Practice Advisory:
The Impact of *Matter of L-N-Y-*, 27 I&N Dec. 755 (BIA 2020)

On January 22, 2020, the Board of Immigration Appeals (BIA or Board) issued *Matter of L-N-Y-* concerning continuances in immigration court for U visa petitioners. The BIA's findings are fundamentally flawed and advocates should continue to fight back against this precedential decision while it is challenged at the circuit court. This advisory provides an overview of key provisions in the decision, discusses its intersection with other BIA decisions on continuances, and provides best practices for requesting continuances for U visa applicants in removal proceedings.

I. Overview

Matter of L-N-Y is a precedent decision that ***does NOT overturn*** *Matter of Sanchez Sosa*.[1] Instead, the Board builds on its 2018 decision in *Matter of L-A-B-R-*[2] discussing the balancing of primary and secondary factors immigration judges (IJs) should consider in granting a request for a continuance when an applicant has an application for "collateral" relief, in this case a U visa, adjudicated under the exclusive jurisdiction of USCIS.[3]

In *L-N-Y*, the Respondent was convicted of attempted possession in 2018 and placed into removal proceedings in January 2019. In March 2019, he sought a continuance to obtain a law enforcement certification for a U visa application, and the matter was continued to April 2019. In April 2019, Respondent notified the court that his U visa petition was filed with USCIS, and requested the Immigration Judge set a hearing on inadmissibility waiver under INA 212(d)(3)(A)(ii) and other provisions.[4] At a hearing in May 2019, the immigration judge granted the Respondent's inadmissibility waiver but declined to continue the matter pending adjudication of his U visa petition, and ordered him removed. Respondent appealed and while the appeal was pending, filed a motion to remand because the Respondent received a notice placing him on the U visa waitlist.[5] Respondent was detained at the time of the decision.

A. *Matter of Sanchez Sosa*

[1] *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012).
[2] *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018).
[3] Note that prior BIA decisions do not use this framework. See CLINIC's L-A-B-R-Advisory at 9.
[4] A footnote in notes that neither DHS nor the Respondent challenged the immigration judge's authority to grant a waiver of inadmissibility under INA 212(d)(3)(A)(ii). This matter was resolved in the Seventh Circuit very recently in Baez-Sanchez II.
[5] Despite the Board's reference to an "informational letter" from USCIS, USCIS in fact issued a deferred action decision and placed Mr. L-N-Y- on the U Visa waitlist pursuant to 8 C.F.R. § 214.14(d)(2). He has been released from ICE custody since the issuance of the BIA's decision.

L-N-Y- discusses the factors of *Sanchez Sosa*, a 2012 BIA case that established that "[a]s a general rule, there is a rebuttable presumption that an alien who has filed a prima facie approvable [U visa petition] with the USCIS will warrant a favorable exercise of discretion for a continuance for a reasonable period of time."[6] Under *Sanchez Sosa*, in granting a continuance, the immigration judge **shall** consider:

- DHS' response to the motion to continue;
- whether the underlying visa petition is prima facie approvable; and
- the reason for the continuance and other procedural factors.[7]

The Board in *Sanchez Sosa* found that if an application has been filed with USCIS with a certification and the application meets the criteria to be granted, then "any delay not attributable to the Respondent 'augurs in favor of a continuance.'"[8] The Board also laid out other factors the IJ may consider, including:

- History and number of continuances being granted by an Immigration Judge; and
- Length of time the application is pending.

B. *Matter of L-A-B-R-*

L-N-Y- later overlays or "refines" this analysis with that of *Matter of L-A-B-R-*, which instructs IJs and the BIA to consider "all relevant factors" in assessing "good cause" to continue proceedings to accommodate a "collateral matter."[9] The chart on the next page outlines the *L-A-B-R-* factors.

Primary Factors	Secondary Factors
● The likelihood that the Respondent will receive the collateral relief ● Whether the relief will materially impact the outcome.	● Respondent's diligence in seeking collateral relief ● DHS position on the motion ● Concerns of administrative efficiency ● The length of continuance requested ● The number of hearings held and continuances granted previously ● Timing of the motion to continue

In *L-N-Y*, the Board did not disagree that the Respondent was *prima facie* eligible (*Sanchez Sosa)* and the grant of the visa would materially affect the outcome (primary factor under *L-A-B-R-*). However, the Board found these primary factors are not dispositive when there are relevant

[6] *See Sanchez-Sosa* at 815.
[7] *Id.* at 812.
[8] *Id.* at 814.
[9] *L-N-Y-* at 757.

secondary factors that weigh against continuing the case.[10] The Board concluded that DHS' opposition to the motion, concerns regarding administrative efficiency, the respondent's lack of due diligence and the respondent's detention were negative factors in considering the request.

II. Analysis

Below we discuss BIA error in *L-N-Y-* and provide practice pointers to address the issues this decision raises in your cases.

A. Primary Factors

1. *Prima Facie* Eligibility

As mentioned above, *L-N-Y-* does not overturn *Sanchez Sosa*, and practitioners should still remind IJs of their obligations to consider the factors laid out in that case. IJs must make their own *prima facie* determinations (PFD) if ICE refuses to initiate the process or if the Vermont Service Center (VSC) fails to respond to ICE requests. Following its recent policy guidance, ICE's stance is that it is not required to reach out to USCIS for a prima facie determination, and in fact, ICE will probably refuse such requests. However, as this new guidance has not been made public and ICE is not prohibited from reaching out to USCIS for PFDs, advocates may consider continuing to make the request.[11]

If an IJ must make a PFD on her own, *Sanchez Sosa* focuses the inquiry on the central elements of the U visa application: **qualifying crime, harm suffered, and helpfulness of the applicant.** If the respondent is inadmissible, the IJ should also assess the "likelihood that USCIS will exercise its discretion favorably" in considering the waiver of inadmissibility.[12]

In *L-N-Y*, the Board does not address whether the IJ made the required *prima facie* analysis after Mr. L-N-Y- filed the U petition, perhaps because there was no dispute as to his eligibility.[13] IJs must make individual determinations about whether the applicant was a victim of a qualifying crime and suffered "substantial physical or mental abuse" based on that crime.[14] It is incumbent on IJs to make these determinations, as the respondent's prima facie eligibility remains a primary factor in the consideration of a continuance in the U visa context.[15] Some IJs erroneously take the position that *L-A-B-R-* requires them to deny continuances in U visa cases. However, nothing in

[10] *L-N-Y-* at 758.
[11] ICE Fact Sheet, Revision of Stay of Removal Request Reviews of U Visa Petitioners, August 2, 2019. Available at https://www.ice.gov/factsheets/revision-stay-removal-request-reviews-u-visa-petitioners.
[12] *Sanchez Sosa* at 814.
[13] *L-N-Y-* at 757.
[14] *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012). For a non-inclusive list of harm factors, *see* 8 C.F.R. §214.14(b)(1). Just as each crime survivor's experience is different, what is substantial harm may vary by individual, as subjective experience may be as important as objective acts.
[15] *L-N-Y-* at 757.

the *L-N-Y-* or *L-A-B-R-* decisions eliminates the required factors and analysis presented in *Sanchez Sosa*.[16]

> ***Practice Pointer:*** ICE can request that USCIS expedite adjudication of the U visa petition.[17] If ICE refuses your request expedited adjudication of the petition, ask the IJ to order ICE to request USCIS expedite the adjudication. This would alleviate the court's need to make a prima facie determination.

2. Grant would Materially Affect the Outcome of Proceedings

In *L-N-Y-*, the BIA agreed that a grant of the U visa would materially affect the proceedings.[18] The fact that the U petition approval will materially affect the proceedings means this prong of the assessment has been met.

> ***Practice Pointer*:** If an IJ or trial attorney disputes whether a U visa grant would materially affect the outcome of removal proceedings, practitioners should brief why the U petition approval would result in an admission and lawful status and would overcome all grounds of inadmissibility waived by DHS with the U petition approval (with the exception of INA 212(a)(3)).

Although the BIA agreed that a U visa grant would materially affect the outcome of removal proceedings, they denied the motion for remand on the basis that having been placed on the waitlist would not change the IJ's denial of the continuance because the U visa itself had not been granted.[19] However, there is no requirement that the collateral matter have been granted in order to show good cause for a continuance. In fact, if the collateral matter had already been granted and the grant would materially affect the outcome of proceedings, there would likely be no need for a continuance at all. In its denial of the remand, the BIA appears to confuse the parameters of this primary factor.

B. Secondary Factors

1. Lack of Diligence

The BIA gave strong weight to the fact that Respondent only applied for U visa relief in 2019 when the qualifying crime occurred in 2009.[20] Again, the BIA ignores the Congressional intent of

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[16] *See Matter of L-A-B-R-* at 413, 418 (citing *Sanchez Sosa* and *Hashmi* with approval).
[17] USCIS will consider expediting adjudication of an application or petition where there is a "compelling U.S. government interests (such as urgent cases for ... DHS…)." https://www.uscis.gov/forms/forms-information/how-make-expedite-request.
[18] *L-N-Y-* at 757.
[19] *Id.* at 760.
[20] *L-N-Y-* at 758, deeming it "significant that despite being potentially eligible for a U visa since 2009, respondent only filed his petition for relief a month before his removal hearing.

establishing U visa protections, which is to provide protection to survivors who come forward to help in the investigation and prosecution of the crime. When Congress created the U visa in 2000, it recognized that the U visa would "facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status," and "give law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions." Congress recognized that "[p]roviding temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States."[21]

Congress intentionally did not establish a statute of limitations for victims to apply for U visa relief. The U visa statute specifically indicates that applicants must prove that they (or in the case of a child under the age of 16, the parent, guardian, or next friend of the alien) have "**been helpful, is being helpful, or is likely to be helpful** to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii)."[22] Thus, the statute contains no time limitations on when survivors may avail themselves to U visa relief given the myriad of barriers they often face accessing protection and safety.

> ***Practice Pointer*:** Advocates should ensure they make the record regarding the bipartisan Congressional goals of creating the U visa as an ameliorative protection for survivors--as it is a tool for law enforcement to investigate and prosecute criminal activity in their community and provides protections for survivors who come forward. To review these arguments in the context of *Sanchez Sosa*, visit ASISTA's amicus bank here: https://asistahelp.org/amicus-brief/.
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> ***Practice Pointer*:** In *L-N-Y-*, the Board noted that Counsel indicated Respondent was not aware of U visa relief until he consulted with Counsel.[23] However, the assertion was not established via testimony or other evidence presented in the record.[24] Thus, if survivors are filing U visa applications while in removal proceedings, or on the basis of a crime that occurred years prior, it is important to show (via a statement or affidavit from the applicant) about their unawareness or inability to apply for relief.
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> ***Practice Pointer*:** In some cases, the effects of victimization may have led to delay in seeking the U visa. For example, many survivors of childhood sexual abuse do not come forward about their experiences until many years after the crime has occurred. If that has happened in your case, include in the record an explanation of why the effects of trauma prevented your client from pursuing the U visa earlier.

[21] *See* section 1513(a)(2)(B), Public Law No: 106-386, 114 Stat. 1464.
[22] INA 101(a)(15)(U)(i)(III).
[23] See *L-N-Y-* 758, note 4.
[24] Id.

2. DHS Opposition to the Motion

ICE attorneys are routinely opposing motions to continue cases of U visa petitioners. The 2009 Vincent memo provides that ICE trial attorneys "s**hall request** a continuance to allow USCIS to make a *prima facie* determination."[25] In addition, the Vincent Memo goes on to say that if a U visa petition is found to be *prima facie* eligible then ICE **should** consider administratively closing or terminating the case.[26] However, according to ICE, the 2009 policy memo has been replaced by its August 2019 fact sheet, though the actual language of the guidance has not been publicly released.

Current ICE guidance states that it is "ICE policy to respect USCIS' grant of deferred action to a U visa waitlisted petitioner."[27]Accordingly, ICE will not remove a U visa petitioner or qualifying family member whom USCIS has placed on the waiting list and granted deferred action unless a new basis for removal has arisen since the date of the waiting list placement or USCIS terminates deferred action."[28] It also states, "It is also permissible for ICE to join a motion to terminate proceedings for petitioners who have been waitlisted or approved."[29] Thus in *L-N-Y*, once USCIS issued the waitlist grant, DHS should have either considered not opposing the motion to continue or else agreed to join a motion to terminate.[30]

> ***Practice Pointer*:** Unless and until the August 2019 guidance is released, advocates can make the argument that ICE has not followed the proper procedure. If ICE opposes a motion to continue based on *Sanchez Sosa* and has refused to follow the 2009 memoranda, advocates can argue its opposition is "unsupported." Failing to follow their own guidance is not "reasonable" or "supported by the record."

Sanchez Sosa provides that if ICE does not oppose a continuance, then proceedings ordinarily should be continued by the immigration judge, "absent unusual, clearly identified, and supported reasons for not doing so."[31] It further provides that "government opposition that is reasonable and supported by the record is a significant consideration while unsupported opposition doesn't carry much weight."[32]

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[25] *See* Vincent Memo at 2. [Emphasis added].
[26] Id.
[27] ICE Fact Sheet, Revision of Stay of Removal Request Reviews of U Visa Petitioners, August 2, 2019.
[28] Id. [Emphasis added]
[29] Id.
[30] In fact, DHS envisioned ICE would join in a motion to terminate when a U petition was pending adjudication without even having been waitlisted or approved. 8 CFR §214.14(c)(i).
[31] *Sanchez Sosa* at 813, quoting *Matter of Hashmi*, 24 I&N Dec. at 790. cf. *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018), holding an immigration judge need not treat as controlling DHS's consent to, opposition to, or failure to take a position on a motion for continuance. *Matter of L-A-B-R-* at 416.
[32] *Sanchez Sosa* at 813.

***Practice Pointer*:** Advocates should remind ICE trial attorneys that the 2011 Morton memo regarding Prosecutorial Discretion for Certain Victims and Witnesses of Crime is still operational pursuant to ICE leadership. In a letter to Congress, ICE confirms the guidance is still in effect. Unless and until ICE formally rescinds this memo, advocates can try to use it as a basis for requesting prosecutorial discretion. However, keep in mind the Morton Memo instructs officers to consider "all serious adverse factors" in their decision to exercise discretion.[33]Thus, ICE may continue to deny prosecutorial discretion requests for survivors on the basis of "adverse factor" loopholes.

Practice Pointer: If your client is on the waitlist and has deferred action, argue that ICE's opposition to a continuance is not reasonable given your client's U visa eligibility as determined by USCIS and ICE's own policy that it will not remove U visa petitioners who are on the waitlist, and therefore, ICE's opposition should not carry much weight.[34]

3. Administrative Efficiency

a. "Informational Letter"

Administrative efficiency, although listed as a "secondary" factor, is given significant consideration in *L-N-Y-*. The Board claims that neither party provided an estimated time for processing the U visa petition before USCIS, thus Respondent was seeking a continuance for an indefinite period of time. However, the Board discounted USCIS agency regulations on the treatment of cap-subject petitions, misdefined USCIS's waitlist determination as an "informational letter", and makes no mention that USCIS made a full adjudication of Mr. L-N-Y 's U petition resulting in USCIS's decision to defer removal action against him. A continuance to allow USCIS to determine U visa eligibility under the waitlist regulatory structure is reasonable and in line with administrative efficiency.

The Board provided no discussion of the fact that USCIS had already actually determined that the respondent was eligible for the U visa.[35] The "informational letter" referenced in *L-N-Y-* was not a mere initial prima facie determination from USCIS stating that the agency received all necessary documents it would need for adjudication.[36] Rather, at the time of the Motion for Remand, USCIS had placed Respondent on the U visa waitlist and granted him deferred action.[37] The "informational letter" meant that USCIS made a full adjudication of the case, and thus, the likelihood that Respondent would receive relief was extremely high. But for the annual 10,000 cap

[33] Morton Memo at 2.
[34] Contact ICE counsel prior to your hearing to ask them to join a motion to terminate proceedings based on placement on the waitlist and grant of deferred action. Even in its restrictive August 9, 2019 FAQ on the treatment of U petitioners, ICE stated it will respect USCIS waitlist decision, not seek to remove the U petitioner and can consider joining a motion to terminate.
[35] *Id.* at 760.
[36] *Id.* at FN6.
[37] 8 C.F.R. § 214.14(d)(2).

on principal applications, the Respondent would in fact have a U visa. This, coupled with the fact that Respondent's INA 212(d)(3)(A)(ii) waiver was approved by the immigration judge, means that relief would have been granted unless a new basis for removal arose since the date of the waiting list placement.

> ***Practice Pointer***: Advocates should argue that a waitlist determination is substantially similar to a grant as it takes place after a full adjudication of the application. Include language from the USCIS U waitlist regulations and argue that USCIS determination to place your client on the waitlist and grant deferred action demonstrates DHS's intent not to pursue removal proceedings against your client.

> ***Practice Pointer*:** An IJ's focus on the processing delays of U visas raises due process grounds for appeal. USCIS' processing delays are wholly outside the control of the Respondent. Argue in your motion that the U waitlist and deferred action adjudication process will result in a basis for remaining in the US under color of law and continued removal proceedings, contrary DHS intent to defer removal of the U petitioner, results in administrative inefficiency. If you're in the 4th Circuit, seek administrative closure under Zuniga-Romero v. Barr, No. 18-1850 __ F.3d __ (4th Cir. 2019) and in the alternative request a continuance.

b. Detention and/or Removal

The BIA considered Mr. L-N-Y's detention as an additional factor. If the court views detention as an efficiency factor, argue that the court should also review the legitimacy of your client's detention. For example: if ICE continues to detain your client despite the grant of deferred action and placement on the waitlist, it is ICE causing the purported administrative inefficiency by continuing to detain a U petitioner who is clearly entitled to relief and who has assisted law enforcement in investigating a serious crime.

The Board overlooked the fact that even if ICE does not remove the petitioner pursuant to their current policy, the court would still have to adjudicate a motion to reopen and terminate proceedings in the future once the U visa is granted. In a case where the petitioner is indisputably prima facie eligible for the U visa, it is not efficient to deny a continuance and order removal, only to then reopen and terminate proceedings in the future.

> ***Practice Pointer:*** Practitioners may need to educate the court about the efficiency implications of ordering the removal of a U visa petitioner. By ordering removal, the immigration courts are simply shifting the administrative burden to other agencies - namely, the Department of State and USCIS, which will have to adjudicate the additional waiver requests and conduct consular processing for any removed petitioners.

C. Due Process

The Board claims there is no due process violation in ordering the removal of a U visa petitioner because removal will not cause prejudice to the U visa petition. This assertion is factually incorrect, as removal will trigger INA 212(a)(9)(A) and most likely 212(a)(9)(B)(i)(II). In order to obtain the U visa, the petitioner will need to seek a waiver for these additional grounds. The waiver at INA 212(d)(14) is discretionary and may only be granted in the public or national interest.

> ***Practice Pointer***: In your motion, explain that removal will trigger additional grounds of inadmissibility that will have to be waived in order for the petitioner to obtain the U visa and return to the US.

> ***Practice Pointer*:** The Board did not address Mr. L-N-Y-'s discretionary factors because they found no good cause to continue the proceedings. However, because a motion to continue is adjudicated on a discretionary basis, it should include evidence of the petitioner's positive equities.

D. Congressional Intent

A bi-partisan majority in Congress created U nonimmigrant status as part of the Victims of Trafficking and Violence Prevention Act with two critical goals: to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute" serious crimes "while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States."[38] Congress recognized that the fear of deportation prevented many crime survivors who lack lawful immigration status from reporting serious crimes or "fully participat[ing]" in the investigation and prosecution of those crimes.[39] Importantly, Congress **did not bar** immigrants in removal proceedings or with outstanding orders of removal from accessing U nonimmigrant status from within the U.S. Instead, Congress created a generous waiver of inadmissibility for U nonimmigrants who may otherwise be inadmissible due to immigration violations.[40] Congress also contemplated the stay of removal orders pending final adjudication of U nonimmigrant status petitions:

> If the Secretary of Homeland Security determines that an application for nonimmigrant status under subparagraph (T) or (U) of section 1101(a)(15) of this title filed for an alien in the United States sets forth a prima facie case for approval, the Secretary may grant the alien an administrative stay of a final order of removal under section 1231(c)(2) of this title until-
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> (A) the application for nonimmigrant status under such subparagraph (T) or (U) is approved; or

[38] *See section* 1513(a)(2)(A), Public Law No: 106-386, 114 Stat. 1464 (2000).
[39] VTVPA, Pub. L. No. 106- 386, §1513(a)(l)(B).
[40] 8 U.S.C. § 1182(d)(14).

(B) there is a final administrative denial of the application for such nonimmigrant status after the exhaustion of administrative appeals.[41]

To further Congressional intent, DHS implemented regulations providing protection to those with an approved U nonimmigrant status petition who have an outstanding order of removal:

> For a petitioner who is subject to an order of exclusion, deportation, or removal issued by the Secretary, the order will be deemed canceled by operation of law as of the date of USCIS' approval of Form I-918. A petitioner who is subject to an order of exclusion, deportation, or removal issued by an immigration judge or the Board may seek cancellation of such order by filing, with the immigration judge or the Board a motion to reopen and terminate removal proceedings.[42]

The BIA in L-N-Y- clearly disregards congressional intent by accepting DHS's argument that a U petitioner can file a U visa from abroad after deportation.

> ***Practice Pointer:*** Remember to make your congressional intent arguments in every continuance motion involving a U visa petitioner. Push back on assertions that the U petitioner can pursue a U visa from outside the US after removal. Point out that Congress intended to alleviate crime victims' fear of deportation and created a path to obtain U visa status even if the crime victim is in removal proceedings or has an outstanding order of removal. An immigration judge derogates Congress' intent when he denies a continuance to pursue U visa status and instead issues a removal order based upon an ICE claim that the U crime victim can seek status from outside the US.

III. Conclusion

Matter of L-N-Y- is a results-based decision meant to instruct IJs to deny continuances. The BIA improperly weighed the secondary factors more heavily than the primary factors, misconstrued USCIS's grant of deferred action and placement on the U visa waitlist, and disregarded Congress' intent of protecting crime victims from deportation in order to alleviate their fear of assisting law enforcement. ASISTA will help fight this decision at the circuit level.

If you have questions about your case, ASISTA Members can submit a Request for Technical Assistance at www.asistahelp.org. Not a Member yet? Join ASISTA today!

[41] 8 U.S.C. § 1227(d)(1).
[42] 8 C.F.R. § 214.14(c)(5)(i).