

# COMMUNITY

## JOURNAL

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ATTY. ROBERT REEVES & NANCY MILLER

## Fairness makes a return appearance in court

record, that becomes one factor to be weighed with the others.

Of equal importance, the BIA specifically stated that IJ compliance with case completion goals is not a proper factor in deciding a continuance request. Case completion goals are case management guidelines set out by the Office of the Chief Immigration Judge. In Hashmi, the IJ recognized that the case completion goals are not mandatory but nonetheless relied on the goals in denying the motion. When this case was initially appealed, the Board upheld the IJ's denial of the motion. Hashmi filed a petition for review with the Third Circuit which was granted. The case was then remanded back to the Board for a new decision consistent with its order. It is that second decision that we are discussing here. In the Third Circuit decision, the court held that it was arbitrary and an abuse of discretion for the IJ to deny the unopposed motion for a continuance on the basis of the case completion goals. This is extremely important because in Hashmi's case (as is true in many cases) the delay was based on the fact that DHS had not adjudicated the petition. Hashmi had no control over when and how the petition was to be decided. It was unfair to penalize him for government inaction.

In a similar case, the Ninth Circuit held, in Ahmed v. Holder, that the IJ had abused her discretion in denying an unopposed motion to continue removal proceedings to allow the Administrative Appeals Office to decide an appeal of a denial of an immigrant visa petition. The court held that there are four factors to be considered in determining whether the denial of a continuance is an abuse of discretion. They are: (1) the nature of the evidence excluded as a result of the denial of

the continuance; (2) the reasonableness of the immigrant's conduct; (3) the inconvenience to the court; and (4) the number of continuances previously granted.

As with the BIA case discussed above, the discussion of the factors provided extremely significant guidance. In discussing the importance of the evidence excluded, the court held that, by denying the continuance, the IJ had effectively pretermitted Ahmed's appeal. That means, the IJ had essentially made the appeal meaningless. The court further held that the need for a continuance was not based on any unreasonable conduct on Ahmed's part. Indeed, it was the government whose actions were needed to complete the process. With regard to the third factor, the court issued a stern warning against "a myopic insistence upon expeditiousness" stating that "an immigrant's right to have his or her case heard should not be sacrificed because of the immigration judge's heavy caseload." A need to clear a heavy calendar or to meet compliance deadlines is insufficient reason to deny a motion to continue.

The court held that no one factor is dispositive. The IJ is required to weigh them all in reaching a decision.

The court made one other important holding in this case. It held that the alien is not required to show prima facie eligibility for adjustment of status to demonstrate good cause for a continuance. This was important because, during the time the case was pending, the visa numbers had retrogressed (gone backwards) and were not immediately available to him. Without specifically saying so, the court implied that, if the visa numbers had been available at the time the adjustment application was filed, the court

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