RESPONDENT'S MEMORANDUM REGARDING
HER ABILITY TO APPLY FOR STATUS ADJUSTMENT UNDER SECTION 209

Respondent submits this memorandum in response to the Court's request at the [DATE], 20XX Master Calendar Hearing for a summary of the legal basis for Respondent's forthcoming application for adjustment of status under Section 209 of the Immigration and Nationality Act, 8 U.S.C. § 1159.

I. This Court Has the Jurisdiction to Consider Respondent's Application to Adjust Status under 209(b).

Respondent is entitled to present an application for adjustment of status under Section 209 as part of these proceedings.[1] The review of adjustment of status applications for aliens granted asylum while within the U.S. is regulated under 8 C.F.R. § 1209.2 (2004). It is well-established that an asylee can file an adjustment application for the immigration court's consideration during deportation proceedings (Section 240 proceedings). *Id.* at § 1209.2(c). In such proceedings, the Immigration Judge has exclusive jurisdiction over the adjustment application, including the adjudication of any requests for waivers of inadmissibility. *See* 8 C.F.R. § 1240.11(a)(2) (2013) (Judges have authority to adjudicate requests for waivers of inadmissibility "[i]n conjunction with *any* application for creation of status of an alien lawfully admitted for permanent residence made to an immigration judge" and "shall afford the alien an opportunity to make application during the hearing.").

Courts have ruled that an asylee may similarly apply for adjustment of status under Section 209 in termination proceedings. *See In Re K-A-*, 23 I. & N. Dec. 661, 665 (BIA 2004);

[1] Under Section 209, an asylee seeking status adjustment must apply and show that: (i) she has been physically present in the United States for at least one year after being granted asylum; (ii) she continues to be a "refugee" under Section 101(a)(42)(A) of the Act; (iii) she is not "firmly resettled" in any foreign country, and; (iv) she is admissible to the United States as an immigrant. 8 U.S.C. § 1159(b).

see also In re V-X-, 26 I. & N. Dec. 147, 154 n.1 (BIA 2013) ("[A]n Immigration Judge need not reach the issue of termination of asylum status if the alien is eligible for, and deserving of, some form of relief that would make termination of asylum status moot, such as adjustment of status under section 209 of the Acts.").

As with deportation proceedings, the Immigration Judge governing a termination proceeding has exclusive jurisdiction to consider a request for waiver of certain ineligibility grounds. *See* 8 C.F.R. § 1240.11 ("[I]f the alien is inadmissible under any provision of section 212(a) of the Act, and believes that he or she meets the eligibility requirements for a waiver of the ground of inadmissibility, he or she may apply to the immigration judge for such waiver."); *see also In Re K-A-*, 23 I. & N. Dec. at 664. Unlike the granting of asylum under Section 208, Section 209(c) expressly allows for waiver of certain inadmissibility considerations including aggravated felonies and crimes of moral turpitude. *Compare* 8 U.S.C. § 1159(c) *with* 8 U.S.C. § 1158(c)(2). Thus, even if the asylee has committed an aggravated felony or a crime of moral turpitude, which would be grounds to terminate the asylee's status, an Immigration Judge may instead, for "humanitarian purposes, to assure family unity, or when it is otherwise in the public interest," issue a waiver and grant the application for adjustment of status. 8 U.S.C. § 1159(c).

Moreover, a previous denial of an application for an adjustment of status submitted to the USCIS does not preclude this Court from considering a newly submitted I-485 application. *See* 8 C.F.R. § 1209.2(f) (stating a previous "denial" of an asylee's adjustment "will be without prejudice to the alien's right to renew the application in proceedings under part 240 of this chapter."). This Court can accept a new application for adjustment while the respondent is before it. *See* 8 C.F.R. § 1240.11(a)(2). Likewise, this Court can review an adjustment application even if this Court terminates the asylum status before reviewing the availability of

relief under Section 209. *See Siwe v. Holder*, 742 F.3d 603, 608 (5th Cir. 2014) ("Nowhere in this section does Congress require that an alien's asylum, once granted, still must be in effect at the time he applies for adjustment of status: Such a requirement is conspicuously absent.").

In re K-A- is instructive. There, the court adjusted the status under Section 209 of an asylee whose asylum status DHS sought to terminate on the grounds that she committed a crime of moral turpitude and an aggravated felony after she was convicted of criminal possession of a forged instrument. 23 I. & N. Dec. at 662. The asylee-respondent conceded she was removable, but expressed her intention to file an application for adjustment of status under Section 209(b). *Id.* Although the Immigration Judge acknowledged the respondent's status was subject to termination, she "concluded that the respondent's adjustment of status would constitute 'relief from termination.'" *Id.* The court granted the respondent's application given the extreme hardship respondent would have faced if she was forced to return to her home county. *Id.* On appeal, the Board of Immigration Appeals upheld the Immigration Judge's authority to review the respondent's adjustment application. *Id.* at 663–64. The court also upheld the ability of the Immigration Judge to grant adjustment to an asylee DHS has placed into asylum termination and removal proceedings because of an aggravated felony or a crime of moral turpitude. *Id.*

Other courts have likewise recognized the ability of an Immigration Judge to adjust status for an asylee placed in removal proceedings with an aggravated felony or a crime of moral turpitude. *See, e.g.*, *Rivas-Gomez v. Gonzales*, 225 F. App'x 680, 682 (9th Cir. 2007). In *Rivas-Gomez*, the government sought removal of a respondent who plead guilty to felony rape, which the immigration court recognized as an aggravated felony and a crime of moral turpitude. *See id.* at 682. The respondent appealed the immigration court's denial of waiver because, among other reasons, the immigration court failed to properly consider the applicability of a waiver to the

respondent's application for adjustment. *Id.* at 663. The Ninth Circuit acknowledged that "despite his aggravated felony conviction, Rivas remained eligible to apply for adjustment of status" if he obtained a waiver for his aggravated felony and crime of moral turpitude under 8 U.S.C. § 1159(c). *Id.* The Ninth Circuit then remanded the case for the immigration court to properly consider the application of waiver in a fact-based, individualized approach as required by law. *Id.* at 663.

Even courts that have declined to adjust the status of respondents have agreed that the application to adjust status was properly before the court as part of the termination proceedings. *See, e.g.*, *Dhillon v. Mukasey*, 319 F. App'x 469, 470 (9th Cir. 2009) (noting the "[Immigration Judge] has exclusive jurisdiction over an adjustment of status application during removal proceedings"). In large part, those courts denied the application to adjust status because (unlike the present circumstances), the respondents in those case had statutorily unwaivable convictions. *Compare In Re K-A-*, 23 I. & N. Dec. at 662 (waiving crime of fraud for forged check) *with Cabrera v. Gonzales*, 185 F. App'x 58, 60 (2d Cir. 2006) (2d Cir. 2006) (noting respondent was ineligible for adjustment because, among other reasons inapplicable here, a violation of a law relating to a controlled substance forbids adjustment).

II. CONCLUSION

For the above mentioned reasons, the Court should allow Respondent to apply for an adjustment of status as part of these proceedings.