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Respondent's Counsel

**UNITED STATES DEPARTMENT OF JUSTICE**  
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**  
**IMMIGRATION COURT**  
**ATLANTA, GEORGIA**

	)	
IN THE MATTER OF	)	IN REMOVAL
	)	PROCEEDINGS
LUONG, Mai	)	File No. A 087 214 763
Respondent.	)	
_____	)	

**RESPONDENT'S WRITTEN PLEADING**

On behalf of my client, I make the following representations:

1. The respondent concedes proper service of the Notice to Appear, dated October 10, 2009.
2. I have explained to the respondent (through an interpreter, if necessary):
  - a. the rights set forth in 8 C.F.R. § 1240.10(a);
  - b. the consequences of failing to appear in court as set forth in INA § 240(b)(5);
  - c. the limitation on discretionary relief for failure to appear set forth in INA § 240(b)(7);
  - d. the consequences of knowingly filing or making a frivolous application as set forth in INA § 208(d)(6);
  - e. the requirement to notify the court within five days of any change of address or telephone number, using Form EOIR-33/IC pursuant to 8 C.F.R. § 1003.15(d).
3. The respondent concedes factual allegations numbers 1, 2 and 3. The respondent denies factual allegations 4 and 5 based on reasons and defenses

stated below.

4. The respondent denies that she is subject to removal as charged under Section 237 (a) (1) (B) of the Immigration and Nationality Act (Act), as amended, in that after admission as a nonimmigrant under Section 101 (a) (15) of the Act, because she has not remained in the United States for a time longer than permitted, in violation of this Act or any other law of the United States.
5. In the event of removal, the respondent; names VIETNAM as the country to which removal should be directed.
6. The respondent will be applying for the following forms of relief from removal:
  - a. Termination of Proceedings
  - b. Withholding of Removal (Restriction on Removal)
  - c. Adjustment of Status
  - d. Cancellation of Removal pursuant to INA § 245 a.
7. If the relief from removal requires an application, the respondent will file the application (other than asylum), no later than fifteen (15) days before the date of the individual calendar hearing, unless otherwise directed by the court. The respondent acknowledges that, if the application(s) are not timely filed, the application(s) will be deemed waived and abandoned under 8 C.F.R. § 1003.31(c).
8. If background and security investigations are required, the respondent has received the DHS biometrics instructions and will timely comply with the instructions. I have explained the instructions to the respondent (through an interpreter, if necessary). In addition, I have explained to the respondent (through an interpreter, if necessary), that, under 8 C.F.R. § 1003.47(d), failure to provide biometrics or other biographical information within the time allowed will constitute abandonment of the application unless the respondent demonstrates that such failure was the result of good cause.
9. On October 5, 2009, the Department of Homeland Security filed a Notice to Appear against the above-named respondent. The filing of this charging document commenced proceedings and vested jurisdiction with this Court. 8 CFR 1003.14(a). Respondent retained counsel for just before the April 28, 2010 NTA and the court continued the NTA for one (1) week to May 5, 2010 at 9:30 am.
10. Respondent concedes proper service of the Notice to Appear (“NTA”) for removal proceedings has been serviced on respondent pursuant to Section 239 of the Immigration and Nationality Act (INA or the Act). 8 CFR1003.13.
11. The Department of Homeland Security must prove by clear and convincing

evidence that the respondent is subject to removal as charged. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. Section 240(c)(3)(A).

### **RESPONDENT'S STATEMENT OF FACTS ON REMOVABILITY**

12. Respondent and her husband are devout Buddhists from Vietnam who consistently maintain that she is married to a USC, THUA VAN LE and in good faith believed that they were first married on May 12, 2008 before her husband first petitioned for her July 10, 2008 with I-130/I-485 petitions. These petitions were denied when CIS decided that USC petitioner had an undissolved prior marriage to respondent's sister, A THI LUONG (Exhibit "NOTICE OF INTENT TO DENY VISA PETITION" dated May 29, 2009 and beginning as page 5 of the court's file). THUA VAN LE had not previously filed for a legal divorce from A THI LUONG even though they lived apart and because THUA cannot read or write English, he asked his son THANH LE to complete and file THUA'S N-400 on July 9, 2008. THANH LE is expected to testify that he erroneously completed that form and forgot to mention his father's marriage to respondent instead of his mother, A THI LUONG. THANH's and A THI's attached affidavits and proffered testimony verify that A THI divorced from Respondent's husband and that Respondent and USC, THUA VAN LE have a truly bona fide marriage. All members of respondent's family listed below as affiants (see attached AFFIDAVITS) are prepared to testify that their cultural heritage and understanding of marriage law was confused due to their previous understanding of what some state's in this country have abolished and yet which the CIS and all forms (including the N-400 and I-485 C) seem to recognize, namely "common law marriage." They all now understand that this was error on their part and deeply regret this mistake.
13. In order to rectify this disparity respondent's husband first retained Attorney Beryl Ferris (witness listed below) to get a divorce and from A THI even though no marriage was ever registered in Vietnam but CIS considered it an undissolved marriage. The Superior Court of Gwinnett County, Georgia issued a final judgment and decree of divorce between THUA VAN LE and A THI LOUNG December 1, 2009; respondent and THUA VAN LE married immediately thereafter on the same day before the Gwinnett County Probate Court; and THUA VAN LE filed a new I-130 petition on December 6, 2009 thereby receiving a receipt number WAC-10-69-10011 for which current status is "testing and interview" with a national average processing time of 18.1 months (COMPOSITE EXHIBIT "E"). Therefore, the couple who intended to be married to each other then remarried each other. Attorney FERRIS filed the second I-130 petition, which remains pending, but has been transferred March 3, 2010 to ATLANTA for a marriage interview to be scheduled. No interview has been scheduled yet. Attorney FERRIS knows of no reason why respondent will not qualify for adjustment once the I-130 is

approved.

14. Five affidavits with extensive Composite Exhibits “A”, “B”, “C” and “D” from respondent’s family are filed with this pleading and incorporated by reference. (See Affidavits from THUA VAN LE, TAM LE, XUAN PHAN, A THI LUONG and THANH LE).
15. Respondent has re-married her husband once his problem [undissolved possible common law marriage] was resolved through divorce (COMPOSITE EXHIBIT “E”).
16. COMPOSITE EXHIBIT “E” includes the receipt for the filing the new I-130 and a very recent copy of the internet inquiry of the case status showing that it is in “testing and interview” stage. This COMPOSITE EXHIBIT “E” also includes complete response to those items requested by in the Notice of Intent filed by ICE Counsel.
17. In the alternative respondent requests an Individual Hearing date to depose the respondents witnesses set in 2011 or early 2012 hoping to have a joint motion with the government to remand prior to then. The court may set this for a hearing on the Velarde merits [real marriage even though post-NTA] or grant the continuance over ICE counsel objection.

#### **PROFERRED WITNESSES EVIDENCE FOR RESPONDENT AT HEARING**

18. RESPONDENT, MAI LUONG
19. BERYL V. BERGQUIST [professionally known as FARRIS], Beryl Farris LLC Immigration Law, P.O. Box 451129, Atlanta, GA 31145-9129 Telephone 678-937-0713 and 678-937-0714fax
20. All affiants in the attached affidavits: THUA VAN LE, TAM LE, XUAN PHAN, A THI LUONG and THANH LE
21. Documentary and photographic include the attached COMPOSITE EXHIBITS A, B, C, D, E and F.
22. Additional anticipated evidence at hearing shall include testimony of the above listed witnesses and any additional proffers of evidence admitted by the court, and stipulations made by the government or respondent.

#### **RESPONDENT’S ARGUMENT OF LAW**

23. As a basis for motion to continue and any other remedies available by law respondent argues that her case is a marriage to a USC post-NTA with very strong similarities to the Ibenez and Velarde cases mentioned below.
24. The Eleventh Circuit Court of Appeals recently vacated and remanded a case to the BIA to reopen removal proceedings on a post-NTA marriage and I-130 application like petitioner’s for Claudia Patricia Potes Ibanez vs. U.S.

Attorney General (Docket Number 08-15300, June 15, 2009, 11<sup>th</sup> Cir.) Respondent maintains that it is in the all party's best interest to recognize her petition for the remedies requested above require at the very least a stay or continue proceedings until the pending I-130 is determined. Under the Ibanez case the 11<sup>th</sup> Circuit Court of Appeals has identified at least three bases upon which the BIA could deny a motion to reopen: "(1) failure to establish a prima facie case of eligibility for adjustment of status; (2) failure to introduce evidence that was material and previously unavailable; and (3) a determination that despite the alien's statutory eligibility for relief, he or she is not entitled to a favorable exercise of discretion." Id.

25. This court of first impression has the potentially more discretion to grant respondent's motion to continue than the BIA had to reopen the removal proceedings in the Ibanez case. If respondent is forced to proceed with a full hearing without the benefit of having a final determination from CIS on the pending December 6, 2009 I-130 petition, then she will be forced to appeal the BIA with a motion to reopen as in the Ibanez case, where the following five more difficult requirements for appellate review exist: (1) the motion is timely filed; (2) the motion is not numerically barred by the regulations; (3) the motion is not barred by Matter of Shaar, 21 I.&N. Dec. 541 (BIA 1996), or on any other procedural grounds; (4) the motion presents clear and convincing evidence indicating a strong likelihood that the [petitioner's] marriage is bona fide; and (5) [DHS] either does not oppose the motion or bases its opposition solely on Matter of Arthur, [20 I.&N. Dec. 475 (BIA 1992)]. In Re Velarde-Pacheco, 23 I.&N. Dec. 253, 256 (BIA 2002). Under the INA, the Attorney General has the discretion to adjust the status of an alien to that of a lawful permanent resident if: "(1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed." 8 U.S.C. § 1255(a). The INA further provides that "any citizen of the United States claiming that an alien is entitled . . . to an immediate relative status . . . may file a petition with the Attorney General for such classification." 8 U.S.C. § 1154(a)(1)(A)(i). The term "immediate relative" as used in that provision includes "children, spouses, and parents of a citizen of the United States." 8 U.S.C. § 1151(b)(2)(A)(i). When an alien marries a U.S. citizen, the citizen spouse may file a I-130 petition to establish the existence of a legal relationship between the spouse and the alien. See Alvarez Acosta v. U.S. Att'y Gen., 524 F.3d 1191, 1194 n.6 (11th Cir. 2008). "If the beneficiary is the spouse of an United States citizen, as here, then the approved I-130 provides the evidentiary basis for the beneficiary's adjustment of status via Form I-485, Application to Register Permanent Residence or Adjust Status." Id.
26. An alien seeking an immigrant visa based on a marriage entered into during the pendency of "administrative or judicial proceedings . . . regarding the

alien's right to be admitted or remain in the United States" generally is not eligible for a status adjustment under 8 U.S.C. § 1255(a). 8 U.S.C. § 1255(e)(1)–(2). However, the statute exempts from this bar any alien who can "establish[] by clear and convincing evidence to the satisfaction of the Attorney General" that her marriage was bona fide and not entered into solely "for the purpose of procuring the alien's admission as an immigrant." 8 U.S.C. § 1255(e)(3). An approved I-130 petition based upon the marriage in question "will be considered primary evidence of eligibility for the bona fide marriage exemption." 8 C.F.R. § 1245.1(c)(8)(v). This regulation involves the adjustment of status for aliens already residing in the United States. See *id.* The 11<sup>th</sup> Circuit Court of Appeals held a prior version of § 1245.1(c)(8), which addressed the unrelated issue of the adjustment of status for arriving aliens, invalid. See Scheerer v. U.S. Att'y Gen., (2008). An applicant who submits an approved petition would need to provide additional evidence to establish that her marriage was bona fide only if the district director found such evidence necessary and ordered her to provide it. See *id.*

27. Although respondent and her husband could not at first provide the evidence requested in the May 29, 2009 Notice of Intent to Deny Visa Petition, they are certain that Attorney Farris has satisfactorily assisted them in the new December 6, 2009 I-130 petition so as to submit this court with an approved I-130 visa petition after the appropriate processing period is over. Then in compliance with the Ibanez case, she will provide "primary evidence" of her eligibility for the bona fide marriage exemption as contemplated under the relevant regulations. 8 C.F.R. § 1245.1(c)(8)(v). Respondent has not been given the opportunity to present an approved I-130, because the current application for that petition is pending. Just as the BIA in the Ibanez case, the government in this case suggests that she had not provided the kind of documentation necessary to make out a prima facie case of eligibility for the bona fide marriage exemption.
28. Similar to the Ibanez case, the government invites this court to avoid mentioning the pending (and hopefully approved) I-130 petition. The government's position would not allow this court to make an effort to discuss the evidentiary standards provided in § 1245.1(c)(8)(v). Perhaps the government maintains that since § 1245.1(c)(8)(v) treats an approved I-130 petition as "primary evidence" of the bona fides of a marriage that it does not need to specify whether pending action by CIS would become "clear and convincing evidence" of the same. The court should not act within its discretion in finding that the petition here did not meet the latter standard, because CIS has not made a determination on the pending petition. See Velarde-Pacheco, 23 I.&N. Dec. at 256 (noting that the BIA has discretion to reopen only when there is "clear and convincing evidence indicating a strong likelihood that the [petitioner's] marriage is bona fide"); 8 C.F.R. § 1245.1(c)(8)(v).

29. Section 1245.1(c)(8)(v) indicates that an approved I-130 petition would be sufficient to trigger the bona fide marriage exemption except when the district director, who is in charge of approving the petition, determines that supporting information is needed. See 8 C.F.R. § 1245.1(c)(8)(v). Only when the director makes this finding would the alien need to produce “evidence which clearly and convincingly establishes that the marriage was entered into in good faith.” *Id.* None of the affidavits and virtually all the attached exhibits were unavailable for the first I-130 petition in this case. And the supporting information that was previously requested and used as a basis for denial of that first petition is fully available for the upcoming marriage interview. Once the new December 6, 2009 I-130 is granted Section 1245.1(c)(8)(v) “implicitly assumes that an approved I-130 petition on its own would be clear and convincing” (Ibenez at 10). And any discussion of potentially corroborating documents would not fall under the portion of 8 C.F.R. § 1245.1(c)(8)(v), which addresses the alien’s need to submit additional documentation, since that language refers only to determinations made by the district director. See 8 C.F.R. § 1245.1(c)(8)(v).
30. Respondent maintains that the attached affidavits and exhibits to this petition should be received as tendered evidence of eligibility for the bona fide marriage exemption, apart from those instances in which the director required the alien to submit yet even more evidence. See Patel v. Ashcroft, 375 F.3d 693, 696 (8th Cir. 2004).
31. Agyeman v. INS, 296 F.3d 871, 879 (9th Cir. 2002) (citing INS v. Chadha, 462 U.S. 919, 937, 103 S. Ct. 2764, 2777 (1983)) “refers to the IJ’s ultimate discretionary decision to accord or deny the status after examining the merits of an eligible alien’s application,” rather than the issue of whether an alien has met her evidentiary burden for eligibility for the exemption. Patel, 375 F.3d at 697; see also Agyeman, 296 F.3d at 879 (noting that although an approved I-130 would “establish[] eligibility for status, the Attorney General — or in the context of deportation proceedings, the IJ — must still decide to accord the status”). Therefore, only this court has the authority to adjust respondent’s status.
32. The respondent respectfully moves this court for the herein mentioned continuance of proceedings until CIS has made a final decision on the pending I-130 petition. Then she shall justifiably “have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds so not apply.” 8 C.F.R. 1240.8(d).
33. Respondent respectfully moves this court to continue proceedings to a date

certain after April 7, 2011, so as to find whether it appears that the respondent may statutorily qualify for the relief of adjusted status after a favorable decision from CIS on the pending I-130 petition. Should the I-130 be granted by CIS it would be respondent's eligibility for such relief and not removal before this Court. In the alternative respondent pleads for the following remedies:

- a. Termination of Proceedings
  - b. Withholding of Removal (Restriction on Removal)
  - c. Adjustment of Status
  - d. Cancellation of Removal pursuant to INA § 245 a.
34. The respondent estimates that 2 hours will be required for the respondent to present the case.
35. It is requested that the Immigration Court order an interpreter proficient in the language, VIETNAMESE.

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Ronald Ehlbert Smith  
Attorney for the Respondent

### **RESPONDENT'S PLEADING DECLARATION**

I, MAI LUONG, have been advised of my rights in these proceedings by my attorney or representative. I understand those rights. I waive a further explanation of those rights by this court.

I have been advised by my attorney or representative of the consequences of failing to appear for a hearing. I have also been advised by my attorney of the consequences of failing to appear for a scheduled date of departure or deportation. I understand those consequences.

I have been advised by my attorney or representative of the consequences of knowingly filing a frivolous asylum application. I understand those consequences.

I have been advised by my attorney or representative of the consequences of failing to follow the DHS biometrics instructions within the time allowed. I understand those consequences.

I understand that if my mailing address changes I must notify the court within 5 days of such change by completing an Alien's Change of Address Form (Form EOIR-33/IC) and filing it with this court.

Finally, my attorney or representative has explained to me what this Written Pleading says. I understand it, I agree with it, and I request that the court accept it as my pleading.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Respondent