UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BALTIMORE, MARYLAND

IN THE MATTER OF	**IN REMOVAL PROCEEDINGS**
[redacted]	**A#** [redacted]
(RESPONDENT)	

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S ADJUSTMENT OF STATUS APPLICATION

COMES NOW INTO COURT, Respondent, [redacted] herein through undersigned counsel, and respectfully requests this Court accept this memorandum of law in support of his adjustment of status application and establishing his removability under section 237(a)(1)(B) of the Immigration and Nationality Act thereby allowing him to adjust his status in this Court.

I. STATEMENT OF FACTS

Respondent is a forty-three year old native of Paraguay. *See* Exh. K, Respondent's Birth Certificate with English Translation. Respondent was admitted into the United States through [redacted] on [redacted] 2001 as a non-immigrant (B2) Temporary Visitor. *See* Exh. E, Copy of I-94 and admission stamp. Respondent overstayed his B2 visa and remained in the United States. *See* Exh. E, Copy of I-94 and admission stamp, and Exh. J, Notice to Appear. While residing in the United States, Respondent met and fell in love with [redacted] a United States citizen, whom he married on [redacted] in [redacted]

Maryland. *See* Exh. C, Copy of Respondent and U.S. Citizen Spouse's Marriage Certificate. Seeking to legalize his status and believing it best to travel back to Paraguay to do so, Respondent planned a trip to Paraguay. *See* Exh. J, Respondent's Declaration at ¶2. His travel itinerary involved a stop in [redacted]. *See* Exh. J, Respondent's Declaration at ¶2, and Exh. L, Copy of Respondent's [redacted] Boarding Pass from December 13, 2009

On [redacted] 2009, Respondent boarded an airplane bound for [redacted]. *See* Exh. L, Copy of Respondent's [redacted] Boarding Pass from [redacted] 2009. Respondent arrived at the [redacted] on [redacted] 2009. *See* Exh. J, Respondent's Declaration at ¶3. As Respondent passed through customs, the inspecting [redacted] Border Patrol officers accused him of presenting a false passport. *See* Exh. J, Respondent's Declaration at ¶¶3-4. Respondent attempted to explain that his passport was valid, but the officer did not believe him and did not allow Respondent to clear customs. *See* Exh. J, Respondent's Declaration at ¶4. Two [redacted] Border Patrol officers then took Respondent out of the customs line and to an area inside the airport where they detained individuals seeking to enter Spain, but posing admissibility problems. *Id.* A uniformed, armed [redacted] official guarded this area by standing outside of the door. *Id.*. Respondent was held in this area for approximately twelve hours and interrogated at least twice by [redacted] immigration officials during this time. *Id*. Respondent was offered no food or water during this time. *See* Exh. J, Respondent's Declaration at ¶8. That evening, at approximately 7:00PM, Respondent was handcuffed and taken to another area of the airport where other individuals posing admission problems were held after [redacted] immigration officials continued to allege Respondent presented fraudulent documents. *See* Exh. J, Respondent's Declaration at ¶ 6. The door to this area remained locked and was also guarded

by uniformed guards carrying weapons. *Id*. Respondent was finally given food later that evening at approximately 10:00PM. *See* Exh. J, Respondent's Declaration at ¶8.

Respondent remained in this enclosed and guarded area of the airport until [redacted] 2009 when he was returned to the United States. *See* Exh. P, Copy of Respondent's [redacted] Boarding Pass from [redacted] 2009, and Exh. J, Respondent's Declaration at ¶¶21-23. Respondent was never allowed to leave this area. *See* Exh. J, Respondent's Declaration at ¶¶12 & 20. Respondent did not have access to his luggage. *See* Exh. J, Respondent's Declaration at ¶9. If Respondent wanted access to the phone or basic necessities, Respondent had to request and pay for these. *See* Exh. J, Respondent's Declaration at ¶7. [redacted] immigration officials provided Respondent and others with meals. *See* Exh. J, Respondent's Declaration at ¶11. Respondent witnessed and spoke out against—to no avail—against [redacted] immigration officials for beating a Nigerian man and neglecting a pregnant Nigerian woman. *See* Exh. J, Respondent's Declaration at ¶¶14-15, 17-18. Respondent was also mistreated and verbally abused by [redacted] immigration officials. *See* Exh. J, Respondent's Declaration at ¶12. The 2009 Department of State Human Rights Report on [redacted] describes accounts of abuse similar to those of Respondent. *See* Exh. M, 2009 U.S. Department of State Human Rights Report: [redacted].

On [redacted] 2009, at approximately 8:00AM, Respondent had a court hearing inside the airport. *See* Exh. J, Respondent's Declaration at ¶21. Two uniformed [redacted] immigration officials took Respondent outside of the area where he was being held to meet appointed legal counsel. *Id*. Respondent was then taken to see a judge who asked if Respondent wanted to appeal the government's decision denying him entry to [redacted] and returning him to the United States. *Id*. Respondent replied that he did not wish to appeal as he never intended to stay in

Spain. *Id*. One of the immigration officials who escorted him signed some documents and informed Respondent that he was "inadmissible." *Id*.

The documents Respondent was provided were entitled "Notice of the Resolution of Refusal of Entrance and of Return" and "Refusal of Entrance at the Border." *See* Exh. N, Refusal of Entrance at the Border from December 14, 2009, with English translation, and Exh. O, Notice of the Resolution of Refusal of Entrance and of Return, with English translation. Both documents expressly state that Respondent was "refused entrance at the border" because he "lacked adequate documentation to justify the purpose and conditions relative to his stay." *Id*.

Respondent was returned to the United States at 11:50AM on [redacted] 2009 on an [redacted] flight bound for [redacted] Illinois. *See* Exh. P, Copy of Respondent's [redacted] Boarding Pass from [redacted] 2009. When Respondent arrived at [redacted], he was interviewed by a Customs and Border Patrol (CBP) officer. *See* Exh. J, Respondent's Declaration at ¶24. The CBP officer retained Respondent's passport and issued him an I-94 stating Respondent had been paroled into the United States until [redacted] 2010 pending removal proceedings. *See* Exh. J, Respondent's Declaration at ¶24, and Exh. Q, Respondent's I-94 dated [redacted]2009 stating Respondent was Paroled Pending 240 Removal Proceedings. Respondent was also issued a Notice to Appear charging him with removability pursuant to section 237 (a) (i) (B) of the INA. *See* Exh. R, Respondent's Notice to Appear from [redacted] 2009.

Respondent's U.S. citizen wife filed an I-130 petition on behalf of Respondent on [redacted] 2010. On or about [redacted] 2010, the Department of Homeland Security filed the Notice to Appear with the Immigration Court in Chicago, Illinois. U.S. Citizenship and Immigration Services approved the I-130 petition on [redacted] 2010. *See* Exh. B, Copy of Approval Notice

for Petition for Alien Relative Form I-130 for U.S. Citizen Spouse. Respondent submitted a Motion to Change Venue to the Chicago Immigration Court requesting a transfer to the Baltimore Immigration Court, which was granted on [redacted] 2010. Respondent attended a Master Calendar Hearing on [redacted] 2010 and then an Individual Hearing on [redacted] 2010. At the Individual Hearing, the Department of Homeland Security indicated for the first time that Respondent was not subject to the jurisdiction of the Immigration Court because he was paroled on [redacted] 2010 and that the Notice to Appear was incorrect. Respondent interpreted the Department of Homeland Security's lack of objection to the Immigration Court's jurisdiction at the Master Calendar Hearing as knowledge of and concession to the argument posed herein: Respondent never departed the United States because he was refused admission to [redacted] and therefore is still subject to the section 237(a)(i)(B) removability charge noted on the NTA and this Court's jurisdiction.

II. LEGAL STANDARD

No statutory definition of "departure" exists. 69 No. Interpreter Releases 384. In *Matter of T*, 6 I&N Dec. 638 (BIA 1955), however, the Board of Immigration Appeals ("the Board") held that an alien who left the United States but did not "enter" the country of destination did not "enter" the United States upon returning here. Rather, as a quirk of the law, the alien had effectively never left the United States. *Id.* The Board relied on the alien's refusal of entry at a foreign post, confinement on the ship, and return to the United States in holding the alien's arrival did not constitute an "entry" into the United States. *Id.* The Board then held that because the alien did not effectuate an entry, "there [was] no basis upon which the ground of inadmissibility urged by the district director can be sustained." *Id.*

Since *Matter of T*, the Board has consistently applied this standard to other similar cases even after the revised language of section 101(a)(13) of the INA replacing the term "entry" with those of "admission" and "'admitted." In *In re: Alcides Mariano Da Silva Baptista*, 2005 WL 3016029 (BIA August 15, 2005), the alien exited the United States and was physically present for a "significant time" in Canada while seeking asylum, but was found never to have departed the United States. The Board stated:

> [I]n order for there to be a recognized departure from the United States, there must be an "entry" into another country. Without such an "entry" into another country, it cannot be said that an alien has departed the United States. *Id.* . . . [A]n "entry" into another country cannot be said to have been made when an alien returns to the United States after having been denied entry into a foreign country to which he intended to proceed, *although physically in such foreign country.*
>
> In the respondent's case, although he was physically present in Canada for significant time while seeking asylum, he was denied admission by Canada. The respondent was never granted admission to Canada and, therefore, pursuant to our decision in *Matter of T* . . . he cannot now be found to have "departed" the United States.

Thus, there cannot be a "departure" from the United States without an "entry" into another country, and mere physical presence in a foreign country does not connote "entry." Rather, to "enter" a foreign country, an individual must be "granted admission" to that country. *Id*.

Two years after deciding *In re: Alcides Mariano Da Silva Baptista* and one year after the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the Board held that an alien who left the United States for Singapore, was denied entry in Singapore, and returned to the United States never departed the United States, and was therefore not an "arriving alien." *In Re: You Theng Wang*, 2007 WL 2463946 (BIA August 2, 2007); *see also Dimitrov v. Mukasey*, 278 Fed. Appx. 26, 27 (2d Cir. 2008) ("an alien who goes abroad but is returned to the United States after having been formally denied admission by the foreign

country to which he intended to proceed is not an applicant for admission, since, in contemplation of law, the alien did not leave the United States") (citing *Matter of T*, 6 I&N Dec. 638 (BIA 1955)); *Handa v. Clark*, 401 F.3d 1129, 1133 (9th Cir. 2005) (holding that alien allowed by Canadian officials to drive his car several feet into Canada before he turned vehicle around and returned to the United States did not depart the United States). Again, despite the passage IIRIRA, the Board specifically stated its decision in *Matter of T-*, 6 I&N Dec. 638 (BIA 1955), remains applicable to the respondent's case despite the replacement of the term "entry" with those of "admission" and "admitted" in section 101(a)(13)of the INA. The Board distinguished *In Re: You Theng Wang* from *Matter of R-D-*, 24 I&N Dec. 221, 223 (BIA 2007) in which the Board held a departure did occur and on which DHS relied, because the alien in that case was given permission to go into Canada to apply for refugee status, was never detained, and remained in Canada for several years free to move about the country.

Physical presence in a foreign country does not connote an "entry," nor does the length of an individual's presence in a foreign country. For example, the Board held that even though an alien had exited the United States and was physically present in Canada in for 22 months while seeking asylum there, she had not "departed" the United States because Canada ultimately denied her entry:

> In the respondent's case, although she was physically present in Canada for significant periods of time while seeking asylum, she was denied admission by Canada each time. The respondent was never granted admission to Canada and, therefore, pursuant to our decision in *Matter of T*., she cannot now claim that she "departed" the United States. *In re Claudia F. Ramos*, 2005 WL 3802245 (BIA Nov. 29 2005).

Therefore, whether the alien is affirmatively admitted into another country is the dispositive factor in determining the effectuation of a departure from the United States. Additionally,

detention at a port of entry or vessel and a subsequent return to the United States signaling a rejection of the alien are two other factors to consider.

III. ARGUMENT

A. RESPONDENT DID NOT DEPART THE UNITED STATES

A person who physically leaves the United States, but does not enter another country does not "enter" the United States upon return. *Matter of T-*, 6 I&N Dec. 638 (BIA 1955). *Matter of T-*, the seminal case on whether an alien has "departed" the United States, as well as the Board's application of *Matter of T* to subsequent cases, prove Respondent did not depart the United States. Respondent did not depart the United States because (a). Respondent was immediately and consistently detained at the [redacted] for three days, (b). [redacted] refused to admit him, and (c). [redacted] returned Respondent to the United States upon denying his entry.

a. Respondent was immediately and continuously detained at the [redacted], a port of entry, thereby signaling [redacted]'s informal refusal of Respondent.

Like the Respondent in *Matter of T-*, Respondent was deprived of his liberty and confined to a transitory area—the [redacted]— the entire time he was in [redacted]. 6 I&N Dec. 638 (BIA 1955). When Respondent arrived at the [redacted] on [redacted] 2009, he attempted to clear customs. However, [redacted] border officials accused Respondent of possessing a fraudulent passport. [redacted] officials then escorted Respondent to an enclosed interrogation area guarded by a uniformed and armed [redacted] officer where he was kept the majority of the day without food or water. [redacted] officials interrogated Respondent throughout the day and ultimately decided to detain Respondent along with other foreign nationals posing admissibility issues instead of allowing him to go through customs and enter [redacted]. Respondent

was handcuffed and escorted to the detention area resembling jail quarters and guarded by armed and uniformed [redacted] officials. Respondent and others who were detained alongside of him were denied access to their luggage and personal belongings. [redacted] officials provided the detainees meals during pre-set hours. Respondent was denied access and communication to the outside world and the only access provided was through a telephone and the purchase of an expensive phone card. Respondent even witnessed the abused of other detainees and when he attempted to intervene, [redacted] officials threatened him. Respondent was kept in these conditions for three days; [redacted] 2009. Though the length of physical presence in another country is not determinative to this issue, compared to the Respondent in *Matter of R-D-* who spent several years in Canada after being granted admission, Respondent in this case spent a very insignificant amount of time in Spain and was neither informally nor formally admitted. Therefore, Respondent was detained in the [redacted] the entire duration of his time in [redacted] signaling [redacted]'s informal refusal of Respondent.

b. [redacted] formally refused to admit Respondent.

Similar to the Respondent in *Matter of T-*, 6 I&N Dec. 638 (BIA 1955)and unlike the Respondent in *Matter of R-D-*, 24 I&N Dec. 221, 223 (BIA 2007), Respondent was formally denied admission into [redacted] and pursuant European Union Law. Respondent appeared before a judge in the [redacted] on [redacted] 2009 who asked Respondent if he wished to appeal the government's decision denying him entry into [redacted] and retuning him to the United States. The government then offered Respondent two documents, three pages in length, entitled "Notice of the Resolution of Refusal of Entrance and of Return" and "Refusal of Entrance at the Border." *See* Exh. N, Refusal of Entrance at the Border from [redacted] 2009, with English translation, and Exh. O, Notice of the Resolution of Refusal of Entrance and of Return, with

English translation. These documents unequivocally state [redacted]'s refusal to formally admit Respondent through statements such as, "I decide to refuse entrance into the national territory, to the citizen of Paraguay [redacted], as well as the return to his place of proceeding, [redacted], which will be effected at 11;50 hours the day [redacted]09 in the transportation company Iberia." *Id*. Aside from these formal documents, Respondent was told by other [redacted] officials that he was "inadmissible." Therefore, Respondent was formally refused admission into [redacted] and was never admitted.

c. [redacted] returned Respondent to the United States upon denying him admission.

Just as the respondent in *In Re: You Theng Wang* was returned to the United States following Singapore's refusal to admit him, the Respondent here was soon returned to the United States following [redacted] refusal to formally admit him. On [redacted] 2009, Respondent was sent back to the United States. Respondent was placed on an [redacted] flight to [redacted], Illinois by three uniformed and armed [redacted] officials escorted me. *See* Exh. P, Copy of Respondent's [redacted] Boarding Pass from [redacted] 2009. In case the documents Respondent received were not clear, one of the [redacted] officials told a flight attendant that Respondent was being "returned". Respondent arrived at [redacted] the same day and then flew to Washington, D.C. the next day; he has since been in the United States residing with his wife in [redacted] Maryland. Therefore, [redacted] returned Respondent to the United States after formally denying him admission.

B. RESPONDENT IS NOT AN ARRIVING ALIEN BECAUSE HE DID NOT DEPART THE UNITED STATES

The regulations at section 1.1(q) state:

> The term arriving alien means an applicant for admission *coming or attempting to come into the United States* at a port-of-entry, or an alien seeking transit through

> the United States at a port-of-entry, or an alien interdicted in international or United States waters and *brought into the United States* by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. 8 C.F.R § 1.1 (q) (emphasis added).

The Board has previously dealt with the exact facts presented here and held, pursuant to its precedential decision in *Matter of T-*, that an alien who left the United States for Singapore, was denied entry in Singapore, and returned to the United States never departed the United States, and was therefore not an "arriving alien" subject to removal under section 212(a)(7)(A)(i)(I) of the INA. *In Re: You Theng Wang*, 2007 WL 2463946 (BIA August 2, 2007). As explained above, Respondent did not depart the United States and is therefore not an "arriving alien" subject to removal under section 212(a)(7)(A)(i)(I) of the INA. Instead, Respondent remains removable under section 237(a)(1)(B) of the INA pursuant to his admission into the United States through Miami International Airport on March 15, 2001 as a non-immigrant (B2) Temporary Visitor.

IV. CONCLUSION

WHEREFORE, Respondent, [redacted], did not depart the United States and therefore remains removable under section 237(a)(1)(B) of the INA and under the jurisdiction of this Court.

Respectfully submitted this [redacted] 2010,

[redacted]