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UNITED STATES DEPARTMENT OF HOMELAND SECURITY
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES
ADMINISTRATIVE APPEALS OFFICE

In the Matter of [redacted], Petitioner	Appeal from denial of Form I-918, Petition for U Nonimmigrant Status File No. A [redacted]

PETITIONER'S BRIEF ON APPEAL

OF THE DENIAL OF FORM I-918, PETITION FOR U NONIMMIGRANT STATUS

I. Introduction

Petitioner [redacted], by and through the undersigned counsel, submits this brief on appeal of the denial of her Form I-918, Petition for U Nonimmigrant Status pursuant to 8 CFR § 103.3.

The grounds of appeal are the following: 1) United States Citizenship and Immigration Services erred in denying Ms. [redacted]'s Form I-918 because Ms. [redacted]'s conditional permanent resident status terminated before she filed her Form I-918; 2) USCIS erred in denying Ms. [redacted]'s Form I-918 because Ms. [redacted] abandoned her permanent residency; 3) USCIS erred because lawful permanent resident status is not a ground of inadmissibility under the Immigration and Nationality Act, and if it is, Ms. [redacted] should be given the opportunity to waive that ground of inadmissibility; 4) USCIS erred in denying the I-918 based on incomplete information without issuing a Request for Evidence or Notice of Intent to Deny to allow Ms. [redacted] to respond to the alleged ground of inadmissibility.

Ms. [redacted] is currently in removal proceedings. It is the position of the Department of Homeland Security that she is no longer a lawful permanent resident. Her master calendar hearing is scheduled for [redacted] in [redacted].

II. Facts and Procedural Background

Ms. [redacted] is citizen of [redacted]. In the decision on her I-918, Petition for U Nonimmigrant Status, USCIS found that she has established eligibility for U nonimmigrant status as a victim of domestic violence and sexual assault. Yet, USCIS denied her I-918, stating that she is inadmissible because she is already a lawful permanent resident. This is confusing because DHS takes the opposite position in her removal proceedings: That she was no longer a lawful permanent resident when she came to the United States in [redacted] 2012. The Department of Homeland Security has placed Ms. [redacted] in a position where she cannot receive a remedy to which she is otherwise entitled due to its conflicting positions on whether her residency has terminated.

On or about [redacted], 2005 Ms. [redacted] was granted conditional lawful permanent resident status on the basis of her marriage to her U.S. citizen husband (now deceased). She never filed form I-751 petition to remove conditions. In 2006, after receiving conditional lawful permanent resident status, and before the time to remove conditions, she and her husband departed the United States for [redacted]. Ms. [redacted] remained in [redacted] for approximately six years. After approximately five years, her husband, who was experiencing significant physical and mental health problems, returned to the United States. The two planned for Ms. [redacted] to follow him after wrapping up their financial affairs in [redacted]. After her husband left, Ms. [redacted] was the victim of [redacted].

Ms. [redacted] returned to the United States on [redacted] 2012, and was issued a Notice to Appear by Customs and Border Protection. The NTA charges Ms. [redacted] as an arriving alien, and alleges that she failed to submit form I-751 to remove conditions and, as a result, her status automatically terminated. In her removal proceedings, Ms. [redacted] admitted to the factual allegations and the charge of removability (i.e. she was not a lawful permanent resident when she entered in [redacted] 2012 because her status terminated in 2007). At her [redacted] master calendar hearing, Ms. [redacted] informed the court that she will seek relief from removal based on asylum, statutory withholding, and a Convention Against Torture claim. She will not file form I-751, Petition to Remove Conditions on Residency.

After entering the United States, Ms. [redacted] was the victim of domestic violence and sexual assault in [redacted]. She escaped her abuser and arrived in [redacted]. She submitted a Form I-918, Petition for U Nonimmigrant Status with USCIS on [redacted].

On [redacted], USCIS denied Respondent's U nonimmigrant status petition. USCIS found that she satisfies all substantive criteria to receive U nonimmigrant status. It found that she has suffered substantial abuse as a result of having been a victim of qualifying criminal activity; that she possesses reliable and credible information regarding the qualifying criminal activity; that she was helpful, is being helpful, or is likely to be helpful to law enforcement in the investigation or prosecution of that criminal activity, and since the initial cooperation has not refused or failed to provide information or assistance when requested; and that the qualifying criminal activity occurred in the United States.[1] USCIS found that she has no grounds of inadmissibility that must be waived in order for to receive U nonimmigrant status. However, it refused to approve the petition for U nonimmigrant status on the basis that she is inadmissible because she is a lawful permanent resident. On [redacted], Ms. [redacted] filed the instant appeal.

III. Legal Analysis

USCIS denied Ms. [redacted]'s I-918, Petition for U Nonimmigrant Status on the basis that she is inadmissible because she is already a lawful permanent resident according to USCIS records. She lost her lawful permanent resident status, at the latest, in 2007, and being a lawful permanent resident it not a ground of inadmissibility. The denial is incorrect and the AAO must reverse for the following reasons:

1. USCIS erred in finding that Ms. [redacted] is a lawful permanent resident because her conditional permanent resident status has terminated

Conditional lawful permanent resident status terminates upon the conditional lawful permanent resident alien's failure to timely file a petition to remove conditions.[2] Where a

[1] I-918 Denial at 1-2, attached hereto at 35-37.
[2] INA § 216(c)(2)(A); INS Memorandum, M. Pearson "AFM Update: Immigrant Investor Petitions – Form I-829 Adjudications" (Mar. 3, 2000), *published on* AILA InfoNet at Doc. No. 00060702 (*posted* Jun. 7,

conditional lawful permanent resident fails to file to remove conditions on her residency, her permanent resident status terminates as of the second anniversary of her admission for lawful permanent residence.[3]

Regulation accords conditional permanent residents the same the rights, privileges, responsibilities and duties of all other lawful permanent residents, unless otherwise specified.[4] The regulations also state that permanent resident status terminates upon a relevant final order.[5] However, they nowhere state that permanent resident status terminates *only* upon a final order of exclusion, deportation, removal, or rescission.[6]

Under the authority of INA §216, conditional permanent residency can terminate in three ways: 1) Termination by the Service where it determines the marriage was for immigration purposes or has been judicially annulled or terminated; 2) Termination by the Service after denial of a petition to remove conditions; 3) Termination by the Service as of the second anniversary of the grant of conditional resident status where the alien does not file a petition to remove conditions within 90 days prior to the second anniversary or fails to appear for an interview on the petition.[7]

In the first scenario, where the Service determines a marriage was fraudulent or has terminated, it must issue the alien notice of its intent to terminate the alien's status.[8] After providing notice, the alien retains their lawful conditional permanent residence and has the opportunity to rebut the evidence of fraud or termination of the marriage.[9] If the Service proceeds to terminate status, the alien may request review in removal proceedings.[10] However, "[t]he termination of status, and all of the rights and privileges concomitant thereto… shall take effect as of the date of such determination [notice of termination] by the director," regardless of whether the alien seeks judicial review.[11]

It is clear that conditional residence, therefore, may terminate prior to a final judicial determination. Termination prior to such a determination also occurs in the third scenario. It is the plain language of the Immigration and Nationality Act that conditional lawful permanent resident status *shall be terminated* by the Secretary of Homeland Security upon the conditional lawful permanent resident alien's failure to timely file a

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2000) ("Termination of conditional status for failure to file to remove the conditions during the proper period is automatic by law and by regulations").

[3] INA § 216(c)(2); 8 CFR § 216.4(a)(6); 9 *Foreign Affairs Manual* (FAM) 42.22 N4.2.

[4] 8 CFR §1216.1.

[5] 8 CFR § 1.2 (stating that for one having been lawfully accorded permanent resident status, such status terminates upon entry of a final administrative order of exclusion, deportation, or removal); 8 CFR § 1001.1(p).

[6] 8 CFR § 1.2; 8 CFR § 1001.1(p); *U.S. v. Yakou,* 428 F.3d 241, 250 (D.C. Cir. 2005) (finding that the definition of LPR – then at 8 CFR §1.1(p)—does not foreclose a change in status by other means than formal termination and that "termination" is only a subset of means by which LPR status could change).

[7] INA §216(b)-(c); 8CFR §216.3-216.4(b); *Matter of Stowers*, 22 I&N Dec. 605 (BIA 1999).

[8] 8 CFR §216.3(a); 8 CFR §1216.3(a).

[9] *Id.*

[10] *Id.*

[11] *Id.*

petition to remove conditions.[12] In contrast to a determination of fraud or divorce, however, termination where the alien fails to file an I-751 occurs automatically.[13]

The regulations not only require "automatic termination," but specify that, if a joint petition is later filed and approved by the director, he or she "shall *restore* the alien's permanent residence status" (emphasis added) and then remove the conditions thereon.[14] These provisions "otherwise specify" procedures for conditional permanent residents, as contemplated by 8 CFR §1216.1 (according the same rights and duties to conditional permanent resident as other lawful permanent residents, unless otherwise specified).

The conclusion that conditional permanent residence may terminate by means other than a final judicial determination is supported by caselaw. In *Severino v. Mukasey*, the Second Circuit held that petitioner's conditional permanent resident status terminated by operation of law on the second anniversary of his grant of that status under 8 USC §1186a(c)(2)(A).[15] The petitioner in that case failed to appear at his interview as required. The court found that his status had accordingly terminated by law under 8 USC §1186a(c)(2)(A).[16] The fact that the petitioner later filed a second I-751 petition did not restore his status,[17] and time after termination (as of the second anniversary of his initial grant of conditional resident status) did not count as time in lawful permanent resident status.[18]

Ms. [redacted]'s status terminated automatically by operation of law when she failed to file form I-751 by the second anniversary of her grant of conditional resident status. Ms. [redacted] was granted conditional lawful permanent resident status on or about [redacted], 2005. She failed to file form 1-751 to remove conditions and her conditional residency terminated on or about [redacted], 2007. When she entered the United States on [redacted], 2012, the Government charged her as an arriving alien (not a returning resident) and removable because she is inadmissible under INA §212(a)(7)(A)(i)(I). Thus, she was not a lawful permanent resident when she attempted to enter the United States on [redacted], 2012.

Further, Ms. [redacted] conceded in her I-918 petition that her residency terminated.[19] Ms. [redacted] is not seeking to have her status restored; she has not filed to remove conditions and she does not intend to do so. She has conceded that her permanent resident status terminated on [redacted], 2007, the second anniversary of her grant of conditional resident status, and that she has not been a lawful permanent resident since that date. In her January 2014 Motion to Change Venue, she admitted the charges in the NTA and conceded removability as charged.[20]

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[12] INA § 216(c)(2)(A).
[13] 8 CFR §216.4(a)(6) 8 CFR §1216.4(a)(6); *Matter of Mendes*, 20 I&N Dec. 833 (BIA 1994).
[14] 8 CFR §216.4(a)(6) 8 CFR §1216.4(a)(6).
[15] 549 F.3d 79 (2d Cir. 2008).
[16] *Severino* at 81.
[17] *Id.* at 82-83.
[18] *Id.* at 83.
[19] I-918 Cover Letter at 1, attached hereto at 38-41.
[20] Respondent's Motion to Change Venue at 2, attached hereto at 42-50.

The Government has taken the position in its NTA that Ms. [redacted] is no longer a lawful permanent resident.[21] We believe that this determination is correct. Ms. [redacted] conceded as much in her I-918 petition for U nonimmigrant status and before the immigration court.[22] Yet a different office of the Department of Homeland Security, USCIS, takes the position that she is currently a lawful permanent resident and therefore cannot receive U nonimmigrant status. This conclusion is in error. Ms. [redacted]'s former conditional lawful permanent resident status terminated. She has established eligibility for a U visa on all other grounds.[23] The denial in this case should be revoked and her I-918 petition for U nonimmigrant status should be approved.

2. Ms. [redacted] abandoned her permanent residency

Ms. [redacted] departed the United States for [redacted] in 2006 and remained in [redacted] for approximately six years, until she reentered the United States on [redacted], 2012. She abandoned her residency as a result.

To be considered a returning resident alien, one who has been granted lawful permanent resident status must return to unrelinquished permanent resident status after a temporary stay abroad.[24] If a stay abroad lasts for more than one year, the alien may no longer enter using their I-551.[25] The Government has taken the position that where an alien departs the United States for more than a year, they have abandoned their residency.[26]

Whether an absence was "temporary," and the alien has thus abandoned, turns on intent rather than bare length of absence.[27] A returning alien's actions, however, must support that intent.[28] If a putative lawful permanent resident has abandoned their status, she is regarded as seeking an admission upon return to the United States, and "must undergo an inspection as an arriving alien."[29] Where she has a colorable claim to LPR status, she will be placed into removal proceedings.[30]

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[21] Notice to Appear at 1, 3, attached hereto at 12-14.
[22] Cover Letter at 1; Motion to Change Venue at 2.
[23] Denial at 1-2.
[24] 8 CFR §211.1(a)(2); *Matter of Huang*, 19 I&N Dec. 749, 753 (BIA 1988).
[25] 8 CFR §211.1(a)(2).
[26] *See* 9 FAM 42.22 N1a., N1.1 (lawful permanent residents unable to return within the travel validity of their Form I-551 may apply for a Returning Resident visa; a lawful permanent resident is eligible for returning resident status after an absence from the United States of over a year only if she can demonstrate she departed the U.S. with the intent to return to an unrelinquished residence and that her stay abroad was for reasons beyond her control and for which she was not responsible); CBP *Inspector's Field Manual* §13.1 ("An LPR who has been outside the United States for more than one year … may have abandoned residence").
[27] *Matter of Huang*, 19 I&N Dec. 749, 753 (BIA 1988).
[28] *Khodagholian v. Ashcroft*, 335 F.3d 1003, 1007 (9th Cir. 2003) (citing *Sing v. Reno*, 113 F.3d 1512, 1514 (9th Cir. 1997).
[29] *Yakou* at 251 (quoting *Alaka v. Elwood*, 225 F.Supp.2d 547, 553 (E.D.Pa. 2002)).
[30] 8 CFR 1001.1(p)); *Huang* at 754 (citing *Matter of Kane*, 15 I&N dec. 258 (BIA 1975)); *Lateef v. Holder*, 683 F.3d 275, 279 (6th Cir. 2012) (citing 8 CFR 1001.1(p)).

However, a final order is not necessarily required to determine that a permanent resident has abandoned her status.[31] A formal renouncement of permanent resident status, such as signing Form I-407, is also not required.[32] At least one case, *U.S. v. Yakou*, has found that a former lawful permanent resident's status terminated as of the time of his abandonment without an administrative determination, and that a final order by an Immigration Judge is not the only way to abandon permanent resident status.[33] While that case involves a criminal prosecution of a foreign national, the D.C. Circuit makes clear that its determination is made under U.S. immigration laws, and that a former lawful permanent resident's status can terminate automatically as of the time of her abandonment.[34]

Ms. [redacted] was charged as an arriving alien upon her reentry to the United States.[35] She stated that she lived in [redacted] for over a year and conceded that she was no longer a lawful permanent resident in her I-918 petition.[36] Ms. [redacted] abandoned her lawful permanent resident status. Where USCIS believed she had not established eligibility on this ground, it should have issued RFE or NOID and allowed her to provide further evidence of her abandonment. Ms. [redacted] could then have produced further evidence regarding her intent in leaving the United States and actions constituting her abandonment. USCIS erred in its determination that she remains a lawful permanent resident, and should reverse their denial or issue RFE/NOID to allow Ms. [redacted] to present evidence of her status.

3. Lawful permanent resident status is not a ground of inadmissibility

Ms. [redacted]'s I-918 was denied on the basis that she is not admissible because she is a lawful permanent resident. As a matter of law, this assertion is incorrect. Being a lawful permanent resident is not a ground of inadmissibility under the Immigration and Nationality Act. If it is, Ms. [redacted] should be given the opportunity to file a Form 1-192 to waive that ground of inadmissibility.

To qualify for U nonimmigrant status, a petitioner must be admissible or have existing grounds of inadmissibility waived.[37] A petitioner for U nonimmigrant status may apply to waive any and all inadmissibility grounds except for participation in Nazi persecution, genocide, torture, or extrajudicial killing.[38]

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[31] *U.S. v. Yakou,* 428 F.3d 241, 247-251 (D.C. Cir. 2005); USCIS Memorandum, "Revised Guidance Pertaining to the Adjudication of Form I-90, *Application to Replace Permanent Resident Card*" (Feb. 6, 2009), *published on* AILA InfoNet at Doc. No. 09051933 (*posted* May 9, 2009) ("An applicant who is a Lawful Permanent Resident (LPR) holds such status until either abandoned by the applicant *or* revoked through rescission and/or removal proceedings" (emphasis added)).
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] NTA at 1.
[36] Cover Letter at 1.
[37] 8 CFR §214.1(a)(3)(i).
[38] INA §212(d)(14).

Lawful permanent residence is not contained in §212 of the INA as a ground of inadmissibility.[39] Where an application for a visa or admission is denied by an immigration officer, the officer must state the specific provision of law under which the alien is inadmissible.[40] The I-918 denial does not cite any provision of §212 for the proposition that Ms. [redacted] is inadmissible. Instead, it cites the definitions of immigrant and nonimmigrant for this proposition.

The denial notice indicates that one who is an immigrant may not be a nonimmigrant, and that one lawfully admitted for permanent resident status, as defined by INA §101(a)(20), is an immigrant.[41] This decision relies incorrectly on the definition of "lawfully admitted for permanent residence" found in §101(a)(20). The full definition reads (emphasis added):

> "[T]he status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, *such status not having changed.*"

Ms. [redacted]'s status has changed. It terminated upon her failure to file to remove conditions on her conditional permanent residence.[42]

The denial does cite *Matter of A*, 6 I&N 651 (BIA 1955), as authority that "an alien may not be both an immigrant and a nonimmigrant at the same time."[43] Nowhere does this case stand for the proposition that possessing permanent resident status is a ground of inadmissibility. The issue in *Matter of A* was whether a nonimmigrant had violated her nonimmigrant status in allowing a private bill to be introduced granting her permanent resident status. The Board found that her intent controlled and resolved the case in favor of the alien. The Attorney General upheld the Board's decision on review. The statement cited by USCIS comes from a portion of the case not ultimately upheld in its ruling. The issue in the case was permanent resident status endangering nonimmigrant status, not vice versa.

Whether Ms. [redacted] still qualifies as an immigrant due to her 2005 grant of conditional permanent resident status is apart from any grounds of inadmissibility that may bar her from U nonimmigrant status. USCIS is required to give the specific reasons for denial.[44] The specific reason given in this case is that Ms. [redacted] is not admissible to the United States as a U nonimmigrant while she remains a lawful permanent resident of the United States.[45]

Being a lawful permanent resident (or having been a lawful permanent resident) is not a ground of inadmissibility under the Immigration and Nationality Act. If it is going to be

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[39] INA §212(a).
[40] INA §212(b)(1)(B).
[41] Denial at 2.
[42] Discussed at III.1., *supra*.
[43] Denial at 2.
[44] 8 CFR §103.3(a)(1)(i).
[45] Denial at 2.

considered such, Ms. [redacted] should be given the opportunity to file a Form 1-192 to waive that ground of inadmissibility.

4. The denial was issued based on incomplete information

Where evidence submitted with a petition leaves question as to eligibility for the benefit, regulations afford an immigration officer the option of asking for additional evidence.[46] It is USCIS policy that in such a case, the officer should issue an RFE "unless there is *no* possibility that additional evidence available to the individual might cure the deficiency" (emphasis added).[47]

It is the position of the Department of Homeland Security that [redacted] conditional lawful permanent resident status automatically terminated, as evidenced by the allegations in the Notice to Appear issued to her on [redacted], 2012.[48] The Government has charged Ms. [redacted] as an arriving alien and removable under INA § 212(a)(7)(A)(i)(I), meaning she was not a lawful permanent resident when she attempted to enter the United States on [redacted], 2012. Yet a different office within the Department of Homeland Security, USCIS, takes the position that she is currently a lawful permanent resident and therefore cannot receive U nonimmigrant status.

With the I-918 denial, the Government has taken a position regarding Ms. [redacted]'s status that conflicts with the position in its previously issued NTA. Different offices within DHS have claimed that she both is and is not a lawful permanent resident. She should have been afforded the opportunity to address the question of her status before her I-918 was denied.

In her I-918 petition for U nonimmigrant status, Ms. [redacted] conceded that she was no longer a lawful permanent resident.[49] She stated that she had failed to file to remove conditions on her permanent residency that she had lived in [redacted] for over year. She conceded that her permanent residency terminated, the charge brought by DHS in its Notice to Appear.

Ms. [redacted] is in removal proceedings. In her January 2014 Motion to Change Venue, she admitted the charges in the NTA and conceded that she is removable as charged.[50] She has declined the opportunity to file form I-751 to remove conditions on her residency. She is clearly no longer a lawful permanent resident of the United States.

If USCIS records were unclear regarding whether or not Ms. [redacted] is a permanent resident (for example, whether she intended to file an I-751 or whether she abandoned her permanent residency by living in [redacted] for several years), Ms. [redacted] deserved

[46] 8 CFR §103.2(b)(8)(ii)-(iii).
[47] USCIS Memorandum, "Requests for Evidence and Notice of Intent to Deny" (Jun. 3, 2013), *published on* AILA InfoNet at Doc. No. 13061247 (*posted* Jun. 12, 2013).
[48] NTA at 1.
[49] Cover Letter at 1.
[50] Motion to Change Venue at 2.

the opportunity to provide that information. No RFE or NOID was issued to allow Ms. [redacted] to provide more information before her 1-918 was denied, and the denial was issued in error as a result.

IV. Conclusion

Ms. [redacted] is currently in removal proceedings. It is the position of the Department of Homeland Security that she is no longer a lawful permanent resident. Ms. [redacted] concedes that she is no longer a lawful permanent resident. USCIS erred in denying Ms. [redacted]'s I-918 petition for U nonimmigrant status. Because she has fulfilled all other eligibility criteria, the denial should be revoked and her 1-918 should be approved.

Dated: September 26, 2014

By: _____
Heather Stenson
Attorney for [redacted]

Attached please find the following supporting documentation: