

# UP AGAINST A WALRUS:

PARALYSIS IN USCIS AND THE  
IMMIGRATION COURT

By Brian K. Bates



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By **Brian K. Bates** \*

*The time has come,' the Walrus said,  
To talk of many things:  
Of shoes — and ships — and sealing-wax —  
Of cabbages — and kings —  
And why the sea is boiling hot —  
And whether pigs have wings.'*

-- From *The Walrus and the Carpenter*  
By Lewis Carroll

Yes, the time has certainly come to talk of many things. The increasing backlog in the Immigration Court docket. The Attorney General's manic frenzy to move cases along without unnecessary delays. The frequency with which the Immigration Court delays are dependent upon USCIS adjudications of underlying petitions and applications. And the sneaking suspicion that these occurrences may be related in some ways. Can anything be done to address *all* of these concerns without limiting the respondent's access to a fundamentally fair removal proceeding? Can pigs have wings, and actually fly? Read on, friends.

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## I. Introduction: *The Walrus and the Carpenter.*

Lewis Carroll has inspired my legal writing on more than a few occasions. As you begin to *understand* our immigration laws, only the writings of Lewis Carroll can serve as an apt literary analogy for the sense of absurdity that grows with that understanding. Or maybe Franz Kafka. I prefer the charming wit of Lewis Carroll's works, but Kafka's *The Trial* also gives me a sense of *deja vu!*

*The Walrus and The Carpenter* is a poem read to Alice by Tweedle Dum and Tweedle Dee in *Through the Looking Glass*. Quick summary: a Walrus and Carpenter are walking along a beach admiring the view, but

“They wept like anything to see  
Such quantities of sand:  
If this were only cleared away,  
They said, it would be grand!”

They come upon a bed of tasty oysters and invite the oysters to join them for “a pleasant walk, a pleasant talk along the briny beach.” Many young oysters happily go along, but their more suspicious elders wisely decline. They eventually arrive at a low and flat rock on the beach. Taking advantage of this natural table, the Walrus and Carpenter proceed with their meal, pausing briefly to regret the oysters' fate.

“It seems a shame,' the Walrus said,  
To play them such a trick,  
After we've brought them out so far,  
And made them trot so quick!”

As they feed upon the young, gullible oysters, the Walrus laments their sacrifice.

“I weep for you,' the Walrus said:  
I deeply sympathize.'  
With sobs and tears he sorted out  
Those of the largest size,  
Holding his pocket-handkerchief  
Before his streaming eyes.”

After the feast, the Carpenter asks, “Shall we be trotting home again?”

“But answer came there none —  
And this was scarcely odd, because  
They'd eaten every one.”

After hearing this poem, Alice ponders the moral question of who was the lesser villain – the Walrus, who professed sympathy but ate more of the oysters, or the Carpenter, who ate fewer but still devoured as many as he could? Finally, she decides: “Well! They were both *very unpleasant* characters.”

**So what the hell does this Victorian rhyme have to do with Immigration Courts in the 21<sup>st</sup> Century?** Imagine that the sand on the beach is the Immigration Court’s backlog, the Walrus is the Attorney General and his Department of Justice (DOJ), and the Carpenter is the Department of Homeland Security (DHS). The respondents caught in between, of course, are the oysters.

## **II. A True Story.**

Perhaps an example from real life will accentuate the literary allegory. The problem of trying to juggle a client’s case simultaneously between the Immigration Court and USCIS (“both very unpleasant characters!”) is, I am sure, a familiar one for most removal defense attorneys. What follows is an extreme example with which I am personally familiar.<sup>1</sup>

### **A. The Story.**

In 2017, Mexican native “Juan Garcia”<sup>2</sup> was placed in removal proceedings based upon a recent Texas felony assault conviction. He was a long time LPR, but had already been granted cancellation of removal in earlier proceedings back in 2010. Deportability was denied,<sup>3</sup> but found by the Immigration Judge. For relief, “Juan”

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<sup>1</sup> This is a real case. My friend and former colleague Amanda Waterhouse represented the client in detained proceedings before the Immigration Judges. I represented him in subsequent appeals to the BIA and the Fifth Circuit.

<sup>2</sup> The name has been changed to protect my law license. Can we get ethics credit for this session now?

<sup>3</sup> Another 20 pages could be written on the issue of whether an assault conviction under TEXAS PENAL CODE §22.01(a) is – or was -- a “crime of violence” and, therefore, an aggravated felony. For simplicity’s sake, deportability was denied for the reasons that ultimately prevailed

was going to seek re-adjustment of status along with a waiver under INA §212(h). *See, Martinez v. Mukasey*, 519 F.3d 592 (5<sup>th</sup> Cir. 2008). The prospects for the waiver looked good; despite several minor criminal offenses, “Juan” had lived virtually all of his life in the United States, had several citizen children, and virtually no remaining ties to Mexico. The most recent assault conviction had, in fact, resulted in an order of community supervision in lieu of incarceration. Nonetheless, he was arrested by ICE and detained throughout the ensuing removal proceedings,

Of course, before he could apply for re-adjustment of status and waiver before the Immigration Judge, “Juan” needed a visa petition approved and an immigrant visa immediately available. One of his children was over 21 and thus “Juan” could seek adjustment of status as an “immediate relative” **just as soon as USCIS approved the visa petition**. Knowing that an approved petition would be required, his USC son filed the petition *before* the first master calendar hearing was conducted.

IMHO, any high school graduate with 10 minutes of training could have adjudicated that petition in no more than five minutes – if he was being *particularly* thorough. As the father of a United States citizen over 21, the only evidence needed was the son’s birth certificate, and the marriage license proving that his parents were married at the time he was born. *See*, INA §101(b)(1). *Quod erat demonstrandum*.<sup>4</sup>

Obviously, since “Juan” was detained, we were in a hurry to get the petition approved. There is a Memorandum between ICE and USCIS providing for expedited adjudications of petitions for individuals – like “Juan” – in detained removal proceedings. *See*, Policy Memo USCIS PM-602-0029 “Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings” (February 4, 2011). This Memo requires ICE to notify USCIS when removal proceedings are awaiting the adjudication of an application or petition. In detained cases, the Memo sets an aspirational goal of adjudication within 30 days. That didn’t happen in the case of our “Juan” – I’m not sure it *ever* happens.

Over the next five months, **FIVE** televideo master calendar hearings were conducted before five *different* Immigration Judges (IJ’s) sitting in five different locations, with five different ICE attorneys. The petition was filed before the first

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in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018).

<sup>4</sup> I’ve heard that we get an extra .25 hours of CLE credit for looking up every Latin phrase included in the paper. Just saying.

hearing, and requests were made at each hearing for ICE counsel to *please* notify USCIS and expedite, but the petition remained pending. It is unknown, but sincerely doubted whether any ICE attorney ever notified USCIS.

When the petition was not approved after a couple of brief continuances, ICE counsel began objecting to the delays.<sup>5</sup> Eventually, the FIFTH IJ refused to continue the case any further and scheduled a hearing on the merits of the Convention Against Torture (CAT) application we had filed as an alternative.<sup>6</sup> Before the final hearing, we desperately tried to contact the USCIS Service Center to get the approval of this ridiculously simple petition. A month later – *after* the final hearing had been conducted – we received a response from USCIS that the case did not “qualify” for expedited consideration. No explanation was given. The only apparent explanation is that the request to expedite came from *us*, and not from ICE as per the Memo.

This simple, incontrovertible petition was never adjudicated before the final hearing **over five months after it had been filed**. The CAT claim left to us was denied (“*Now, THERE’s a surprise!*”), so we appealed to the BIA and lost (surprise again!). We appealed to the Fifth Circuit, which refused to grant a stay (another profound shock) and “Juan” was deported to Mexico while his appeal remained pending at the Court of Appeals. While it was still pending, *Sessions v. Dimaya, supra*, was issued and the removal order was eventually vacated.<sup>7</sup> And this simple I-130 *still* wasn’t adjudicated during the appeal to the BIA or the Court of Appeals.

So, despite our best efforts to overcome the USCIS delays beyond our control, “Juan” was **detained for over a year and removed** without any chance to pursue his best avenue of relief. The preparation, hearing, decision and appeal of the alternate CAT application was essentially a waste of *everyone’s* time, necessitated by the delay in adjudicating the I-130 petition. The fact that our challenge to his deportability was a matter pending before the Supreme Court (where it ultimately prevailed), was also repeatedly made to the IJ’s and the BIA and the Court of Appeals. They proceeded anyway to order his deportation as quickly as possible, before either the

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<sup>5</sup> Hey, why bother taking the time and trouble to push USCIS to expedite, when you can do nothing and actually use the inevitable delay as a weapon instead? ☹

<sup>6</sup> I always try to have a backup plan. This case is a good example of why.

<sup>7</sup> Which proves yet again that successfully contesting deportability is still the best “relief from removal.” ☺

circumstances or the law could change in his favor. Which inevitably reminds me of another Lewis Carroll poem<sup>8</sup> (*The Mouse's Tale*) from *Alice in Wonderland*:

“Fury said to a mouse,  
That he met in the house,  
'Let us both go to law:  
I will prosecute you.—

Come, I'll take no denial;  
We must have a trial:  
For really this morning  
I've nothing to do.'

Said the mouse to the cur,  
'Such a trial, dear sir,  
With no jury or judge,  
would be wasting our breath.'

'I'll be judge, I'll be jury,'  
Said cunning old Fury;  
'I'll try the whole cause,  
and condemn you to death.'”

## **B. The Rest of the Story.**

The story related above is, hopefully, an extreme example of the problem. However, judging by my other cases and what I hear from colleagues, it is hardly unusual for removal case to be prolonged by USCIS adjudications.

Multiple continuances while awaiting USCIS action on a petition or application has been “the Rule,” not an exception. This is not a good thing for *anyone* associated with the Immigration Courts. It hurts the IJ’s production numbers and lengthens the backlog, it doesn’t help respondents (like Juan) who may be detained months longer than necessary and even deported while waiting for the decision, and ICE has to pay

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<sup>8</sup> See what I mean? As an immigration practitioner, you can't swing a dead cat without colliding with an apt analogy authored by Lewis Carroll. I think AILA should name an award after him or something.

for all that additional detention and supervision. And, apparently, it *really* pissed off our former Attorney General.

### III. *Matter of L- A- B- R-, et al.*

Former Attorney General Jeff Sessions saw the problem and attempted to address it in a published precedent. *Matter of L- A- B- R-, et al*, 27 I&N Dec. 405 (AG 2018). If you wonder why perfectly reasonable requests for continuances are often denied these days, you may want to read this decision.

#### A. The Attorney General's Opinion.

Noting that “Respondents often request continuances because they are pursuing collateral relief in other forums that may affect the outcome of their removal proceedings,” the Attorney General revealed that “the number of continuances granted by immigration judges has increased dramatically over the past decade.” *Id.*, at 405, 406. According to the EOIR Inspector General, “‘frequent and lengthy continuances’ were a ‘primary factor’ contributing to delays in the immigration courts.”<sup>9</sup> *Id.*, at 409.

While acknowledging that continuances are a legitimate and appropriate case management tool, Sessions emphasized that the Government has “a strong interest in the orderly and expeditious management of immigration cases.” *Id.*, at 406. Quoting himself, Sessions again noted that “once DHS initiates proceedings, immigration judges and the Board must proceed expeditiously to resolve the cases,” *Id.*, at 406 - 407, quoting *Matter of Castro-Tum*, 27 I&N Dec. 271 (AG 2018).

The BIA had previously set forth multiple factors for IJ’s to consider before granting a continuance for “collateral” adjudications. *See, Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). Those factors include whether and why DHS opposes the continuance, whether approval of the petition will make the respondent eligible for adjustment of status, whether adjustment is likely to be granted in the exercise of discretion, *etc.*

The Attorney General concluded that IJ’s should continue to apply the *Hashmi* factors in considering continuances, “but that the decision should turn **primarily on**

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<sup>9</sup> A truly brilliant statement. Barring an emergency shutdown of the building (or government), what factor *other than* a “continuance” of some kind would possibly delay Immigration Court proceedings? I can’t think of any. Can you?



**the likelihood that the collateral relief will be granted and will materially affect the outcome of the removal proceedings.”** *Matter of L- A- B- R-, et al, supra*, at 412. And, of course, “good cause” may not exist if the respondent has not proceeded with “reasonable diligence,” if DHS “justifiably opposes<sup>10</sup>” the motion, or the continuance is “unreasonably long.” *Id.*

## **B. My Opinion.**

My opinion is that attorneys can always best serve their clients by keeping judges and opposing counsel as happy as may be possible consistent with zealous representation. Therefore, every effort should be made to address the Attorney General’s concerns in *Matter of L- A- B- R-, et al*, and avoid running afoul of that precedent. To that end, I offer some practical suggestions *infra*.

Having said that, I must also add that I cannot read *Matter of L- A- B- R-, et al* without becoming angry. It isn’t so much the actual holding of the case that I find contemptible; rather, it is the rationale and tone.

For example: Sessions repeatedly refers to the adjudication of petitions by DHS as “collateral” relief. IMHO, the processing of a petition that is *necessary* for an IJ to consider an application *within his or her jurisdiction* is not “collateral.” The only thing “collateral” about it is that the required petition is filed with another government agency because the Government’s own regulations set it up that way! (*But see below*).

I am also angered when Sessions refers to the notion that unjustified continuances provide “an illegitimate form of de facto relief from removal.” *Matter of L- A- B- R-, et al, supra*, at 411. This is just his invocation of the traditional government misconception that continuances *always* favor the respondent in Immigration Court and removal defense lawyers are paid more for every extra day we can keep the case going.<sup>11</sup> This baseless allegation ignores the fact that many (far *too*

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<sup>10</sup> I have a difficult time imaging a “justifiable” objection where the respondent has acted diligently, the petition is likely to be approved, and there are no serious adverse factors that would otherwise compel a denial of relief in the exercise of discretion. Even if DHS plans to oppose the requested relief, this should not justify the denial of a hearing on the application.

<sup>11</sup> Like most immigration attorneys I know, we charge on a fixed fee basis for representation before the Immigration Court. Since I don’t bill by the hour, having to go to *more* hearings, file *more* motions, *etc.*, means I spend *more* time on the case and make *less* money.

many) respondents are DETAINED and, therefore, do not benefit from delay *per se*. Quite the contrary: Prolonging the case hurts the detained respondent and his family. I have had many clients with viable defenses or relief who simply gave up and accepted deportation because they couldn't stand to be in jail for the time it took to reach a resolution.

The misconception is also refuted by many of my non-detained clients who, being eligible for and ready to seek relief in removal proceedings, are actually frustrated by the delays they encounter in Immigration Court. It would apparently come as a shock to Mr. Sessions that *many* respondents *do not want their cases postponed*. I have simple adjustment cases that, without any motion from the respondent, have been pending in the Houston Immigration Court for **over six years**. Far from being more profitable for attorneys, these cases carry the additional burden of having to repeatedly update documentation, take phone calls and respond to emails from impatient clients explaining – over and over and over – why the case hasn't been scheduled yet.

Apparently, Sessions believes that only the Government suffers from the Immigration Court's backlogged docket. The suggestion that it's all a plot by dilatory defense counsel is also a thinly veiled insult to the integrity of the immigration bar. I don't think I'm a "snowflake," but I take that personally.<sup>12</sup>

#### **IV. "And Why the Sea is Boiling Hot."**

Another obvious defect in the Attorney General's opinion is that there is no intelligent discussion regarding the true reasons behind the increasing number and length of continuances. *Why* are cases being continued in the first place? Other than blaming the respondents and their attorneys, the decision offers not a clue.<sup>13</sup> The responsibility of USCIS for the increase in requested continuances is never mentioned anywhere in the 14 page decision. Jeff Sessions may believe that the increase in number and length of continuances is all on respondents and their attorneys, but

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Maybe I'm not doing it right. Or maybe the notion that removal defense attorneys profit by encouraging senseless delay is just nonsense repeated despite having little foundation.

<sup>12</sup> As may be apparent. ☺

<sup>13</sup> Perhaps the former Attorney General didn't have one to offer. Certainly, someone in the Department of Justice should have had the information to explain the phenomenon if he bothered to ask.

anyone who actually knows what goes on in an Immigration Court understands that USCIS bears much, if not most of the blame.

### **A. USCIS Adjudications.**

I take it as given that USCIS adjudications are taking longer than they did a few years ago. I don't have an Inspector General's Report to prove this, but I have a lot of experience and a lot of friends and we talk. Processing times posted on the USCIS website indicate up to 10 months for the adjudication of an immediate relative I-130 – and that's just wishful thinking.

The procedures for filing with USCIS insure that petitioners and their attorneys have no effective way to expedite or even track filings. We send it to a “lock box;” it goes to a Service Center with which communication is intentionally difficult if not impossible. Sometimes, after waiting for months, we get notice that the case has been transferred to a different Service Center for “faster service.” (LOL). If an interview is deemed necessary (not uncommon when the beneficiary is in removal proceedings), then of course the petition must come to the local Field Office for the interview and adjudication. The Service Center and/or Field Office may issue RFE's, often for evidence that has already been submitted, further delaying the adjudicatory process.

I won't presume to tell USCIS how to do its job. I will even give USCIS the benefit of the doubt: This system may indeed be the most efficient way for USCIS to deal with its huge caseload. But it was not designed to accommodate expedite requests or “special” cases. It's like a county hospital providing thorough checkups and treatment for thousands of people once a year, but unable to serve people bleeding to death *now*.

### **B. But Wait, It Gets Worse!**

Far from lending a sense of urgency, the pending removal proceedings actually complicate the adjudication process. Again, I rely upon personal experience over a period of many years. The respondent's “A file” may have to move from ICE to a USCIS Service Center to a USCIS Field Office, *etc.*, sometimes more than once. ICE counsel needs the file for an upcoming hearing; transferring the file to ICE counsel takes it away from the USCIS adjudicator (who would otherwise get around to it eventually).

IJ's are under strong pressure to keep continuances as short as possible. Ironically, however, a quicker turnaround between hearings increases the chances that

the file won't get where it needs to be on time, or remain there long enough to actually get anything done. Shorter continuances can thus prolong the adjudication process, the opposite of the desired effect.

Further, when ICE counsel doesn't receive the file by the time of the hearing, another continuance may result for that reason alone. And, as far as I can tell, DHS files do not move themselves automatically – **someone has to move the file from one office to another**, which means that inertia may take hold at any point in this Odyssey.<sup>14</sup> The adjudication process comes to a screeching halt until someone responsible finds and moves the file again. And who will that person be? The unknown and unreachable USCIS adjudicator? The ICE attorney who appeared at the *last hearing* before the IJ? Or the as-yet-unknown ICE attorney who will appear at the next hearing? The movement of ICE attorneys lessens the probability that any particular attorney for DHS can actually assume ownership of the file and follow up. I strongly suspect that having five different ICE attorneys in five months was a major factor in my True Story related above; a “rolling stone gathers no moss,”<sup>15</sup> and a petition trapped in a moving file is hard to adjudicate.

This ridiculous “system” is a “Rube Goldberg machine:”<sup>16</sup> a process intentionally designed to perform a simple task in an indirect and over-complicated fashion. The adjudication of petitions for respondents in removal proceedings, far from being “expedited” as the Policy Memo intends, ends up taking much *more* time than the normal “processing times” posted on the USCIS website. Tragically, actually deciding the petition may take only a matter of minutes despite the PROCESS taking months or even years. Rube Goldberg would love it. Everyone else, including IJ's, respondents and their attorneys, ICE and former Attorney General Sessions, should hate it.

## V. “And Whether Pigs Have Wings. . .”

Can pigs fly? Is there a better way to handle these things? Is there a process that would benefit not just the government or the respondent, but *everyone* involved?

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<sup>14</sup> First Lewis Carroll, now a Homeric metaphor. What classic author is next??

<sup>15</sup> Proverb credited to someone named Publilius Syrus.

<sup>16</sup> Look up “Rube Goldberg machine” on the internet. Watch a few of the videos that come up, while thinking of the this adjudication process. If you don't fall on the floor laughing, you're made of sterner stuff than I.

## **A. A Modest Proposal.<sup>17</sup>**

I humbly offer a modest proposal (ahem):

- **Amend the regulations to give IJ's jurisdiction over petitions filed in support of an application for relief from removal.**

If IJ's can be expected to understand and apply the "categorical approach" to resolve criminal issues of removability (often a very complicated legal analysis), it can hardly be suggested that I-130 petitions would overtax their abilities. And, by insisting that IJ's prioritize "the likelihood that the collateral relief will be granted" in considering continuances, former Attorney General Sessions has already presumed the ability of the IJ's to determine the approvability of the USCIS filing. So granting them the authority to adjudicate the filings in the Immigration Court proceeding is a rather small step further.

Why are I-130's not handled this way already? I believe it is simply a matter of bureaucratic inertia. When I started practicing, the IJ's and the trial attorneys worked for the Immigration and Naturalization Service (INS) which was a part of the DOJ. So did the examiners who adjudicated petitions. If a respondent in deportation proceedings needed a petition approved to support an application for relief, it was a simple matter for the trial attorney to go down the hall and talk to the examiner working on the petition and move it along (petitions were filed in the local district offices back then). After all, both the examiner and the trial attorney were under the same INS District Director.

When EOIR was created as a separate entity within the DOJ (back in 1983, I believe), a lot of regulations had to be amended. But I-130 adjudication was left with the INS. Then, with the Homeland Security Act in 2003, what had been INS was divided into three agencies and moved to the new DHS. Again, a lot of regulations had to be amended but the regs governing petition adjudications were left intact. Personally, I think it was a simple oversight – there were more pressing priorities and no one at that time could foresee the mess that would ensue a few years later. I can't prove that this is the reason; but the idea that the Rube Goldberg machine that presently exists could actually be the intended result of a conscious decision seems pretty far-fetched to me.

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<sup>17</sup> Now a tip of the hat to Jonathan Swift. One of the benefits of a liberal arts education is the ability to superficially refer to great literary works you've never read (or finished).

## **B. Advantages.**

There are numerous advantages to making this change. The first and most obvious advantage would be that removal proceedings would no longer be delayed waiting for USCIS to join the party. In most cases, the IJ would simply decide the petition AND the relief application (usually adjustment of status) at the same hearing. This should absolutely thrill the Attorney General and his people at DOJ. If he were still around, I'm sure Jeff Sessions would embrace my Modest Proposal.

### *-- Benefits to Respondents*

The respondents seeking relief in removal proceedings should also welcome the change. The same IJ deciding the relief application will also be deciding the petition; the same evidence and witnesses need only be presented once to the same tribunal. Approvable relief applications will be approved faster, benefitting respondents and their families. And even if the relief application is to be denied, many respondents (especially detained individuals) prefer to know that sooner rather than later. Those wishing to contest the denial can always appeal and, indeed, the appeal process itself will also improve as discussed below.

### *-- Benefits to USCIS*

The change should also benefit USCIS by reducing its workload. USCIS obviously has its own "system" for processing petitions and applications, and that system was not designed to coexist with removal proceedings. While USCIS may try to adapt to the exigencies of Immigration Court proceedings, the agency is obviously challenged by the effort. By removing those urgent cases from the system, USCIS need no longer adapt to the priorities of ICE and the Immigration Courts. They can just focus on what they do best.

### *-- Improved Appellate Review*

Another advantage of having IJ's adjudicate petitions for individuals in removal proceedings is that it would streamline review when petitions are denied. At present, the denial of a petition by USCIS (in DHS) results in an appeal to the Board of Immigration Appeals (in DOJ). *See*, 8 CFR §§ 1003.1(b)(5), 1003.3(a)(2). The record for the appeal must then be prepared by the USCIS Director and forwarded to the BIA. 8 CFR §1003.5(b). The reg allows a 45 period for the USCIS Director to consider whether to reopen the case and approve it, after which the appeal record is supposed to be forwarded to the Board "immediately." *Id.*

But, as many immigration practitioners know, **it sometimes takes years for USCIS to forward an appeal to the BIA.**<sup>18</sup> Apparently, it's just not a high priority for USCIS Directors. Since USCIS and ICE are both within the DHS, a cynic might even suggest that USCIS priorities in this regard may be *intended* to foreclose or delay relief in removal proceedings. Maybe that's a bit harsh, but I've never seen an ICE attorney try to light a fire under USCIS and move a petition appeal along.

Meanwhile, the beneficiary's removal case may proceed without the opportunity of pursuing the relief that was dependent upon the petition. This creates the possibility (which I have personally experienced) of having *two* appeals pending at the BIA for the same client at the same time – one for the petition that USCIS denied, and one for the removal proceedings that went forward anyway.

If the IJ decides the necessary petition **in removal proceedings**, the case would stay within the confines of DOJ. EOIR would forward the IJ decision and the record of proceedings to the BIA. This is familiar territory for EOIR personnel; they do it several times each day before lunchtime. Instead of two appeals to the BIA, one from the USCIS denial and one in removal proceedings, there would be only *one* appeal. The BIA's caseload would reduce, and the parties only have to write *one* brief.

-- *Improved Judicial Review.*

Finally, for those cases that may go there, judicial review would be streamlined by giving IJ's jurisdiction over petitions in removal proceedings. At present, if an immigrant visa petition is denied and the BIA affirms that denial, you have to go to District Court for review of the petition. *Ayanbadejo v. Chertoff*, 517 F.3d 273 (5<sup>th</sup> Cir. 2008). But issues that arise *in removal proceedings* bypass the District Court and go straight to the Court of Appeals. INA §242(a)(1), 8 U.S.C. §1252(a)(1). Again, the prospect of litigating two inextricably linked cases in two different courts.

By giving the IJ jurisdiction to adjudicate underlying petitions in removal proceedings, review of the BIA's petition denial would be a part of the removal order, and consolidated in one appeal. My friends, I submit that this proposal is a winner for everyone involved.

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<sup>18</sup> This is not an exaggeration; it is a common occurrence. The worst delay I experienced was two and a half years to forward an I-130 denial to the BIA. Delays of over a year are so common that I have developed the tactic of filing a mandamus action in District Court when the appeal is not forwarded after a few months. I have had to employ this tactic on several occasions.

## C. Objections.

There are, of course, potential issues on the other side of the argument. I believe they can be easily answered or taken into account.

What about difficult I-130's, like a last minute marriage to a U.S. citizen, that may require closer scrutiny and/or investigation than an IJ can give? Well, in the first place, I submit that the validity of a questioned relationship can better be determined by examination and cross examination on the record in adversarial proceedings than in an unrecorded interview before a USCIS officer. Putting that aside for the moment, I submit that *most* I-130's are simple, requiring only the examination of documentary evidence and the application of the law to that evidence. Therefore, *in most cases*, giving IJ's jurisdiction over these petitions would be more efficient.

For the exceptional cases, I submit that an IJ can do what IJ's *always* do when they need something for their decision making – **order someone to provide it and set a schedule for doing so**. If the IJ wants specific documentation from the respondent and/or the respondent's petitioner before the petition can be approved, a deadline can be set to file and serve those documents just as is done for any other type of evidence in Immigration Court. If the IJ believes that a field investigation is necessary, then the case can be continued and a date set for submission of the report. DHS would then have a deadline with which to comply, and every incentive to proceed with dispatch.

And if a case must occasionally be continued for these purposes, so be it. Such a delay would be the rare exception in contrast with the frequent, almost inevitable continuances for USCIS adjudication under the present Rube Goldberg "system."

It can hardly be said that this proposal will add greatly to an IJ's workload. The filing of the petition and supporting documentation would occur simultaneously with the adjustment and other relief applications. The factors relevant to the petition invariably arise in considering the applications anyway; the witnesses and evidence are already being offered in the hearing and it is unlikely that any additional time would be required. An additional check mark on a Memorandum Order, or few extra paragraphs in a written or oral decision, would appear to be the extent of any additional burden on the IJ's.

Maybe I'm wrong, and I'm willing to listen to anyone who thinks I am. I've been around a while, though, and I've thought about it a lot. If this proposal places any significant imposition on the IJ's it is not apparent to me. Even if the



adjudication of immigrant visa petitions adds to an IJ's workload, I strongly suspect that the time saved by the streamlining discussed above would more than compensate.

Oh, and BTW – I think the quality of decision-making would also improve. I have seen some really, really deplorable decisions made on petitions by USCIS when the beneficiary is in removal proceedings. The transparency of witnesses testifying on the record subject to cross examination, cross service of documents by the parties, and having a legally-trained IJ as the decider would all contribute to a better end result, IMHO.

#### **D. Getting the Pig to Actually Fly.**

So why am I offering this modest proposal? I didn't write the regs and I can't amend them. But I am hoping that others may agree and, together, we can provide *impetus* for the changes needed. I'm writing about it to spread the word. If you also think it's a good idea, talk about it with others. IMHO, the FBA is an excellent forum for cross pollination of ideas between private and government practitioners.

### **VI. Protecting The Oysters While Waiting for the Pig to Fly.**

For the present, respondents and their attorneys are stuck with the Rube Goldberg machine of USCIS adjudications and *Matter of L- A- B- R-, et al.* What can they do (or avoid doing) to prevent the oysters from being eaten while waiting for sanity to break out? What if the case is pending at USCIS and they need a continuance? I have several suggestions, most of them learned the hard way.

#### **A. Be Prepared.**

In seeking a continuance, as in all things, timely and thorough preparation will help your cause. If you have a reputation with the Court and DHS counsel for being prepared, you are less likely to need a continuance and more likely to receive consideration when you do.

File the immigrant visa petition as quickly as possible. If you need a continuance thereafter, file a written motion *in advance*. Follow the dictates of the Immigration Court Practice Manual. Contact DHS counsel (if you can), let them know you are seeking the continuance and try to get an agreement for a joint motion.

Doing these things will save everybody time and, if done sufficiently far in advance, will allow the Court to schedule something else for your time slot. It will also prevent opposing counsel from wasting time preparing for the hearing.

This is in keeping with my overall, personal philosophy of litigation: “Make it as *easy* as possible for the judge and opposing counsel to go along with you; make it as *hard* as possible for them to oppose or deny you.” If you appear on the day of the scheduled hearing, and make an oral motion for continuance because the respondent’s wife of 10 years just filed an I-130 yesterday, don’t expect sympathy from the IJ or opposing counsel.

## **B. Jurisdiction.**

It is also vital to keep in mind the IJ’s jurisdiction. For example, with the exception of “arriving aliens,” an IJ has exclusive jurisdiction over adjustment of status for an eligible applicant in removal proceedings. *See*, 8 CFR §1245.2(a)(1). Thus, if the respondent is eligible to adjust before the IJ, the IJ has a reason to wait for USCIS to adjudicate the necessary petition.<sup>19</sup> The petition pending with USCIS is required for the IJ to consider a matter within his or her jurisdiction, and thus “will materially affect the outcome of the removal proceedings.” *Matter of L- A- B- R-, et al, supra* at 412.

If, OTOH, the respondent is not eligible for adjustment of status before the IJ, then there is nothing to *compel* a continuance. If the petition pending with USCIS is truly “collateral” and not connected to anything the IJ can consider in removal proceedings, it is far less likely you will get your continuance. Which brings us to the next helpful hint.

## **C. “What’s In It for Me?”**

To the extent possible, give the IJ and opposing counsel incentives to continue the case. This is the other side of the philosophy noted above: if the respondent needs a continuance, make it *hard* for the IJ and opposing counsel to not give it.

If a respondent has a possible argument in defense of the removability charge, and/or more than one possible relief application available, **these issues should not be waived**. It is not unusual for someone to have an arguable but difficult asylum or cancellation of removal case, and a comparatively easy adjustment of status case **if and when** the petition is approved by USCIS. Since neither USCIS adjudications nor the IJ’s continuance can be considered certain, the respondent should file the

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<sup>19</sup> Although, as noted throughout this paper, there is no good reason the IJ should be *required* to wait on USCIS.

other relief applications as well. Both the IJ and ICE counsel can then weigh the certainty of a four hour cancellation and/or withholding hearing against the prospects of a 15 minute adjustment of status hearing, and see that continuing the case may actually save everyone's time where multiple relief possibilities exist.

Once filed, the alternative relief applications should be fully supported by filing and serving the supporting documents, and preparing for a full hearing on the merits. If the petition gets approved by USCIS and the superior relief application becomes available, the alternate relief applications can always be withdrawn later when "the bird in hand" is actually "in hand." But if forced to go forward without the USCIS approval, then at least the respondent will have a hearing (and a possible appeal) for something other than the unsuccessful request for continuance. **You can't appeal a denial unless you actually applied for something**, and it is very hard to win an appeal from the denial of a continuance alone. *See, e.g., Patel v. INS*, 803 F.2d 804 (5<sup>th</sup> Cir. 1986), *Witter v. INS*, 113 F.3d 549 (5<sup>th</sup> Cir. 1997).

If your respondent is not eligible to adjust but needs time before proceeding abroad for consular processing, then *Matter of L- A- B- R-*, *supra*, may prevent getting a continuance. In such cases, contesting the charges and/or pursuing alternative relief applications may yield the time that the IJ might otherwise be unable or unwilling to grant. Of course, making an argument or filing an application that is "frivolous" *solely* for the purpose of delay is unethical. 8 CFR §1003.102(j). Don't do that.<sup>20</sup>

But an application for relief that is arguable and properly prepared is not "frivolous" just because you know the IJ may deny it and the BIA may affirm that denial. In our legal system, DOJ does not get to decide the permissible limits of the law. The law changes all the time, and the only way it can change is for crazy lawyers to make well supported arguments they know will be rejected at first.

These suggestions will hopefully minimize the damage that could otherwise result from *Matter of L- A- B- R-*, *et al* and the rush to finish proceedings before the respondent can apply for available relief. Until the ridiculous *status quo* gets fixed, all we can do is all we can do.

## VII. Conclusion.

Lamenting that their beach was made up of entirely too much sand, the Walrus and Carpenter ultimately concluded that nothing could be done about it.

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<sup>20</sup> If we don't get ethics credit for this, it won't be because I didn't try.

If seven maids with seven mops  
Swept it for half a year,  
Do you suppose,' the Walrus said,  
That they could get it clear?'  
I doubt it,' said the Carpenter,  
And shed a bitter tear.

I believe, however, that the increasing docket backlog in the Immigration Courts *can* be helped without limiting the respondents' access to full and fair hearings. I believe that a solution can be found that benefits respondents as well as the government agencies involved. I have offered a proposal, and a few suggestions to otherwise cope. Hopefully, our new AG will not only "deeply sympathize," but actually try to fix the problem.

*"I am the Walrus.  
Googoogajoob."*