September 28, 2015

USCIS

Vermont Service Center

75 Lower Welden St.

St. Albans, VT 05479

Re:

Dear Sir or Madam:

Please find enclosed Form I-290B Motion to Reopen and Reconsider from a Decision of a USCIS Officer, with the required filing fee. Specifically, this is a Motion to Reopen and Reconsider of an I-485 denial by the Vermont office of CIS, dated August 28, 2015.

My argument on the Motion to Reopen and Reconsider is below. Please find the following documents enclosed:

A. Form I-290B motion to reopen and reconsider……………………………………….. p. 1

B. G28………………………………………………………………………………………. p. 3

C. CIS Notice of Denial of I-485, dated 8/28/2015 ………………………………………... p. 7

D. Copy of Applicant’s social security card…………………………………………………p. 11

E. Certificate of Applicant’s mother illness with certified translation ……………………...p. 13

F. Death certificate of Applicant’s mother with certified translation………………………..p. 15

G. Letter of Applicant’s father with certified translation…………………………………….p. 17

H. Letter of Applicant’s girlfriend……………………………………………………………p. 19

I. Letter of recommendation of ……………………………………………p. 21

J. Letter of recommendation of …………………………………………..p. 22

K. Letter of recommendation of ………………………………………………p. 23

L. Copy of Applicant’s regional council union of carpenters’ membership card………….…p. 24

M. Certificates of Applicant’s completion of construction protection training classes……....p. 25

N. Length of Service recognition from Applicant’s Employer………………………………..p. 28

O. Applicant’s Certificate of confirmation from church with certified translation……………………………………………………………………………………...p. 29

P. Letter of recommendation of Pastor ……………………………...p.31

Q. Letter of...…………………………………………………………....p.32

The petitioner in the above-referenced case filed an Application to Register Permanent Residence or to Adjust Status (Form I-485) under Section 245 of the Immigration and Nationality Act (ACT).

Section 245 (m) of the Act states in pertinent part:

The Secretary of Homeland Security may adjust the status of an alien admitted into the United States (or otherwise provided nonimmigrant status) under section [101(a)(15)(U)](http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-101/0-0-0-195.html#0-0-0-797)to that of an alien lawfully admitted for permanent residence… if --

1. the alien has been physically present in the United States for a continuous period of at least 3 years since the date of admission as a nonimmigrant under clause (i) or (ii) of section [101(a)(15)(U)](http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-101/0-0-0-195.html#0-0-0-797);

(2) An alien shall be considered to have failed to maintain continuous physical presence in the United States under paragraph (1)(A) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days unless the absence is in order to assist in the investigation or prosecution or unless an official involved in the investigation or prosecution certifies that the absence was otherwise justified.

Title 8 Code of Federal Regulations (CFR) Section § 245.24 states in pertinent part:

(a) Definitions. As used in this section, the term:

(1) Continuous Physical Presence means the period of time that the alien has been physically present in the United States and must be a continuous period of at least 3 years since the date of admission as a U nonimmigrant continuing through the date of the conclusion of adjudication of the application for adjustment of status. If the alien has departed from the United States for any single period in excess of 90 days or for any periods in the aggregate exceeding 180 days, the applicant must include a certification from the agency that signed the Form I–918, Supplement B, in support of the alien's U nonimmigrant status that the absences were necessary to assist in the criminal investigation or prosecution or were otherwise justified.

In the present case, USCIS found that the petitioner failed to maintain continuous physical presence in the United States for at least three years following the grant of U nonimmigrant status because the petitioner departed the United States on May 09, 2011 through October 03, 2011, a period which exceeded 90 consecutive days. However, USCIS did not take into consideration that the petitioner was physically present in the United States from October 03, 2011 through March 09, 2015, when the I-485 was filed. During this period, the petitioner did not leave the United States.

Section 245 (m) (2) of the INA sets forth that: “An alien shall be considered to have failed to maintain continuous physical presence in the United States under paragraph (1)(A) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days…”. Following from this, an alien fails to maintain continuous presence if he leaves the country for more than 90 consecutive days or more than 180 days in the aggregate *during the 3 required years of continuous presence.* In other words, a continuous presence of 3 years is sufficient to meet the requirement of Section 245 (m) (2) INA notwithstanding a journey prior to that 3 year period of more than 90 consecutive days or more than 180 days in the aggregate.

This interpretation is consistent with the interpretation of the parallel regulation [8 U.S.C. § 1229b(a)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1229B&originatingDoc=Ib1fa8fc5cacd11e1b11ea85d0b248d27&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_8b3b0000958a4). Similarly to section 245 (m) of the INA, [8 U.S.C. § 1229b(a)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1229B&originatingDoc=Ib1fa8fc5cacd11e1b11ea85d0b248d27&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_8b3b0000958a4) requires a continuous (seven-year) residence in the United States. 8 U.S.C. § 1229b(d) contains special rules relating to the continuous residence or physical presence:

1. Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2) of this section, when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

1. Treatment of certain breaks in presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) of this section if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

It is therefore of interest to read the analyses that the BIA and different circuit courts elaborated on the stop-time provision of § 1229b(d)(1) and the break-provision of § 1229b(d)(2).

Indeed, both the Third Circuit Court of Appeals and the BIA have analyzed and elaborated on those provisions. See *Nelson v. Attorney Gen. of U.S.,* 685 F.3d 318, 321 (3d Cir. 2012). In *In re Mendoza–Sandino,* 22 I. & N. Dec. 1236 (BIA 2000), the BIA held that, once an alien's period of continuous presence or residence is terminated by the stop-time provision—through service of a notice to appear or commission of a specified offense—it does not restart, and the alien does not automatically begin accruing a new period following the cessation of the first one. In reaching that conclusion, the BIA focused on the language and structure of the statute, particularly the fact that the service of a notice to appear or commission of a crime are said to “*end* ” the alien's period of continuous presence. The Board contrasted that with the provision of the statute identifying events that merely “*break*” the alien's period of continuous presence:

Congress has distinguished between certain actions that “end” continuous physical presence, *i.e.,* service of a charging document or commission of a specified crime, and certain departures from the country that only temporarily “break” that presence. Service of ... a notice to appear is not included as an interruptive event under [the statute], which merely breaks continuous physical presence. Rather ... such service is deemed to end an alien's presence completely. Therefore, a reading of [the statute] that would allow an alien to accrue a new period of continuous physical presence after the service of a charging document is not supported by the language of [the statute]. *Id.* at 1240.

Accordingly, the BIA concluded “that the language of [the statute] reflects that service of a notice to appear ... is not *simply* *an interruptive event that resets the continuous physical presence clock*, but is a terminating event, after which continuous physical presence can no longer accrue.” *Id.* at 1241 (emphasis supplied).

Thus, in contrasting the events that “*terminat*e” the alien’s period of continuous presence with the events that merely “*break* ” it, the BIA made clear that an alien can accrue a new period of continuous physical presence after a simple “*interruptive event”,* such asa journey of more than 90 consecutive days outside of the United States.

This interpretation is also supported by several authors and commentators of the regulations. Elwin Griffith explains:

Section 240A(d)(1) identifies certain events that end continuous residence or continuous physical presence, whereas section 240A(d)(2) covers certain absences from the United States that break an alien's continuous physical presence. It seems, therefore, that Congress intended to make a distinction between those two sections. If it did not intend such a distinction, one might query why it went out of its way to use different terminology and to convey a message of termination in one section, while preferring to deal in the other section with “breaks in presence.” Section 240A(d)(1) stipulates an end to “any period” of continuous residence or continuous physical presence if certain events occur, but that period refers to the different times contemplated by sections 240A(a), 240A(b)(1), and 240A(b)(2). Therefore, the term “any period” in section 240A(d)(1) does not initiate a new period of continuous residence or continuous physical presence if the occurrence of a section 240A(d)(1) event has already terminated such residence or presence. See Elwin Griffith, *Admission and Cancellation of Removal Under the Immigration and Nationality Act,* 2005 Mich. St. L. Rev. 979, 1050-51 (2005).

As the break-provision of § 1229b(d)(2) is identical to the provision at stake here, the same language interpretation should be followed in the present case. Therefore, the petitioner’s departure from the United States from May 9, 2011 through October 03, 2011 must be considered as a simple “break”, an “interruptive event” which reset the continuous physical presence clock. Following from this, USCIS erred in finding that the petitioner failed to maintain continuous physical presence in the United States for at least three years although he was physically present in the United States from October 03, 2011 through March 09, 2015, when the I-485 was filed.