[ATTORNEY NAME], Esq. DETAINED

[TITLE]

[ORGANIZATION NAME]

[ADDRESS]

Tel: (###) ###-####

Email: [EMAIL]

*Counsel for Respondent*

**UNITED STATES DEPARTMENT OF JUSTICE**

**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

**IMMIGRATION COURT**

**XXX CORRECTIONAL FACILITY**

**[ADDRESS]**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_X

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In the Matter of )

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[], ) **A --- --- ---**

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Respondent ) **IN REMOVAL PROCEEDINGS**

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**RESPONDENT’S BRIEF ON ELIGIBILITY FOR**

**FORM I-601 WAIVER IN CONJUNCTION WITH**

**FORM I-751 PETITION TO REMOVE CONDITIONS**

For the reasons that follow, respondent [] (“Mr. M\_\_\_\_\_\_\_” or “Respondent”) is eligible for a merits hearing on his Form I-751 Petition to Remove Conditions on Residence – which was denied by USCIS on [DATE], 2016 – in conjunction with a Form I-601 Application for Waiver of Grounds of Inadmissibility. Collectively, these applications, if granted, would permit Mr. M\_\_\_\_\_\_\_ to waive the charges of removability stemming from his convictions and retain his status as lawful permanent resident.

**I. STATEMENT OF FACTS**

A. Mr. M\_\_\_\_\_\_\_’s Adjustment of Status to Conditional Permanent Resident

Mr. M\_\_\_\_\_\_\_ is a 25-year-old citizen of Trinidad and Tobago who entered the United States on [DATE], 2002, on a non-immigrant B2 visitor visa. *See* Exhibit A, Respondent’s Form I-94. On [DATE], 2012, he married R\_\_\_\_\_\_\_\_ S\_\_\_\_, a U.S. citizen, in [CITY], NY. *See* Exhibit B, Certificate of Marriage Registration, [CITY, STATE] ([DATE], 2012). On [DATE], 2013, USCIS approved Mr. M\_\_\_\_\_\_\_’s application for permanent residence based on Ms. XXX’s Form I-130 Petition. *See* Exhibit C, USCIS Approval Notice ([DATE], 2013). As required by law, USCIS granted permanent resident status to Mr. M\_\_\_\_\_\_\_ on a two-year conditional basis. *See id.*

On [DATE], 2014, Mr. M\_\_\_\_\_\_\_ and Ms. XXX were granted a judgment of divorce by the XXX County Supreme Court on the grounds that their relationship had broken down irretrievably for at least six months. *See* Exhibit D, Judgment of Divorce (XXX County Supreme Court, [DATE], 2014). Mr. M\_\_\_\_\_\_\_ subsequently filed a Form I-751 Petition to Remove Conditions of Residence, which was denied by USCIS on [DATE], 2016. *See* Exhibit E, USCIS Denial of Form I-751 ([DATE], 2016).

B. Mr. M\_\_\_\_\_\_\_’s Convictions and Removal Proceedings

On [DATE], 20XX, Mr. M\_\_\_\_\_\_\_ was convicted in XXX County Supreme Court of Attempted Robbery in the First Degree, in violation of New York Penal Law (“NYPL”) § 110-160.15(03). *See* Exhibit F, Certificate of Disposition (XXX County Supreme Court, [DATE], 2014). On [DATE], 20XX, he was convicted in XXX County Supreme Court of Burglary in the Second Degree in violation of NYPL § 140.25(02). *See* Exhibit G, Certificate of Disposition (XXX County Supreme Court, [DATE], 2014).

On [DATE], 2016, the Department of Homeland Security (“DHS”) served Mr. M\_\_\_\_\_\_\_ with a Notice to Appear (“NTA”) charging that his convictions rendered him removable for (1) being convicted of two crimes involving moral turpitude, (2) being convicted of an aggravated felony relating to a theft offense, (3) being convicted of an aggravated felony crime of violence, and (4) being convicted of an aggravated felony relating to an attempt to commit an offense described in INA § 101(a)(43). *See* Exhibit H, Notice to Appear.

**II. ARGUMENT**

As a threshold issue, Mr. M\_\_\_\_\_\_\_ is eligible to apply for a waiver of inadmissibility under INA § 212(h) because he entered the United States on a B-2 non-immigrant visa and subsequently adjusted status. *See* INA § 212(h) (providing that “[n]o waiver shall be granted under this subsection in the case of an alien *who has previously been admitted to the United States as an alien lawfully admitted for permanent residence . . .*” (emphasis added)); *Matter of J-H-J*, 26 I. & N. Dec. 563, 565 (BIA 2015) (“[S]ection 212(h) . . . only precludes aliens who entered the United States as lawful permanent residents from establishing eligibility for a waiver on the basis of an aggravated felony conviction.”).

Of course, while Mr. M\_\_\_\_\_\_\_ is *prima facie* eligible for a Section 212(h) waiver, he cannot apply for such a waiver on a “stand-alone” or *nunc pro tunc* basis, but rather must apply in conjunction with an application for admission to the United States. *See Matter of Rivas*, 26 I. & N. Dec. 130 (BIA 2013) (concluding that, “since [INA § 212(h)] does not provide for a ‘stand alone’ waiver . . . , granting a waiver nunc pro tunc would violate the plain language of the statute and the intent of Congress”). Furthermore, Mr. M\_\_\_\_\_\_\_ cannot “re-adjust” on the basis of his ex-wife’s petition. *See Matter of Villarreal-Zuniga*, 23 I. & N. Dec. 886, 892 (BIA 2006) (holding that federal regulations “preclude[] the respondent from basing his current application for adjustment of status on his original approved visa petition, which he used to adjust his status in 1990”).

However, the structure of the INA makes clear that Mr. M\_\_\_\_\_\_\_ *can* apply for a 212(h) waiver in conjunction with a Form I-751 petition because such a petition – when denied by USCIS, and renewed before an Immigration Judge – constitutes a *renewed* application for admission. This is so because the INA imagines a three-step process for conditional permanent residents:

* First, a conditional permanent resident is admitted to the United States when USCIS grants the application for conditional status. *See Matter of Paek*,26 I. & N. Dec. 403, 406 (BIA 2014) (concluding that “[t]he language [of the INA] makes clear that permanent resident status is obtained on the date of an alien’s initial admission as a conditional permanent resident”).
* Second, if USCIS denies the Form I-751 petition, the immigrant’s permanent resident status is terminated as of the date of the USCIS denial. *See* INA § 216(b)(1) (“[I]f the Attorney General determines [that the qualifying marriage was invalid], the Attorney General . . . shall terminate the permanent resident status of the alien . . . *as of the date of the determination*.” (emphasis added)).
* Third, an immigrant whose conditional permanent resident status is terminated can renew the application before an Immigration Judge. *See* INA § 216(b)(2) (“[A]n alien whose permanent resident status is terminated . . . can request a review . . . in a proceeding to remove the alien.”).

Since a USCIS denial terminates the permanent resident status “as of the date of the [USCIS] determination,” INA § 216(b), it follows that a conditional permanent resident whose Form I-751 petition has been granted by an Immigration Judge has effectively been admitted twice – first, when the initial adjustment is granted, *see Paek*,26 I. & N. Dec. at 406, and second, when the Immigration Judge grants the renewed application, *see* INA § 216(b)(2) (providing for a hearing in removal proceedings). Accordingly, a Form I-751 renewed before an Immigration Judge constitutes an application for *re-admission*, in conjunction with which an applicant can seek a 212(h) waiver of inadmissibility. *See Rivas*, 26 I. & N. Dec. at 132 (“[A] lawful permanent resident may obtain a waiver only if he is an applicant for admission or assimilated to the position of an applicant for admission by applying for an adjustment of status” (quoting *Poveda v. U.S. Att’y Gen*., 692 F.3d 1168, 1177 (11th Cir. 2012)).

That a Section 212(h) waiver is available in such a scenario is confirmed by *Matter of Abosi*, 24 I. & N. Dec. 204 (BIA 2007) – a case expressly approved by the *Rivas* Court. *See Rivas*, 26 I. & N. Dec. at 132. In *Abosi*, a Nigerian lawful permanent resident left the United States and was charged upon his return with being inadmissible based on a prior conviction for marijuana possession. *See Abosi*,24 I. & N. Dec. at 204-05. The respondent sought a Section 212(h) waiver, which the Immigration Judge denied, concluding that a 212(h) waiver could only be obtained in conjunction with an application for adjustment of status. *See id.* at 205. The BIA reversed, concluding that “[i]n cases such as this, where the respondent is a returning lawful permanent resident charged with a ground of inadmissibility, a grant of a 212(h) waiver of inadmissibility simply eliminates the basis for his inadmissibility and leaves his lawful permanent resident status intact.” *Id.*

In this case, as in *Abosi*, Mr. M\_\_\_\_\_\_\_ was admitted to the United States when USCIS granted him conditional permanent resident status, then he effectively “departed” when USCIS terminated his permanent resident status on [DATE], 2016. He is therefore eligible to apply for re-admission by way of a Form I-751 petition in conjunction with a Form I-601 waiver.

**III. CONCLUSION**

For the foregoing reasons, Mr. M\_\_\_\_\_\_\_ is eligible to apply for a Form I-601 waiver in conjunction with a Form I-751 petition.

DATED: [City, STATE]

[DATE], 20XX \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[ATTORNEY NAME], Esq.

[TITLE]

[ORGANIZATION NAME]

[ADDRESS]

Tel:

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*Counsel for Respondent*

UNITED STATES DEPARTMENT OF JUSTICE

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ULSTER CORRECTIONAL FACILITY

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K\_\_\_\_\_ F\_\_\_\_\_ M\_\_\_\_\_\_\_, ) **A --- --- ---**

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Respondent ) **IN REMOVAL PROCEEDINGS**

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**Proof of Service**

On [DATE], 2017, I, [ATTORNEY NAME], served a copy of this RESPONDENT’S BRIEF ON ELIGIBILITY FOR FORM I-601 WAIVER IN CONJUNCTION WITH FORM I-751 PETITION TO REMOVE CONDITIONS, and any attached pages, by certified USPS mail to:

Assistant Chief Counsel

U.S. Immigration and Customs Enforcement

U.S. Department of Homeland Security

[ADDRESS]

DATED: [CITY, STATE]

[DATE], 20XX \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[ATTORNEY NAME], Esq.

[TITLE]

[ORGANIZATION NAME]

[ADDRESS]

Tel:

Email:

*Counsel for Respondent*

**INDEX OF EXHIBITS**

1. Respondent’s Form I-94
2. Certificate of Marriage Registration, [CITY, STATE] ([DATE], 2012)
3. USCIS Approval Notice ([DATE], 2013)
4. Judgment of Divorce (XXX County Supreme Court, [DATE], 2014)
5. USCIS Denial of Form I-751 ([DATE], 2016)
6. Certificate of Disposition (XXX County Supreme Court, [DATE], 2014)
7. Certificate of Disposition (XXX County Supreme Court, [DATE], 2014)
8. Notice to Appear