. *Prieto-Romero*, 534 F.3d at 1061.

Moreover, citing *Chevron*, the court stated that “[i]n any event, Congress has ‘directly spoken to the precise question at issue’ and its intent is readily ascertainable using the traditional tools of statutory interpretation.” *Id.* (citing *Chevron*, 467 U.S. at 842-43 & n.9).

The Ninth Circuit further held that the petitioner’s continued detention remains authorized by section 236(a) because his repatriation to Mexico is “practically attainable” if his petition for review is ultimately denied. *Id.* at 1062. In reaching this determination, the Ninth Circuit compared the circumstances presented in the petitioner’s case with those considered by the Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001), a case involving post-removal period detention under section 241(a)(6) of the Act. *Id.* at 1062-65; *see also Zadvydas*, 533 U.S. at 689-90, 699-701 (holding that an alien’s post-removal-period detention is limited “to a period reasonably necessary to bring about that alien’s removal from the United States” and that after a presumptively reasonable 6-month period of detention, an alien is entitled to release if he successfully demonstrates that there is “good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future”). Drawing on the Supreme Court’s reasoning in *Zadvydas*, the Ninth Circuit held that the Attorney General’s detention authority under section 236(a) is limited to a “‘period reasonably necessary to bring about [an] alien’s removal from the United States,’ even if continued detention in any particular litigant’s case would not pose a constitutional problem.” *Prieto-Romero*, 534 F. 3d at 1063 (citing *Zadvydas*, 533 U.S. at 689).

The court, however, reasoned that unlike the aliens in *Zadvydas*, whose removal could not be effectuated based on either the refusal of the destination country to accept them or the absence of a repatriation agreement between the United States and the receiving country, there was no evidence that the petitioner was unremovable. *Id.* at 1062-63; *cf Clark v. Martinez*, 543 U.S. 371, 386 (2005) (noting that the Government conceded that it was no longer “involved in repatriation agreements with Cuba” and finding that the Government failed to establish that removal was “reasonably foreseeable”). Indeed, the court noted that the Government presented evidence that repatriations to Mexico are routine and that it was prepared to deport the petitioner upon completion of judicial review. *Prieto-Romero*, 534 F.3d at 1063. The court rejected the petitioner’s argument that under the reasoning of *Zadvydas*, his detention is not statutorily authorized because the Government cannot demonstrate with any

level of certainty when judicial review will be complete, thus rendering his deportation an “unforeseeable” event and his detention indefinite. *Id.* The court found that although the petitioner’s detention did not have a certain end date, this uncertainty did not render the petitioner’s detention indefinite so as to raise the constitutional concerns discussed by the Supreme Court in *Zadvydas*. *Id.* Moreover, the court found that the petitioner “foreseeably remains capable of being removed—even if it has not yet finally been determined that he should be removed—and so the government retains an interest in ‘assuring [his] presence at removal.’” *Id.* at 1065 (citing *Zadvydas*, 533 U.S. at 699).

The Ninth Circuit additionally determined that the petitioner had not been denied procedural due process while in custody in that he received a bond hearing before an Immigration Judge, which afforded him “an individualized determination of the government’s interest in his continued detention by a neutral decisionmaker.” *Id.* at 1066. The Ninth Circuit declined to resolve the petitioner’s contention that his bond hearings before the Immigration Judge were deficient because the regulations place the burden of the alien to show that he does not present a flight risk or a danger to the community. *Id.* The petitioner argued that the Ninth Circuit’s decision in *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005), requires that all aliens be afforded a bond hearing where the Government bears the burden of establishing ineligibility for release from removal. *Prieto-Romero*, 534 F.3d at 1066. The Ninth Circuit noted that unlike the alien in *Tijani*, the petitioner was never subject to mandatory detention under section 236(c) of the Act and the alien in *Tijani* was never afforded an individualized bond hearing. *Id.* The court ultimately did not reach the petitioner’s argument however, determining that the petitioner could not demonstrate prejudice where he received an individualized bond hearing before an Immigration Judge, who, even with the burden placed on the alien, determined that he did not present a flight risk or a danger to the community and ordered his release from custody upon the posting of a \$15,000 bond. *Id.* at 1066-67.

Finally, the court determined that it was precluded by section 236(e) of the Act from reaching the merits of the petitioner’s argument that the \$15,000 bond set by the Immigration Judge was excessively high. *Id.* at 1067; see also section 236(e) of the Act (providing that “[t]he Attorney General’s discretionary judgment regarding the application of this section shall not be subject to review”

and further providing that “[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole”). The court rejected the petitioner’s reliance on *Doan v. INS*, 311 F.3d 1160 (9th Cir. 2002), in which the Ninth Circuit suggested that “serious questions may arise concerning the reasonableness of the amount of the bond if it has the effect of preventing an alien’s release.” *Prieto-Romero*, 534 F.3d at 1067 (citing *Doan*, 311 F.3d at 1162). The court, however, indicated that *Doan*’s conclusion was not inconsistent with section 236(e) “because an alien who contends that an unreasonable bond amount precludes her release from detention that is *statutorily unauthorized* does not challenge the ‘Attorney General’s exercise of discretion[, but rather] the extent of the Attorney General’s authority’” under the Act. *Id.* (emphasis added) The court reasoned that because the petitioner was lawfully detained under section 236(a), it was without authority to review the reasonableness of the amount of bond set by the Immigration Judge. *Id.*

Casas-Castrillon v. Department of Homeland Security also involved an alien’s appeal from a district court’s order denying his petition for habeas corpus. See *Casas-Castrillon*, 2008 WL 2902026, at *1. The petitioner in *Casas-Castrillon* was a lawful permanent resident alien, and native and citizen of Colombia, who had been detained in the custody of the DHS for a period of 7 years. See *id.* He was detained during his removal proceedings under the mandatory detention provisions of section 236(c) of the Act. See *id.* at *2. An Immigration Judge ordered the petitioner removed, and the Board affirmed the Immigration Judge’s decision on appeal. See *id.* The petitioner thereafter pursued a number of avenues of relief from removal before the Federal district and circuit courts and was apparently granted more than one stay of removal. *Id.* At the time of the Ninth Circuit’s decision in *Casas-Castrillon*, the petitioner’s removal proceedings were pending before the Board pursuant to a Ninth Circuit remand. See *id.*

In his petition before the district court, the petitioner argued that “his detention had become indefinite and was therefore not authorized by any statute, and that his prolonged detention without a meaningful opportunity to contest the necessity of continued detention violated his right to procedural due process.” *Id.* The district court denied the petition. The Ninth Circuit reversed and remanded. *Id.* at *1, 9.

As in *Prieto-Romero*, the Ninth Circuit analyzed where the petitioner fell within the “statutory framework of detention authority” provided by sections 236 and 241 of the Act. *Id.* at *1-3. The court emphasized that “[t]he statutory scheme governing the detention of aliens in removal proceedings is not static; rather, the Attorney General’s authority over an alien’s detention shifts as the alien moves through different phases of administrative and judicial review.” *Id.* at *2.

The court found that section 236(a) governed the petitioner’s detention, reiterating its reasoning in *Prieto-Romero* that section 1226(a) authorizes the Attorney General to detain an alien “pending a decision on whether the alien is to be removed from the United States” and that it is “reasonable to consider the judicial review of a removal order as part of the process of making an ultimate ‘decision’ as to whether an alien ‘is to be removed.’” *Id.* at *1, 4 (citing *Prieto-Romero*, 534 F.3d at 1057-59; 8 U.S.C. § 236(a)).

As in *Prieto-Romero*, the Ninth Circuit rejected the Government’s contention that aliens awaiting judicial review of their petitions for review are subject to detention under section 241(a) of the Act. *Id.* at *3. The court reiterated that where an alien has a pending petition for review and has been granted a stay of removal, the “removal period” under section 241(a) of the Act begins only after the court denies the petition for review and withdraws the stay of removal. *Id.*

The Ninth Circuit also rejected the Government’s suggestion that section 236(c) of the Act mandates the petitioner’s continued detention. *Id.* at *4. The court relied on its decision in *Tijani v. Willis*, 430 F.3d 1241 (9th Cir.2005), in which it held that the mandatory detention provisions of section 236(c) of the Act apply only to “expedited removal of criminal aliens,” as well as the Supreme Court’s statement in *Demore v. Kim*, 538 U.S. 510 (2003), that section 236(c) of the Act governs the “detention of deportable criminal aliens pending their removal proceedings,” which the Supreme Court emphasized was typically of limited duration. *Id.*; 8 C.F.R. § 236.1(c)(1)(i) (providing that “[a]fter the expiration of the Transition Period Custody Rules . . . no alien described in section 236(c)(1) of the Act may be released from custody during removal proceedings except pursuant to section 236(c)(2) of the Act (emphasis added)). Additionally, the court relied on 8 C.F.R. § 1241.1(a) to find that the “conclusion of proceedings” occurs when an alien’s appeal is dismissed by the Board. *Casas-Castrillon*, 2008 WL

2902026, at *4; 8 C.F.R. § 1241.1(a) (providing that [a]n order of removal made by the immigration judge at the conclusion of proceedings under section 240 of the Act shall become final . . . [u]pon dismissal of an appeal by the Board of Immigration Appeals). The court concluded that once the petitioner’s proceedings before the Board were completed, the Attorney General’s authority to detain the petitioner shifted from section 236(c) to 236(a). *Id.* at *4.

The Ninth Circuit additionally rejected the Government’s contention that even if section 236(c) of the Act did not govern the petitioner’s detention while his petition for review was pending before the court, he became subject to section 236(c) custody following the Ninth Circuit’s remand of the petitioner’s case to the Board. *Id.* Citing *Tijani*, the Ninth Circuit stated that “[a]n alien whose case is being adjudicated before the agency for a second time-after having fought his case in this court and won, a process which often takes more than a year-has not received expeditious process” and that “the mandatory, bureaucratic detention of aliens under § 1226(c) was intended to apply for only a limited time and ended in this case when the BIA affirmed [the petitioner’s] order of removal.” *Id.* The court determined section 236(a) governed the petitioner’s detention thereafter and would continue to govern until the Ninth Circuit rejected his final petition for review or the time to seek such review expired. *Id.*

The Ninth Circuit next rejected the petitioner’s contention that his detention was not authorized by statute because it had become prolonged and was potentially indefinite. *Id.* at *5. The court determined that although the petitioner’s detention was prolonged, the Government retained the authority to detain him under section 236(a) because there is a significant likelihood that he will be removed to Colombia once his administrative and judicial review is complete. *Id.* As in *Prieto-Romero*, the court found that there was nothing, such as the lack of a repatriation agreement or a finding of eligibility for mandatory relief that would prevent his removal to Colombia if he does not succeed in fighting the Government’s charge of removability, and thus the Government retained an interest in “assuring [his] presence at removal.” *Id.* at *5 (citing *Zadvydas*, 533 U.S. at 699).

The Ninth Circuit determined, however, that the Government “may not detain a legal permanent resident such as [the petitioner] for a prolonged period

without providing him a neutral forum in which to contest the necessity of his continued detention.” *Id.* The court stated that when the Supreme Court upheld the mandatory detention provision under section 236(c) in *Demore*, it did so “with the specific understanding that [section 236(c)] authorized mandatory detention only for the ‘limited period of [the alien’s] removal proceedings.’” *Id.* at *6. The Ninth Circuit suggested that the Supreme Court in *Demore* understood this period to be brief and that the petitioner’s 7-year detention exceeded the brief period approved by the Supreme Court in *Demore*. *Id.* (citing *Demore*, 538 U.S. at 530).

Expanding on its analysis in *Tijani*, the court concluded that because section 236(c) does not authorize prolonged mandatory detention after the completion of an alien’s administrative proceedings, the continued detention of such an alien is permissible “only where the Attorney General finds such detention individually necessary by providing the alien with an adequate opportunity to contest the necessity of his detention.” *Id.* at *7. Thus the court concluded that the Attorney General is required to afford aliens, such as the petitioner, an individualized bond hearing pursuant to section 236(a). *Id.* Moreover, the court stated that such an alien is “entitled to release on bond unless the ‘government establishes that he is a flight risk or will be a danger to the community.’” *Id.* Because the court could not ascertain from the record whether the petitioner had been afforded an adequate opportunity to contest the necessity of his continued detention, the court remanded the case to the district court with instructions to grant the writ of habeas corpus unless, within 60 days, the Government provides the petitioner with a hearing that complies with the requirements of *Tijani* or demonstrates that the petitioner has already received such a hearing. *Id.* at *8.

For the original article “Bond Proceedings Before Immigration Judges ...”, see the Immigration Law Advisor Vol. 2, No. 7.

Second Chances, *cont’d*

Categories of Factors Applicable to Continuance or Reopening Requests for Adjustment

A survey of cases across circuits reflects factors to evaluate and weigh in family- and employment-based adjustment scenarios in deciding whether a continuance or reopening is warranted. These factors can be organized and discussed in similar fashion to other discretionary determinations such as the hardship analysis articulated in *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

Bad Facts --If cause for concern is present under the facts, referred to in this article as “bad facts,” it is important to articulate and identify why the concern would adversely affect the respondent’s ability to ultimately adjust status. These cases may contain an overlay of fraud, deceit, or manipulation of process that augers against further delay in the proceedings. As a general matter, in cases where the record indicates some form of bad faith on the part of the respondent in pursuing his or her claim to adjust status, the circuit courts tend to uphold the denial of the continuance or motion to reopen. On the other hand, if the facts support the likelihood of ultimately prevailing in obtaining relief and overall good behavior by the respondent, caution should be exercised in moving too quickly to dispose of the case. The overall factual picture sets the tone.

Garcia scenarios--*Wood v. Mukasey*, 516 F.3d 564 (7th Cir. 2008), provides a fine example of how the courts frame bad facts at the outset to support an adverse outcome to the respondent. In *Wood*, the court characterized the respondent’s second marriage that occurred “during the final stages of her removal proceeding,” as a “last-ditch effort to stave off removal.” *Id.* at 566. In *Wood*, the respondent presented herself as married to her first husband in order to ride on his asylum application, when, in fact, they had divorced. The court, in upholding the denial of the continuance, observed that the Immigration Judge had granted the respondent a 14-month continuance “based solely on Wood having misrepresented her status as a derivative asylum beneficiary.” *Id.* at 567.

In *Morgan v. Gonzales*, 445 F.3d 549 (2d Cir. 2006), the Second Circuit agreed that the respondent failed to show good cause to continue proceedings to await the outcome of his “I-130 petition stemming from a marriage that had already been determined to lack *bona fides*.” *Id.* at 552. In *Morgan*, the INS had denied the first visa petition filed by the respondent’s USC wife in light of significant discrepancies during their interviews. The wife’s visa petition remained pending at the time of the entry of the order of removal. In *Oluyemi v. INS*, 902 F.2d 1032 (1st Cir. 1990), the respondent returned to the United States twice after being ordered deported, each time using counterfeit passports with different names, in addition to having multiple marriages. The court characterized the case as having “a history that includes . . . efforts to return using different names, and which also includes evidence of three marriages, one of which was bigamous and . . . possibly entered into in order to obtain

the right to stay in this country.” *Id.* at 1034. These cases upheld the denial of continuances despite pending visa petitions.

Velarde scenarios--In *Malhi v. INS*, 336 F.3d 989 (9th Cir. 2003), the court upheld the Board’s denial of a motion to reopen and remand predicated on a pending I-130 for a second marriage, which was entered into during the course of proceedings. The I-130 previously filed by the first wife was revoked by INS due, in part, to the respondent’s failure to appear for the interview. He divorced the first wife and remarried within 6 months. The Board declined to exercise discretion favorably to remand the case and await the outcome of the second I-130. In *Mali*, the respondent had applied for asylum and was denied on the basis of adverse credibility, which was also upheld by the court. The court did not evaluate the *Velarde* factors, but relied on the respondent’s failure to produce evidence “probative of the motivation for marriage, not just the bare fact of getting married.” *Id.* at 994.

Kotte scenarios--Cases involving bad faith and fraud appear to be less frequent in employment-based cases. It may be that the opportunity for bad faith to surface is generally greater in the family context than in the employment arena because of the nature of the respective relationships, although a dubious employment relationship was a consideration in an unpublished case, *Ali v. Gonzales*, 197 Fed.Appx. 485 (7th Cir. 2006). Ali sought section 245(i) treatment based on a labor certification filed on his behalf by Broadway Grocery & Video (“Broadway”) on April 27, 2001, and visa eligibility based on a labor certification filed on his behalf by Dunkin’ Donuts. The Immigration Judge found that Ali was not a grandfathered alien because Broadway’s labor certification was not approvable when filed. The Immigration Judge concluded that Ali was not minimally qualified for the job offered--a store manager. The labor certification revealed that Ali’s experience was limited to cab driving and cashing. The Immigration Judge “did not believe that there was ever a real job offer from Broadway Grocery.” *Id.* at 487. Thus, the Immigration Judge denied Ali’s motion to continue based on Dunkin’ Donuts’ pending labor certification. Ali challenged the Immigration Judge’s denial of his motion to continue and the Board’s denial of his motion to reopen based on his approved Dunkin’ Donuts labor certification. The court agreed with the Immigration Judge that Ali was not a grandfathered alien and so Ali’s requests for a continuance and reopening were properly denied.

Likelihood of success on underlying visa petition or adjustment of status--Courts tend to uphold EOIR adjudicators when the record reflects little likelihood of the respondent obtaining a favorable adjudication of the visa petition, or the adjustment application based on statutory eligibility and/or discretion. Where the chances of success are encouraging, or not well evaluated, the courts are reluctant to close the door on respondents.

Visa petition--Garcia--In *Morgan v. Gonzales*, *supra* and *Olyuemi v. INS*, *supra*, the First and Second Circuits observed that the unlikely prospects for a favorable adjudication of the visa petition argued against delaying proceedings further. Similarly, in *Ilic-Lee v. Mukasey*, 507 F.3d 1044 (6th Cir. 2007), the facts indicated that the respondent would not achieve a favorable outcome because the first visa petition filed by her husband had been denied by INS, the motion to reopen the visa petition denial remained pending with INS, and she did not provide evidence, other than her own assertion, that her husband had filed a second visa petition. INS denied the visa petition filed in the respondent’s behalf because her husband had failed to respond to a request to submit an “amended marriage certificate to reflect the correct number of Ilic-Lee’s marriages (i.e., two rather than one).” *Id.* at 1046.

Numerous cases provide relevant examples of upholding continuance denials where there is little reason to believe that a pending visa petition, or the appeal of its denial, will succeed. *See, e.g., Ukpabi v. Mukasey*, 525 F.3d 403 (6th Cir. 2008) (observing that a notice of intent to deny issued by USCIS demonstrated the unlikelihood of the visa petition being granted); *Pedrerros v. Keisler*, 503 F.3d 162, 166 (2d Cir. 2007) (finding “no basis for obligating the agency to grant continuances pending adjudication of an immigrant visa petition when there is a reliable basis to conclude that the visa petition or the adjustment of status will ultimately be denied”); *Onyinkwa v. Ashcroft*, 376 F.3d 797 (8th Cir. 2004) (observing in dictum that the Immigration Judge was justified in denying a motion for continuance where the INS had issued a notice of intent to deny the second visa petition for substantive reasons).

On the other hand, where it appears that the petition filed on the respondent’s behalf is likely to be approved, the courts are hesitant to deny the respondent an opportunity to await the outcome of the visa petition. In *Badwan v. Gonzales*, 494 F.3d 566 (6th Cir. 2007), the Sixth Circuit held that the Immigration Judge lacked good cause to deny the continuance where the respondent

requested a chance to obtain further evidence supporting the validity of his foreign divorce. The record contained no hint of improper motive or behavior by the respondent. As stated by the court, “Badwan amply showed a ‘likelihood of success’ that he would be able to prove the validity of his divorce” *Id.* at 569. The Third and Seventh Circuits offer similar examples of disagreement with a continuance denial in the absence of facts indicating problems with the visa petition. *See Hashmi v. Att’y Gen.*, 531 F.3d 256 (3d Cir. 2008), *Bensilame v. Gonzales*, 430 F.3d 828 (7th Cir. 2005).

Visa petition--Velarde--In the *Velarde* context, the same pattern emerges regarding the likelihood of visa petition success. In *Huang v. Mukasey*, 523 F.3d 640 (6th Cir. 2008), the Sixth Circuit upheld the Board’s denial of reopening, agreeing that the respondent’s previous marriage fraud, involving her first USC husband, constituted a valid reason to expect that she would not obtain approval of the visa petition filed by her second husband during the course of removal proceedings.

On the other hand, in *Melnitsenko v. Mukasey*, 517 F.3d 42 (2d Cir. 2008), the court overturned the Board’s denial of the motion to reopen, recognizing the high likelihood that the visa petition filed by the respondent’s USC husband would be granted. In evaluating Government opposition as a *Velarde* factor, the court disagreed that unexamined Government opposition alone, as a single factor, could trump the strength of the respondent’s case in all other respects.

Visa petition--Kotte--Evaluating the likelihood of I-140 success is complicated because of the underlying labor certification requirement. In general, the circuit courts first specify an alien’s place in the three-step adjustment process (labor certification/I-140/I-485), then address the factors relevant to the alien’s adjustment eligibility.

A trilogy of cases in the Eleventh Circuit provides a possible paradigm for evaluating the likelihood of success of an employment-based adjustment application filed in removal proceedings. *See Haswanee v. U.S. Att’y Gen.*, 471 F.3d 1212 (11th Cir. 2006); *Merchant v. U.S. Att’y Gen.*, *supra*; *Zafar v. U.S. Att’y Gen.*, *supra*. In all three cases, the respondents requested a continuance to afford them the opportunity to apply for 245(i) adjustment. Yet, each respondent was in a different place in the three-step process when he sought a continuance.

Zafar’s application was based on his father’s pending labor certification.⁵ Haswanee had an approved labor certification and a pending I-140. Merchant had an approved labor certification and had filed his I-140 and I-485 concurrently. The Eleventh Circuit observed that Haswanee’s case fell between Zafar’s and Merchant’s. *See Haswanee*, 471 F.3d at 1217.

Having identified where Zafar, Merchant, and Haswanee were in the three-step adjustment process, the court evaluated their chances for success on their section 245(i) applications. Zafar’s chance of ultimate success was remote. Without a *prima facie* approvable I-140, he was not *prima facie* eligible for section 245(i) adjustment. He could not establish that he was eligible to receive an immigrant visa and that an immigrant visa was immediately available pursuant to sections 245(i)(2)(A) and (B) of the Act (identical to sections 245(a)(2) and (3) of the Act). Hence, the Immigration Judge had properly exercised his discretion in denying Zafar’s continuance.

Merchant and Haswanee fared better. The court determined that Merchant had established adjustment eligibility under sections 245(i)(2)(A) and (B) of the Act because he was eligible to receive an immigrant visa (based on a pending I-140 and I-485) and an immigrant visa was immediately available. The court specifically rejected the Government’s argument that Merchant was ineligible for adjustment because the DHS had not yet approved his I-140. The court explained that the statute only requires that an alien be “eligible” to receive an immigrant visa, “not that he must have the visa in hand.” *Merchant*, 461 F.3d at 1378. The court observed that concurrent filing procedures supported its determination that adjustment eligibility is established when an alien shows, *inter alia*, that he is “eligible” to receive an immigrant visa. For the same reasons, Haswanee, with his pending I-140, was found eligible for adjustment of status. Thus, the Eleventh Circuit determined that the Immigration Judges abused their discretion in denying Merchant and Haswanee a continuance.

Five circuits have agreed with the Eleventh Circuit’s “Zafar-Merchant-Haswanee” approach and upheld Immigration Judges’ decisions denying a continuance based on an alien’s pending labor certification. The courts agree that without a *prima facie* approvable visa petition an alien cannot establish *prima facie* adjustment eligibility.⁶ *See Sandoval-Luna v. Mukasey*, 526 F.3d 1243 (9th Cir. 2008) (Immigration Judge denied second

continuance to apply for section 245(a) relief based on the respondent's father's pending labor certification because no relief was then immediately available); *Elbahja v. Keisler*, 505 F.3d 125, 129 (2d Cir. 2007) (Immigration Judge denied respondent's continuance request for 254(i) based on a pending labor certification because adjustment eligibility was "speculative at best"); *Lendo v. Gonzales*, 493 F.3d 439, 442 (4th Cir. 2007) (Immigration Judge denied continuance based on respondent's wife's pending labor certification because he could not establish that he was eligible to receive a visa and that a visa was immediately available under section 245(i)(2)(A) and (B) of the Act); *Khan v. Att'y Gen.*, 448 F.3d 226, 235 (3d Cir. 2006) (Immigration Judge denied continuance for 245(i) based on his wife's pending labor certification because he could not establish visa eligibility and availability); *Ahmed v. Gonzales*, 447 F.3d 433, 438-39 (5th Cir. 2006) (Immigration Judge denied a continuance based on a pending labor certification because it is insufficient to establish prima facie eligibility for section 245(i) adjustment).

Does this mean that an alien's pending labor certification can never justify a continuance or reopening? No. All factors relevant to the alien's adjustment eligibility must be considered and articulated. See, e.g., *Butt v. Gonzales*, 500 F.3d 130 (2d Cir. 2007) (Immigration Judge erred in denying a continuance based on a pending labor certification because the Immigration Judge failed to consider the alien's section 245(i) eligibility); *Ahmed v. Gonzales*, 465 F.3d 806 (7th Cir. 2006) (Immigration Judge abused his discretion in denying a continuance based on the alien's *intent* to file a labor certification because the Immigration Judge failed to acknowledge the effect of the alien's section 245(i) eligibility, although a visa was not immediately available); *Subhan v. Ashcroft*, 383 F.3d 591, 593 (7th Cir. 2004) (Immigration Judge abused his discretion in denying a third continuance based on a pending labor certification because the Immigration Judge did not give a reason for the decision but simply stated the obvious: "the labor departments hadn't yet acted").

The courts affirm that an EOIR adjudicator may, but is not required to, continue or reopen proceedings based on a pending I-140. The Eleventh Circuit emphasized that its decision did "not mandate indefinite continuances" and acknowledged that the adjudicator's decision would be influenced by other relevant factors. *Merchant*, 461 F.3d at 1380. In three unpublished cases, the Fifth and Sixth Circuits upheld the denial of motions to continue and reopen where the alien had a pending

I-140. See *Hasnain v. Keisler*, 248 Fed.Appx. 612 (5th Cir. 2007) (a continuance was properly denied where alien had pending I-140, but no visa availability); *Taghzout v. Gonzales*, 219 Fed.Appx. 464 (6th Cir. 2007) (reopening properly denied where alien did not show an I-140 was filed or approved, or that a visa was immediately available); *Raheemani v. Ashcroft*, 162 Fed.Appx. 313 (5th Cir. 2006) (reopening properly denied where the I-140 was "highly problematic and the mere filing of such petition does not justify the reopening of a case" (quoting the Immigration Judge's opinion)).

The Board, in its unpublished decisions, and the courts are unwilling to equate a pending I-140 with a pending I-130. The Board has consistently rejected the argument that motions to reopen based on a pending I-140 should be accorded deferential treatment under *Matter of Velarde*, *supra*. The Board recognizes the significant difference between family and employment relationships and observes the Act's preference for family-based immigration. See, e.g., *Thapa v. Gonzales*, 460 F.3d 323 (2d Cir. 2006) (quoting from the Board's decision not to extend *Velarde* to the case of a pending I-140); *Taghzout v. Gonzales*, *supra* (Board found respondents' reliance on *Velarde* was misplaced because their case was based on an employment relationship).

Statutory Eligibility for Adjustment of Status--In addition to evaluating the likelihood of the respondent succeeding as the beneficiary of an approved visa petition, the respondent must also satisfy the statutory eligibility requirements to adjust status. Where a bar to admissibility exists, the adjudicator should identify the statutory basis for inadmissibility and address potential options to waive inadmissibility.

Statutory Eligibility for Adjustment of Status--Garcia--In *Onyeme v. INS*, 146 F.3d 227 (4th Cir. 1998), the respondent was inadmissible under 212(a)(6)(C)(i) for misrepresentation. The facts indicated repeated instances of fraudulent conduct by the respondent, who was awaiting the outcome of a second visa petition filed by his USC wife. The Board, in affirming the Immigration Judge's denial of a continuance, relied on Onyeme's statutory ineligibility for adjustment, absent the granting of a discretionary section 212(i) waiver. The Fourth Circuit found that the Immigration Judge did not abuse his discretion "[g]iven Onyeme's statutory ineligibility for admission into the United States and the numerous contingencies that had to occur before Onyeme would obtain the relief he sought." *Id.* at 232.

In *Hassan v. INS*, 110 F.3d 490 (7th Cir. 1997), and *Bull v. INS*, 790 F.2d 869 (11th Cir. 1986), both respondents were statutorily ineligible to adjust status based on convictions for crimes involving moral turpitude. In *Bull*, the Immigration Judge determined that the respondent, who was awaiting the outcome of a visa petition filed by his USC wife, could not adjust status. The Eleventh Circuit disagreed, reasoning that the Immigration Judge and the Board had failed to consider the possibility of obtaining a waiver of inadmissibility under section 212(h) of the Act. The court stated that there was “no mention in either the opinion of the immigration judge or that of the Board of Immigration Appeals of any such finding or even of the consideration of 1182(h).” *Bull*, 790 F.2d at 872-73. In *Hassan*, the respondent’s visa petition had already been denied and was pending on appeal. The Seventh Circuit distinguished *Hassan* from *Bull* on this basis, even though the Immigration Judge did not address the section 212(h) waiver.

In *Alvarez Acosta v. U.S. Att’y Gen.*, 524 F.3d 1191, (11th Cir. 2008), the Immigration Judge explained that the respondent’s “criminal, immigration, and marital history raised serious questions about his eligibility for an adjustment of status,” and the Eleventh Circuit agreed. *Id.* at 1195. The respondent, who had married a United States citizen during proceedings and was awaiting a decision on the visa petition filed by his wife, had previously been removed for a controlled substances conviction and had reentered the United States illegally.

Statutory Eligibility for Adjustment of Status--Velarde--In *Sarr v. Gonzales*, 485 F.3d 354 (6th Cir. 2007), the Immigration Judge denied the respondent’s asylum application, which the respondent appealed to the Board. The respondent also filed a motion to reopen and remand with the Board based on his marriage to a United States citizen. In denying the motion, the Board relied on the Immigration Judge’s finding that the respondent falsely testified at the hearing. Based on this finding, the Board determined him to be inadmissible under section 212(a)(6)(C)(i). Because the respondent’s motion to remand did not include an application for a section 212(i) waiver, the Board found the motion to be “insufficient.” The Sixth Circuit was troubled by what it deemed to be a “hyper-technical” decision, but nonetheless upheld the result. *Id.* at 364.

Statutory Eligibility for Adjustment of Status--Kotte--Of course, an alien must show more than visa

eligibility and visa availability to establish adjustment of status eligibility. An alien must either meet the other section 245(a) requirements and avoid the section 245(c) bars or establish section 245(i) eligibility. In the employment context, an alien’s adjustment eligibility often turns on whether s/he is eligible for section 245(i) treatment. The courts uniformly uphold EOIR adjudicators’ decisions denying a continuance or reopening based on an alien’s ultimate inability to meet the statutory requirements of section 245(a) or (i) of the Act. *See, e.g., Ali v. Gonzales*, 196 Fed. Appx. 314 (5th Cir. 2006) (Board’s denial of a motion to reopen upheld where the respondent failed to establish that he was a grandfathered alien and eligible for 245(i) treatment); *Saneh v. Mukasey*, No. 07-3079, 2008 WL 2520881 (6th Cir. June 23, 2008) (unpublished) (Immigration Judge’s denial of a motion to continue upheld where the respondent had concurrently filed an I-140 and I-485, but he was ineligible for adjustment under section 245(c)(2) of the Act); *Hussain v. U.S. Att’y Gen.*, 222 Fed. Appx. 860 (11th Cir. 2007) (Board’s denial of a motion to reopen upheld where the respondent’s wife had an approved I-140, but he failed to establish that he was a grandfathered alien and eligible for 245(i) treatment).

In *Butt v. Gonzales*, *supra*, the Second Circuit rejected an Immigration Judge’s decision denying Butt’s continuance request based on a pending labor certification because the Immigration Judge failed to consider Butt’s section 245(i) eligibility in reaching his decision. The case was remanded to the Board to do so.

Discretion--Whether the discretionary aspect of the respondent’s adjustment application is unlikely or likely to succeed should be addressed. A strong case for denial in discretion, if clearly articulated and supported by the record, is meaningful to the circuit courts. Where a *prima facie* case for relief is presented, including a favorable discretionary outlook, the courts expect time to be allotted appropriately to the case.

Discretion--Garcia--In *Oluymi*, the respondent “was ordered deported in 1986; he returned in 1987, with a counterfeit passport issued in a different one of his several names, and without the necessary governmental permission, and was excluded and deported; and he returned yet another time (again without permission), using a passport issued in yet another of his names.” *Oluymi*, 902 F.2d at 1033. The First Circuit commented, “[t]here is no reason to think the Attorney General would

exercise his ‘discretion’ to permit [the respondent] to stay.” *Id.* at 1034. Similarly, in *Onyeme*, the respondent’s lengthy pattern of fraud caused the court to conclude that “there is no reason to believe that the Attorney General was so likely to grant this request that the IJ’s refusal to continue deportation proceedings against Onyeme constituted an abuse of discretion.” *Onyeme*, 146 F.3d at 232. In *Wood v. Mukasey*, *supra*, in which the respondent misrepresented her marital status during removal proceedings in an attempt to qualify for asylum, the Seventh Circuit had no disagreement with the Board’s decision not to exercise its discretion in the respondent’s favor to reopen the case.

Alternatively, in an older case that would currently be governed by *Velarde*, the Ninth Circuit observed that, where a prima facie case for relief exists in terms of apparent statutory eligibility and the absence of adverse factors relevant to discretion in line with *Garcia*, the respondent was “entitled to have her case reopened.” *Israel v. INS*, 785 F.2d 738, 742 (9th Cir. 1986).

Discretion--Velarde--In a number of cases, parties or adjudicators have applied *Velarde* in cases that are not *Velarde* scenarios, i.e., cases in which a motion to reopen is filed based on an unapproved visa petition from a marriage entered into subsequent to the commencement of the removal proceeding. These cases highlight the need to correctly identify the pertinent facts and apply the appropriate standards.

For example, in *Singh v. Gonzales*, 404 F.3d 1024 (7th Cir. 2005), the Board incorrectly applied *Velarde* to a case in which the respondent filed a motion to reopen based on an approved visa petition. While the marriage had been entered into after removal proceedings began, the approval of the visa petition constitutes clear and convincing evidence of the bona fides of the marriage and does not fit within *Velarde*. See 8 C.F.R. § 245.1(c)(8)(v).

The Board concluded that the motion did not meet the *Velarde* standard, but also found that the ultimate adjustment application would not warrant approval in discretion. The Seventh Circuit pointed out the Board’s misapplication of *Velarde*, but upheld the Board’s analysis regarding discretion. The Seventh Circuit concluded it would be pointless to remand where “it would be possible . . . to overcome the general bar against adjustment of status entered into during removal proceedings, nevertheless . . . his past behavior amounts to an insurmountable obstacle

. . . and his application would be denied in the exercise of discretion.” *Id.* at 1028.

In *Patel v. Ashcroft*, 375 F.3d 693 (8th Cir. 2004), the respondent sought asylum from the Immigration Judge, which was denied. While on appeal, a visa petition filed by the respondent’s father was approved, and the Board remanded for the Immigration Judge to consider her application for adjustment of status. Before the hearing, the respondent’s father was ordered removed from the United States, “thus extinguishing the approved visa petition.” *Id.* at 695. Before the hearing, the respondent also married a USC, who filed a visa petition in her behalf. At the hearing, the Immigration Judge denied her motion for a continuance to await the decision on the visa petition and returned the original appeal of the asylum denial to the Board. While on appeal, the second visa petition was approved, causing the respondent to move to reopen and remand to the Immigration Judge to consider adjustment. The Board denied the motion, finding that the approved visa petition submitted in support of the motion did not constitute clear and convincing evidence within the meaning of *Velarde*. The court disagreed, finding that the Board erred in applying *Velarde* to a situation where the visa petition had been approved at the time the motion was filed. The Eighth Circuit did acknowledge that, “in the sound exercise of his discretion, the Attorney General could still deny [Ms. Patel] the adjustment, should other evidence belie the legitimacy of the marriage on remand.” *Id.* at 697.

Discretion--Kotte--In *Falae v. Gonzales*, 411 F.3d 11 (1st Cir. 2005), the First Circuit upheld the Board’s decision denying a motion to remand in the exercise of administrative discretion. Judge Selya, writing for the court, as usual makes “a tedious tale tolerably terse.” *Id.* at 13. The court begins with the assumption that Falae established his prima facie eligibility for adjustment and considered whether the Board abused its discretion in denying a motion to remand based on an approved I-140. *Id.* at 15. The Immigration Judge had pretermitted Falae’s adjustment application because he was ineligible for a required a section 212(i) waiver. Seven months after the Immigration Judge’s decision, Falae married for the third time, this time to a USC. Now eligible for a section 212(i) waiver, he sought a remand. The Board denied the motion in its discretion based on the timing of Falae’s third marriage and his marital history, the overall adverse credibility determination, his use of fraudulent documents to enter the United States, and his submission

of questionable documents in support of his asylum application. Contrary to Falae's assertions, the First Circuit concluded that the Board weighed all the relevant discretionary factors and properly denied the motion in the exercise of its discretion.

Government Opposition -- Whether the Government opposes a continuance or reopening is a significant factor for evaluation. Mere opposition by the Government, with no persuasive reason, is not well received by the circuit courts as a basis to deny the respondent's motion. Government opposition that is reasonable and supported by the record matters.

Garcia--The decision maker should articulate the Government's position and evaluate the reasonableness of any opposition. For example, in both *Ukpabi v. Mukasey, supra*, and *Ilic-Lee v. Mukasey, supra*, the Government opposed continuances requested by respondents awaiting the outcome of visa petitions filed by their USC spouses. In both cases, suspicious circumstances surrounded the marriages. The Government's opposition based on these circumstances was recognized as relevant and valid by the Sixth Circuit.

On the other hand, the Sixth Circuit took exception to the Immigration Judge denying the continuance where the Government did not object and in the absence of bad facts. As stated by the court, "[w]hile an IJ has no obligation to grant a continuance whenever the parties agree to one, the government's position demonstrates at a minimum that, as between the parties to the case, no adversarial interest was served by the denial." *Badwan*, 494 F.3d at 568.

Velarde--In the *Velarde* context, courts have held that mere Government opposition does not alone suffice to deny the motion to reopen. Although *Velarde* can be read to require all five factors to be present, the courts have not accepted unexamined Government opposition as a dispositive reason against reopening. In *Sarr v. Gonzales* and *Melnitsenko v. Mukasey, supra*, the Sixth and Second Circuits declined to find Government opposition dispositive without more. The Second Circuit noted that "the BIA may not deny the motion based solely on the fact of the DHS's objection," and, if the Board denies the motion on the merits of DHS opposition, it "must provide adequate reasoning as to why the objection calls for denial." *Melnitsenko*, 517 F.3d at 52.

Alternatively, where the Government opposition is reasonable and articulated in the decision, courts tend to support the outcome. In *Miah v. Mukasey*, 519 F.3d 784 (8th Cir. 2008), the Eighth Circuit gave credit to DHS opposition "on multiple grounds--insufficient evidence of the bona fides of Miah's recent marriage, the timing of that marriage, his not--credible testimony before the IJ, and his criminal history." *Id.* at 790. See also *Huang v. Mukasey, supra* (holding that the Board did not abuse discretion in denying motion to remand for adjustment of status in light of Government opposition based on prior fraudulent marriage).

Kotte--It appears that Government opposition has not been a determining factor in deciding whether to grant additional time to an alien seeking adjustment of status based on an offer of employment.

Other procedural factors--Other procedural factors are relevant in deciding whether to allow the respondent the opportunity for the ancillary adjudication of the visa petition. For example, a history of continuances afforded by the Immigration Judge for the respondent to pursue the ancillary remedy supports a decision to move forward with the case when a favorable outcome cannot be predicted or the time to achieve an outcome is very protracted. On the other hand, a decision to deny the second chance based solely on a technical item, such as failure to file the adjustment application, creates dissatisfaction at the circuit court level. An Immigration Judge's conclusion that the case has been pending on the docket for a sufficiently lengthy period, without other indicia of problems underlying the relief sought, causes concern on judicial review.

Garcia--In *Morgan v. Gonzales, supra*, and *Pedrerros v. Keisler, supra*, both of which involved little likelihood of favorable visa petition adjudication, the Immigration Judges did grant multiple continuances to allow the respondents an opportunity for the spouses' visa petitions to be decided by DHS. The Second and Sixth Circuits referenced the fact that these continuances had been granted prior to denying further requests and upheld the denial of further continuances. The Sixth Circuit observed that "[t]he IJ continued the removal proceedings on multiple occasions over two years in order to give the immigration authorities an opportunity to adjudicate the I-130 petition." *Pedrerros*, 503 F.3d at 164. In *Ilic-Lee*, the Immigration Judge denied the continuance request, but reset the case to another hearing 6 months in the future to

allow the respondent to submit “all of her applications for relief,” thereby actually providing time for the respondent to acquire eligibility for adjustment, even though the prognosis was not favorable. *Ilic-Lee*, 507 F.3d at 1046.

In *Alvarez v. Att’y Gen.*, *supra*, the Eleventh Circuit upheld the Immigration Judge’s denial of the first continuance request to await the decision on a spousal visa petition where bad facts indicated that adjustment was not a realistic eventuality. In explaining her reasoning, the Immigration Judge noted that the case had been on the docket for 2 years already and granting an additional continuance did not make sense in light of the “serious questions about his eligibility for adjustment of status.” *Id.* at 1195. Similarly, in *Mejia v. Keisler*, 251 Fed.Appx. 354 (7th Cir. 2007), the Seventh Circuit, in an unpublished decision, upheld the denial of the continuance in the absence of any reasonable hope that adjustment would be granted. The court stated that “[a]n IJ’s denial of a continuance because of its ultimate hopelessness is consistent with § 1255.” *Id.* at 357. In *Mejia*, the Immigration Judge also considered the fact of the respondent’s failure to submit the completed adjustment application (I-485) for the record. Here, denying a continuance request was warranted where bad facts were combined with statutory ineligibility for adjustment, Government opposition, and the failure to file the I-485.

On the other hand, where the Immigration Judge denies the first request for a continuance in a case where the respondent appears poised to prevail, the circuit courts are less likely to uphold the decision. *See, e.g., Badwan v. Gonzales*, *supra* (observing that the Immigration Judge denied Badwan’s first and unopposed request for a continuance in a case without adverse factors). This is particularly true where the Immigration Judge relied on efficiency as a reason to proceed with the case. In *Hashmi v. Att’y Gen.*, *supra*, the Third Circuit overturned the Immigration Judge’s denial of a continuance where the Immigration Judge based his decision on the need to meet case completion goals. The Immigration Judge had afforded the respondent multiple continuances over an 18-month period of time, but the delay in DHS adjudication of the visa petition related to an internal file transfer issue, and the respondent’s chances to obtain approval of the visa petition were promising. The court noted that “[i]t is evident from the record that CIS had not proceeded with the adjudication of Hashmi’s I-130 petition because it was missing Hasmi’s ‘A’ file, which was

being held by a different branch of DHS responsible for overseeing Hashmi’s removal proceedings.” *Hashmi*, 531 F.3d at 260. The court took issue with the “IJ’s perceived ‘obligation’ to ‘manage [his] calendar’ and ‘complete cases within a reasonable period of time.’” *Id.* at 261 (quoting Immigration Judge’s opinion). Similarly, where the Immigration Judge bases a decision not to grant a continuance on the absence of the adjustment application, without other substantive concerns, the courts find fault. *See, e.g., Bensilame v. Gonzales*, *supra*.

Velarde--Whether Velarde applies depends on the procedural posture of the case and can easily be confused. As discussed, if the Immigration Judge or Board is confronted with a motion to reopen based on an unadjudicated visa petition from a marriage occurring after proceedings began, *Velarde* controls. For example in *Ukpabi v. Mukasey*, *supra*, at 406, the Immigration Judge, in denying the continuance request, explained that the respondent’s reliance on *Velarde* was misplaced. *See also Hadayat v. Gonzales*, 458 F.3d 659, 663 (7th Cir. 2006) (approved visa petition filed by his USC brother without a current priority date); *Singh v. Gonzales*, *supra* (visa petition approved at time motion to reopen filed); *Patel v. Ashcroft*, *supra* (visa petition approved at time motion to reopen filed).

Kotte--Aliens seeking a continuance or reopening based on a pending labor certification often blame the DOL’s undue processing delays for their inability to proffer an approved labor certification and a pending I-140. While the circuit courts have expressed dismay at the DOL’s excessive case processing delays, the DOL’s inaction alone has not proved to be a sufficient reason to grant a continuance or reopening for adjudication of the labor certification. For example, in *Khan v. Att’y Gen.*, *supra*, the Third Circuit, citing to *Garcia*, upheld an Immigration Judge’s denial of a continuance based on Khan’s wife’s pending labor certification. Khan provided no authority for his assertion that DOL’s delay in processing his wife’s labor certification was an extraordinary circumstance justifying an “open-ended” continuance. *But see Atia v. U.S. Att’y Gen.*, No. 07-2282, 2008 WL 1891479 (3d Cir. April 30, 2008) (unpublished) (staying the issuance of its mandate for 90 days to allow the DOL to adjudicate the alien’s labor certification where it found the delay unconscionable).

Likewise, in an unpublished case, *Cordova v. Gonzales*, 245 Fed.Appx. 508, (6th Cir. Aug. 21, 2007),

the Sixth Circuit concluded that the Immigration Judge did not abuse his discretion in denying the respondent's seventh request for a continuance where his labor certification remained pending after 4 years. Judge Avern Cohn rendered a strong dissent in *Cordova*. He asserted that "Cordova is hostage to the timetable of the DOL" and that his adjustment ineligibility was due to the DOL's inaction on his labor certification. *Cordova*, 245 Fed.Appx. at 515. Judge Cohn also found that the Immigration Judge's denial of the respondent's seventh continuance request was unreasonable because he had continued the case for 2 years for the same reason, namely, to give the DOL an opportunity to act.

Articulation of reasons--The failure by EOIR adjudicators to explain where the adjustment application stands in the processing stage and articulate their reasons for denying the motion to continue or reopen lands them in hot water on judicial review. This is easily remedied by providing a reasoned explanation for the decision. Care taken in this respect is welcomed by the circuit courts.

Garcia--When an Immigration Judge or the Board clearly articulate and explain their reasons for denying the continuance or reopening, the reviewing courts tend to accord more deference to the agency. For example, in *Ukpabi v. Mukasey, supra*, at 406, the Sixth Circuit quoted the Immigration Judge extensively with approval. The Seventh Circuit accorded weight to the reasons set forth by the Immigration Judge, taking note of the clear explanations afforded by the Immigration Judge to the respondent during proceedings. The court noted in a footnote that the "IJ failed to mention . . . that an alien ordered to voluntarily depart the country as a result of a visa overstay is inadmissible for three or ten years." *Wood*, 516 F.3d at 567, n.1. Despite this omission, the Immigration Judge's otherwise clear record and decision supported the outcome. In *Mejia v. Keisler, supra*, the Board commented on the "cogent" reasons provided by the Immigration Judge and added further rationale, which was upheld by the Seventh Circuit. Similarly, in *Alvarez v. U.S. Att'y Gen., supra*, the Eleventh Circuit included the Immigration Judge's explanation in its decision upholding the result.

On the other hand, where the Immigration Judge or the Board fail to provide cogent reasons based on the record, fail to address relevant issues, or rely on inappropriate or incorrect factors, the circuit court will call EOIR to task. For example, in *Bull v. INS, supra*,

the potential availability of a waiver of the respondent's ineligibility to adjust status was not discussed. In *Israel v. INS*, the Immigration Judge conditioned a grant of voluntary departure on the respondent not marrying a USC thereafter. The respondent did marry a USC, requested reopening, and was denied because he disobeyed the Immigration Judge. The Ninth Circuit found this to be inappropriate, stating that the "IJ's act of conditioning his grant of voluntary departure on Israel's promise not to marry represents unjustified government interference in a personal decision relating to marriage." *Israel*, 785 F.2d at 742 n.8.

Velarde--Examples of reasoning deemed inappropriate by the circuits in the *Velarde* context, include cases in which the Board based its decision solely on unevaluated Government opposition. While *Velarde* could be interpreted as requiring that each of its five factors be met, this is not settled in the circuits. See, e.g., *Sarr*, 485 F.3d at 363 ("[O]ur reading of *Velarde* leads us to conclude that although a motion *may be granted* when certain factors are present, the Board's ruling does not necessarily mean that such a motion *must be denied* when any one of the identified factors is absent . . ."); *Melnitsenko v. Mukasey, supra* (holding that the Board may not deny motion solely on basis of Government opposition). However, even when the circuit overturns one of the bases for the decision, the result will be upheld if a valid, alternative rationale is provided. See, e.g., *Sarr v. Gonzales, supra*.

Kotte--In *Subhan v. Ashcroft, supra*, the respondent sought a third continuance based on his pending labor certification. The Immigration Judge denied the request observing that the respondent "was not eligible for this form of relief [adjustment of status] at this time" because he only had a pending labor certification. *Subhan*, 383 F.3d at 593. Judge Posner determined that the Immigration Judge and the Board "violated" section 245(i) of the Act when the Immigration Judge denied the respondent's continuance request "without giving a reason consistent with the statute." *Id.* at 595. This case has been mistakenly cited for the proposition that an alien who is eligible for section 245(i) treatment has a right to a continuance based on a pending labor certification. In *Ali v. Gonzales, supra*, the Seventh Circuit explained that "Subhan holds that the agency [EOIR] may deny a continuance so long as it provides a reason consistent with the statute--like the alien's foot--dragging, criminal activity, or lack of merit to his application." *Ali*, 197 Fed.Appx. at 488.

In another unpublished case *Saeed v. Mukasey*, No. 07-3020, 2008 WL 2311596 (7th Cir. June 4, 2008)(unpublished), the Seventh Circuit upheld an Immigration Judge's denial of a continuance request where the Immigration Judge had provided a reasonable explanation for his decision. In denying the respondent's fourth continuance request, the Immigration Judge distinguished the respondent's case from *Subhan*. He explained that he had already granted three continuances for more than 2 years based on the respondent's pending I-140, and now the evidence showed that the I-140 had been denied.

Conclusion

Accounting for relevant circumstances in a clear fashion communicates thoroughness to the reviewing court and is generally well received, as reflected by the case law discussed above. A common articulation of the circuit courts abuse-of-discretion standard of review offers instructive guidance. "We will uphold the BIA's decision 'unless it was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination.'" *Hassan*, 110 F.3d at 492 (quoting *Cordoba-Chaves v. INS*, 946 F.2d 1244, 1246 (7th Cir. 1991)). The case law reflects an emphasis on the "rational explanation" aspect of this standard by requiring well-reasoned explanations for denying reopening or a continuance.

At the outset, the adjudicator should examine the overall tone of the case, as reflected by adverse and favorable factors of record. Next, the adjudicator should determine the impact the absence or presence of bad facts on the likelihood of success of visa petition approval, statutory eligibility for adjustment, including waivers of inadmissibility, and discretionary prospects; consider the Government's position, including the merit of any opposition; address relevant procedural factors in the overall context, including technical filing requirements and any adjournments already granted; and articulate this reasoning in the decision. A clear roadmap combining procedural markers with the type of evaluation of relevant factors instills confidence on review that EOIR fully considered these concerns.

Teresa Donovan is an Attorney Advisor with the Board of Immigration Appeals. Anne Greer is an Assistant Chief Immigration Judge with the Office of the Chief Immigration Judge.

1. This article does not discuss the general statutory and regulatory requirements for filing motions to continue and reopen. See section 240(c)(7) of the Act, 8 U.S.C. §1229a(c)(7); 8 C.F.R. §§ 1003.2, 1003.23, 1003.29, 1240.6. This article does not discuss the Board's authority to reopen on its own motion. 8 C.F.R. § 1003.2(a). Nor does this article address motions filed by arriving aliens seeking adjustment of status in removal proceedings. See 8 C.F.R. § 1245.2(a)(1).
2. This article does not consider EB-2 workers who seek to waive the labor certification requirement under section 204(b)(2)(B) of the Act.
3. Prior to October 1, 1991, an alien could concurrently file an I-140 and a I-485 if a visa was immediately available. The forms were filed together at the local former Immigration and Naturalization Service district office (one-step processing). Concurrent filing for all the employment preference categories was eliminated on October 1, 1991, to provide more uniform adjudications of I-140s. 56 Fed. Reg. 49,839 (Oct. 2, 1991). Concurrent filing for EB-1, EB-2, and EB-3 categories was restored on July 21, 2002. 67 Fed. Reg. 49,561 (July 31, 2002); see also 8 C.F.R. § 1245.2(a)(2)(B).
4. 8 C.F.R. § 245.2(a)(2) (1978). These regulations were necessitated by a single-word change to section 245(a) of the Act: the word *approved* was replaced by the word *filed*. See, Act of Oct. 20, 1976, Pub. L. No. 94-571, § 6, 690 Stat. 2706. Thus, the date the adjustment application is *filed* is the date used to determine visa availability. See *Matter of Kotte*, *supra*, at 451.
5. In *Zafar*, the Eleventh Circuit considered the cases of three respondents who requested a continuance of their removal proceedings based on a pending labor certification.
6. The Sixth Circuit reached the same conclusion in an unpublished decision. See *Cordova v. Gonzales*, 245 Fed.Appx. 508, (6th Cir. 2007) (Immigration Judge denied seventh continuance for section 245(i) based on pending labor certification because relief was speculative and he failed to establish prima facie eligibility for adjustment of status).

EOIR Immigration Law Advisor

Juan P. Osuna, Acting Chairman
Board of Immigration Appeals

David L. Neal, Chief Immigration Judge
Office of the Chief Immigration Judge

Karen L. Drumond, Editor
(703) 605-1102
EOIR Law Library

Jean King, Senior Legal Advisor
(703) 605-1744
Board of Immigration Appeals

Anne Greer, Assistant Chief Immigration Judge
(703) 305-1247
Office of the Chief Immigration Judge

Emmett D. Soper, Attorney Advisor
(703) 305-1723
Office of the Chief Immigration Judge

Layout by Hasina Rahman, Kimberly Camp & Kathy Edwards