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March 16, 2026

The Honorable
Jill A. Otake
Judge, USDC. District of Hawaii
Prince Kuhio Federal Building
300 Ala Moana Blvd., Suite C-338
Honolulu, Hawaii 96850

Re: Viktor Mazeliah v. Michael J. Smith, et al; Civ No. 1:26-cv-00053 JAO-WRP

Dear Honorable Judge Otake,

It is my understanding that Edric M. Ching, Assistant US Attorney, is not including the Motion to Reopen which Petitioner filed at the Immigration Court on February 16, 2025, and which the Immigration Court then transmitted to the Board of Immigration Appeals on February 18, 2025 because the Immigration Court claimed that it no longer had jurisdiction over said motion. For the Court's edification, attached is the subject Motion to Reopen which was filed with the Immigration Court, and which we believe is pending before the BIA as per the representations of the clerk at the Honolulu Immigration Court who transmitted the motion to the BIA and previous reassurances by the BIA clerk.

The transmittal notice of the subject Motion to Reopen is found in the BIA docket which can be accessed by clicking on the February 18, 2025 entry labeled as "Case Notice," which is also attached hereto.

A copy of the foregoing is being filed via the Court's electronic filing system on the above date, therefore personal service is not required nor necessary on Respondents.

Respectfully submitted by:

s/Fernando L. Cosio
Fernando L. Cosio
Attorney for Petitioner
Viktor Mazeliah


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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
HONOLULU, HAWAII

_____) NOT DETAINED
)
In the Matter of:) **File No. A** 
)
)
VIKTOR MAZELIAH,) MOTION TO REOPEN;
) CERTIFICATE OF SERVICE;
) PROPOSED ORDER.
)
)
_____)

The Honorable Clarence M. Wagner

Individual Hearing: January 17, 2025
8:30 AM

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Prefatory Statement

Respondent respectfully requests that the Immigration Judge rescind the in absentia order of removal on the grounds that the immigration court did not have jurisdiction over the underlying joint I-751.

This motion to reopen is brought pursuant to 8 C.F.R. § 1003.23, entitled Reopening or reconsideration before the immigration court. The application for relief for purposes of the instant motion is the pending I-751 waiver which was pending as of January 17, 2025, the date in which the Immigration Judge entered the in absentia order of removal.

Through the instant motion to reopen, Respondent respectfully requests that the in-absentia removal order be vacated and that the case be placed back on the calendar until such time that USCIS adjudicates the pending I-751 waiver, or terminate the case without prejudice until such time that there is a USCIS decision.

Biographical Information

Respondent VIKTOR MAZELIAH is an owner of three (3) construction companies which have partnered with the State of Hawaii and City and County of Honolulu, as well as with other persons and entities to build affordable housing in the State of Hawaii. Respondent has never been charged with any criminal crimes whatsoever. He is a hard working, good person who has dedicated himself to provide housing for those in need.

Respondent and his spouse terminated their marriage because she could not

have children due to a medical condition. His Rabbi wrote a letter which was filed with the immigration court and 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.

Respondent and his 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 explain that they were deeply in love but ultimately divorced due to her inability to have children.

Respondent 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.

Upon information and belief, Respondent did not appear at the January 17, 2025 because he earnestly believed that while his I-751 waiver pending the Court would not act on the demised Joint I-751. He informed the undersigned that he constantly checked with the client portal and did not see any decision on his I-751 waiver. Under no circumstances did he abandoned his I-751 waiver nor his desire to have the conditional permanent.

The Immigration Judge's Lacked Subject Matter Jurisdiction over the Joint I-751 because it was revoked and no Longer Reviewable

The Immigration Judge does not have jurisdiction to review a USCIS denied joint I-751 when the underlying marriage was terminated by divorce during its pendency at the USCIS level. Matter of Tee, 20 I & N Dec. 949, 950-951 (BIA 1995).

In this case, the Immigration Judge acknowledged on the record that he did not have jurisdiction to review the I-751 waiver while it was still pending at the USCIS level, and therefore the focus of this motion is over the joint I-751.

The USCIS Policy Manual, Volume 6, Immigrants, Part I- Family Based Conditional Permanent Residents, Chapter 7, Effect of Removal Proceedings reads:

USCIS has original jurisdiction over all pending Forms I-751, whether they are joint petitions, individual filing request, or waiver request. 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.

Respondent respectfully submits that based on the termination of the marriage and considering the implemented governing federal code of regulations and case precedence cited herein, the Immigration Judge did not have jurisdiction of either I-751 after Respondent filed his I-751 waiver.

Analysis of the Immigration Judge's Order

The focus of the Immigration Judge's order and determination is that Respondent and counsel did not appear for the individual hearing----however, the Court did not discuss the jurisdictional issue--at all.

The Court did not address at all the fact that the Joint I-751 had been revoked by operation of the law, inasmuch as the joint I-71 was revoked and superseded by the I-751 waiver.

In its order, the Court said that it reached its decision to issue the inabsentia order based only on the factual finding that Respondent and counsel did not appear at the individual hearing and therefore that Respondent had abandoned his case.

The Court did not discuss at all that there was a pending I-751 waiver and what effect the pending I-751 had on the Court's subject matter jurisdiction. Nor did the Court address or analyze whether Respondent had presented any evidence in its filings that would have any tendency to prove that Respondent terminated his marriage due to his spouse's inability to have children due to her medical condition. Instead, the Court summarily found that DHS had proven with clear and convincing evidence that Respondent was removable.

Respondent respectfully submits that the Court's finding of removability is in conflict with the holding of the U.S. Supreme Court in Pereira v. Sessions, 138 S.Ct. 2105 (U.S. June 21, 2018). In Pereira, Justice Sotomayor wrote the decision for the majority and essentially held that an NTA has to not only provide the date and time of an Immigration Court appearance but also it has to give due notice of the underlying charges and factual basis of how the respondent has essentially broken the law to warrant removal. The decision in Pereira states in relevant part:

"..when the alien is served a notice to appear under section 1229(a) of this title." § 1229b(d)(1)(A). Section 1229(a), in turn, provides that "written notice (in this section referred to as a 'notice to appear') shall be given ... to the alien ... specifying":

The period of continuous physical presence also stops if and when "the alien has committed" certain enumerated offenses that would constitute

grounds for removal or inadmissibility. § 1229b(d)(1)(B). That provision is not at issue here.

"(A) The nature of the proceedings against the alien.

"(B) The legal authority under which the proceedings are conducted.

"(C) The acts or conduct alleged to be in violation of law.

"(D) The charges against the alien and the statutory provisions alleged to have been violated....

Respondent submits that the requirements of an NTA as discussed in Pereira are applicable in other immigration areas besides the Asylum's top time rule. That is to say that all NTAs should provide in clear language what provisions of the INA or federal regulations were violated by the alleged offending respondent.

The inherent problem with the NTA in the instant case is that it alleged violations related to the Joint I-751 which was revoked by operation of the law due to the termination of the marriage. Once the Joint I-751 was no longer operative, the Court no longer had subject matter jurisdiction over the matter. In another words, the Court had an overarching obligation to determine deportability before entering an inabsentia removal order.

In the instant case, the Immigration Court's disregard of the pending I-751 as of the date of the issuance of the inabsentia order constitutes an act that exceeded the Court's Congressionally delegated power.

The "subject matter jurisdiction/ingredient of claim for relief dichotomy" as the Court referred to such a situtation in Arbaugh v. Y & H orporation, 546 U.S. 500, 511, concerns wheter a statutory requirement is an element of a plaintiff's claim for relie or a

jurisdictional mandate. Under the Arbaugh logic, the notice to appear requirement is not in the realm of the “claims for relief” requirements, but is instead about whether the immigration courts are acting within the Congressional implement and delegated powers bestowed upon the immigration courts. In the instant case, the Immigration Court subsumed the conferred right to have his I-751 first decided by USCIS before the Court had jurisdiction over the pending I-751 waiver.

The first sentence of 8 C.F.R. § 1003.14(a) reads: “Jurisdiction vest, and proceedings before an Immigration Judge commence when a charging document is filed with the Immigration Court by the Service.” This language confirms that the matter before the Court is one of subject matter jurisdiction, which in this case the only matter before the Immigration Judge was the “defunct” Joint I-751. DHS did not file any other allegations against Respondent, nor did DHS file any superseding NTA. Such nonfeasance left the Court with no subject matter jurisdiction to proceed under any other allegations other than the original Joint I-751.

The Law Post *Pereira v Sessions*

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 inabsential 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).

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 Immigration Court overlooked that Respondent had the conferred right to have his I-751 decided by USCIS, and in so overlooking or disregarding the possibility that USCIS could have decided in favor of Respondent’s I-751 waiver, the Immigration Court’s order of removal was premature as an act that exceeded the Court’s authority and which lacked subject matter jurisdiction over the “revoked” Joint I-751 because it was superseded by the I-751 waiver that Respondent had filed following DHS’ position statement that the IJ was precluded from

reviewing the Joint I0751 since it was no longer valid because Respondent and spouse had divorced while the Joint I-751 was pending before USCIS.

In this regard, on its face 8 C.F.R. § 1003.14 (a) concerns whether a particular case is properly before an immigration court. Without this propriety, an immigration court lacks authority to render any decisions regarding the issues raised therein. Courts that take action without a recognition of any subject matter jurisdiction, essentially result in an extrajudicial attack. Subject matter jurisdiction is one of the cornerstones of US jurisprudence.

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.")

Factual and Procedural Background

It is uncontroverted that on June 22, 2016, the Respondent and his spouse, Valerie Josephine Morales, jointly filed with U.S. Citizenship and Immigration Services (USCIS) a Joint Form I-751. It is also undisputed that on or about May 21, 2018, the Hawaii Family Court granted Respondent's divorce from his spouse.

On April 1, 2021, USCIS denied Respondent's Joint I-751 Petition because Respondent did not appear for the interview. Respondent did not appear for the I-751 interview because the notice was sent to Respondent's prior address. On May 5, 2021, Respondent was placed in removal proceedings with the filing of a Notice to Appear.

The Immigration Court filings also include that on February 17, 2022, Geoffrey Ling, Assistant Chief Counsel, US Immigration and Custom Enforcement, U.S. Department of Homeland Security, filed 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 relevant 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 Court subsequently granted the motion to continue. Respondent mailed his I-751 waiver to USCIS on February 28, 2022 and included the \$ 595 filing fee and \$ 85 for biometrics. It was included in Respondent's motion to continue or in the alternative

administrative closure. 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.

At the July 26, 2023, DHS counsel represented to 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 absentia order of removal because Respondent and counsel did not appear for the individual hearing. Prior to issuing its ruling, Counsel for DHS informed the Court that the second I-751 Waiver Petition was still pending, but that USCIS would be adjudicating the I-751 waiver within 60 days.

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 Respondent still wears a mask every day and is still adapting to having to work in a post Covid era and environment. In short, Respondent did not ever intend to abandon his case. A review of the record shows that Respondent, 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 Respondent would have no reason not to appear for the individual hearing, particularly after putting in so much effort and time into the instant matter. Respondent filed with the Immigration Court over a hundred pages of evidence in support of his case. Respondent also filed a statement from his Rabbi with the court which explains that according to the tenets of the Jewish religion, that one of the core and principal directive of a marriage is to have children. In addition, Respondent filed with the court, a statement from his ex-spouse which states that she has been diagnosed with a medical condition which prevents from having children. Respondent 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. Further, Respondent filed his ex-spouse's letter in which she states that they were divorced due to her inability to have children and other health issues. These exhibits constitute objective and solid evidence that neither Respondent nor counsel had any intent to abandon the instant case.

The Court Lacked Jurisdiction Over the Joint I-751 Because the Marriage Was Terminated by a Divorce Decree

In 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, supra, Matter of Balsillie, 20 I & N Dec. 4 86 (BIA 1992).

Black’s Law Dictionary defines “revocation” as: The recall of some power, authority, or thing granted, or a destroying or making void of some deed that had existence until the act of revocation made it void. See *Revocation*, online Black’s Law Dictionary (2nd ed.).

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 “destroyed” or “recalled” and no longer in play or in existence as part of the adjustment of status process. Stated differently, the joint I-751 filing requirement is part and parcel of the adjustment of status

regulated rules and procedure. When the marriage terminates by divorce, the joint I-751 is no longer available or applicable, and by operation of law...it 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.

The Immigration Judge's Authority is Also Limited by the Implemented Code of Federal Regulations and Agency Policies

The Immigration Judge's specific authority to adjudicate the various kinds of applications for relief is provided through the implemented regulations. See, e.g., 8 C.F.R. § 1240.1(a)(1)(i - iv). However, Subsection (iv) mandates that the Immigration Judge has "To take any other action consistent with applicable law and regulations as may be appropriate." (Emphasis added).

Subsection (iv) is mandatory and operates as a legal procedural safeguard to preclude actions which are inconsistent with applicable laws and regulations. In the instant case, the in absentia order should be vacated because it inconsistently and effectively cut off Respondent's conferred right to have the I-751 adjudicated first by USCIS before the Immigration Judge can act. In brief, the in absentia order was inconsistent with 8 CFR § 216.4(d)(2) and 8 CFR § 216.5(f). See also Matter of Mendes, 20 I. & N. Dec. 833, 839 (BIA 1994) and Matter of Ferreira, 28 I. & N. Dec. 765, 769 (BIA 2023). In another words, the Immigration Judge should adhere to the regulations despite his broad enumerated authority under 8 C.F.R. § 1240.1(a)(1)(i through iii). See Matter of Francisco Herrera Del Orden, Respondent, 25 I&N Dec. 589, 591 (BIA 2011) Interim Decision #3726.

The USCIS Policy Manual is Crystal Clear that the IJ Does not Have Jurisdiction Over a Joint I-751 When the Marriage is Terminated While the Joint I-751 is Pending at the USCIS Level

The USCIS Policy Manual also reiterates and supports Respondent's argument and position that the Immigration Judge lacked jurisdiction over the joint I-751 due to the termination of the marriage. 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, as matter of law, to remove his conditional permanent resident status. The relevant portions of Chapter 4, reads in relevant part as follows under A.

Joint Petitions:

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.[4] (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 lacks 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 general process for the filing of the waiver for the I-751 on the basis of a good faith marriage. Chapter 5, Waiver of Joint Filing Requirement, of the USCIS policy manual which provides in relevant part:

A. 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)].

The USCIS policy manual also provides clear guidance regarding 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 Matter of Bador, 28 I&N Dec. 638, 641 (BIA 2022), the court explained that the conditional status provides “immigration authorities time to examine the bona fides of a marriage more fully.” Subject to certain exceptions, the conditional permanent resident and the United States citizen spouse must jointly file a Form I-751 petition attesting to certain facts regarding the bona fides of the marriage within the 90 days preceding the second anniversary of the date on which the conditional permanent resident obtained the status and must appear for a personal interview. See INA § 216(c)(1), (d), 8 U.S.C. § 1186a(c)(1), (d); Matter of Mensah, 28 I&N Dec. 288, 290 (BIA 2021).

Recognizing that some marriages may be entered into in good faith yet still fail, a conditional permanent resident who is unable to file jointly with a spouse or former

spouse may be eligible for a discretionary waiver. See INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4); 8 C.F.R. § 1216.5(a)(1) (2023).

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. 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). Respondent cites the Bador case herein as support for the argument 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 Court Lacked Jurisdiction Over the Joint I-751 According to Case Law

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

The Immigration Court'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 consider 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 Respondent 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.

Conclusion

Given the above circumstances, proper cause exists under 8 C.F.R. Section 1003.23 (b)(i) for the Immigration Judge to rescind the in absentia order of removal and reopen this case. Accordingly, the in absentia order should be vacated to allow USCIS to adjudicate the pending I-751, or in the alternative terminate the proceedings without prejudice until such time that the pending I-751 waiver is adjudicated by USCIS.

Honolulu, Hawaii, February 16, 2025

s/ Fernando L. Cosio

FERNANDO L. COSIO

Attorney for Respondent

VIKTOR MEZELIAH

VIKTOR MAZELIAH

A 

PROOF OF SERVICE

On February 16, 2025, the undersigned served a copy of Respondent's Motion to Reopen on the Office of Chief Counsel, Department of Homeland Security, via the ECAS electronic filing system which will complete service upon said party.

Date: Honolulu, Hawaii, February 16, 2025


s/Fernando L. Cosio

FERNANDO L. COSIO

Attorney for Respondent

VIKTOR MAZELIAH

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HONOLULU, HAWAII**

_____)
In the Matter of:)
)
) File No.: A 
)
VIKTOR MAZELIAH,,)
)
)
In Removal Proceedings.)
_____)

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of Respondent's Emergency Motion to Reopen, it is HEREBY
ORDERED that the motion be GRANTED DENIED because:
 DHS does not oppose the motion.
 The respondent does not oppose the motion.
 A response to the motion has not been filed with the court.
 Good cause has been established for the motion.
 The court agrees with the reasons stated in the opposition to the motion.
 Other: _____.

Date Immigration Judge

Certificate of Service

This document was served by: Mail Personal Service
To: Noncitizen Noncitizen c/o Custodial Officer Noncitizen's Attorney DHS
Date: _____ By: Court Staff _____