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**UNITED STATES DEPARTMENT OF JUSTICE**  
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**  
**BOARD OF IMMIGRATION APPEALS**

In Re the Matter of:	)	File No. A75 555 555
	)	
KAWALI SENEGAL	)	<b>RESPONDENT’S MOTION TO REOPEN</b>
	)	
	)	
Respondent,	)	
	)	
In Removal Proceedings	)	
_____	)	

**I. INTRODUCTION**

This motion to reopen removal proceedings, filed in accordance with 8 C.F.R. §3.2, is made to permit respondent to apply to the immigration judge (IJ) for adjustment of status under the Immigration & Nationality Act (INA) §245(i).

**II. FACTS**

Respondent is a citizen of India who has been found inadmissible under INA §212(a)(6)(a)(i). Removal proceedings were last before the IJ on September 26, 2000, at which time respondent’s asylum application was denied. Respondent filed a timely appeal from that decision to the Board of Immigration Appeals (Board). On June 24, 2002 his appeal was dismissed.

On April 18, 2001 respondent married Kathy Senegal (Kathy), a citizen of the United States.

On April 26, 2001, Kathy filed an immigrant petition with the INS asking that it accord respondent immediate relative immigrant classification under INA §201(b). That petition is now pending before the Service. *See*, Declaration of Kathy Senegal In Support Of Motion to Reopen, served and filed herewith.

As respondent is the beneficiary of an immigrant petition filed before April 30, 2001, that will make an immigrant visa immediately available if approved, he is prima facie eligible for adjustment of status under INA §245(i). *See*, 8 C.F.R. §245.10.

Respondent's proposed application, INS Forms I-485 and Supplement A, is attached, and marked as Exhibit A.

Respondent seeks to offer the IJ evidence of his marriage to an American citizen, the filing of an immigrant petition on his behalf, and respondent's eligibility for adjustment of status. The evidence is material evidence unavailable at the time of the last removal hearing.

### **III. ARGUMENT**

In *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), the Board modified its position under *Matter of Arthur*, 20 I&N Dec. 475 (BIA 1992), and announced a new policy of permitting reopening of a proceeding before a spousal immigrant petition is approved.

The Board may reopen a proceeding in the exercise of discretion to provide a respondent an opportunity to pursue an adjustment application where: (1) the motion is timely filed; (2) the motion is not numerically barred; (3) the motion is not barred by *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), on any other procedural grounds; (4) the motion presents clear and convincing evidence indicating a strong likelihood that the respondent's marriage is bona fide; and (5) the INS does oppose the motion or base its opposition solely on *Matter of Arthur*.

Respondent clearly satisfies the first four factors required in *Velarde*. His motion is timely, filed well within the ninety-day limit. This being respondent's first motion to reopen, it is not numerically barred. Respondent is not barred by *Matter of Shaar*, or any other procedural ground, from receiving the benefits of §245(i).

Kathy's declaration attests to facts, and offers evidence, establishing clear and convincing evidence that her petition is prima facie approvable, and that her marriage to respondent is bona fide.

Kathy and respondent offer copies of their house leases, establishing their continuous residence together since marriage.

Their evidence also includes photographs of respondent and Kathy at home, and with members of Kathy's family.

Their evidence includes proof that respondent and Kathy are co-owners of their own small business.

Their evidence includes proof that respondent and Kathy are co-owners of their automobile.

Their evidence includes evidence that Kathy will suffer hardship if respondent is removed.

While evidence of a joint bank account and other joint financial assets and liabilities is lacking, its absence is reasonably explained by the fact that respondent is an alien who is presently ineligible to receive employment authorization from the INS, and is ineligible to obtain a social security number from the SSA. *See*, 8 C.F.R. §208.7.

It is respectfully submitted that respondent has offered evidence sufficient to meet his burden of proving, by clear and convincing evidence, that his marriage to Kathy is bona fide.

The final factor in *Velarde* is the INS position on reopening; a position upon which respondent can only speculate.

Respondent will observe, however, that there is little or no evidence in the record that would militate against the favorable exercise of discretion.

While the Board did not disturb the IJ's finding that respondent's evidence of persecution was not sufficiently credible, there has been no finding that respondent filed a frivolous asylum application, or testified falsely. There has been no charge that respondent is inadmissible under §212(a)(6)(C)(i).

Respondent did violate the INA by entering the United States without inspection. Congress, however, in first enacting, and later extending §245(i), evidenced its expectation that this immigration violation should be redressed with a \$1,000.00 penalty fee, not a discretionary denial of an adjustment application. Moreover, as with any discretionary decision, the adverse factors must be balanced against the equities present in the record. It is submitted that the adverse factors here are more than offset by the hardship Kathy, an American citizen, will suffer if her husband is removed.

#### **V. STATEMENT REGARDING JUDICIAL PROCEEDINGS**

The Board's June 24, 2002, order is not the subject of judicial review.

#### **VI. STATEMENT REGARDING PENDING CRIMINAL PROCEEDINGS**

Respondent is not the subject of any criminal proceeding under the INA, or the subject of any other criminal prosecution.

## VII. CONCLUSION

Based upon the foregoing, it is respectfully submitted that this motion be granted.

Dated: August 6, 2002.

Respectfully submitted,

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AMY L. BECERRA  
Attorney for Respondent

## **CERTIFICATE OF SERVICE**

I, Amy L. Becerra, do hereby certify that on August 6, 2002, copies of respondent's motion to reopen and its supporting declaration were served on the INS by placing copies in the U.S. Mail at San Francisco, California addressed to Office of District Counsel, Immigration and Naturalization Service, P.O. Box 26449, San Francisco, CA 94126-6449.

Dated: August 6, 2002.

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AMY L. BECERRA