ALASKA IMMIGRATION JUSTICE PROJECT
431 WEST SEVENTH AVENUE, SUITE 208
ANCHORAGE, ALASKA 99501
PHONE: (907) 279-2457
FAX: (907) 279-2450

February 21, 2015

U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Ave, NW, MS 2090
Washington, DC 20529-2090

Re: Name
I-290B Receipt Number:
1-918 Receipt Number:
Submission of Brief of Amicus Curiae

Dear AAO Officer:

I am the attorney of record for Ms. _____. My G-28 is on file. Ms._____ has filed form I-290B appealing the denial of her I-918, Petition for U Nonirnmigrant Status, along with her brief in support of appeal.

On January 20, 2015 I filed my request to allow filing of an amicus brief by ASISTA Immigration Assistance in the above-captioned matter. On February 4, 2015 your office sent its approval to my office via facsimile, granting an extension for the filing of the amicus brief until February 27, 2015.

I hereby transmit the brief of amicus curiae ASISTA Immigration Assistance in the appeal of Ms._____ of the denial of her I-918, Petition for U Nonimmigrant status.

With regards,

Staff Attorney

Maria Baldini-Potermin
Attorney
Maria Baldini-Potermin & Associates, P.C.
1N. LaSalle, Suite 2150
Chicago, IL 60602
Tel. 312-368-8200
Fax. 312-368-9400
maria@baldini-potermin. com

UNITED STATES DEPARTMENT OF HOMELAND SECURITY
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES
ADMINISTRATIVE APPEALS OFFICE
WASHINGTON, D.C.

In the Matter of:

BRIEF *FOR AMICUS CURIAE* ASISTA

REGARDING JURISDICTION TO ADJUDICATE

A U VISA PETITION

FOR A FORMER LAWFUL PERMANENT RESIDENT

IN REMOVAL PROCEEDINGS

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PRELIMINARY STATEMENT

Amicus curiae ASISTA submits this amicus brief to address an ongoing issue involving noncitizens who are placed in removal proceedings by the U.S. Department of Homeland Security as lawful permanent residents and determined by immigration judges to have abandoned their lawful permanent resident status or have been determined to be removable and are ineligible for cancellation of removal under INA §240A(a). Currently, the USCIS Vermont Service Center ("VSC") takes the position that a noncitizen who is placed in removal proceedings as a lawful permanent resident cannot apply for a U visa until after a final order of removal has been entered. The USCIS VSC's interpretation is not supported by the statute, regulations, and case precedent. This interpretation does not follow the USCIS's own regulations or precedent regarding affirmative abandonment oflawful permanent residence by a noncitizen. This interpretation also does not comp0lt with the procedural realities of a lawful permanent resident's eligibility to apply for other forms of relief in removal proceedings before the immigration judge following a finding ofremovability.

Amicus curiae ASISTA respectfully submits that the correct interpretation of the INA, regulations, and precedent allows for a lawful permanent resident who has been found removable by an immigration judge or found to have abandoned his or her lawful permanent residence to apply for a U visa while removal proceedings are pending. A final order is not required for a noncitizen in this instance to apply for a U visa, with conctment jurisdiction by the immigration judge and the USCIS to adjudicate Form I-192, waiver of the grounds of inadmissibility under INA § 212(d)(3). ASISTA asks the Administrative Appeals Office ("AAO") to establish clear guidelines for the VSC to allow lawful permanent residents in removal proceedings to apply for U visa nonimmigrant status without first requiring the entry of a final removal order.

INTEREST OF AMICUS CURIAE

ASISTA possesses unique and substantial experience in issues involving sexual violence and other crimes enumerated in the U visa statute of which noncitizens are victims. ASISTA worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes, incorporated in the 1994 Violence Against Women Act and its progeny ("VAWA"), including the U visa and subsequent amendments. ASISTA serves as liaison for the field with Department of Homeland Security ("DHS") personnel charged with implementing the U visa and related laws, most notably United States Citizenship and Immigration Services ("USCIS"), Immigration and Customs Enforcement, and DHS's Office on Civil Rights and Civil Liberties. ASISTA also trains and provides technical support on best practices in helping crime victims eligible for U visas to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, and legal services, non-profit, pro bono and private attorneys working with immigrant crime survivors.

STATEMENT OF THE ISSUES PRESENTED

Amicus Curiae ASISTA presents the following issues for consideration by the AAO:

- Whether a final order of removal is required before a noncitizen who is placed in removal proceedings as a lawful permanent resident and is subsequently found removable by an immigration judge can apply for a U visa with the USCIS.

ARGUMENT

The AAO should issue clear guidance to USCIS VSC regarding noncitizens who are placed in removal proceedings as lawful permanent residents and charged with being removable. The USCIS VSC has held that a lawful permanent resident who has been placed in removal proceedings cannot apply for a U visa (with waivers) until after her residence has been terminated by a final order of removal. The agency relies on *Matter of A,* 6 I&N Dec. 651 (BIA 1955) for the proposition that "an alien may not be both an immigrant and a nonimmigrant at the same time." The USCIS VSC's decision is not supported by the INA, the regulations or case precedent.

A. The USCIS's regulatory interpretation of certain sections of the INA is *ultra vires* as related to eligibility for a U visa.

Congress has defined an "order of deportation" to mean:

> (A) The term *"order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable* or ordering deportation.
>
> (B) The order described under subparagraph (A) shall become final upon the earlier of –
> (i) a determination by the Board of Immigration Appeals affirming such order; or
> (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

INA § 101(a)(47) (emphasis added). Based on the plain language of the INA, an immigration judge can find that a lawful permanent resident is deportable and therefore subject to an order of deportation without entering a final order of deportation. As a matter of practice and procedure regarding INA § 1O1(a)(47)(B), for noncitizens placed in removal proceedings before an immigration judge under INA §240, a removal order is final in three instances: 1. upon the entry of an order of removal by an immigration judge and the waiver of the right to appeal by the noncitizen following a master calendar or an individual hearing; 2. upon entry of a stipulated

removal order by an immigration judge; and 3. upon the entry of a final order of removal by the Board of Immigration Appeals following an appeal by either party or both parties from the decision of an immigration judge.

> The term "permanent" has been defined by Congress as:
>
> a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.

INA § 101(a)(31). It is important to note that the relationship may be dissolved by either the U.S. or the individual.

Under INA §101(a)(2), a lawful permanent resident is defined as:

> The term lawfully admitted for permanent residence means the 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.

The implementing regulation, however, defines the termination of lawful permanent resident status as:

> The term lawfully admitted for permanent residence means the 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. *Such status terminates upon entry of a final administrative order of exclusion, deportation, removal, or rescission.*

8 C.F.R. § 1001.1(p) (emphasis added). The Department of Justice amended this regulation in 1996 to codify the rule in *Matter of Lok,* 18 I&N Dec. 101 (BIA 1981), which was adopted to provide "finality in immigration proceedings," 61 Fed. Reg. 18,900, 18,900 (Apr. 29, 1996). The amendment of this regulation, however, "did not foreclose a change in status by means other than formal termination." *United States v. Yakou,* 2005 U.S. App. LEXIS 37, at **23-34 (D.C. Cir. 2005) (unpublished) (emphasis added). Finality of a removal proceeding is required for

purposes of judicial review, not for purposes of eligibility for relief in removal proceedings. *See* INA § 242(a)(1).

Based on the foregoing, the USCIS VSC's decision that a lawful permanent resident placed in removal proceedings cannot apply for a U visa until after a final order of removal has been entered is *ultra vires*. The AAO should reverse the USCIS VSC's decision based on the plain language of the Immigration and Nationality Act.

B. The USCIS has not provided any reasoning regarding its policy prohibition against allowing dual intent for a lawful permanent resident to apply for a U nonimmigrant visa in removal proceedings.

Although immigrant intent will ordinarily make an applicant ineligible for most types of nonimmigrant status, the USCIS has the authority to allow dual intent for some classifications. *See, e.g.,* 8 C.F.R. §§ 214.2(h)(16), (1)(16) (the filing of an adjustment of status application for lawful permanent residence "shall not" be a basis for denying H-1 or L-1 petitions). While the USCIS has not issued express regulations allowing for dual intent for U nonimmigrant petitioners, it has *de.facto* authorized petitioners with immigrant intent to apply for such status. Many, if not most, U petitioners are in the United States at the time of petitioning for such status and have lived and worked inside the country for years, and in some instances, decades.

C. Lawful permanent residents are not prohibited from applying for forms of relief in removal proceedings that are less than full residency anew.

Lawful permanent residents may be charged with removability under INA § 212 (grounds of inadmissibility) or INA §237 (grounds of deportability). Once the DHS has met its burden to prove removability for a lawful permanent resident, then the question shifts to the availability of relief from removal. *See* INA § 240(c)(2), (c)(3), (c)(4).

There are multiple forms of relief that do not lead to a retention of or new grant of lawful permanent residence for which a lawful permanent resident who has been found to be removable

and unable to retain her lawful permanent resident status may apply while in removal proceedings. Such forms of relief include:

- Asylum, INA §208;
- Administrative closure, *Matter of Avetisyan,* 25 I&N Dec. 688 (BIA 2012);
- S nonimmigrant visa (granted by U.S. Department of Justice), INA § 101(a)(15)(S);
- T nonimmigrant visa (granted by USCIS), INA § 101(a)(15)(T);

In the case of a noncitizen granted asylum, she may apply for adjustment of status one year after being in asylee status. *See* INA § 209(b). Asylee status is not, however, nonimmigrant status as asylees are admitted indefinitely. *See* INA § 208. In the case of a noncitizen granted S or T status, she has been deemed admitted in nonimmigrant status and removal proceedings are terminated because she is no longer removable while maintaining her nonimmigrant status. The same applies for a noncitizen who was not a lawful permanent resident when placed in removal proceedings.

Two other forms of relief that do not lead to either lawful permanent residence or nonimmigrant status are:

- Withholding ofremoval, INA § 241(b)(3); and
- Withholding of removal or defenal of removal under Article 3 of the Convention against Torture.

For a lawful permanent resident who has been found to be removable and eligible to be granted withholding of removal, an immigration judge must order the termination of her lawful permanent resident status and then enter an order of removal. *See Matter of l-S- &* C-S-, 24 I&N Dec. 432 (BIA 2008). Ifshe appeals to the Board of Immigration Appeals, then the order is not final while she exercises her right to appeal.

Furthermore, the Board of Immigration Appeals held that where conditional residence status was terminated by the legacy INS and a waiver of the petition to remove conditions of residency was denied, the noncitizen was eligible to apply for adjustment of status anew without

requiring a final order ofremoval. *See Matter of Stockwell,* 20 I&N Dec. 309, 312-13 (BIA 1991) (Heilman, J., concurring). To have held otherwise, the noncitizen would have been barred from pursuing relief from removal.

Placing a noncitizen into the dilemma of foregoing her right to appeal an initial finding of removability in order for the USCIS VSC to accept her application and process a U visa is contrary to the INA and intent of Congress regarding the enactment of the U visa for victims of serious crimes who have cooperated with law enforcement in the investigation and/or prosecution of the offense. The USCIS VSC's decision that a lawful pennanent resident who has been found to have abandoned her lawful permanent resident status or to be deportable and eligible for these non-permanent resident forms of relief is arbitrary, capricious, and contrary to the statute and Congressional intent. Amicus respectfully suggests that the AAO should reverse the decision of the USCIS VSC and hold that the USCIS VSC has jurisdiction to process a U visa petition where a lawful permanent resident has been placed in removal proceedings and found to be removable by an immigration judge.

D. The USCIS's refusal to acknowledge the submission of a signed Form 1-407 as binding for a noncitizen placed in removal proceedings as a lawful permanent resident defies its own regulations, policies and practice.

It is established agency procedure to accept and process Forms 1-407 at domestic USCIS field offices. The Adjudicator's Field Manual and an agency memorandum direct domestic USCIS field offices to accept and process Forms 1-407 from numerous types of applicants for immigration benefits. Applicants for EB-5 status who already have conditional pennanent residence, may abandon such residence by tendering Fo1111I-407 with a local field office with a concurrently filed adjustment of status application. Adjudicator's Field Manual, Ch. 22.4(c)(4)(G); Neufeld, "Memorandum: Adjudication of EB-5 Regional Center Proposals and

Affiliated Form I-526 and Fom1I-829 Petitions; Adjudicators Field Manual (AFM) Update to Chapters 22.4 and 25.2 (AD09-38)," HQ 70/6.2, Dec. 11, 2009; Pearson, *Eb-5 Field* "Memorandum Number 9: Form I-829 Processing Memorandum For All Regional Directors, All Service Center Directors, District Directors (Including Foreign), Directors, Glynco and Artesia," Mar. 3, 2000. Form I-407, when processed, makes the applicant eligible to adjust to the new status. *See id.* This nationwide policy confers a procedural right upon noncitizens to provide Form I-407 at a local field office and have this application processed domestically rather than solely at a U.S. consulate or embassy abroad.

The USCIS has failed to provide any reasoned decision regarding its rejection of abandonment oflawful permanent residency within the U.S. in the context of U visa applications. The USCIS' s action therefore violates the Administrative Procedures Act:

> Though the agency's discretion is unfettered at the outset, if it announces and follows-by rule or by settled course of adjudication-a general policy by which its exercise of discretion will be governed, an irrational departure from the policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, or an abuse of discretion' within the meaning of the Administrative Procedures Act, 5 U.S.C. § 706(l)(A).

INS v. Yueh-Shaio Yang, 519 U.S. 26, 32 (1996); *see also Judulang v. Holder,* 132 S.Ct. 476 (2011).

The USCIS has articulated no reason for accepting Forms I-407 domestically from other types of benefit applicants to the exclusion of U visa petitioners. In fact, given the strong congressional intent to "protect" U visa petitioners, it is unlikely that Congress intended to exclude U visa petitioners for a procedural benefit allowed to immigrant investors. *See* DHS, "Interim Rule, New Classification for Victims of Criminal Activity; Eligibility for 'U' Nonimmigrant Status," 72 Fed. Reg. 53014-15 (Sept. 17, 2007) ("[C]ongress intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic

violence, sexual assault, trafficking of aliens and other crimes while offering protection to victims of such crimes.").

A signed Form I-407 is one of many acts sufficient to renounce a person's lawful pennanent resident status in favor of nonimmigrant status. *See Matter of Lok,* 18 I. & N. Dec. 101, 107, n.8 (BIA 1981) ("[o]ther circumstances [other than a final order of deportation] under which lawful permanent resident status may change include: ... when [one] relinquishes such status, intentionally or unintentionally.") (internal citations omitted); *Matter of Duarte,* 18 I. & N. Dec. 329, 323, n.3 (BIA 1982) (stating that in addition to a final administrative order of exclusion and deportation, a person could "have been ... divested of his lawful permanent resident status ... through abandonment, intentional or unintentional."). Acts showing an intent to renounce lawful residence, such as absences from the country other than a temporary visit abroad, or filing taxes as a nonresident alien are generally sufficient for a finding of abandonment of LPR status by themselves. 22 C.F.R. § 42.22; 8 C.F.R. § 316.5(c)(l)(i), (2).

It has long been recognized that execution of Form I-407 manifests an even clearer intent to relinquish lawful residence. *See Matter of Montero,* 14 I&N Dec. 399, 401 (BIA 1973) (finding that a voluntary statement of renunciation of LPR status, signed before an immigration officer, was corroborating evidence ofloss ofresidence). *See also, e.g., Singh v. Ashcroft,* 2004 U.S. App. LEXIS 8947, **3 (9th Cir. 1004) (unpublished) ("Singh exhibited a clear intent to abandon his LPR status when he surrendered his alien registration card and executed INS Form I-407, 'Abandonment By Alien Of Status As Lawful Permanent Resident,' and requested a non-immigrant visitor's visa."); *Omosule v. INS,* 2010 U.S. Dist. LEXIS 87737, *5 (S.D. Ohio, 2010) (unpublished) ("Plaintiff abandoned that status by signing, on December 7, 2008, an INS Form I-407"); *Freund v. INS,* 1992 U.S. Dist. LEXIS 15071, *2 (N.D. Cal. 1992) (unpublished) (noting

that the alien had signed I-407 and was issued a multiple entry B-1/B-2 visitors visa, as evidence in support of abandonment); *Castellani v. INS,* 1990 U.S. Dist. LEXIS 14843, *2-*3 (E.D. Penn., 1990) (unpublished) (dismissing case where alien contended that he did not know he was abandoning his LPR status when he signed Form I-407 and was issued a non-immigrant visa).

Consular posts have issued nonimmigrant visas to applicants simultaneous to their renunciation or abandonment of status on Form I-407, or in some cases, prior to the signing of Form I-407. *See, e.g., Singh v. Ashcroft,* 2004 U.S. App. LEXIS 8947 at **3 (applicant signed Form I-407 and was then issued a B visa); *Moreno v. BCIS,* 185 Fed. Appx. 688, 2006 U.S. App. LEXIS 15932, **3 (9[1]h Cir. 2006) (unpublished) ("Petitioner returned to the United States on February 18, 1997, using a Bl/B2 visitor's visa. Upon his return, he was presented with Form I-407[.]")

Courts have also pointed to an alien's obtaining a nonimmigrant status as evidence of his or her intent to abandon LPR status. In *Singh v. INS,* 115 F.3d 1512, 1515 (9th Cir. 1997), one of the key pieces of evidence used by the government to show Mr. Singh's abandonment of LPR status was his application for, and approval of, a visitor's visa, which he used to travel to the United States on several occasions notwithstanding the fact that he still held a green card.

Counsel for legacy INS even argued that a noncitizen's "LPR status could change only through an administrative procedure, either by filing Form I-407 or by formal adjudication of his status by the BIA." *United States v. Yakou,* 2005 U.S. App. LEXIS 37, **9 (D.C. Cir. 2005) (unpublished) (emphasis added). Although a final order of removal is one way in which an LPR may lose his or her status, 8 C.F.R. § 1001.1(p), it is not the sole means by which such status can be changed. Voluntary renunciation or abandonment, whether involuntary or voluntary, are alternative means by which a person may lose LPR status. *See Matter of Lok, supra.*

The USCIS's decision is contrary to the law, has no support in the statute, and renders Form I-407 meaningless if the noncitizen's voluntary relinquishment of status is regarded as insufficient proof of renunciation solely due to the location the form was filed. Amicus suggests that the AAO should reverse the decision of the USCIS VSC and issue a published decision to allow for clear guidance in the case ofrenouncement oflawful permanent residency.

E. Current precedent mandates that a noncitizen placed in removal proceedings be allowed to request a continuance of her removal proceedings, and to pursue her Form 1-192, waiver of grounds of inadmissibility concurrently before the immigration judge and the USCIS VSC.

The USCIS VSC's interpretation of the INA for lawful permanent residents found to be removable by an immigration judge runs contrary to the precedent of the Board of Immigration Appeals. In *Matter of Sanchez Sosa,* 25 l&N Dec. 807 (BIA 2012), the Board held that an immigration judge should grant a continuance where a noncitizen has demonstrated that she has filed *a prima facie* approvable petition for a U visa with the USCIS VSC.

In *L.D.G. v. Holder,* 744 F.3d 1022 (7th Cir. 2014), the Seventh Circuit Court of Appeals held that INA §§ 212(d)(3)(A) and (d)(14) provide independent and non-exclusive means of applying for waivers of inadmissibility for U nonimmigrant visa applicants. The Seventh Circuit held that the plain language of INA § 212(d)(3)(A) grants the Attorney General authority to adjudicate waivers of inadmissibility requested under INA § 212(d)(3)(A).

The USCIS VSC's refusal to accept and process a U visa petition, including Form 1-192, for a lawful permanent resident who has been found to be removable by an immigration judge in removal proceedings is contrary to *L.D.* G. *v. Holder, supra.* Under the USCIS VSC's interpretation of the INA, a lawful pennanent resident who has been found to be removable will never be able to seek adjudication of her Form I-192 waiver application by the immigration

judge. An immigration judge cannot have concurrent jurisdiction to adjudicate Form I-192 unless the USCIS VSC has accepted the U visa and Form I-192 for adjudication.

CONCLUSION

Amicus curiae respectfully requests that the USCIS VSC's interpretation of the INA related to eligibility of lawful permanent residents to apply for a U visa while in removal proceedings be reversed.

Respectfully submitted, Dated: 2/26/2015

Maria Baldini-Potermm
Attorney
Maria Baldini-Potermin & Associates, P.C.
1 N. LaSalle, Suite 2150
Chicago, IL 60602
Tel. 312-368-8200
Fax. 312-368-9400
maria@baldini-pote 1min.com