

From: (b)(6)
To: OPLA HQ Personnel; OPLA Field Personnel
Subject: Matter of L-A-B-R-, 27 I&N Dec. 405 (A.G. 2018)
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Disseminated on behalf of Ken Padilla and Adam V. Loiacono. . .

On August 16, 2018, the Attorney General (AG) issued his decision in *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018), clarifying that the “good cause” standard for continuances and adjournments, 8 C.F.R. §§ 1003.29, 1240.6, is a substantive requirement that limits the discretion of immigration judges and “is not a mere formality that permits immigration judges to grant continuances for any reason or no reason at all.” *L-A-B-R-*, 27 I&N Dec. at 406. He determined that the “overuse of continuances in the immigration courts is a significant and recurring problem” and “[u]njustified continuances provide an illegitimate form of de facto relief from removal.” *Id.* at 411. The decision can be found [here](#).

As such, the AG held that when determining whether good cause exists to continue proceedings for a collateral matter, immigration judges should continue applying a multifactor analysis, as directed by the Board of Immigration Appeals (Board) in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), but that the principal focus should be on (1) the likelihood that the collateral relief will be granted, and (2) whether the collateral relief will materially affect the outcome of the removal proceedings. While “[t]he good-cause standard in section 1003.29 requires consideration and balancing of all relevant factors[,]” the factors “are not all of equal importance.” *L-A-B-R-*, 27 I&N Dec. at 413. Because 8 C.F.R. § 1003.29 focuses on the sufficiency of the “cause,” the emphasis of the good-cause inquiry is on “whether a continuance is likely to do any good.” *Id.* (citing *United States v. Swanson*, 572 F.3d 523, 526 (5th Cir. 1978)). Whether the continuance is likely to do any good turns on whether the alien would ultimately receive the collateral relief and such relief would materially affect the outcome of the removal proceedings. *Id.*

Immigration judges should also consider relevant secondary factors, including the alien’s diligence in pursuing collateral relief, DHS’s position on the motion for continuance, concerns of administrative efficiency, the length of the continuance requested, the number of hearings held and continuances granted previously, and the timing of the continuance motion. Notably, the AG found that DHS’ position on the continuance motion is not controlling, even if DHS consents or does not oppose a continuance. Moreover, the AG expressly stated that immigration judges should not shift the burden to DHS to demonstrate an absence of good cause. As with any multifactor balancing analysis, the AG noted that an alien’s strength on certain factors may compensate for a weaker showing on others, but emphasized that a truly weak showing on the likelihood of success of the collateral relief “may be dispositive” as to whether good cause exists. *L-A-B-R-*, 27 I&N Dec. at 417. Specifically, the AG found that there would be no good cause for an alien in removal proceedings seeking a continuance to apply for a provisional unlawful presence waiver from USCIS because an alien is ineligible for such relief while in removal proceedings. *Id.* (citing 8 C.F.R. § 212.7(e)(4)(iii)). Furthermore, he noted that an alien’s pending collateral attack on a criminal conviction is “too tentative” and “speculative” to support a continuance of removal proceedings. *Id.*

The AG further noted that, even if the alien’s collateral proceedings show “clear promise,” *id.* at 418, it may still be impossible to determine that such collateral relief will affect the disposition of removal proceedings. For example, good cause would not exist for an alien to seek a visa petition if the immigration judge would nonetheless deny the application for adjustment of status because the alien is statutorily ineligible or does not merit a favorable

exercise of discretion. Similarly, if an alien is eligible for a visa petition, but the priority date is too remote, the alien's success on an application for adjustment of status may be too speculative to establish good cause. *Id.* Because an immigration judge's principal focus should be on the likelihood of collateral relief, the AG indicated that an immigration judge should assess the speculative nature of a collateral matter by reviewing an alien's evidentiary submission, to include copies of the submissions in the collateral proceeding and supporting affidavits. *Id.* An alien who fails to submit such evidence will most likely fail to meet his burden of proof. In addition, the immigration judges must state the reasons for granting a continuance on the record or in a written decision. *Id.*

In light of *L-A-B-R-*, OPLA attorneys should consider the following practice pointers:

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