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**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
901 NORTH STUART ST., STE. 1300  
ARLINGTON, VA 22203**

In the Matter of:

PERRY LOMAX,

Respondent,

In Removal Proceedings.

**File No. A75 555 555**

**RESPONDENT'S MOTION TO  
ADMINISTRATIVELY CLOSE  
REMOVAL PROCEEDINGS  
Hearing Date: November 14, 2007  
Hearing Time: 1:00 p.m.**

**Immigration Judge: O'Leary**

Respondent Perry Lomax, moves the Court for an order administratively closing his removal proceedings; in the alternative, he asks for a continuance.

**I. FACTS**

On April 22, 1998, Respondent's status was adjusted to that of conditional resident under section 219(a) of the Immigration & Nationality Act based on his marriage to Maria Puccini, a U.S. citizen. Pursuant to section 216 of the Act, this status expired on September 29, 2006.

On May 31, 2000, Respondent filed a *Petition to Remove Conditions on Residence*, (Form I-751) with the Immigration & Naturalization Service at its Vermont Service Center (VSC) (Receipt Notice #EAC-00-000-0000) requesting a waiver of the joint filing requirement based on having entered into the marriage in good faith but with the marriage later being terminated (Exhibit 1). Respondent did not seek legal counsel prior to filing his petition. Upon

filing, Respondent's conditional status was extended for a period of one year. On October 25, 2001, the Service sent Respondent a letter indicating that his petition had been relocated from the VSC to the Service's Newark District Office for adjudication (Exhibit 2).

Having received no further information or notice regarding the status of his original petition, on March 16, 2004, Respondent filed a second Form I-751 with the VSC (Receipt # EAC-04-000-00005) (Exhibit 3). Respondent did not seek legal counsel prior to filing his petition. Upon filing, Respondent's conditional status was extended for a period of one year.

On October 12, 2004, the Service issued a Request For Evidence (RFE) of legal termination of marriage due by January 7, 2005 (Exhibit 4). Upon receiving the RFE, Respondent contacted the Service at its National Service Center via telephone and explained to the officer answering that his wife had left him several years before, that he had not since been able to locate her or communicate with her, and as such, he believed the marriage to be terminated when he submitted his petitions. The Service officer informed Respondent that he needed to submit a certificate of divorce in response to the RFE. Respondent then initiated divorce proceedings. When respondent learned that he would not be able to obtain a divorce certificate in time to respond to the RFE, he again called the National Service Center and asked the officer what he should do in order to comply with the Service's request. The officer told him not to worry but to simply forward the proof of termination of marriage as soon as he was able. On October 3, 2005, Respondent received the Final Judgment of Divorce (Exhibit 5) from the Hudson Superior Court in Jersey City, New Jersey, incident to his attorney's Request to Enter Default Judgment before the Court on August 25, 2005 (Exhibit 6), as neither Respondent nor his representative were able to locate Ms. Puccini to serve her with notice all the months preceding. Respondent immediately forwarded a copy of the divorce certificate to the Service.

On April 12, 2006, Respondent contacted the Service in an attempt to learn what had become of his petition and what result the Service had reached (Exhibit 7). Over a year later, the *California* Service Center issued an RFE on August 19, 2006, without indicating a Receipt number, but referring to an I-751 petition (Exhibit 8). Respondent was given until November 11, 2006, to submit proof of marriage termination to the Service. Confused as to why his

petition had been transferred to California when he had no nexus with that jurisdiction and to why he was being asked again to provide proof of marriage termination, but desiring to comply with the Service's request, Respondent again sent his divorce certificate to the Service.

On September 22, 2006, Respondent's second Form I-751 (Receipt # EAC-00-000-00005) was denied by the Service and Respondent was subsequently placed in removal proceedings (Exhibit 9). The Service's decision was based on its position that in order for a petitioner to file a waiver of the joint filing requirement, s/he must have been terminated before requesting the waiver.

When Respondent originally applied for the waiver of the joint filing requirement of the Form I-751, he believed his marriage had been "terminated" as his wife had left him; he did not understand at the time of filing that his marriage had to be *legally* terminated (ie., divorce) in order to be eligible. At present, Respondent has been divorced since October 3, 2005, and is eligible to have the condition on his residence removed based on a waiver of the joint filing requirement. On July 23, 2007, Respondent filed a new I-751 petition with the Service via certified mail which return receipt shows was received by the Vermont Service Center on July 26, 2007 (Exhibit 10). The Service's own Receipt Notice for Respondent's petition (Receipt # EAC-0700000007) lists the notice date as August 7, 2007, and extends Respondent's conditional resident status for a period of one year (Exhibit 11). On September 11, 2007, Respondent attended his appointment at the Service's Application Support Center in Norfolk, Virginia, to have his biometrics captured in conjunction with the processing of his petition (Exhibit 12).

As of present, the Service has not made a decision on this latest Form I-751 and it is currently pending.

## II. STATEMENT OF THE LAW

Section 216 (c) of the Act provides, in part that, "The Attorney General, in the Attorney General's discretion, may remove the conditional basis of the permanent resident status for an alien who fails to meet the requirements of paragraph (1) [ie., joint filing of petition to remove conditional basis] if the alien demonstrates that... (B) the qualifying marriage was entered into in

good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the requirements of paragraph (1) .” INA §216(c)(4)(B). A conditional resident alien described in that section who is unable to meet the requirements under § 216(c)(1) may file Form I-751, Petition to Remove the Conditions on Residence, if the alien requests a waiver. 8 CFR § 216.5(a)(1). A conditional resident alien in removal proceedings may apply for the waiver before a final order of removal is issued. 8 CFR § 216.5(a)(2). As for jurisdiction, the regulations provide that “Form I-751 *shall* be filed with the regional service center director having jurisdiction over the alien's place of residence.” 8 CFR § 216.5(c) [italics added]. The Form I-751 waiver may be filed before, during, or after the 90-day filing window that applies to jointly filed I-751 petitions. *Matter of Stowers*, 22 I&N Dec. 605 (BIA 1999). In discussing the adjudication and decision of waiver applications, § 216.5(c) refers solely to the “director” as considering evidence submitted and making decisions in such cases. 8 CFR § 216.5(e)-(f). Only after the director has made an adverse decision and issued a notice to appear placing the alien in removal proceedings may the alien seek review before an immigration judge. 8 CFR § 216.5(f).

The BIA, in *Stowers*, has held that “the Act and the regulations expressly contemplate an initial adjudication of the waiver application before the regional service center director. BIA Int Dec. 3383 (1999). “To rule otherwise would be to allow circumvention of the regulatory jurisdictional scheme...” *Matter of Anderson*, 20 I&N Dec. 888, 892 (BIA 1994). The BIA also held that “the Immigration Judge erred by not continuing proceedings to allow the Service to adjudicate the respondent’s waiver application.” *Stowers, supra* at 11. Where an alien is prima facie eligible for a waiver under section 216(c)(4) of the Act and wishes to have the Service adjudicate an application for such waiver, proceedings should be continued in order to allow the Service to adjudicate the application. *Matter of Mendes*, 20 I&N Dec. 833 (BIA 1994).

### III. ARGUMENT

Respondent is entitled to apply for a “good faith” waiver as provided for in section 216(c)(4). He is further entitled to submit evidence in support of his application for a waiver and have that application adjudicated by the regional service center director having jurisdiction over his place of residence. Respondent has prepared such an application has filed such with the Service's Vermont Service Center. Until there is a decision on Respondent’s application for a waiver by the Service, the court lacks the authority under 8 CFR § 216.5(f) to review Respondent’s eligibility.

The BIA has held in *Stower* that until the Service has made an initial decision on the respondent’s application for a waiver, the Immigration Judge should adjourn the proceedings. Respondent's case presents the same situation as the BIA spoke to in *Matter of Stower*. Until Respondent has received an official decision by the Service on his waiver application, this should adjourn these proceedings.

### V. CONCLUSION

Based upon the foregoing it is respectfully submitted that this motion should be granted and these proceedings be administratively closed. In the alternative, should proceedings not be administratively closed, Respondent moves the Court to continue the proceedings until such time as the Service has adjudicated his petition.

Dated: September 25, 2007.

Respectfully submitted,

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AMY L. BECERRA  
Attorney for Respondent

## CERTIFICATE OF SERVICE

I, AMY L. BECERRA, do hereby certify that on September 25, 2007, a copy of Respondent's motion to administratively close removal proceedings and a copy of the original "Notice of Entry of Appearance as Attorney" (Form EOIR-28) were served upon the Department of Homeland Security by placing them in the U.S. Mail at Williamsburg, Virginia, addressed to the Chief Counsel, U.S.I.C.E., 901 North Stuart St., 7th Floor, Arlington, VA 22203.

Dated: September 25, 2007.

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Attorney for Respondent

**UNITED STATES DEPARTMENT OF JUSTICE**  
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**  
**IMMIGRATION COURT**  
**901 NORTH STUART ST., SUITE 1300**  
**ARLINGTON, VIRGINIA**

In re the Matter of	)	<b>File No. A75 555 555</b>
	)	
PERRY LOMAX,	)	<b>DECLARATION IN SUPPORT OF</b>
	)	<b>MOTION TO ADMINISTRATIVELY</b>
In Removal Proceedings.	)	<b>CLOSE REMOVAL PROCEEDINGS</b>
_____	)	

I, AMY L. BECERRA, under penalty of perjury, do hereby declare: I am an attorney at law, duly authorized to practice law in the State of Oregon, and attorney for respondent herein.

Respondent concedes service of the Notice to Appear dated November 30, 2006. I certify that respondent was advised of the availability of free legal services. I further certify that respondent has been advised of the right to counsel of choice at no expense to the Government.

Respondent waives formal advisals under 8 C.F.R. § 240.10(a)(1)-(4), and waives the reading of the factual allegations and charges contained in the charging document.

Respondent admits the factual allegations contained in the charging document, with the exception of correcting the date stated in allegation 5, and concedes that he is subject to removal as charged.

Respondent designates Paraguay as the country for removal.

On September 19, 2007, I spoke with Arlington ICE assistant general counsel, Susan Marcantoni regarding the Service's position on this motion. Assistant counsel did not have Respondent's file with her, but she informed me that under the circumstances the Service would not oppose a motion to continue or administratively close this matter, given that the Respondent seeks relief via an I-751 waiver, and that said waiver had already been filed with the Service.

I declare under penalty of perjury that the foregoing is true and correct and that this was executed on September 25, 2007, at Williamsburg, VA.

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**AMY L. BECERRA**



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**U.S. DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
901 NORTH STUART ST., SUITE 1300  
ARLINGTON, VA 22203**

In the Matter of:  
LOMAX, PERRY

Case No.: A75-555-555

RESPONDENT

Docket: Arlington, Virginia

IN REMOVAL PROCEEDINGS

**ORDER OF THE IMMIGRATION JUDGE**

Upon due consideration of the Motion to Administratively Close Removal Proceedings filed in the above entitled matter, and having been satisfied that the non-moving party was accorded notice and an opportunity to respond, it is **HEREBY ORDERED**:

that this case be administratively closed.

Respondent's current address remains: 1234 Smiley Way  
Williamsburg, VA 23188

Respondent's attorney of record is: Amy L. Becerra, Esq.  
Swynford Law Group, P.C.  
1101 Professional Drive, Suite D  
Williamsburg, VA 23185  
(757) 345-3467

\_\_\_\_\_  
Immigration Judge: O'Leary  
Date:

Appeal: NO APPEAL (A/I/B)  
Appeal Due by:

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**CERTIFICATE OF SERVICE**

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)  
TO:  ALIEN  ALIEN c/o Custodial Officer  Alien's ATTY/REP  DHS  
DATE: \_\_\_\_\_ BY: COURT STAFF: \_\_\_\_\_  
Attachments:  EOIR-33  EOIR-28  Legal Services List  Other