U.S. Department of Justice
Immigration and Naturalization Service

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Office of the General Counsel

425 I Street NW
Washington, DC 20536

MAY 17 2001

MEMORANDUM FOR REGIONAL COUNSEL
FOR DISTRIBUTION TO DISTRICT AND SECTOR COUNSEL

FROM: Bo Cooper
General Counsel

SUBJECT: Motions to Reopen for Consideration of Adjustment of Status

In a memorandum dated December 23, 1997, this office reaffirmed a prerequisite standard of "extraordinary and compelling circumstances" in order to obtain INS concurrence in general motions to reopen. This office has determined that applying the "exceptional and compelling circumstances" standard to motions to reopen for consideration of adjustment of status, will no longer advance significant law enforcement objectives.[1] **The INS may join in a motion to reopen (or a motion to the BIA to remand) for consideration of adjustment of status pursuant to INA § 245 if such adjustment of status was not available to the respondent at the former hearing, the alien is statutorily eligible for adjustment of status, and the respondent merits a favorable exercise of discretion.**

To request INS consent to file a motion to reopen with an Immigration Court or the Board of Immigration Appeals, respondent's representative must contact the District Counsel's Office that represented the INS during the respondent's immigration proceedings. Such a request must be in writing and supported by affidavits or other evidentiary material establishing proof of current eligibility for adjustment, to include, if applicable, a complete copy of the adjustment application, and visa petition approval. The motion should include a stipulation that

[1] This standard had been set to comport with the congressional mandate contained in §545(d) of IMMACT 90 regarding motions to reopen. The mandate appeared to have been directed at preventing an alien from accruing time after a final order and then seeking suspension or 212(c) relief. (EOIR's regulations implementing the language became final in 1996). While post-order adjustment applications did not appear to be the real target of the measure, the wording covered them as well; and, this office took a narrow approach. Given changes to the INA such as the "stop-time rule" in INA § 240(A)(d) and repeated amendments to §245(i), an amendment to our guidance as it relates to adjustment of status and motions to reopen is warranted.

the INS may still contest the merits of the respondent's case in a reopened proceeding. Where appropriate, the District Counsel's Office may request that revisions to the joint motion be made as a precondition for giving its consent. INS counsel should reply to requests for joint motions to reopen in a timely manner.

Statutory Bars

Obviously, INS counsel may not join in a motion to reopen if an alien is ineligible for adjustment due to any applicable statutory bars such as those due to overstaying a grant of voluntary departure (See INA §240B[d][2000]; §242B[e][2][1996]) or an *in absentia* order (See §240[b][5][2000]; §242B[e][1996]).

Under INA§240B(d)(2000) an alien in removal proceedings who is permitted to voluntarily depart and who fails to do so is ineligible to adjust status for a ten-year period. Under §242B(e)(2)(1996) an alien in deportation proceedings who is permitted to depart the United States voluntarily pursuant to §244(e)(1) and who remains in the United States beyond the scheduled departure date, other than due to exceptional circumstances, is not eligible to adjust status under Section 245 of the Act for a period of five years after the scheduled departure date. See INA §242B(e)(2)(A), (5)(C)(1996). This restriction, however, only applies where the Attorney General provides the alien with written notice in English and Spanish, and with oral notice, in the alien's native language or in another language that the alien understands, of the consequences of remaining in the United States after the scheduled departure date. In pre-§242B deportation cases and in cases in which the requisite written and oral warnings were not administered, failure to depart the United States in accordance with a voluntary departure order does not act as a statutory bar to relief but does constitute a negative discretionary factor.

Any alien subject to a deportation or removal order issued *in absentia* will be subject to five and ten-year bars, respectively, where she cannot establish exceptional circumstances for her failure to appear at her scheduled hearing. See INA§240(b)(5)(2000); § 242B(c)(1996); Matter of M-S-, Int. Dec. 3369. This bar, however, will not apply where a deportation order was issued under section 242B(c)(1) of the Act unless the Attorney General provided the alien with written notice in English and in Spanish, and with oral notice, in the alien's native language or in another language that the alien understands, of the consequences of failing to appear for a scheduled hearing. INA §242B(e)(1)(1996). In removal proceedings, the bar will not apply unless written notice of the consequences of one's failure to appear was provided in writing to the alien or her counsel of record. Id. §240(b)(5)(A)(2000).

Discretion

Factors to be considered in determining whether a favorable exercise of discretion is warranted should include but are not limited to (1) the hardship to the alien and/or her USC or LPR family members if the alien were required to procure a visa through consular processing (including the potential applicability of section 212(a)(9) should the alien depart the United

States); (2) the alien's criminal history, if any; (3) the number and severity of the immigration violations (a deportation or removal order resulting from a failure to depart after a grant of voluntary departure being a weighty negative factor), (4) whether the alien has cooperated with, or his continued presence in the United States is desired for, a criminal or civil investigation or prosecution conducted by any law enforcement agency; and (5) whether the alien's removal is consistent with INS objectives. When novel or otherwise sensitive issues are presented, consult with Regional Counsel.

In general, if a decision is made to join in a motion to reopen for consideration of adjustment of status, and if INS counsel is confident that the INS would approve the I-485, the joint motion to the Immigration Judge should simultaneously propose a "remand" of proceedings to the INS for adjudication of the adjustment application using Form I-471 (attached) or such similar procedures as exist locally. Any such "remand" or "joint motion to terminate" should contain a stipulation, (as contained in Form I-471) that the termination is conditioned upon approval of the I-485.

An increase in requests regarding motions to reopen based on alleged eligibility for adjustment of status under Section 245(i) is expected. The Legal Immigration Family Equity Act Amendments (LIFE) Pub. L. 106-554 (Dec. 21, 2000) amended Section 245(i), changing the date by which an alien must file a qualifying immigrant visa petition or application for labor certification to April 30, 2001.[2] LIFE also added a new 245(i) eligibility requirement: If the qualifying petition or application was filed after January 14, 1998 the alien must have been physically present in the United States on December 21, 2000. On March 26, 2001, new 245(i) regulations were published as an interim rule with request for comments.

This memorandum is intended solely for the guidance of INS personnel in performing their duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Further information on motions to reopen, §245(i), and LIFE can be found on Docushare (E.g., go to "General Counsel" and then "Examinations Division"), on the cc: mail bulletin board under "LIFE Act," and at the INS Website (www.ins.gov).

Attachment (1)

[2] Several bills have been introduced which would extend the sunset date. If an extension occurs, this memo should be read to encompass any such extension.

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

MOTION BY TRIAL ATTORNEY TO IMMIGRATION JUDGE AFTER COMMENCEMENT OF DEPORTATION HEARING

IN DEPORTATION PROCEEDINGS

In the Matter of

_____
Respondent

A - _____

ORDER TO SHOW CAUSE ISSUED ON: _____

Motion is hereby made (check and complete as appropriate):

1. That the deportation proceedings against the respondent be terminated to permit his case to be considered or reconsidered by the District Director

☐ a. for permanent resident status under section _____.

☐ b. for change in nonimmigrant classification under section 248 of the Immigration and Nationality Act.

☐ c. for reinstatement in nonimmigrant status as _____.

☐ d.

Reason:

For the District Director

DATE _____

_____
Trial Attorney

I have received a copy of the above motion and consent to its being granted.

DATE: _____

_____
Signature of Respondent or Representative

ORDER

Upon due consideration of the motion by the trial attorney IT IS ORDERED that the deportation proceedings herein be terminated for the limited and sole purpose of permitting the respondent's case to be considered or reconsidered by the District Director for the purpose set forth above.

IT IS FURTHER ORDERED that if the action taken by the District Director is favorable to the respondent, the pending deportation proceedings shall be terminated; but that if the action taken by the District Director is not favorable to the respondent the pending deportation proceedings shall remain in full force and effect.

DATE: _____

_____
Immigration Judge