AMERICAN IMMIGRATION LAW FOUNDATION

November 3, 2008

Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Ste. 2000
Falls Church, VA 22041

RE: Case No.: A 071 610 438

Dear Board of Immigration Appeals:

Enclosed please find our Brief of Amicus Curiae in Support of Respondent regarding Case No.: A 071 610 438.

If you have any questions, please contact me directly at byourish@ailf.org or 202-507-7516.

Sincerely,

Brian Yourish
Legal Assistant
American Immigration Law Foundation

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

October 15, 2008

Mary A. Kenney, Esquire
American Immigration Law Foundation
1331 G Street, NW
Washington, DC 20005

RE: Maria C. YAURI, A071 610 438

Dear Ms. Kenney,

The Board of Immigration Appeals received on October 10, 2008, your request to file an amicus curiae brief in the above-referenced case currently pending at the Board. Your request is hereby granted as follows:

Your brief should be filed directly with the Board of Immigration Appeals at Post Office Box 8530, Falls Church, VA 22041, with proof of service on all parties, no later than November 4, 2008. In addition, please attach a copy of this letter to the front of your brief.

We thank you for your helpful participation in this case.

Respectfully,

Jean King
Senior Legal Advisor

cc: David Landau
Chief Appellate Counsel
Department of Homeland Security
5113 Leesburg Pike, #200
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In Re **Maria C. Yauri,**	) Case No.: **A 071 610 438**
Respondent.	) REMOVAL PROCEEDINGS

BRIEF OF THE AMERICAN IMMIGRATION LAW FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Federal Register

Miscellaneous

I. INTRODUCTION

In *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005), the court held that Congress intended in the adjustment of status statute, 8 U.S.C. § 1255(a), that immigration parolees, as a category, be afforded a full opportunity to apply for adjustment of status. The court then struck down – as contrary to the statute – immigration regulations that barred "arriving alien" parolees from adjusting status if they were in removal proceedings. Three other courts of appeals soon followed. *Scheerer v. U.S. Attorney General,* 445 F.3d 1311 (11th Cir. 2006); *Bona v. Gonzales*, 425 F.3d 663 (9th Cir. 2005); and *Zheng v. Gonzales*, 422 F.3d 98 (3d Cir. 2005).

In response to these decisions, the Executive Office of Immigration Review (EOIR) and the United States Citizenship and Immigration Service (USCIS) withdrew the offending regulations and instead adopted interim regulations that specifically grant USCIS jurisdiction over adjustment of status applications of arriving alien parolees in removal proceedings. 71 Fed. Reg. 27585 (May 12, 2006).

For these interim regulations to comply with the adjustment statute, they must allow all eligible "arriving alien" parolees a full opportunity to apply for adjustment of status. This includes parolees subject to an unexecuted final order of removal. An unexecuted final removal order,

itself, is neither a bar to adjustment nor an ineligibility factor. USCIS recognizes this and has adopted a policy allowing adjudication of adjustment applications of "arriving alien" parolees subject to a final order.

To implement the interim regulations in compliance with the statute, both USCIS and EOIR – the two agencies that adopted the interim regulations and that are involved in the process – must cooperate to ensure that eligible parolees have a full and fair opportunity to have their adjustment applications adjudicated by USCIS prior to the applicant's removal.[1] As the Seventh Circuit emphasized, there must be some "minimal coordination" between these agencies or the "statutory opportunity to seek adjustment will be a mere illusion." *Ceta v. Mukasey,* 535 F.3d 639, 647 (7th Cir. 2008).

This amicus brief will address the question posed by this Board and demonstrate why USCIS not only "can" but must adjudicate these adjustment applications. This brief also will discuss EOIR's vital role in ensuring that the interim regulations are fully implemented.

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[1] Of course, a full and fair opportunity to apply for adjustment does not mean that USCIS necessarily will approve all adjustment applications of parolees in removal proceedings. Instead, it means only that a decision on the merits will be made on each application, and those who meet all other eligibility requirements and who deserve a favorable exercise of discretion will be approved.

AILF is a non-profit organization established to increase public understanding of immigration law and policy and to advance fundamental fairness, due process, and constitutional and human rights in immigration law and administration. AILF has a direct interest in ensuring that noncitizens have the fullest opportunity to have their adjustment applications made and decided in accordance with the law. AILF appeared as amicus in *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005), as well as two of the other cases that struck down the regulatory bar to an arriving alien in removal proceedings adjusting status. See *Bona v. Gonzales*, 425 F.3d 663 (9th Cir. 2005); *Zheng v. Gonzales*, 422 F.3d 98 (3d Cir. 2005). AILF also appeared as amicus in a case in which the regulation was initially upheld. *Mouelle v. Gonzales*, 416 F.3d 923 (8th Cir. 2005), vacated and remanded, 126 S. Ct. 2964 (2006).

II. BACKGROUND AND HISTORY

A noncitizen "adjusts status" by applying for lawful permanent residence while in the United States. 8 U.S.C. § 1255(a), the general adjustment of status statute, allows a noncitizen to apply for adjustment of status to that of a lawful permanent resident if he or she 1) has been inspected and either admitted or paroled into the United States; 2) is the beneficiary of an approved petition that makes an immigrant visa

immediately available; and 3) is otherwise eligible for permanent residence. *See* 8 U.S.C. § 1255. There are no limits in the statute to the adjustment eligibility of a parolee in removal proceedings. *Succar*, 394 F.3d at 10. Congress's intent behind the adjustment statute was to relieve the burden on the petitioning party in the U.S., as well as on U.S. consulates abroad, and on the noncitizens themselves. *Succar*, 394 F.3d at 22.

Prior to 1997, there were two major types of proceedings to expel a noncitizen from the United States: exclusion proceedings, which were brought against arriving aliens, that is, noncitizens who had never made an entry into the United States; and deportation proceedings, brought against noncitizens who had entered the United States. Under this former model, a paroled arriving alien in exclusion proceedings was not barred from applying for adjustment of status. Generally, however, only the former INS had jurisdiction over the adjustment applications of individuals in exclusion proceedings. *Succar*, 394 F.3d at 16-17 (quoting *Matter of Castro*, 21 I&N Dec. 379 (BIA 1996)); *see also* 71 Fed. Reg. at 27586 (supplemental comments to the interim regulations describing this history). Moreover, an individual remained eligible to adjust even when there was a final order of exclusion against him. *See Matter of C-H-*, 9 I&N Dec. 265 (INS 1961).

With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. Law 104-208, Division C, 110 Stat. 3009 (September 30, 2006), Congress did away with exclusion and deportation proceedings and instead created a single "removal" proceeding. 71 Fed. Reg. 27586. Following this, the former INS adopted a regulation that barred "arriving aliens" who were in removal proceedings from adjusting status. *See* former 8 C.F.R. §§ 245.1(c)(8); 1245.1(c)(8) (1997). At the same time, INS also for the first time adopted a regulation defining the term "arriving alien," such that the term encompassed almost all parolees. 8 C.F.R. §§ 1.1(q); 1001.1(q).[2] As a result, almost all paroled arriving aliens who were in removal proceedings were prohibited from applying for adjustment of status on any basis and in any forum – that is, before either an immigration judge or the immigration service. *Succar*, 394 F.3d at 8.

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[2] The regulatory definition of an arriving alien currently reads, in relevant part:

> The term *arriving alien* means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) of the Act, and even after any such parole is terminated or revoked.

8 C.F.R. §§ 1.1(q), 1001.1(q).

Four federal courts of appeals struck down 8 C.F.R. §§ 245.1(c)(8) and 1245.1(c)(8). *Scheerer v. Attorney General*, 445 F. 3d 1311 (11th Cir. 2006); *Bona v. Gonzales*, 425 F.3d 663 (9th Cir. 2005); *Zheng v. Gonzales*, 422 F.3d 98 (3d Cir. 2005); *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005). After conducting a thorough statutory analysis, these courts determined that the majority of parolees were in removal proceedings and that the regulations thus barred most parolees from being able to adjust in proceedings. The courts found that this result violated the adjustment statute, which specifically states that parolees are eligible to adjust status. 8 U.S.C. § 1255(a); *Bona*, 425 F.3d at 669-670 (quoting *Succar*, 394 F.3d at 27); *Scheerer*, 445 F.3d at 1321-22; *Zheng*, 422 F.3d at 118. In decisions that ultimately were vacated following publication of the interim rule, two other courts of appeals upheld the regulations. *Momin v. Gonzales*, 447 F.3d 447 (5th Cir. 2006), vacated and remanded, 2006 U.S. App. LEXIS 21923 (5th Cir. Aug. 25, 2006) and *Mouelle v. Gonzales*, 416 F.3d 923 (8th Cir. 2005), vacated and remanded, 126 S. Ct. 2964 (2006).

The May 12, 2006, interim rule was specifically adopted in response to this litigation. 71 Fed. Reg. 27587. EOIR and USCIS amended the regulations to "acquiesce" to the four courts of appeals that held that the prior regulatory bar on an "arriving alien" in proceedings adjusting status

violated the adjustment statute. 71 Fed. Reg. at 27587 (citing *Succar*; *Bona*; *Zheng*; and *Scheerer*). The agencies recognized that the former regulation was unenforceable in these four circuits – covering 18 states – and that it was not in the public interest to allow this conflict in the law to continue. 71 Fed. Reg. at 27590. Thus, the intent of the interim regulations was to bring the regulations into compliance with these four decisions which held "that the Attorney General must provide an opportunity for 'arriving aliens' in removal proceedings to apply for adjustment on the basis of a valid immigrant visa petition." *Kalilu v. Mukasey,* 516 F.3d 777, 780 (9th Cir. 2008).

In addition to repealing the regulatory bar on adjustments, the interim regulations also address jurisdiction over the adjustment applications of arriving aliens in removal proceedings. Using the model of the prior exclusion proceedings, the interim regulations provide USCIS with jurisdiction to adjudicate the adjustment applications of "arriving aliens" in removal proceedings.[3] This result is accomplished in two steps: first, the regulations provide that USCIS has jurisdiction to adjudicate an adjustment application of any alien "unless the immigration judge has jurisdiction to

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[3] The limited exception to this, not relevant here, concerns advance parolees who meet certain regulatory criteria. *See* 8 C.F.R. § 1245.2(a)(1)(ii).

adjudicate the application under 8 C.F.R. § 1245.2(a)(1)." 8 C.F.R. § 245.2(a)(1). Thus, USCIS has jurisdiction over all adjustment applications except those that an immigration judge has jurisdiction over. Second, the regulations state that an immigration judge does not have jurisdiction over an adjustment application of an arriving alien placed in removal proceedings. 8 C.F.R. § 1245.2(a)(1)(ii).

USCIS instructed the field regarding implementation of the interim regulations. These instructions direct that an unexecuted final order of removal, itself, is not a bar to admissibility and therefore not a bar to adjustment. See "Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate applications for Adjustment of Status" (Jan. 12, 2007), http://www.uscis.gov/files/pressrelease/AdjustStatus011207.pdf.

III. ARGUMENT

a. USCIS BOTH HAS THE AUTHORITY TO ADJUDICATE AND IS ADJUDICATING ADJUSTMENT OF STATUS APPLICATIONS BY "ARRIVING ALIENS" UNDER FINAL ORDERS OF REMOVAL.

1. A Paroled "Arriving Alien" Under A Final Order Of Removal Remains "In Proceedings" And Thus USCIS Has Jurisdiction Over Such Parolee's Adjustment Application.

A. A final order of removal is not a bar to adjustment and does not render the parolee ineligible to adjust.

The existence of an unexecuted final order of removal is not a bar to adjustment under either the adjustment statute or the regulations. See 8 U.S.C. § 1255(c) (listing various bars to adjustment of status, but not including unexecuted final orders of removal); 8 C.F.R. §§ 245.1(b), 1245.1(b) (describing categories of aliens facing restricted eligibility for adjustment, but not including those with unexecuted final orders); and §§ 245.1(c), 1245.1(c) (listing categories of aliens ineligible to apply for adjustment, but not including those with final orders).

Additionally, the existence of an unexecuted final order of removal does not render an "arriving alien" parolee ineligible to apply for adjustment. There are three general eligibility requirements for adjustment of status under 8 U.S.C. § 1255: an application for adjustment; eligibility to receive an immigrant visa and admissibility to the U.S.; and an immediately available visa number. 8 U.S.C. § 1255(a).

An unexecuted final order does not prevent a paroled "arriving alien" from applying for adjustment of status, the first of the statutory requirements. *See* 8 C.F.R. § 245.1(a) (specifically allowing such applications where the applicant is physically present in the U.S., meets the

statutory eligibility requirements for adjustment, and does not fall within one of the restricted or ineligible categories discussed above).[4]

The existence of a final order also does not impact a parolee's eligibility to receive an immigrant visa or the immediate availability of a visa number. Assuming that those factors independently are met in a particular case, the final order itself would have no bearing on the parolee's eligibility to adjust.

Finally, an unexecuted order does not render a parolee inadmissible.[5] As USCIS has specifically stated in instructions to the field, a "removal order, itself, does not make the alien inadmissible until it is executed." USCIS Memorandum, "Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to

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[4] In relevant part, this regulation reads:

> General. Any alien who is physically present in the United States, except for an alien who is ineligible to apply for adjustment of status under paragraph (b) or (c) of this section, may apply for adjustment of status to that of a lawful permanent resident of the United States if the applicant is eligible to receive an immigrant visa and an immigrant visa is immediately available at the time of filing of the application.

8 C.F.R. § 245.1(a)

[5] While the final order itself does not render an individual inadmissible, the ground upon which the order is based may be an inadmissibility ground. Where this is the case, and where a waiver either is unavailable or denied, the adjustment application could be denied on the basis that the applicant is inadmissible. Such a denial would be on the merits, however, and not based upon a lack of jurisdiction resulting from the final removal order. Thus, USCIS would adjudicate the application notwithstanding the final order.

Adjudicate Applications for Adjustment of Status" (Jan. 12, 2007) at 3, http://www.uscis.gov/files/pressrelease/AdjustStatus011207.pdf.[6]

B. USCIS has jurisdiction over the adjustment application of a parolee under a final order of removal.

Under the interim regulations, USCIS has jurisdiction over the adjustment applications of "arriving aliens" "in removal proceedings," since immigration judges do not have jurisdiction over these applications. See 8 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(1)(ii). While the phrase "in removal proceedings" is not defined in the interim regulations, it is used and defined in a closely-related regulatory provision, 8 C.F.R. §§ 245.1(c)(8), 1245.1(c)(8) (2008). Like the interim regulations, §§ 245.1(c)(8) and 1245.1(c)(8) are regulations promulgated pursuant to the adjustment of status statute. These regulations define as ineligible certain applicants who seek adjustment based upon a marriage that occurred while the applicant was

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[6] Once the removal order has been executed, the individual's return to the U.S. might implicate inadmissibility grounds. See, e.g., 8 U.S.C. § 1182(a)(9). However, these provisions are inapplicable where there is an unexecuted order, as they only apply after a noncitizen has departed or been removed and then returns to the United States. *See* INS Memorandum, "Processing of Section 245(i) adjustment applications on or after the October 1, 1997 sunset date; Clarification regarding the applicability of certain new grounds of inadmissibility to 245(i) applications" (May 1, 1997) (stating that 8 U.S.C. § 1182(a)(9) "applies only if the alien has departed or been removed from the United States subsequent to issuance of an order") (copy attached).

"in ... removal proceedings." 8 C.F.R. §§ 245.1(c)(8), 1245.1(c)(8).[7] It defines the period that constitutes being "in ... removal proceedings" as, *inter alia*, terminating:

> [w]hen the alien departs from the United States while an order of exclusion, deportation or removal is outstanding or before the expiration of the voluntary departure time granted in connection with an alternate order of deportation or removal.

8 C.F.R. §§ 245.1(c)(8)(ii)(A), 1245.1(c)(8)(ii)(A).

Under this regulation, an individual would be "in proceedings" while under an unexecuted final order of removal. Applying this definition to the same term – "in proceedings" – used in the interim regulations, it follows that USCIS would retain jurisdiction over any adjustment application filed by a parolee with a final removal order.[8]

C. The government takes the position that USCIS can adjudicate the adjustment application of a paroled "arriving alien" under a final order of removal.

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[7] The regulations cover marriages that occur while the applicant is "in exclusion, deportation, or removal proceedings, or judicial proceedings relating thereto." 8 C.F.R. §§ 245.1(c)(8), 1245.1(c)(8) (2008).

[8] Even were this definition found not to apply, USCIS nevertheless would have jurisdiction over such an adjustment application. If the paroled "arriving alien" was not considered still to be in proceedings, the immigration judge would not have jurisdiction over the application. 8 C.F.R. § 1245.2(a)(1)(ii). Instead, USCIS would have jurisdiction by default. 8 C.F.R. § 245.2(a)(1).

The government agrees that, under the interim regulations, USCIS has authority to decide an adjustment application of an "arriving alien" even where there is an unexecuted removal order. In briefing to the Second Circuit Court of Appeals in *Ni v. BIA*, respondents Board of Immigration Appeals (BIA), USCIS and the Attorney General asserted that "... an alien who applies to USCIS for adjustment under the new regulations can have that application adjudicated even after he has a final order of removal." 520 F.3d 125, 131 (2d Cir. 2008).

Similarly, USCIS has instructed its field offices that an unexecuted final order of removal, itself, does not render an adjustment applicant inadmissible. USCIS further cautioned that "[a]n alien may be eligible for a waiver or consent to reapply notwithstanding the removal order." USCIS Memorandum, "Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate applications for Adjustment of Status" (Jan. 12, 2007), http://www.uscis.gov/files/pressrelease/AdjustStatus011207.pdf.

This conclusion is entirely consistent with the fact that USCIS and EOIR modeled the current division of jurisdiction over adjustment applications of "arriving aliens" in removal proceedings on that existing prior to IIRIRA, when there were distinct exclusion and deportation

proceedings. At that time, the former INS had authority to decide an adjustment application of someone in exclusion proceedings (the equivalent of an "arriving alien" in removal proceedings now). *Matter of Castro*, 21 I&N Dec. 379 (BIA 1996). Moreover, an individual remained eligible to adjust even when there was an unexecuted final order of exclusion. *See Matter of C-H-*, 9 I&N Dec. 265 (INS 1961). ("Exclusion order does not bar eligibility [for adjustment] when alien has been inspected and paroled"]; *see also Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978) (legacy INS had a policy of "refraining from either deporting or instituting proceedings against the beneficiary of a prima facie approvable visa petition if approval of the visa petition would make the beneficiary immediately eligible for adjustment of status").

In *Matter of C-H-*, the noncitizen applied for admission and was placed in exclusion proceedings. She was found inadmissible and ordered excluded on the basis that she was not in possession of a valid, unexpired immigrant visa. Before this final exclusion order was executed, she applied for adjustment of status before the former INS. In a precedent decision, the INS Regional Commissioner held that the unexecuted final order of exclusion did not preclude her from establishing eligibility for adjustment of status. The Regional Commissioner found that she was eligible for a visa

and that a visa was immediately available. He also found that she was admissible to the U.S., specifically noting that the order of exclusion was based solely on the finding that she was not in possession of proper entry documents at the time of the hearing. Because – at the time of adjustment – the noncitizen was eligible for a visa, this ground of inadmissibility was no longer applicable to her. Thus, the Regional Commissioner found that she met the statutory requirements for adjustment of status.

2. Many USCIS Offices Correctly Exercise Jurisdiction And Adjudicate Adjustment Applications When There Is A Final Order; Those Offices That Do Not Do So Are Violating The Interim Regulations.

In accord with national policy and the interim regulations, local USCIS offices around the country are exercising jurisdiction and deciding adjustment applications in cases in which there is an unexecuted final removal order. For example, counsel for amicus has heard from attorneys in over a dozen cities that the local USCIS offices in their cities have decided their clients' adjustment applications notwithstanding the existence of a final order of removal. See Attachment A, Declaration of Mary Kenney. [9]

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[9] These local offices include Atlanta, Georgia; Baltimore, Maryland; Bloomington, Minnesota; Charleston, South Carolina; Houston, Texas; Louisville, Kentucky; Memphis, Tennessee; Miami, Florida; Newark, New Jersey; New Orleans, Louisiana; New York, New York; Portland, Oregon; Seattle, Washington; and West Palm Beach, Florida.

Since the adoption of the interim regulations in 2006, many local USCIS offices initially demonstrated a lack of knowledge of the interim regulations or confusion about their scope and how to implement them. As a result, some local offices have failed or refused to exercise jurisdiction when an "arriving alien" adjustment applicant was in removal proceedings. For example, in some instances, local offices found no jurisdiction by citing to the now-deleted regulatory bar on the adjustment of an arriving alien in proceedings. In other cases, local office personnel have been unsure whether they could adjudicate the case if the removal proceedings were not terminated or administratively closed. Counsel for amicus is aware that some local offices also have been unsure about adjudicating a case in which there is a final order of removal. The majority of these cases ultimately have been favorably resolved, with the local office exercising jurisdiction.

There no doubt still exist some local USCIS offices – apparently including the Los Angeles office in the present case – that still do not fully understand the interim regulations and that, as a result, erroneously refuse to exercise jurisdiction where there is a final order of removal. Such a refusal to exercise jurisdiction is an aberration and does not represent USCIS policy. Any such refusal to exercise jurisdiction due solely to the existence of an

unexecuted removal order violates the interim regulations and USCIS policy.

b. TO FULLY IMPLEMENT THE INTERIM REGULATIONS IN ACCORD WITH THE STATUTE, THE BIA MUST CONSIDER ON THE MERITS AND CONSISTENT WITH ITS OWN PRECEDENT AND THE REGULATIONS, MOTIONS TO REOPEN, REMAND OR CONTINUE CASES THAT SEEK TO PROVIDE USCIS THE TIME TO DECIDE THE ADJUSTMENT APPLICATION.

EOIR and USCIS amended their regulations to "acquiesce" to the four courts of appeals that held that the regulatory bar on an arriving alien in proceedings adjusting status violated 8 U.S.C. § 1255. 71 Fed. Reg. at 27587. The agencies recognized that these former regulations were unenforceable in four circuits – covering 18 states – and that it was not in the public interest to allow this conflict in the law to continue. 71 Fed. Reg. at 27590. Thus, the intent of the amendments was to bring the regulations into compliance with the decisions in *Succar*, *Scheerer*, *Bona*, and *Zheng*.

In these four decisions, the courts held that the fact that a parolee was in removal proceedings could not interfere with eligibility under the statute to apply for adjustment of status. As explained in *Succar*:

> By statute, paroled individuals are eligible for adjustment of status is they meet the other statutory eligibility requirements. 8 U.S.C. § 1255(a). Section 1255 makes no distinction between those who are in removal

> proceedings and those who are not for purposes of adjustment of status.

394 F. 3d at 16.

To comply with these decisions – and the adjustment statute itself – the interim regulations, as implemented, must actually afford arriving alien parolees such as Respondent the opportunity to have their adjustment applications adjudicated. In many cases, this will require an immigration judge or the BIA to grant a motion to reopen or continue the case.[10] Without this relief, many parolees will be subject to a final order while USCIS decides his or her adjustment application.

Once a removal order is *executed*, the adjustment applicant loses eligibility for adjustment. *Ceta*, 535 F.3d at 646; *see also Subhan v. Ashcroft*, 383 F.3d 591, 595 (7th Cir. 2004) (noting that an adjustment application cannot be pursued once the alien has been removed from the U.S.). There is always a risk of removal once a final order has been issued. Thus, the only sure safeguard against such removal is to secure a

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[10] The BIA would have jurisdiction over any such motion. *See, e.g.,* 8 C.F.R. §§ 1003.1(d)(1); 1003.2(c). Although the BIA does lack jurisdiction over the adjustment application pursuant to the interim regulations, the BIA's adjudication of this application is not what these motions, including that filed by Respondent here, seek. Instead, the Respondent and others seek to have the BIA reopen, remand, and/or continue the removal case long enough for USCIS to adjudicate the adjustment application, as a grant of adjustment would eliminate the basis for removal and render the individual eligible for termination of proceedings.

continuance or reopening of the removal proceedings until USCIS decides the adjustment application. "The opportunity that the Interim Rule affords for an arriving alien in removal proceedings to establish his eligibility for adjustment based on a *bona fide* marriage [or an approved labor certification] is rendered worthless where the BIA .... denies a motion to reopen (or continue) that is sought in order to provide time for USCIS to adjudicate a pending application." *Kalilu,* 516 F.3d at 780; *see also Ceta,* 535 F.3d at 646.[11]

1. Binding precedent requires the BIA to consider on the merits all motions filed pursuant to the interim regulations.

Board precedent clearly dictates how a motion to reopen removal proceedings to allow a noncitizen to apply for adjustment of status is to be considered. The BIA has long held that a motion to reopen is proper when a noncitizen becomes eligible for relief from removal, in the form of adjustment of status, subsequent to an order of removal. *Matter of Garcia,* 16 I&N Dec. 653 (BIA 1978). Generally, the movant need only submit a prima facie approvable visa petition and adjustment application to secure a

[11] Amicus does not contend that reopening is necessary for USCIS to exercise its jurisdiction and decide the adjustment application. As noted previously, this jurisdiction exists regardless of whether the proceedings are ongoing or final.

reopening. *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978); *see also Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002).

Under this precedent, the BIA is obligated to review the merits of the Respondent's motion and those of similarly situated parolees, to determine whether such parolees establish a prima facie case of eligibility for a visa petition and adjustment of status. *See Kalilu,* 516 F.3d at 780 (holding that the BIA abused its discretion when it denied the motion on grounds that were contrary to the above-cited precedent and remanding for BIA to consider *Velarde* criteria); *Ni,* 520 F.3d at 131 n.4 (ordering that if BIA denies the motions on remand, it must explain how doing so comports with its policy under *Garcia*).

Moreover, *Garcia* and *Velarde* cannot be distinguished from the present situation by the fact that, in those cases, an immigration judge ultimately had jurisdiction over the adjustment applications. There is nothing in the statute, the regulations, or case law that prohibits the BIA from granting a motion to reopen, remand or continue a case in order for USCIS to decide an adjustment application as potential relief from removal. *See Ceta,* 535 F.3d at 648 n. 14 ("the fact that Mr. Ceta's application .... will not be adjudicated by the immigration courts is not a sound or responsive reason for denying his continuance request"). Furthermore, there

potentially is ultimate relief over which the immigration judge or the BIA will have jurisdiction: termination of the removal proceedings in cases in which the parolee is granted adjustment of status.

Additionally, in a parallel situation, immigration judges do have authority to continue or reopen a case based upon potential relief that only USCIS can adjudicate. Where an applicant applies for a U visa – over which USCIS exercises sole jurisdiction – an immigration judge has the authority to continue a case pending the USCIS' determination of the U visa application. *Ramirez Sanchez v. Mukasey,* 508 F.3d 1254, 1256 (9th Cir. 2007); *see also* 8 C.F.R. § 214.14(c)(1); 72 Fed. Reg. 53014, 53022 n.10 ("While this rule specifically addresses joint motions to terminate, it does not preclude the parties from requesting a continuance of the proceedings."); 8 C.F.R. § 214.14(c)(2) (providing that a U Visa petitioner who is subject to a final removal order may request a stay of removal). Thus, there clearly is precedent, in at least the U visa context, for exactly the relief that Respondent and others seek.

2. The BIA's policy contradicts the clear intent of the interim regulations

The clear intent behind the interim regulations was that immigration judges and the BIA would consider motions such as Respondent's under

Velarde and similar precedent. It is well-settled that an agency's intent at the time a regulation is adopted is key to the interpretation of the regulation. *See, e.g., Gonzales v. Oregon,* 546 U.S. 243, 258 (2006) (declining to defer to an agency interpretation that "runs counter to the 'intent at the time of the regulation's promulgation'") (*quoting Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994)).

When it adopted the interim regulations, EOIR intended that continuances would be granted under the standards set forth in *Garcia* and *Velarde*. As explained in the introductory comments to the interim regulations:

> [I]t will ordinarily be appropriate for an immigration judge to exercise his or her discretion *favorably to grant a continuance or motion to reopen* in the case of an alien who has submitted a prima facie approvable visa petition and adjustment application in the course of a deportation hearing,.... [*citing Garcia* and *Velarde*] .... [T]he Secretary and the Attorney General invite public comment on whether rules limiting the exercise of discretion or implementing a presumption against favorably exercising discretion should be established. . . . In the meantime, USCIS, the immigration judges, and the BIA will continue to apply the discretionary factors in accordance with the general principles noted above, and guided by *prior decisions*.

71 Fed. Reg. at 27589-590 (emphasis added).

These introductory comments reveal that EOIR: 1) understood that the current applicable law for continuances was found in *Garcia* and *Velarde;*[12] 2) was considering changes to this applicable law by regulation, and therefore inviting public comment; and 3) specifically stated and intended that, "in the meantime" (that is, until new regulations are promulgated following comments by the public), immigration judges and the BIA would continue to apply *Garcia* and *Velarde.*

As the Ninth Circuit now has made clear, this intent must be carried out, and motions such as that filed by Respondent and others in a similar situation, must be considered under the relevant BIA precedent.

IV. CONCLUSION

For all of the reasons discussed above, amicus urges the BIA to find that 1) USCIS has the authority to adjudicate the applications of "arriving aliens" under a final order of removal and has adopted a policy to this effect; and 2) that both the BIA and immigration judges must ensure full implementation of the interim regulations by cooperating in these cases – and granting motions to reopen, remand or continue – so that parolees in

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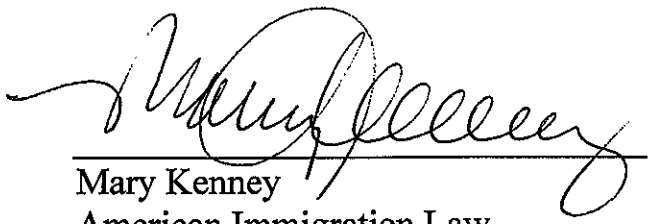
[12] While these introductory comments focus on continuances, the same principles apply to motions to reopen or remand since the same standards apply to these motions as to continuances. In fact, *Garcia* and *Velarde* actually involve motions to reopen rather than motions to continue.

proceedings or under a final order have a full opportunity to apply for adjustment prior to removal.

Dated: November 3, 2008

Respectfully submitted,



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Attorney for *Amicus Curiae*

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In Re **Maria C. Yauri,**	) Case No.: **A 071 610 438**
Respondent.	) REMOVAL PROCEEDINGS
	) **Amicus Curiae Brief**
	) **Attachment A**

SWORN DECLARATION OF MARY KENNEY

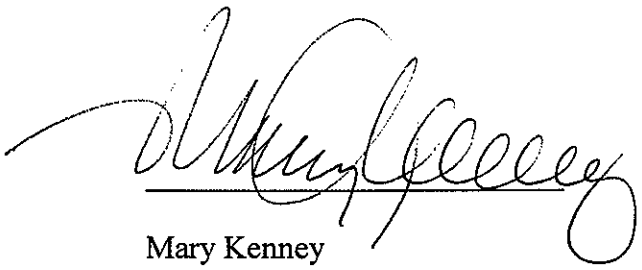
1. My name is Mary Kenney. I am counsel for amicus curiae AILF in this case and hold the position of Senior Attorney with AILF.
2. I have closely followed the issue of when and how an "arriving alien" in removal proceedings can apply for adjustment of status since first submitting an amicus brief on this issue to the Court of Appeals for the First Circuit in the case *Succar v. Ashcroft* in 2004. Since that time I have submitted several dozen amicus briefs relating to this issue in federal courts around the country. I also submitted comments to the May 12, 2006 interim regulations. Finally, I have written several practice advisories for attorneys on this subject and have talked or emailed with well over 100 attorneys who have cases that raise the issue.
3. In particular, I have closely followed the implementation of the interim regulations by local USCIS offices throughout the country. I have assisted in resolving several dozen or more cases in which local USCIS offices misunderstood or misapplied the interim regulations. The problems encountered in these cases include local USCIS offices that erroneously cite to the now-deleted

regulatory bar to deny jurisdiction over an adjustment application by an "arriving alien" in removal proceedings; local USCIS offices that misunderstand whether they have jurisdiction to decide an adjustment application of an "arriving alien" in removal proceedings if the proceedings have not been terminated; and USCIS offices that misunderstand whether they can decide an adjustment application of an "arriving alien" with an unexecuted final order of removal. The majority of these cases have been resolved favorably.

4. I have corresponded directly with at least one dozen attorneys who report that a local USCIS office adjudicated an adjustment application for one or more of their "arriving alien" clients with an unexecuted final order of removal. The local offices involved in these reported cases include Atlanta, Georgia; Baltimore, Maryland; Bloomington, Minnesota; Charleston, South Carolina; Houston, Texas; Louisville, Kentucky; Memphis, Tennessee; Miami, Florida; Newark, New Jersey; New Orleans, Louisiana; New York, New York; Portland, Oregon; Seattle, Washington; and West Palm Beach, Florida.

I swear that the foregoing is true and correct to the best of my knowledge. The foregoing statement is submitted under penalty of perjury.

This declaration is executed on Nov. 3, 2008



Mary Kenney

May 1, 1997 INS Memo on 3/10 Year Bars and Section 245(i)

(96Act.034)

Subject: Processing of Section 245(i) adjustment applications on or after the October 1, 1997 sunset date; Clarification regarding the applicability of certain new grounds of inadmissibility to 245(i) applications

Date: May 1, 1997

To: Regional Directors
District Directors
Officers in Charge
Service Center Directors
ODTF Glynco, GA
ODTF Artersia, NM

From: Office of Examinations

This memorandum provides additional guidance to the field regarding implementation of section 245(i) of the Immigration and Nationality Act, as amended (the "Act"). In addition, this memorandum provides general information regarding section 212(a)(9) of the Act. Finally, this memorandum provides guidance on the effect of the new grounds of inadmissibility found in sections 212(a)(6)(A) and 212(a)(9)(B) of the Act, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the "IIRAIRA"), on applications for adjustment of status. Interim regulations implementing these new provisions and revising existing provisions will be published in the Federal Register at a later date.

Section 245(c)(6) of the Act

Under IIRAIRA, Congress amended section 245(c)(6) of the Act by changing the reference to section 241(a)(4)(B) to section 237(a)(4)(B) of the Act. Section 237(a)(4)(B) of the Act renders any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity, as defined in section 212(a)(3)(B)(iii) of the Act deportable. The Service has determined that any person who is deportable under section 237(a)(4)(B) of the Act is ineligible to adjust status under section 245(i) of the Act.

Impact of amended section 212(a)(6)(A) of the Act on section 245 of the Act

Section 301 of the IIRAIRA, which went into effect on April 1, 1997, created several additional grounds of inadmissibility. IIRAIRA section 301(c)(1) amended section 212(a)(6)(A) of the Act to render inadmissible aliens who are "present in the United States without being admitted or paroled." As set forth in a previous memorandum (HQIRT 50/5.12, March 31, 1997), the INS General Counsel has determined that this

new ground of inadmissibility does not disqualify aliens present in the United States without admission or parole from adjustment of status under section 245(i) of the Act.

New section 212(a)(9)(A)(i) of the Act is applicable to aliens ordered removed under new section 235(b)(1) of the Act, as well as to aliens ordered removed at the end of proceedings under new section 240 of the Act, if the section 240 proceedings were initiated upon the alien's arrival in the United States. Under new section 212(a)(9)(A)(i) of the Act, any such alien is inadmissible, including for purposes of adjustment of status, for five years (and in certain cases longer) from the date of the alien's departure or removal, unless the alien has obtained the advance consent of the Service to reapply for admission prior to completion of his or her statutorily mandated stay abroad.

New section 212(a)(9)(A)(ii) of the Act, in turn, applies to all other aliens who were ordered removed, including aliens who were ordered excluded under pre-IIRAIRA section 236 of the Act or deported under pre-IIRAIRA section 242 of the Act. Under new section 212(a)(9)(A)(ii) of the Act, any such alien is inadmissible, including for purposes of adjustment of status, for ten years (and in certain cases longer) from the date of the alien's departure or removal, unless the alien has obtained the advance consent of the Service to reapply for admission prior to completion of his or her statutorily mandated stay abroad.

It should be noted that new section 212(a)(9)(A) of the Act applies only if the alien has departed or been removed from the United States subsequent to issuance of an order.

General impact of amended section 212(a)(9)(B) and 212(a)(9)(C) of the Act on section 245 of the Act

New section 212(a)(9)(B) and 212(a)(9)(C) of the Act do not apply to applications for adjustment of status filed by an alien who has not yet departed or been removed from the United States. This interpretation is consistent with the language of the statute which provides that an alien must depart or be removed from the United States in order to become inadmissible under new section 212(a)(9)(B) of the Act, or enter or attempt to enter for purposes of new section 212(a)(9)(C) of the Act. Such a person, however, if otherwise within the purview of section 212(a)(9)(B) or 212(a)(9)(C) of the Act, will be deemed inadmissible under that section of the Act for purposes of adjustment of status if he or she departs from the United States and subsequently reenters the United States by any means. The Service will be issuing further guidance regarding the impact of amended section 212(a)(9)(C) of the Act on section 245 of the Act in the near future.

Impact of amended section 212(a)(9)(B) of the Act on section 245 of the Act

With certain exceptions, effective April 1, 1997, under new section 212(a)(9)(B) of the Act, any alien (other than an alien lawfully admitted for permanent residence) who has been "unlawfully present" in this country for a period of more than 180 days but less than one year, has voluntarily departed from the United States, and again seeks admission to this country within three years from the date of departure, will be inadmissible to the

United States. Similarly, with certain exceptions, an alien (other than an alien lawfully admitted for permanent residence) who has been "unlawfully present" in the United States for a period of one year or more, departs from the United States, and again seeks admission to this country within ten years of the date of such departure or removal, will be deemed inadmissible. In addition to the specific exceptions set forth under new section 212(a)(9)(B)(iii) of the Act, no period prior to April 1, 1997 may be counted toward the period of "unlawful presence." See section 301(b)(3) of the IIRAIRA. Thus, the earliest possible date an alien could be deemed to be inadmissible under section 212(a)(9)(B) of the Act would be September 28, 1997.

Section 245(c)(7) of the Act

Section 245(c)(7) of the Act, which took effect on September 30, 1996, provides that any alien beneficiary of an employment-based immigrant visa petition is ineligible for adjustment under section 245(a) of the Act if he or she is not in a lawful nonimmigrant status at the time he or she applies for adjustment. This new section renders aliens who are legally permitted to remain in the United States, such as parolees, but who are not among the classes of nonimmigrants defined in section 101(a)(15) or other provisions of the Act, ineligible to adjust status under section 245(a) of the Act on the basis of an approved employment-based immigrant petition. It should be noted, however, that the section 245(c)(7) bar does not apply to an alien who was in a lawful nonimmigrant status at the time he or she applied for adjustment of status, subsequently departed from the United States, and then reentered this country pursuant to an approved advance parole. (For additional information on the Service's policy regarding implementation of section 245(c)(7) of the Act, please refer to the memorandum titled "IIRAIRA provisions affecting INA section 245 adjustment eligibility, amount of the additional sum required under INA section 245(i), and rescission of adjustment under INA section 246", December 20, 1996, HQ 70/23-P).

Clarification of the term "otherwise violated the terms of a nonimmigrant visa" in new section 245(c)(8) of the Act

An alien will not be deemed to have "otherwise violated the terms of a nonimmigrant visa" merely by filing an application for adjustment of status, provided that such filing was in accordance with 8 CFR 103.2(a) and occurred prior to the expiration of the alien's nonimmigrant status. Further, for purposes of section 245(c)(8) of the Act, an alien will not be deemed to have "otherwise violated the terms of a nonimmigrant visa" if the alien: (a) is eligible for relief under 8 CFR 245.1(d)(2); (b) was granted a change of nonimmigrant status pursuant to 8 CFR 248.1(b); (c) was granted an extension of nonimmigrant stay pursuant to current Operations Instruction 214.1(c)(5) or any analogous previous Operations Instruction; (d) was granted an extension of nonimmigrant stay based on a timely filed extension application which the Service approved after the alien's authorized nonimmigrant stay expired; or (e) was granted reinstatement to student status pursuant to 8 CFR 214.2(f)(16) on the basis of circumstances beyond the student's control.

Clarification of the term "unauthorized alien" in new section 245(c)(8) of the Act

For purposes of section 245(c)(8) of the Act, an alien will not be deemed to be an "unauthorized alien" as defined in section 274A(h)(3) of the Act while his or her properly filed Form I-485 application is pending final adjudication, if the alien has otherwise obtained permission from the Service to engage in employment, of if the alien: (a) has not previously engaged in unauthorized employment at any time; (b) was authorized, at the time of filing the adjustment application, to be employed by his or her current employer pursuant to a nonimmigrant classification permitting such employment (including any on-campus employment permitted under the Service's regulations governing F or J nonimmigrant students); and (c) would otherwise have been authorized to continue employment had he or she not filed the application for adjustment of status. In all other cases, the adjustment applicant must await issuance of an employment authorization document ("EAD") from the Service before he or she may lawfully engage in employment. Further, in all cases, if the district director or service center director denies the alien's application for adjustment of status, any employment authorization granted to the alien on the basis of the adjustment application will be subject to termination pursuant to 8 CFR 274a.14(b).

Treatment of immediate relatives and certain special immigrants under new section 245(c)(8) of the Act

By its terms, new section 245(c)(8) of the Act applies to "all aliens." Unlike section 245(c)(2) of the Act, this section does not expressly exempt immediate relatives or certain special immigrant from the bar to adjustment. Despite the reference to "all aliens" in new section 245(c)(8) of the Act, however, it is the position of the Service that section 245(c)(8) does not supersede the more specific language of section 245(c)(2) of the Act. For this season, immediate relatives as defined in section 201(b) or special immigrants described in sections 101(a)(27)(H),(I),(J), or (K) of the Act who have at any time engaged in unauthorized employment or otherwise violated the terms of a nonimmigrant status, if admissible, continue to be eligible to adjust status under section 245(a) of the Act. As is currently the case, such individual are not required to pay the additional sum required for filing an adjustment application pursuant to section 245(i) of the Act. See 8 CFR 245.1(b)(4),(5) and (6). These persons are still required, however, to pay the base filing fee required of other adjustment applicants under section 245(a) of the Act. See 8 CFR part 103.7(b)(1).

Completion of processing of pending section 245(i) adjustment applications

An application for adjustment of status filed subsequent to September 30, 1994 and prior to October 1, 1997 shall be adjudicated to completion by an officer of the Service, regardless of whether the final decision is made after September 30, 1997. The Service may consider a motion to reopen or reconsider an application for adjustment of status on the basis of section 245(i) of the Act only if: (1) the application for adjustment of status was filed on or after October 1, 1994 and before October 1, 1997, and (2) prior to

October 1, 1997, the applicant submitted Supplement A to Form I-485, any additional sum required by section 245(i) of the Act, and any other required documentation.

This memorandum has the concurrence of the Office of Field Operations.

Louis D. Crocetti, Jr.

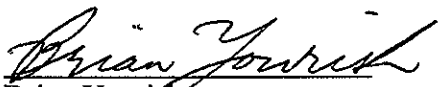
Associate Commissioner

CERTIFICATE OF SERVICE

On November 3, 2008, I, Brian Yourish, served a copy of this Amicus Curiae Brief in Support of Respondent by first-class mail on the following:

Stuart I. Folinsky, Esquire
6255 Sunset Boulevard, Suit 915
Los Angeles, CA 90028

Office of the District Counsel/LOS
606 South Olive Street, 8th Floor
Los Angeles, CA 90014



Brian Yourish
Legal Assistant
American Immigration Law Foundation

Date: November 3, 2008