Meredith Lynch, Esq.
EOIR# SW614530
AZ Bar No. 030546
Catholic Social Service
140 W. Speedway, Suite 130
Tucson, AZ 85705

NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
TUCSON, AZ

In the Matter of:	)	
XXXXXX, XXXXXX	)	File No. A XXX XXX XXX
In removal proceedings	)	

Immigration Judge XXXXXXXXXX

Next Hearing: XXXXXXXXXX
XXXXXXXXXX

RESPONDENT'S MOTION TO ADMINISTRATIVELY CLOSE PROCEEDINGS

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
TUCSON, AZ

In the Matter of:		
XXXXXX, XXXXXX	**File No.**	**A XXX XXX XXX**
In removal proceedings		

RESPONDENT'S MOTION TO ADMINISTRATIVELY CLOSE PROCEEDINGS

COMES NOW Respondent, through the undersigned attorney, hereby moves this Court to administratively close the proceedings for which the Master Calendar hearing is currently scheduled for **DATE** at **TIME**. In the alternative, Respondent moves this Court to continue the Master Calendar hearing. This motion is based on the following:

I. Procedural History

Respondent was issued a Notice to Appear on **DATE**. On **DATE**, represented by undersigned counsel, Respondent entered pleadings. Undersigned counsel entered an appearance on **DATE** [if after proceedings started].

Respondent filed a Petition for U Nonimmigrant Status (I-918) with the USCIS Vermont Service Center (VSC) on **DATE**. A copy of the USCIS I-918 filing receipt is attached as Exhibit **XX**. The USCIS filing receipt was first provided to the Court on **DATE**.

Respondent has not yet received a decision on the petition. The USCIS online case status information shows that Respondent's I-918, which has now been pending for **AMOUNT OF TIME**, is still at the initial review stage. A copy of the case status printout is attached as Exhibit **XX**. According to USCIS online case processing information, attached as Exhibit **XX**, Vermont

Service Center is currently processing cases received as of **DATE**. If Respondent appeared at the Master Calendar hearing on **DATE, HE/SHE** would request another continuance pending adjudication of the self-petition.

II. U Visa

The U Visa was created in 2000 so that victims of certain enumerated crimes, including domestic violence and sexual assault, could be able to "report these crimes to law enforcement and fully participate in the investigation of the crimes." Victims of Trafficking and Violence Prevention Act of 20000, Pub. L. No. 106-386, 114 Stat. 1464, Sec. 1513(a)(1)(B). The U Visa was created for three stated purposes: 1) to "strengthen the ability of law enforcement detect, investigate and prosecute cases" and "encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens"; 2) give "law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions;" and 3) "gives the Attorney General discretion to convert the status of such nonimmigrants to that of permanent residents when doing so is justified." *Id.* at Sec. 1513(a)(2).

To qualify for a U Visa, the applicant must be able to demonstrate that he or she: 1) "has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity"; 2) "has knowledge of the details concerning the qualifying criminal activity"; 3) "has been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution"; and 4) "the qualifying criminal activity occurred in the United States." 8 CFR Sec. 214.14(b). The application must include *inter alia* a law enforcement certification, a signed statement by the applicant and any other relevant evidence. 8 CFR Sec. 214.14(c)(2).

USCIS has sole jurisdiction to adjudicate U Visa applications. 8 CFR Sec. 214.14(c)(1). Applicants in removal proceedings or with final orders of removal are not precluded from seeking U nonimmigrant status. *Id.* A 2011 ICE memorandum instructs attorneys to "exercise all appropriate prosecutorial discretion to minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice." John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011) (hereinafter *John Morton PD Memo*). ICE spokeswoman Danielle Bennett confirmed that this memorandum remains in effect in a March 19, 2017 news report. Nora Caplan-Bricker, "I Wish I'd Never Called the Police," *Slate*, *available* at http://www.slate.com/articles/news_and_politics/cover_story/2017/03/u_visas_gave_a_safe_path_to_citizenship_to_victims_of_abuse_under_trump.html.

Congress has authorized 10,000 U Visas per year. 8 CFR 214.14(d)(1). Applicants who cannot be granted U Visa status due solely to the U Visa cap are placed on the U Visa waiting list and granted deferred action status while waiting. 8 CFR 214.14(d)(2).

Although Congress authorized the TVPRA in 2000, the regulations to apply for U Visa status were not published until 2007. U Visa applications received by USCIS have increased steadily since that time. USCIS publishes the number of I-918 Petitions for U Nonimmigrant Status received by Fiscal Year and currently lists numbers from 2009 to 2016. Number of I-918 Petitions for U Nonimmigrant Status, *available* at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2016_qtr4.pdf. USCIS received 6,835 petitions in 2009, 25,432 petitions in 2013 and 35,044 petitions in 2016. *Id.* The 2014 ombudsman report on USCIS reported that USCIS continued "extensive efforts to engage with

the public, particularly emphasizing training for federal, state, and local law enforcement, to increase awareness of and access to the T and U visa programs." Ombudsman, *Annual Report to Congress: Citizenship and Immigration Services* (June 27, 2014).

III. Summary of the Argument

The Immigration Judge should grant administrative closure under *Matter of Avetisyan*. The delay in U Visa adjudication is reasonable as compared to the respondent in *Avetisyan*. Respondent has a prima facie approvable U Visa application that should be conditionally approved and later granted a visa when available under the statutory cap.

In the alternative, the Immigration Judge should grant a continuance under *Matter of Sanchez Sosa*. Respondent's U Visa application is prima facie approvable.

IV. Argument

A. Administrative closure is appropriate in this case

Administrative closure is an administrative convenience which allows the removal of cases from the calendar in appropriate situations. *Matter of Amico*, 19 I&N Dec. 652, 654 n. 1 (BIA 1988).

Administrative closure may be appropriate to "temporarily remove a case from an Immigration Judge's active calendar or from the Board's docket … to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time. *Matter of Avetisyan*, 25 I&N 688, 692.

The relevant factors for an Immigration Judge to evaluate a request for administrative closure are:

> (1) The reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition,

> application, or other action... (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is recalendared... *Matter of Avetisyan*, 25 I&N Dec. 688, 696.

In addition to these factors, the Board noted that the "efficient use of court resources is a legitimate purpose of administrative closure." Memo., Brian M. O'Leary, Chief Immigration Judge, *Operating Policies and Procedures Memorandum 13-01; Continuances and Administrative Closure*, 4, (March 7, 2013)(hereinafter *Memorandum 13-01*)[1]; *Avetisyan* at 695. Administrative closure under the *Avetisyan* standards "help[s] to focus resources on those matters that are ripe for resolution." *Memorandum 13-01* at 4.

The Board stated that administrative closure would be appropriate where "an alien demonstrates that he or she is the beneficiary of an approved visa petition filed by a lawful permanent resident spouse who is actively pursuing, but has not yet completed, an application for naturalization." *Avetisyan* at 696. The Board held, on the other hand, that administrative closure was not appropriate for a "purely speculative event (such as a possible change in law or regulation); [or] an event or action that is certain to occur, but not within a period of time that is reasonable under the circumstances (for example, remote availability of a fourth-preference family based visa..." *Avetisyan* at 696.

An Immigration Judge "has the authority to administratively close a case, even if a party opposes, if it is otherwise appropriate under the circumstances." *Matter of Avetisyan*, 25 I&N 688, 690. The DHS in Avetisyan opposed administrative closure because the visa petition had

[1] Although the February 20, 2017 Memorandum "Enforcement of the Immigration Laws to Serve the National Interest" purported to rescind "all existing conflicting directives, memoranda, or field guidance regarding the enforcement of our immigration laws and priorities for removal... ---to the extent of the conflict---...," this memorandum is vague as to how it should be interpreted, with the exception of a few specific memorandums that are mentioned. It is the Respondent's position that *Memorandum 13-01* and others cited in this motion are not "conflicting" and therefore remain valid.

not yet been adjudicated and the visa petition had been pending "for a significant and unexplained time." However, the Board affirmed the Immigration Judge's decision to administratively close and stated "once jurisdiction over removal proceedings vests with the Immigration Judge, he or she has the authority to regulate the course of those proceedings." *Avetisyan* at 694; 8 CFR Sec. 1003.14(a), 1240.1(a)(1)(iv), (c).

Administrative closure is appropriate in this case to allow the Respondent to await the decision of the Vermont Service Center on the pending U Visa petition. Respondent asserts that **HE/SHE** has a right to pursue the best defense available while in proceedings (not be forced to pursue second-choice option). However, Respondent also acknowledges that recurring Master Calendar hearings for an undetermined length of time are not an "efficient use of court resources." O'Leary, *Memorandum 13-01* at 4. Therefore, Respondent moves this Court to administratively close the case while the U Visa petition remains pending. Once a decision has been received on the pending U Visa petition, Respondent or DHS may move to recalendar the hearing before an Immigration Judge to proceed with termination of proceedings or further removal proceedings, as appropriate based on the decision by USCIS. *Matter of Avetisyan*, 25 I&N Dec. 688, 695.

It is appropriate for the Court to use judicial discretion and grant administrative closure in this case based on the factors in *Avetisyan*:

1. *Reason sought:* Administrative closure in this case is sought for judicial economy and efficient use of court resources. Respondent wishes to remove these proceedings from the Court's calendar while awaiting a final decision on the U Visa petition. Administrative closure in this case would not allow the alien to improperly benefit, as in the in absentia context. *Matter of Amico*, 19 I&N Dec. 652, cited in *Matter of*

Avetisyan, 25 I&N Dec. 688, 693.

2. *Basis for opposition:* Because DHS has not yet responded to the motion for administrative closure in this case, any argument on that factor is reserved for a later response. **At the last master calendar hearing on DATE, DHS opposed a motion to continue but did not give a detailed reason for opposition.**

3. *Likelihood of success on underlying petition:* A decision from USCIS on the U Visa petition is not a "purely speculative event" and is expected to occur within a reasonable period of time. *Avetisyan* at 696. In *Avetisyan*, the Board gave the example of a change in law or regulation as an example of a "purely speculative event." In comparison, the determination of a final adjudication of the U Visa petition, whether approved or denied, is a very certain event, although the exact time at which the adjudication may occur is somewhat uncertain. The Board in *Avetisyan* stated that administrative closure would not be appropriate when an event is "certain to occur, but not within a period of time that is reasonable." *Avetisyan* at 696. At the time *Avetisyan* was decided in January 2012, the anticipated wait time for the fourth preference category was approximately eleven years, five months. U.S. Dep't of State Visa Bulletin, Vol. IX, No. 40 (January 2012)(showing that the F4 category for all chargeability areas except those listed was August 15, 2000). However, the Board granted a continuance in that case after more than two and a half years of previous continuances to allow for USCIS to adjudicate the marriage-based visa petition. *Avetisyan* at 689-90.

   Furthermore, the U Visa petition is not "purely speculative" in that USCIS data shows that U Visa approval rates from 2009 to 2016 averaged 79.2% approval. The rate of

petitions approved in 2016, at 84.5%, was second only to the year 2013, in which 84.6% were approved. Number of I-918 Petitions for U Nonimmigrant Status, *available* at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2016_qtr4.pdf.

IN THIS CASE… (INFORMATION ABOUT LENGTH OF TIME PENDING; INFORMATION ABOUT OTHER U VISAS APPROVALS BY SAME ATTORNEY OR BY AILA COMMUNITY)

4. *Anticipated duration of closure:* The anticipated duration of the closure would depend on the policies and preference of the Court and DHS. USCIS may grant up to 10,000 U Visas to principal applicants per fiscal year. INA Sec. 214(p)(2)(A). After 10,000 U Visas have been granted, any subsequent application that USCIS deems is eligible to receive a U Visa but for the annual cap is granted provisional approval and placed on a waiting list pending availability of visa numbers. Respondent argues that **SHE/HE** should be permitted to recalendar and terminate these proceedings once granted provisional approval. However, if the Court does not agree, the proceedings would remain administratively close until a U Visa was available to the Respondent. *Responsibility of either party:* Administrative closure is appropriate in this case because the responsibility for the delay in this case does not lie with the Respondent.

CASE-SPECIFIC DETAILS OF HOW QUICKLY PLEADINGS AND RECEIPT WERE FILED. [IF PROSECUTORIAL DISCRETION WAS EVER PROPOSED, INABILITY TO CONSIDER THAT WAS BECAUSE A-FILE WAS AT VSC, DHS IS SOMEWHAT RESPONSIBLE FOR INABILITY TO

CONSIDER] Rather, the delay in receiving a decision on the pending U Visa petition is solely the responsibility of USCIS, which has exclusive jurisdiction over U Visa adjudications. 8 CFR Sec. 214.14(c)(1). In **2014**, U Visa processing times to receive provisional approval were at eight months. Ombudsman, *Annual Report 2014: Citizenship and Immigration Services* (June 27, 2014). Therefore, when Respondent requested a continuance on **DATE**, he expected to have a response on conditional approval within a few months. When Respondent requested a subsequent continuance on **DATE**, the Vermont Service Center was processing U Visa applications submitted as of May 7, 2014. The Vermont Service Center case processing times remained at May 7, 2014 as of August 25, 2016, nine months later. Because the delay in receiving a decision on the U Visa petition has occurred through no fault of the Respondent, it would be unjust to require Respondent to move forward to pursue alternative forms of relief before receiving a final decision on the U Visa. Had Respondent been given notice at the time of filing the U Visa petition that **HE/SHE** would only be permitted to continue the case for a specified amount of time and that the processing time of the U Visa petition would exceed that amount of time, **HE/SHE** would have had the opportunity to seek other forms of relief. **Specifically, Respondent could have married his current girlfriend and the mother of his child and sought to pursue an immigrant petition based on that relationship. However, the undersigned attorney advised Respondent that the U Visa was his best option because Respondent entered by "waive-through" at the Point of Entry. Based on this advice, Respondent chose to continue waiting on the already-pending U Visa application rather than start a new petition.**

5. *Ultimate outcome:* The ultimate outcome of removal proceedings will depend heavily on the ultimate outcome of the U Visa decision by USCIS. If the U Visa petition is approved by USCIS, Respondent would move to terminate proceedings based on that petition. If the U Visa petition is denied, Respondent would move the Court to consider the alternate forms of relief set forth in Respondent's pleadings, which include (**ALTERNATE FORMS OF RELIEF)**

B. In the alternative, further motions to continue are appropriate until such time as the Respondent receives a response on the pending U Visa petition from the Vermont Service Center.

The BIA specifically stated in *Matter of Hashmi* that "unsupported DHS opposition does not carry much weight and that an Immigration Judge should evaluate the DHS's objection considering the totality of the circumstances." *Matter of Hashmi*, 24 I&N Dec. 785, 791 (BIA 2009).

In the alternative, the Respondent moves this court to continue the case until a response has been received on the U Visa petition. "The Immigration Judge may grant a motion for continuance for good cause shown." 8 CFR 1003.29; O'Leary, *Memorandum 13-01* at 2. A continuance should be granted when an alien can make a "reasonable showing" that he or she made a "diligent good faith effort to be ready to proceed and that any additional evidence he seeks to present is probative, noncumulative, and significantly favorable to the alien." *Matter of Sibrun*, 18 I&N Dec. 354, 356 (BIA 1983); O'Leary, *Memorandum 13-01* at 2. "[D]ecisions on motions for continuance and for administrative closure remain discretionary determinations within the province of the presiding judge." O'Leary, *Memorandum 13-01* at 1. "[A]n immigration judge's decision denying the motion for continuance will not be reversed unless the alien establishes that the denial caused him actual prejudice and harm and materially affected the outcome of his case." *Matter of Sibrun*, 18 I&N Dec. 354, 356-357. However, the Immigration

Judge should "articulate, balance, and explain all these relevant factors, and any others that may be applicable, in deciding whether to grant the respondent a continuance for USCIS to adjudicate the...petition." *Matter of Hashmi*, 24 I&N Dec. 785.

Although "administrative efficiency cannot be the sole factor considered, it remains sound docket management to seriously consider administrative efficiency and the effect of multiple continuances on the efficient administration of justice." O'Leary, *Memorandum 13-01* at 2.

In considering a motion to continue, "discretion should, as a general rule, be favorably exercised where a prima facie approvable petition and adjustment application have been submitted..." *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978), *modified on other grounds*, *Matter of Arthur*, 20 I&N Dec. 475 (BIA 1992). Other relevant, non-exclusive factors to consider related to a motion to continue are:

> (1) The DHS response to the motion; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent's statutory eligibility for adjustment of status; (4) whether the respondent's application for adjustment merits a favorable exercise of discretion; and (5) the reason for continuance and other procedural factors. *Matter of Hashmi*, 24 I&N Dec. 785, 790 (BIA 2009).

"The number and length of prior continuances are not alone determinative." *Matter of Hashmi*, 24 I&N Dec. 785, 794. "[I]t is well established that *Garcia* does not require the Immigration Judge to grant a continuance in every case where there is a pending visa petition. *Matter of Hashmi*, 24 I&N Dec. 785, 790. For instance, the denial of a continuance was not an abuse of discretion where the Immigration Judge considered the number and length of prior continuances, the recently filed second I-130 by the respondent's second wife, and the respondent's criminal history. *Abu-Khaliel v. Gonzales*, 436 F.3d 627 (6th Cir. 2006).

"Certain of the *Hashmi* factors also relate to the U Visa, in particular: (1) the DHS's

response to the motion; (2) whether the underlying visa petition is prima facie approvable; and (3) the reason for the continuance and other procedural factors." *Matter of Sanchez Sosa*, 25 I&N 807, 812 (BIA 2012). In *Matter of Sanchez Sosa*, the Respondent had submitted law enforcement certification from 2005 and had stated as of the November 2005 hearing that he had recently submitted the U Visa request and was still waiting for USCIS to send a receipt. At the time that the case was remanded to the Board in April 2010 for having improperly denied the motion to continue, Respondent's counsel submitted a declaration that the U Visa request remained pending. *Matter of Sanchez Sosa*, 25 I&N 807, 816. The Board remanded the proceedings to the Immigration Judge to provide "a final opportunity to provide copies of and proof regarding the filing of their application with the USCIS and to otherwise meet the criteria established in [the] decision." *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012).

In this case, a continuance would further "administrative efficiency" by removing an unnecessary Master Calendar hearing from the Court's calendar. O'Leary, *Memorandum 13-01* at 2. If the Court prefers to continue this case rather than administratively close, motions to continue could be granted through written motions without the need to take time from the Court's calendar with a Master Calendar hearing.

The factors stated in *Hashmi* and applied to the U Visa context in *Sanchez Sosa* also weigh in favor of a continuance in this case:

1. DHS expressed opposition to the motion to continue at the previous Master Calendar hearing on **DATE**. However, the Department did not state any reason behind the opposition. This opposition is not "reasonable and supported by the record." *Matter of Sanchez Sosa*, 25 I&N Dec. 807, 813, quoting *Matter of Hashmi*, 24 I&N Dec. 785, 791. Therefore, the Department's "unsupported opposition" should not "carry

much weight" in the Court's decision whether to continue this case. *Matter of Hashmi*, 24 I&N Dec. 785, 791.

Furthermore, DHS opposition is not appropriate in the context of a U Visa application. In a 2009 Memorandum by Peter S. Vincent, the Department was instructed that "[i]f an alien in removal proceedings states that he or she has filed a U visa petition with USCIS, and provides proof of such filing, the OCC shall request a continuance to allow USCIS to make a *prima facie* determination. Respondent filed proof of filing Form I-918 on **DATE**, but the Department has not yet sought a prima facie determination from USCIS. Therefore, it is appropriate for the Department to join in the motion to continue.

2. Discretion is appropriate in this case because a prima facie approvable petition has been submitted. *Matter of Garcia*, 16 I&N Dec. 653. In order to prevail on a U Visa petition, the applicant must show that he or she has "suffered substantial physical or mental abuse as a result of having been a victim of criminal activity;" that he or she "possesses information concerning [the] criminal activity;" that he or she "has been helpful, is being helpful, or is likely to be helpful to...Federal, State or local authorities investigating or prosecuting [the] criminal activity;" and that "the criminal activity...violated the laws of the United States." Section 101(a)(15)(U)(i) of the Immigration and Nationality Act. The requirement of whether the Respondent has relevant information and "has been, is being, or will be helpful" may be shown if the Respondent has obtained the law enforcement certification on Form I-918, Supplement B. *Matter of Sanchez Sosa*, 25 I&N Dec. 807, 813. The initial evidence with the application must include: Form I-918, Supplement B certification form

signed by the head of the agency or his or her designee; any additional evidence the applicant wishes to submit; the applicant's signed statement concerning the crime of which he or she is a victim and Form I-192 if the applicant is inadmissible. 8 CFR Sec. 214.14(c)(2).

IN THIS CASE... (DISCUSS WHEN SUBMITTED TO USCIS AS WELL AS ATTACH COPIES TO MOTION)

Copies of the application were not previously provided to the Court because Respondent understood that USCIS had sole jurisdiction over the adjudication of the petition. However, Respondent has provided copies of the relevant portions of the U Visa application with this motion, based on the order in *Matter of Sanchez Sosa* that on remand to the Immigration Judge, respondents should be given an "opportunity to provide copies of and proof regarding the filing of their application with the USCIS and to otherwise meet the criteria established in this decision." *Matter of Sanchez Sosa*, 25 I&N Dec. 807, 816.

3. It is especially appropriate to grant this continuance for the stated purpose of allowing USCIS additional time to adjudicate the U Visa petition because USCIS has exclusive jurisdiction over U Visa petitions. 8 CFR Sec. 214.14(c)(1). **WHAT ELSE?**

THEREFORE, Respondent therefore respectfully moves that the Court to administratively close the proceedings in this case. In the alternative, Respondent moves the Court to continue the Master Calendar hearing currently scheduled for **DATE** at **TIME**, pending adjudication of the U visa petition.