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LAW OFFICE OF FERNANDO L. COSIO

FERNANDO L. COSIO 3940
Attorney at Law
1050 Bishop Street # 244
Honolulu, Hawai'i 96813
Telephone: (808) 533-6007
E-mail: condorlaw@aol.com

Attorney for Petitioner
VIKTOR MAZELIAH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

VIKTOR MAZELIAH, Petitioner, vs. MICHAEL J.D. SMITH, Warden, Federal Detention Center, Honolulu, Hawai'I and his successor; POLLY KAISER, Acting Field Office Director, San Francisco Field Office, Immigration and Customs Enforcement, and her successor; PAMELA BONDI, Attorney General of the United States; and her successor; KRISTI NOEM Secretary of Homeland Security, and her successor; JAYCI RONEY. USCIS Honolulu Field Office Director. All in their official capacity.) Respondents.	CIVIL NO. CV26 00053 JAO WRP PETITIONER IS IN CUSTODY AT THE HONOLULU FEDERAL DETENTION CENTER **EMERGENCY PETITION FOR WRIT OF HABEAS CORPUS; WITH EMERGENCY STAY OF REMOVAL AND REQUEST FOR TEMPORARY RESTRAINING ORDER; REQUEST FOR DECLARATORY JUDGMENT; VERIFICATION OF COUNSEL; EXHIBITS "A-C"**

PREFATORY STATEMENT

Petitioner VIKTOR MAZELIAH, currently in custody and held without bond at theHonolulu Federal Detention Center, respectfully requests the following relief:

- Emergency Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241;
- Order an Emergency stay of his removal by Respondents pending his appeal which he filed at the Board of Immigration Appeals;
- Declaratory Judgment: Finding that the Immigration Judge did not have jurisdiction over the I-751Waiver which was still pending before USCIS. And that the USCIS 1/23/26 Decision is in conflict with its own policy manual, legal precedence and its own Government attorney who informed the Immigration Judge that he had no jurisdiction over the then pending I-751 waiver, coupled with the fact the Immigration Judge agreed on the record that he had not authority over the pending I-751 Waiver.
- Order Respondents that they are prohibited from transferring petitioner to another out of state custody detention center while his appeal is pending before the Board of Immigration Appeals;

Petitioner seeks the above emergency relief because he was taken into custody by Immigration Custom and Enforcement (ICE) on or about January 27, 2026 even though his appeal to reopen his case is still pending before the Board of Immigration Appeals (hereinafter referred to as the "BIA").

ICE served Petitioner at the FDC with a notice that he has a final order of an *in absentia* removal order entered by the Honolulu Immigration Judge

(hereinafter referred to as the "IJ"), and that ICE will deport him once it gets his travel documents.

On January 23, 2026 USCIS issued a denial of the I-751 waiver, in which it denied the waiver on the grounds that the Immigration Judge had entered the *in absentia* order of removal on January 17, 2025. The January 23, 2025 USCIS denial did not address the Immigration Judge's lack of jurisdiction. See USCIS Decision, attached hereto as "Exhibit A."

As will be discussed in greater detail below, Petitioner filed an appeal of the IJ's order of removal on the grounds that the IJ did not have jurisdiction to enter the order because Petitioner had a pending I-751 waiver before USCIS which had not been adjudicated at the time when the IJ entered his order of removal.

The DHS government's own attorney filed a statement with the Immigration Court and made it crystal clear that the Immigration Judge did not have jurisdiction to review the Joint I-751 petition because Petitioner Mazeliah was no longer married to Ms. Morales, and therefore any review of the Joint I-751 would not be appropriate.

On February 17, 2022, Geoffrey Ling, DHS Assistant Chief Counsel, filed the Department of Homeland Security's Position Statement of the Respondent's Eligibility for Relief Through a Joint I-751 Petition Under Section 216 (c) (1)of the Immigration and Nationality Act, which reads in part:

> The respondent is statutorily ineligible for relief through a joint I-751 petition under Section 216(c) (1) of the Immigration and Nationality Act (INA). The INA "requires a present demonstration that the marriage has not been annulled or terminated, [and] it is clear that the qualifying marriage must be ongoing in order for a joint petition to be approved." INA Section 216(d) (1) (A)(II) , Matter of Tee, 20 I & N Dec. 949, 950-951 (BIA 1995). Having divorced from the petitioning spouse in 2018, the respondent is statutorily ineligible for approval of the joint petition by the Immigration Judge. As such, a review of the merits of such a petition by the court would not be necessary or appropriate.

Thereafter, Respondent filed a non-opposed motion to continue the individual hearing or in the alternative for administrative closure to allow Respondent to file a I-751 waiver since Respondent was no longer eligible for the joint I-751 because the marriage had been terminated by the divorce while the joint I-751 was pending with USCIS. The IJ subsequently granted the motion to continue. Note: Petitioner is also referred to as the " Respondent" as it relates to the underlying Immigration Court proceedings.

After the Immigration Judge granted Respondent's motion, the Court *sua sponte* scheduled a hearing for March 28, 2023, at which time counsel for Respondent made the following statement:

MR. COSIO: ....This is Fernando Cosio on behalf of the Respondent asking permission from the Court to speak.

THE COURT: Please proceed.

MR. COSIO: Thank you, your Honor. Last year almost to the date, on March

7th, the Court granted a motion to continue, and pursuant to the Government's motion (Erratum: It was Respondent's motion), the case was administratively closed, as I understand it, pending the review of the 751, which was refiled by the Respondent by himself since there had been a divorce while the original I-751 had been adjudicated by USCIS.

MR. LING: DHS's understanding is that a joint I-751 had previously been denied by USCIS, and there had been an issue as to whether the Court could review that denied joint I-751 given that the Respondent had divorced the Respondent subsequently filed an I-751 waiver with USCIS, and as stated earlier by DHS, it appears that that I-751 waiver remains pending at USCIS....

THE COURT: The Court will set this matter to July 26, 2023 at 8:30 a.m. for a master calendar hearing for the status of the pending I-751. If there is a desire for the Court to rule on or evaluate the Respondent's previously submitted and denied I-751, then the parties are going to have to be clear to me because I don't understand that that is the position at this time. The second I-751 is the I-751 that I reset this matter to have to allow U.S. Citizenship and Immigration Services to review the I-751 because that is the I-751 that I do not have jurisdiction to review. Anything further from either parties?

MR. COSIO: Just a point of clarification, your Honor. Was that the 25th or the 26th?

THE COURT: 26th, Wednesday.

MR. COSIO: And just to clarify because there -- there are two 751s at play and -- and just so it's clear to me, your Honor, is the Court's position that it has jurisdiction over one and not the other? And if so, which one does the Court believe that it has jurisdiction?

THE COURT: The I-751 that the Department of Homeland Security has previously ruled on, the Court would have jurisdiction over that I-751. The I-751 that U.S. Citizenship has not reviewed, the Court would not have jurisdiction over that I-751.

Biographical Background

Respondent is an Israeli national and citizen who immigrated into the

United States lawfully as a B-2 nonimmigrant visitor on March 16, 2010.

Petitioner is the owner of three (3) construction companies which have partnered with the State of Hawaii, the City and County of Honolulu, and other entities to build much needed affordable housing in the State of Hawaii. Petitioner has never been charged with any criminal crimes whatsoever. He is a hardworking, good person who has dedicated himself to provide housing for those in need. Petitioner and his spouse terminated their marriage because she could not have children due to a medical condition. His Rabbi wrote a letterwhich was filed with the immigration court which states that in the Jewish religion one of the main principles and tenets is for a husband and wife to have children, and if a wife is unable to have children, then a husband can seek dissolution of his marriage.

Petitioner and his ex-spouse filed statements with the Immigration Court which affirmed that the reason that they terminated their marriage was due to her inability to become pregnant. The statements also explained that they were deeply in love but ultimately divorced due to her inability to have children.

Petitioner remarried to a USC and is the stepfather of a minor USC child. They recently purchased a home and very much look forward to a lifetime of happiness together.

Petitioner describes the catastrophic consequences of any removal to Israel in his statement:

My other company, Tal Builders, has successfully completed over 100 residential projects in the past year and runs a donation program that provides salvaged building materials and appliances to families in need, benefitting over 22 families last year. Additionally, my construction company currently has about 60 active projects across Hawaii. These projects provide jobs and stability to many workers, subcontractors, and families who rely on them. If I were to be removed from the country, it would severely impact these projects, forcing their termination and leaving over a hundred people without work or financial security. Many families who have hired us to build or renovate their homes would be left in unlivable conditions, with unfinished projects and no clear path forward. This situation would not only cause immense hardship for these homeowners but would also force my company to shut down all operations, creating a ripple effect of financial and personal distress across the community.

Procedural Background

On June 22, 2016, the Petitioner and his ex-spouse, Valerie Josephine Morales, jointly filed with USCIS a I-751 Petition to Remove Conditions on Residence. On May 21, 2018, the Hawaii Family Court granted Petitioner's divorce from his spouse.

On April 1, 2021, USCIS denied the Joint I-751 Petition because Petitioner did not appear for the interview. Petitioner did not appear for the I-751 interview because the notice was sent to Petitioner's prior address.

On May 5, 2021, Petitioner was placed in removal proceedings with the filing of a Notice to Appear.

At a master calendar hearing on July 28, 2021, Petitioner sought review de

novo of the denial and reserved the right to file Adjustment of Status. Petitioner also challenged the NTA on the grounds that it was defective because the joint I-751 was not decided on the merits, to the extent USCIS denied the petition on the grounds that Petitioner failed to appear for the I-751 interview. The following is an excerpt from the transcript of the July 28, 2021 hearing regarding Petitioner's argument that the NTA (Notice to Appear, attached as Exhibit C) was defective:

MR. COSIO : ....And if I can, with the Court's permission, address allegation number 4 as to our position?

THE COURT: Please proceed.

MR. COSIO: Thank you, your Honor for allowing me this opportunity to clarify allegation number 4.Your Honor, it's -- it's our position that allegation number 4, as written, is vague and ambiguous for the following reason: The 751 was never adjudicated. What happened -- and this is coming directly from the records submitted by the DHS -- is that the -- when notice of the appointment was sent to an address that was no longer a valid address for the Respondent, so there was never really an adjudication on the merits of the 751 other than on the reasoning that he failed to appear. So in essence, it was an absentia decision and so I -- I don't think that number 4, as written, accurately reflects what occurred in fact.

THE COURT: Understand.
So just for clarification, your position here is that the allegations should be more detailed on actually how the Department derived its conclusion in - in -- in the allegation?

MR. COSIO: Yes, your Honor, not only for the purpose of clarity, but in order to preserve the record as far as what the administrative record actually reflects, which is not necessarily what has been predicated on allegation number 4 on the notice to appear.

THE COURT: This document will be so marked and entered. The Court, when it evaluates the evidence that has been submitted in support of factual allegation

number 4, would sustain factual allegation number 4 in this matter. The Court understands the objection by Respondent's counsel, but the Court will find that the Department of Homeland Security's met their burden of establishing that the allegation is factually correct, although the Court would agree that it does not contain specific information relating to how the decision was derived, the conclusion of the allegation is correct. The Court would sustain factual allegation number 4.

At the July 26, 2023, DHS counsel informed the Court that the I-751 waiver was still pending at USCIS and that it would be adjudicated within 60 days. The Immigration Judge then set the Individual Hearing for January 17, 2025 at 8:30 a.m.

On January 17, 2025, the Court entered an in absentia order of removal because Petitioner and counsel did not appear for the individual hearing. Prior to issuing its ruling, Counsel for DHS informed the Court that the I-751 Waiver Petition was still pending. (See in absentia order, attached hereto as "Exhibit B."

Counsel did not appear on January 17, 2025 because of an unintended clerical scheduling inadvertent oversight. The January 17, 2025 hearing date was not inputted into Counsel's case management program, and as such it failed to issue the usual notices and alarms of the individual hearing date. The inadvertent clerical oversight was also in part due to the effects of Covid as it impacted the orderly process of the practice of law. Covid indelibly changed appearances and other areas of practice in the courts, including at the US Supreme Court, US Federal District Courts, State, and Immigration Courts. Covid affected all aspects

of life in Hawaii, demolishing its economy, closing its schools and straining its healthcare system. Many lawyers had to close their offices because they were not essential workers. Other lawyers had to work out of their homes to continue to represent their clients under extra ordinary conditions.

The instant case was initiated at the height of the pandemic in 2021. The first master calendar hearing was scheduled for May 19, 2021. During that time period many businesses, including law firms, were struggling to reach a level of stability with limited at home resources, due to Covid's interference with the orderly process of the practice of law. The residual effects of Covid continue to the present date. Counsel for Petitioner still wears a mask every day and is still adapting to having to work in a post Covid era and environment. In short, Petitioner and counsel did not ever intend to abandon the instant case.

A review of the record shows that Petitioner, through counsel, submitted over a hundred separate exhibits in support of his case and appeared for all prior hearings. Other than the unintended scheduling occurrence, counsel for Petitioner would have no reason not to appear for the individual hearing, particularly after putting in so much effort and time into the instant matter.

Among other key submittals of evidence, Petitioner filed a statement from his Rabbi which explains that according to the tenets of the Jewish religion, the core and principal directives of a marriage is to have children.. Petitioner also

filed with the court, a statement from his ex-spouse which states that she had been diagnosed with a medical condition which prevented her from having children.. Petitioner also filed a personal statement with the court that explains that the marriage ultimately ended due to his ex-spouse's inability to get pregnant despite their many attempts. All these exhibits constitute objective and compelling evidence that neither Petitioner nor counsel had any intention to abandon the instant case.

On February 6, 2025, Petitioner timely filed with the Immigration Court a Motion to Reconsider, in which Petitioner's position was that the IJ did not have subject matter jurisdiction over the defunct I-751 and requested that the IJ rescind the order and reopen the case.

Thereafter, on February 9, 2025 Petitioner filed a motion to stay removal on the grounds that there was imminent detention by ICE since the local media in Honolulu, Hawaii as well as the national news media was reporting on a daily basis that ICE was detaining persons with outstanding removal orders.

On February 10, 2025 the IJ denied the MTR on the same grounds that he had issued the in absentia order of removal: That Respondent and counsel had failed to appear for the individual hearing and had abandoned the case. The IJ did not discuss nor analyze whether he had jurisdiction over the defunct joint I-751,

and expressly limited his reasoning for his entry of the in absentia order to the non-appearance of Petitioner and abandonment.

On February 18, 2025 the IJ rejected Petitioner's motion to reopen. Instead of ruling on the motion to reopen, the Immigration Court forwarded the motion to reopen to the BIA with a transmittal notice which read that the Immigration Court no longer had jurisdiction over the motion to reopen since Petitioner had appealed the MTR to the BIA.

Following the mailing of the Motion to Reopen to the BIA, the IJ then issued a denial of the motion to stay removal on the grounds that there was no imminent removal since Petitioner had not been detained by ICE.

Petitioner also filed a stay of removal at the BIA following the IJ's position that there was no "imminen removal" at that time. Petitioner was not incarcerated when he filed the stay of removal before the IJ.

Summary of Argument

Petitioner respectfully submits that the IJ did not have the authority nor jurisdiction to issue the in absentia order because the underlying I-751 joint petition had been revoked due to the termination of the marriage and was legally superseded by the filing of the I-751 waiver. Further, the IJ acknowledged on the record that he lacked subject matter jurisdiction because the I-751 waiver was still

pending with USCIS. In this regard, the regulations, USCIS practice manual, and case precedence establishes that original jurisdiction over a I-751 waiver vests with USCIS, and not with the Immigration Court.

Petitioner also respectfully submits that the Immigration Judge erroneously issued the order in violation of 8 U.S.C.A. § 1229a which expressly mandates that in absentia hearings should be conducted in order to confirm appropriate notice and that the individual was in fact removable. Petitioner Mazeliah was not in fact or legally removable on January 17, 2025 because he still had a pending conferred right to have his pending I-751 waiver adjudicated by USCIS.

In the instant case, the IJ acknowledged that he had no jurisdiction over the pending I-751 waiver because USCIS had not adjudicated the waiver. Indeed, the IJ asked the DHS attorney if the I-751 waiver was still pending, and the DHS attorney confirmed that it had not been adjudicated as of January 17, 2025. Under said circumstances, the IJ should have continued the matter. See Matter of Stowers, 22 I&N Dec. 605 (BIA 1999).

Further, in addition to the above legal improprieties, the IJ also failed to provide sufficient findings of fact and conclusions of law in his in absentia order of removal and in his order in which he denied Respondent's Motion to Reconsider. In this regard, the BIA should remand this case to the IJ because the

function of the BIA does not include making findings of fact.

Legal Arguments

Case Precedence Supports that the IJ Lacked Subject Matter Jurisdiction Over the Joint I-751 and the I-751 Waiver because Petitioner's I-751 Waiver Was Still Pending at the USCIS Level 1

In the Matter of Tee, 20 I & N Dec. 949, 950-951 (BIA 1995) a couple filed a joint I-751 and subsequently divorced, and then sought relief before the IJ to reconsider the denial of the joint I-751, the court held:

> "Considering that the Act requires a present demonstration that the marriage has not been annulled or terminated, it is clear that the qualifying marriage must be ongoing in order for a joint petition to be approved. We accordingly hold that an alien becomes statutory ineligible for approval of a Section 216(c) (1) joint petition upon termination of the marriage, other than through the death of the spouse, before its adjudication by an immigration judge."
> The BIA further explained in the Matter of Tee, supra, that its holding is:
> "...consistent with the statutory scheme enacted of Section 216 of the Act by the Immigration Marriage Fraud amendments of 1966, Pub. Law No. 99-639, 100 St. 3537. In this connection, we note that the regulations have long provided that the legal termination of the marriage between a petitioner and the beneficiary of a relative visa petition, prior to the alien adjustment of status or entry on the basis of that petition, constitutes automatic revocation of that petition, even though it was already approved... Moreover, where the marriage has been terminated, the respondent is still entitled under the statutory scheme to apply for a waiver of the requirement to file a joint petition... This gives the alien an opportunity to demonstrate that the conditional basis of the permanent residence should be removed despite the termination of the marriage." See Matter of Mendes, 20 I & N Dec. 833, 838-39 (BIA 1994).

Thus, once the marriage is terminated by divorce while the I-751 joint petition is pending before USCIS (as in the instant case), it is "revoked "and no longer in play or in existence as part of the adjustment of status process. Hence, when the marriage terminates by divorce while the joint petition is pending before USCIS, the joint I-751 is no longer available or applicable, and by operation of law, it is extinguished and collapses when the respondent files a I-751 waiver, which in turn effectively divests the Immigration Judge's jurisdiction to review the automatically revoked joint I-751 petition.

Petitioner also respectfully submits that the basis of the IJ's jurisdiction on the date of the subject hearing could not have been predicated on the pending I-751 waiver because the USCIS had not adjudicated the waiver as of January 17, 2025.

Courts have found that the conditional permanent resident (CPR) must file the Form I-751 with USCIS, even if the CPR is in removal proceedings. If a CPR is in removal proceedings and has filed the Form I-751, USCIS must adjudicate the petition first before an immigration judge (IJ) can review it. See Matter of Anderson, 20 I. & N . Dec. 888 (BIA 1994).

Further, case precedence has found that original jurisdiction to rule on the merits of an Application for Waiver of Requirement to File Joint Petition for

Removal of Conditions (I-751 waiver) rests soley with the appropriate regional service center director, and not the immigration judge. See Matter of Lemhammad, 20 I. & N. Dec. 316 (BIA 1991).

In the instant matter as of the individual hearing date, January 17, 2025, the original I-751 had been terminated due to the divorce, and the I-751 waiver was still pending with USCIS, therefore pursuant to Matter of Lemhammad, the Court lacked jurisdiction to issue a ruling which would disallow the relief sought under the pending I-751 waiver before USCIS.

a) The United States Supreme Court Supports Plaintiff's Position

In Campos-Chaves v. Garland, Nos. 22–674, 22 884, -- U.S. --, 2024 WL 2981506 (2024) the United States Supreme Court reaffirmed the two-tier procedural requirements before an Immigration Judge can enter an in absentia order of removal as follows:

> Aliens who receive such written notice are expected to attend their hearings. Section 1229a(b)(5)(A) provides the consequences for aliens who, "after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided," fail to attend "a proceeding under this section." Such aliens "shall be ordered removed in absentia" if the Government "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." §1229a(b)(5)(A). (Emphasis added).

In Campos-Chaves v. Garland, *supra*, The United States Supreme Court

also clarified:

> While Campos-Chaves limits individuals' ability to seek no-notice rescission of in absentia removal orders based solely on the fact that their NTAs lack time and/or place information, it should not limit other challenges to defective NTAs, including those related to eligibility for cancellation of removal, see, e.g., Pereira v. Sessions, 585 U.S. 198 (2018); Niz-Chavez v. Garland, 593 U.S. 155 (2021), eligibility for voluntary departure, see, e.g., Matter of M-F-O-, 28 I. & N. Dec. 408 (BIA 2021); Posos-Sanchez v. Garland, 3 F.4th 1176 (9th Cir. 2021), or DHS' failure to provide a sufficient NTA as a violation of a mandatory claim-processing rule, see, Matter of Fernandes, 28 I. & N. Dec. 605 (BIA 2022); Suate-Orellana v. Garland, 101 F.4th 624 (9th Cir. 2024); Arreola-Ochoa v. Garland, 34 F.4th 603 (7th Cir. 2022).
>
> Nor does Campos Chaves prevent individuals who received in absentia orders based on deficient NTAs from seeking rescission on other bases, including exceptional circumstances for failure to appear or failure to receive actual notice of their hearings, or address the consequences of in absentia proceedings based on NTAs that lack other required information, like the consequences of failing to appear or the charges against the individual. (Emphasis added).

In the instant case, the NTA was no longer applicable as such, and therefore could not legally be the basis of the subject in absentia order because its allegations related to the Joint I-751 which had been revoked by operation of the law due to the termination of the marriage. Once the Joint I-751 was no longer operative, IJ no longer had subject matter jurisdiction over the matter. In another words, the IJ could not legally fulfill his overarching obligation and duty to determine removability before entering an *in absentia* order since the joint petition

was defunct.

The IJ Exceeded His Delegated Congressional Authority When He Issued the In-Absentia Order When He Knew That The I-751 Waiver Was Still Pending and Knew or Should Have Known That He Had No Jurisdiction Over the Joint I-751 Because It Had Been Legally Revoked By The Filing Of The I-751 Waiver

In the instant case the, Immigration Court knowingly disregarded that Petitioner had the conferred right to have his I-751 decided by USCIS and the possibility that USCIS could have decided in favor of Petitioner's I-751 waiver. Therefore, the IJ's order of removal was premature as an act that exceeded the IJ's authority and which lacked subject matter jurisdiction over the "revoked" Joint I-751 because it was superseded by the I-751 waiver.

In this regard, 8 C.F.R. § 1003.14 (a) defines whether a particular case is properly before an immigration court. Without the required subject matter jurisdiction the IJ lacks authority to render any decisions regarding the issues raised therein. IJs who take action without a recognition of proper subject matter jurisdiction results in an extrajudicial act considered as ultra vires. When an IJ performs an action that is "ultra vires," it means that the IJ acted beyond the scope of the delegated and vested legal authority which is defined by the regulations, policy manuals, and other applicable law. In the instant case, the ultra vires act was the inappropriate assumed jurisdiction by the IJ over the revoked Joint I-751,

and therefore such an ultra vires act legally nullifies the subsequent issuance of the in absentia order because the IJ lacked the necessary jurisidiction to do so.

In Louisville & Nashville RR Co. v. Mottley, 211 U.S. 149 (1908), the U.S. Supreme Court discussed subject matter jurisdiction which after 100 years is still a bedrock foundational requirement for all judges to follow. So much so that it has been permanently codified in federal civil law procedure as Fed.R. Civ. P. 12 (h)(3) ("If the court determines that it lacks subject matter jurisdiction, the court must dismiss the action.")

The requirement for subject matter jurisdiction cannot be disregarded by the IJ. In United States of America v. John Miguel Leon Gonzales, 351 F.Supp. 306 (USDC, W.D. Texas, El Paso Division 1908) the Court held that the Immigration Judge lacked subject matter jurisdiction to issue a removal order where the NTA was defective. The analysis of the Court supports Petitioner's position that the IJ lacked subject matter jurisdiction.

Leon Gonzalez involved a prosecution for illegal reentry into the United States after an IJ had issued a removal order. Leon Gonzalez argued that the underlying removal order was a legal nullity that could not serve as the predicate for the charge of illegal reentry, and that the defendant was not required to satisfy statutory requirements for collaterally challenging the removal order's validity.

In Leon Gonzalez the USDC held that "When reviewing agency's construction of statute it administers, if intent of Congress is clear, that is the end of the matter; for court, as well as agency, must give effect to unambiguously expressed intent of Congress."

In the instant case, the IJ failed to adhere to the plain language of 8 U.S.C.A Section 1229a when the IJ knowingly disregarded that Petitioner had a legal right to have his I-751 waiver adjudicated first by USCIS.

The Leon Gonzales holding clarified that the Court (herein the IJ) has to follow the unambiguous and clear intent of Congress, which in this case includes several mandates: 1) The NTA charging document must not be defective; 2) The IJ has the duty to determine whether the Respondent is removable as charged; 3) The NTA has to specifically list the nature of the offense and the legal authority which provides that the Respondent is removable; and 4) That the lack of subject matter cannot form the basis for removal; 5) That the challenge to such a defective NTA and lack of subject matter jurisdiction cannot be the basis for an in absentia order of removal.

The Leon Gonzalez holding also made reference to Pereira v. Sessions, 585 U.S. 198 (2018), which involved an in absentia order of removal in the context of a the stop time rule in an asylum proceeding. The USDC the Senior Judge David

Briones held in part:

> According to the Supreme Court's recent opinion in Pereira v. Sessions, as well as a holistic analysis of both the regulatory and statutory definitions of a Notice to Appear, the incomplete Notice to Appear did not vest jurisdiction and therefore Mr. Leon-Gonzalez's underlying removal was void and his indictment for illegal re-entry should be dismissed. A later-sent Notice of Hearing with a date and time does not vest an immigration court with subject matter jurisdiction and complaint about this cannot be waived.

Thus, per Pereira, a document that is not a valid Notice to Appear cannot be a valid charging document. See 8 C.F.R. § 1003.13 (2013). "And, without a valid charging document, jurisdiction never vests in the immigration court. 8 C.F.R. § 1003.14(a) (2018)." Id. At 1033.

Again, in the instant case, the NTA was deficient because it only made reference to the Joint I-751 petition which had been legally revoked, and therefore it was an invalid charging document because it did not reference the subsequent I-751 waiver. Accordingly, the IJ did not have any valid charging NTA document to go forward on January 17, 2025, and the IJ should have continued the case until such time that USCIS had reached a decision on the waiver.

Clearly, the IJ had no jurisdiction to subsume the pending I-751 waiver in his order in absentia of removal.

The USCIS Policy Manual Supports the Position that an IJ Does Not

Have Jurisdiction Over a Joint I-751 When a Marriage Is Terminated by Divorce or Over a I-751 Waiver When It Is Pending With USCIS

The USCIS Policy Manual reiterates and supports Petitioner's position that the IJ lacked jurisdiction over both the joint I-751 (due to divorce) and the I-751 waiver which was before USCIS on the date of the subject hearing. The USCIS Policy Manual, Volume 6, Part I, Chapter 4, Joint Petitions, provides that once a marriage is terminated, the joint I-751 petition is no longer legally available to remove the conditional permanent resident status.

However, an I-751 waiver is available to the divorced CPR. The relevant portions of Chapter 4, reads in relevant part as follows under A. Joint Petitions:

> In a joint petition, the CPR and petitioning spouse or stepparent must establish that a qualifying, bona fide marriage exists and must submit evidence to show that the marriage was entered into in good faith and not to evade U.S. immigration laws.
> USCIS may not deny a joint petition solely because the spouses are separated or have initiated divorce or annulment proceedings. If all other eligibility requirements are met and both the CPR and petitioning spouse or stepparent appear for an interview (if requested by USCIS), USCIS approves the joint petition.
> However, if the divorce or annulment is finalized while the joint petition is pending, the CPR is no longer eligible to remove conditions using the joint petition. However, the CPR may request that USCIS amend the joint petition to a waiver based on divorce. (Emphasis added).

The legal effect of Chapter 4 of the USCIS manual when considered in pari materia to the regulations regarding the Immigration Judge's jurisdiction is

clear: The Immigration Judge lacked jurisdiction to adjudicate the joint petition I-751 under the USCIS policy manual and 8 CFR § 216.4(d)(2) and 8 CFR § 216.5(f).

Chapter 5 of the USCIS policy manual explains the process for the filing of the waiver for the I-751 waiver on the basis of a good faith marriage. Chapter 5, Waiver of Joint Filing Requirement, of the USCIS policy manual provides in relevant part:

1. Good Faith Marriage (Divorce)

> ...Accordingly, the INA provides for a waiver if the CPR can establish that the qualifying marriage was entered into in good faith and that the CPR was not at fault in failing to meet the filing requirements for Form I-751. See 8 CFR 216.5(a)(1)(ii). CPRs whose marriages have been terminated by divorce or annulment may request this waiver, but CPRs whose marriages were terminated by death of the petitioning spouse should instead submit an individual filing request. See Chapter 4, Joint Petitions and Individual Filing Requests, Section B, Deceased Petitioning Spouse [6 USCIS-PM I.4(B)].

Moreover, the USCIS policy manual expressly provides when an Immigration Court has the appropriate jurisdiction to review denials of I-751 petitions and waivers. See Chapter 7- Effect of Removal Proceedings, Subsection A: CPRs In Removal Proceedings, which reads in relevant part as follows:

> USCIS has original jurisdiction over all pending Forms I-751, whether they are joint petitions, individual filing request, or waiver request.[1] The conditional permanent resident (CPR) must file the

> Form I-751 with USCIS, even if the CPR is in removal proceedings. If a CPR is in removal proceedings and has filed the Form I-751, USCIS must adjudicate the petition before an immigration judge (IJ) can review it. (Emphasis Added).

In this case, the only petition which was still in existence as of the date of the subject hearing was the I-751 waiver, which the IJ acknowledged at the July 26, 2023 master calendar that he had no jurisdiction over the waiver since it was still pending before USCIS. Therefore, pursuant to the Policy Manual, the IJ did not have appropriate authority to assume jurisdiction and extinguish the pending waiver when he issued the order in absentia.

Petitioner's Initial Joint I-751 was Superseded by the Filing of the Subsequent Waiver

Petitioner further submits that the revoked joint I-751 could not legally serve as the basis for the IJ's assumed jurisdiction because it was superseded by the subsequent filing of the I-751 waiver.

Where the basis for USCIS' denial of a Form I-751 petition is the denial of a waiver of the joint filing requirement, the Immigration Judge reviews the denial of the waiver, and not the original joint petition. See 8 C.F.R. § 1216.5(f); Matter of Bador, 28 I&N Dec. at 642 (collecting authority); see also Matter of Herrera Del Orden, 25 I&N Dec. 589, 593–95 (BIA 2011) (discussing the scope of the Immigration Judge's review of the denial of an applicant's request for a waiver of

the joint filing requirement).

In the Matter of Bador, 28 I & N Dec. 638, 641(BIA), in the written decision Appellate Judge Goodwin treated a withdrawn and denied Joint I-751 petition "as if never filed, " by operation of law. Citing Matter of Mendes, 20 I&N Dec. 833, 838–39 (BIA 1994) (stating that written withdrawal of the joint petition by the petitioner automatically withdraws the petition from consideration).

Petitioner cites the Bador case to clarity that the joint I-751 should be treated as "as if never filed" since it was superseded by the I-751 waiver by operation of INA Section 216 (b) (1) and 8 USC § 1186a(c)(4).

The Immigration Judge Erroneously Issued the In Absentia Order in Violation of 8 U.S.C.A. § 1229a

The Petitioner respectfully submits that the IJ erroneously issued the in absentia order and did not conduct the appropriate procedure prescribed under 8 U.S.C.A. § 1229a, which sets forth the general procedure which allows an IJ to issue an order in absentia. It reads in relevant part as follows:

> (5) Consequences of failure to appear
> (A) In general
> Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as

> defined in subsection (e)(2)). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title. (Emphasis Added)
> 8 U.S.C.A. § 1229a (West).

Further, subsection (e)(2) of the same statute outlines and defines the term removable which reads in relevant part:

> (2) Removable
> The term "removable" means--
> (A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or
> (B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.
> 8 U.S.C.A. § 1229a (West)

In the instant case, the IJ issued the *in absentia* order of removal on the grounds that Petitioner and counsel did not appear for the individual hearing and that Petitioner by not appearing had abandoned his case. However, the IJ did not discuss in his order whether the Petitioner was in fact "removable" at the time of the hearing. As stated in prior sections, the Petitioner still had a pending, unadjudicated I-751 waiver pending with USCIS at the time, therefore he was not legally removable as required in 8 U.S.C.A. § 1229a. Petitioner still had the right to have any denial by USCIS of his I-751 waiver reviewed by the IJ in a subsequent removal proceeding.

The IJ's precipitous *in absentia* order directly conflicts with the statutory

requirement that the IJ has to first find Petitioner removable by clear and convincing evidence presented by DHS. To the extent that the I-751 waiver was still pending at the USCIS level, the IJ could not factually nor legally reach any determination on removability because the IJ acknowledged on the record that he did not have jurisdiction to decide the I-751 waiver.

Under the circumstances, the IJ should have continued the matter since an *in absentia* hearing is a hearing on the merits of record before the administrative court. See Wellington v. I.N.S., 108 F.3d 631 (5th Cir. 1997). The regulations also demand that removability be proved by clear, unequivocal, and convincing evidence prior to issuing any removal order. See 8 CFR § 1003.26. In this case, the record is devoid of any indication that a proper in absentia hearing was even entertained, much less conducted. Rather, the IJ erroneously concluded that he had the right and jurisdiction to subsume the pending I-751 waiver in his in absentia order.

The Immigration Judge's Authority to Dismiss or Terminate Proceedings Does Not Include Dismissing Pending Conferred Rights

The Attorney General has statutory authority to promulgate regulations governing Immigration Court proceedings. INA § 103(g)(2), 8 U.S.C. § 1103(g)(2) (2018), and the Attorney General has, by regulation, given Immigration

Judges significant latitude in controlling the cases before them. See, e.g., 8 C.F.R. §§ 1240.1(a)(1)(iv), (c), 1240.7(a), (c), 1240.46(b), (d) (2023); 8 C.F.R. § 1240.6 (2020). Immigration Judges also have substantial authority to independently adjudicate cases. See, e.g., 8 C.F.R. §§ 1240.1(a)(1)(i)–(iii), 1240.12; 1240.41, 1240.50 (2023). This includes authority to dismiss or terminate proceedings. See 8 C.F.R. § 1239.2(c) (2023); see also Matter of Coronado Acevedo, 28 I&N Dec. 648, 651–52 (A.G. 2022).

However, the above broad latitude of the Immigration Judges is not absolute. Decisions to terminate proceedings, including the issuance of removal orders in absentia, nevertheless, have to comply with the implemented code of federal regulations and case precedence safeguards and procedure, and should not subsume a legal conferred right such as a pending I-751 waiver.

In this regard, the BIA has held ruled and explained that an order terminating or dismissing proceedings must be consistent with the law. See Matter of J-A-B- & I-J-V-A, 27 I&N Dec. 168, 169 (BIA 2017); Matter of Sanchez-Herbert, 26 I&N Dec. 43, 45 (BIA 2012).

In the context of removal proceedings, courts have even found that when a respondent has not filed an application for a waiver and is prima facie eligible for such relief, the proceedings should be continued in order to grant the respondent a

reasonable opportunity to file the application before the regional service center director and for the center director to decide application. See Matter of Mendes, 20 I. & N. Dec. 833 (BIA 1994).

In the instant matter, the conferred right was that Petitioner Viktor Mazeliah still had a statutory and legal right to have his second I-751 (which was still undecided by DHS-USCIS on the date that the IJ issued the in-absentia order) decided by USCIS. Pursuant to Matter of Mendes, the Court had the option to terminate the case sua sponte without prejudice, pending the adjudication of the pending I-751 waiver. Alternatively, the Court could have continued the matter to afford USCIS the ability to adjudicate the outstanding I-751 waiver. If the waiver had been denied, then Petitioner still would have had the opportunity according to the regulations and case law to seek review of the denial by the IJ in removal proceedings.

USCIS' January 23, 2026 denial conflicts with its own policy manual and legal case precedence, to the extent that it is well established that Petitioner, even to the present date still has a legal conferred right to have the January 23, 2026 denial reviewed by an Immigration Judge.

Petitioner's Absence at the Hearing is not legally tantamount to abandonment of the pending I-751 waiver as per the USCIS policy manual

In the IJ's order denying Respondent's motion for reconsideration the IJ states that he denied the MTR because Respondent did not appear at the individual hearing and as such abandoned his case. The IJ's position is inconsistent with the USCIS policy manual which describes circumstances which constitute abandonment over a pending I-751 waiver. The USCIS Policy Manual, Volume 6, Part I, Chapter 6, Section C. 1 outlines the sort of situations which rise to the level of abandonment. The policy manual considers an abandonment when the petitioner fails to provide evidence as requested by USCIS which USCIS considers is necessary to conduct its determination to lift the conditional legal permanent resident status. Said section reads in relevant part as follows:

> Insufficient Response or Failure to Respond
>
> USCIS generally considers the Form I-751 abandoned and denies the Form I-751 if the CPR does not submit all of the requested evidence by the required date provided in the Request for Evidence (RFE) or Notice of Intent to Deny (NOID). See 8 CFR 03.2(b)(13)(i).

In the instant case, there were no RFE's (requests for additional evidence) by USCIS, nor did USCIS ever issue any intent to deny the pending I-751 waiver. The policy manual does not list absence at a calendared hearing as a valid legal ground to deem the underlying pending I-751 waiver abandoned because the

USCIS has original jurisdiction over the waiver until it denies it, then and only then the IJ can commence removal proceedings upon the proper filing of a Notice to Appear and specific charges relating to the denied I-751 waiver. Petitioner's absence at the calendared hearing should not be considered as abandonment, since the pending waiver still required adjudication by USCIS at the time of the individual hearing.

Subject matter jurisdiction is a sacrosanct foundational requirement which cannot be disregarded by an IJ. Lacking subject matter jurisdiction, an IJ does not have any legal authority to restrict or disregard any pending conferred right, such as the I-751 waiver at issue herein.

JURISDICTION

1. This Court has jurisdiction under 28 U.S.C. § 2241 (habeas corpus); 28 U.S.C. § 1331 (federal question); and Article I, section 9, clause 2 of the United States Constitution (the Suspension Clause).

2. This Court may grant relief pursuant to 28 U.S.C. § 2241, the Declaratory Judgment Act, 28 U.S.C. § 2201, and the All Writs Act, 28 U.S.C. § 1651.

3. This Court has jurisdiction over the Honolulu Federal Detention Center and its warden.

VENUE

4. Venue is proper in this Court pursuant to 28 USC § 1391 (c) inasmuch as this action is against officers and agencies of the United States in their official capacities, duly brought in the District where Petitioner resides and where a substantial portion of the events or omissions giving rise to Plaintiff's claims occurred.

5. Venue is proper in the District of Hawai'i under 28 U.S.C. § 2241 and 28 U.S.C. § 1391 to the extent Petitioner Mazeliah is detained in an immigration detention facility in the immediate custody of, Respondent Michael J.D. Smith, the Warden of FDC Honolulu.

PARTIES

6. Petitioner Mazeliah is a resident of the City and County of Honolulu.

7. Respondent Michael J.D. Smith is the Warden of FDC Honolulu and is Petitioner's immediate custodian while he is in immigration detention. He is named in his official capacity.

8. Respondent Polly Kaiser is the Acting Field Office Director of the San Francisco ICE Field Office, which oversees immigration enforcement operations in Honolulu, Hawai'i. is responsible for his detention and removal. 9. Respondent Kristi Noem is the Secretary of the Department of

Homeland Security. She is responsible for the implementation and enforcement of the INA and oversees ICE, which is the agency responsible for detention. Ms. Noem has ultimate custodial authority over Petitioner and is being sued in her official capacity.

9. Respondent Pamela Bondi is the Attorney General of the United States. She is responsible for the Department of Justice, of which the Executive Office for Immigration Review and the immigration court system it operates are component agencies. She is being sued in her official capacity.

10. Respondent Jayci Roney is the USCIS Honolulu Field Office Director. She signed the Decision of denial dated January 23, 2026.

CLAIMS FOR RELIEF

11. Petioner realleges paragraphs 1 through 10 herein and the above

A. Writ of Habeas Corpus

12. Petitioner respectfully requests that it issue a Writ of Habeas Corpus and order the release of Petitioner from custody.

13. In the alternative, Petitioner request that this Court set bail for his immediate release from custody while his appeal is pending before the Board of Immigration Appeals. Petitioner has no criminal history. He is not a flight risk. He has significant equities in his favor, including ownership of businesses,

lawful admission into the United States, is highly regarded in the community as a responsible and productive member of the community, who is helping the State of Hawaii by providing affordable low cost housing, and other meaningful contributions to needy State of Hawaii residents. Petitioner has successfully completed over 100 residential projects in the past and runs a donation program that provides salvaged building materials and appliances to families in need, benefitting over 22 families last year. Additionally, his construction company currently has about 60 active projects across Hawaii. These projects provide jobs and stability to many workers, subcontractors, and families.

14. Petitioner's incarceration at the Honolulu Federal Detention is in violation of the US. Constitution to the extent that his freedom of liberty and his legal concomitant rights have been unlawfully infringed.

15. Moreover, Petitioner's due process has been violated by Respondents to the extent that he has a conferred right to a statutory review of the denied I-751 waiver by an Immigration Judge.

16. The US Constitution is the supreme law of the United States, and for good cause can trump any agency law and/or Immigration and Nationality Law, including orders in absentia.

B. Stay of Removal

17. Petitioner respectfully requests that this Court order a stay of his removal by Respondents pending his appeal which he filed at the Board of Immigration Appeals;

18. Counsel for Petitioner has been informed by local ICE agents that ICE intents to deport Petitioner once the General Counsel of Israel in Los Angeles provides a temporary passport to Petitioner.

19. Counsel for Petitioner has been informed that ICE will deport Petitioner even though his appeal to the Board of Immigration Appeals is pending.

C. Temporary Restraining Order

20. Petitioner further requests that this Court issue an Order prohibiting Respondents from transferring Petitioner to any other detention center whether out of state or in another country.

21. Petitioner fears that ICE will transfer him to another prison/facility/jail out of state or in another country while his appeal is pending. Any such transfer will result in irreperable harm to his businesses, and his wife and stepdaughter will suffer extreme hardship if Petitioner is transferred to another detention center. Also any transfer out of state or out of country will seriously restrict his right to counsel and representation, to the extent that counsel will essentially be precluded

from visiting Petitioner due any such transfer.

22. Petitioner is likely to prevail in his appeal to the Board of Immigration Appeals, or at the Ninth Circuit Court of Appeals in the event that his appeal at the BIA is denied.

23. Given the current government's stance against immigrants, both the local and national news have reported various incidents where ICE has transferred immigrants to another state, and in some instances to another country, pending their appeals.

D. Declaratory Judgment

24. Petitioner also requests this Court find that the Joint I-751 filed by Petitioner and his ex-spouse had been legally revoked by the filing of Petitioner's I-751 Waiver.

25. That the IJ had no jurisdiction over the I-751 Waiver since as of January 17, 2025, it was still pending at the USCIS level.

25. That the IJ's order of removal was inappropriate and that the IJ should have dismissed the case since he knew that the I-751 Waiver was still pending at the USCIS level, particularly when he admitted on the record that he had no jurisdiction over the pending I-751 Waiver as early as the March 28, 2023 Master Calendar hearing.

26. That this Court issue a finding that the January 23, 2026 USCIS Decision is in direct conflict with USCIS' own policy manual, federal code of regulations, and case precedence, and the statement of the DHS counsel which informed the Immigration Judge that it had no jurisdiction over the revoked Joint I-751 by operation of law, and when USCIS in its policy manual expressly provides that an Immigration Judge does not have any jurisdiction to decide a pending I-751 Waiver at the USCIS level.

PRAYER

WHEREFORE, in view of the circumstances and legal authorities noted herein, Petitioner respectfully requests the Court to grant all relief as requested herein, and,

a) Accept jurisdiction;

b) Provide emergency relief as requested and listed in Paragraphs Nos. 11 through 25 herein;

c) That the Court award EAJA fees and costs as provided by statute;

d) Grant any and all other relief, both legally and in equity that is necessary and appropriate under the circumstances.

Dated: Honolulu, Hawaii, February 4, 2026.

Respectfully submitted by:

s/Fernando L. Cosio

FERNANDO L. COSIO
Attorney for Petitioner
VIKTOR MAZELIAH

Law Office of Fernando Cosio
1050 Bishop Street # 244
Honolulu, HI 96813
Tel.: (808) 533-6007
Email: condorlaw@aol.com

VERIFICATION PURSUANT TO 28 U.S.C. § 2242

1. I, FERNANDO L. COSIO, declare:

2. I represent Petitioner VIKTOR MAZELIAH, in the above captioned matter.

3. Pursuant to 28 U.S.C. § 2242, I hereby submit this verification on Petitioner's behalf who is presently in custody at the Honolulu Federal Detention Center.

4. I have reviewed the attached Petition for Writ of Habeas Corpus and hereby declare that the factual statements contained in said writ are true and correct to the best of my knowledge, information, and belief, based on my personal knowledge and the records on file in the instant action. including references to the transcripts of the Immigration Court, letters submitted to the Immigration Court and filed at the Board of Immigration Appeals in support of Petitioner's appeal, as well as information obtained from Petitioner.

5. I declare under penalty of perjury that the foregoing is true and correct.

Dated: Honolulu, Hawaii, February 4, 2026.

/s/ Fernando L. Cosio
FERNANDO L. COSIO
Attorney for Petitioner
VIKTOR MAZELIAH