

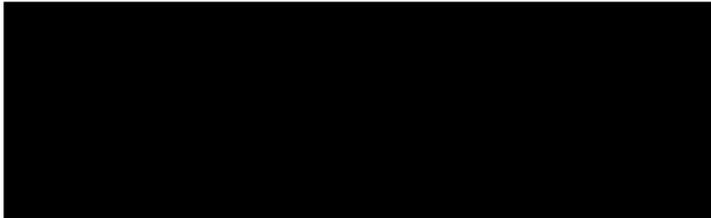
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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**U.S. Citizenship
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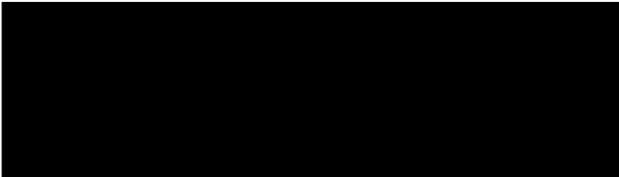
Date: Office: VERMONT SERVICE CENTER File: 

SEP 14 2011

IN RE: Petitioner: 

PETITION: Petition for Nonimmigrant Classification as a Victim of Qualifying Criminal Activity
Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C.
§ 1101(a)(15)(U)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The matter is again before the AAO on a motion to reopen and reconsider. The motion will be granted. The previous decision of AAO will be affirmed and the petition will remain denied.

Applicable Law

The petitioner seeks nonimmigrant classification under section 101(a)(15)(U) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1101(a)(15)(U), which provides, in pertinent part, for U nonimmigrant classification to:

- (i) subject to section 214(p), an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that –
 - (I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);
 - (II) the alien . . . possesses information concerning criminal activity described in clause (iii);
 - (III) the alien . . . has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and
 - (IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States[.]

(iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes[.]

Facts and Procedural History

As the facts and procedural history have been adequately addressed in our prior decision, we shall repeat only certain facts as necessary here. The petitioner is a native and citizen of the Philippines. She entered the United States as a K-1 fiancée on March 16, 2004, and married the U.S. citizen K-1 petitioner on March 24, 2004 in Alaska. On April 28, 2004, the petitioner filed a Form I-485, Application to Register Permanent Residence or Adjust Status, based upon her marriage. On

November 3, 2005, the Form I-485 was denied because the petitioner's spouse stated that he had entered into the marriage for the sole purpose of helping the petitioner obtain permanent residence in the United States. On November 17, 2005, the petitioner was granted deferred action by U.S. Immigration and Customs Enforcement (USICE) due to her assistance with a pending investigation that involved the circumstances of her marriage.

In July 2006, the petitioner filed a request for U nonimmigrant status and interim relief pending the publication of regulations implementing the U classification. On January 26, 2007, U.S. Citizenship and Immigration Services (USCIS) granted the petitioner interim relief in the form of deferred action, which was subsequently extended until December 9, 2010. The petitioner filed the instant Form I-918 U petition and the Form I-192, Application for Advance Permission to Enter as a Nonimmigrant, on April 11, 2008. On October 21, 2009, the director issued a Request for Evidence (RFE), asking the petitioner to submit evidence regarding whether she was the victim of substantial abuse, and to address her inadmissibility under section 212(a)(6)(C)(i) of the Act. The petitioner, through counsel, responded to the RFE. The director subsequently denied the Form I-192 waiver application and the Form I-918 U petition. In his decision on the Form I-918 U petition, the director stated that the petitioner was ineligible for U nonimmigrant status because she was inadmissible and her request for a waiver of inadmissibility had been denied. On March 26, 2010, the petitioner filed a motion to reconsider the director's denial of the Form I-192 waiver application, and in a June 25, 2010 decision, the director granted the motion and affirmed the waiver application's denial.

On appeal of the Form I-918 U petition, counsel submitted a brief, an article by a rape survivor, articles on rape trauma syndrome, and copies of documents already included in the record. In its appellate decision, the AAO found that the petitioner had knowledge of the falsity of her misrepresentations about the sham marriage to her uncle and that she did not timely retract such misrepresentations to prevent a finding of inadmissibility under section 212(a)(6)(C)(i) of the Act.

On motion, counsel states that the petitioner has been denied due process because she was not able to review her entire record of proceeding and because the time to submit a motion in response to the AAO's dismissal of the appeal was shortened by one day when the AAO dated its decision on December 8, 2010 but postmarked it on December 9, 2010. Regarding the willfulness of the petitioner's misrepresentation, counsel states that the AAO ignored the trauma of the petitioner's repeated rape by her uncle and the control exerted over her by her aunt when coming to the conclusion that the petitioner voluntarily and willfully participated in a sham marriage. Regarding the timing of the retraction of her misrepresentation, counsel states that given the petitioner's mental state, she could not have recanted her misrepresentations any earlier than she did. According to counsel, at her initial adjustment interview, the petitioner was never apart from her uncle and would not have had an opportunity to admit to the interviewing officer that her marriage was a sham. Counsel also states that any documents submitted in support of the adjustment application were accomplished by the petitioner's aunt, who took charge of the process for the petitioner to obtain lawful permanent residence, including the obtaining of the marriage certificate, the initial filing of the immigration forms, and the filing of any subsequently requested documents from U.S. Citizenship and Immigration Services (USCIS). In support of the motion, counsel submits a psychological evaluation of the

petitioner, a new declaration from the petitioner, and a copy of the Ninth Circuit Court of Appeals Decision, *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010).

The psychological evaluation was prepared by [REDACTED] and was based on an interview with the petitioner on December 29, 2010. [REDACTED] diagnosed the petitioner with Post Traumatic Stress Disorder (PTSD) and Major Depression, Severe, and indicated that the petitioner “continues to suffer psychological symptoms such as depression, anxiety, poor self esteem, difficulty with trust and intimacy, hyper vigilance and flashbacks – all common to women who have been victims of sexual assault.” According to [REDACTED] the petitioner’s PTSD and depression, which began before she came to the United States, severely impaired the petitioner’s ability to accurately evaluate her parents’ request for her to enter into a sham marriage with her uncle and she would also have been unable to understand the nature of its risks. [REDACTED] also opined that because she was socially isolated and suffering from PTSD and depression, the petitioner would have been unable to recant her misrepresentations about her sham marriage any earlier than when she was alone with an immigration officer in 2005.

In her January 3, 2011 declaration submitted on motion, the petitioner describes her life with her aunt and uncle upon her arrival in the United States. The petitioner states that she knew that lying about her sham marriage was wrong, but she did not believe that she had any other option but to go along with her aunt and uncle’s scheme because of the control they exerted over her daily life.

The Petitioner is Inadmissible Due to Her Material Misrepresentations

Section 212(a)(6)(C)(i) of the Act states:

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

In *Matter of G-G*, I&N Dec. 161 (BIA 1956), the Board of Immigration Appeals (BIA) held that “fraud” consists of a false representation of a material fact made with knowledge of its falsity and with intent to deceive the immigration officer, who then acts upon his or her belief of the fraud. Willful misrepresentation occurs when the misrepresentation was deliberate and voluntary. *Forbes v. I.N.S.*, 48 F.3d 439, 442 (9th Cir. 1995). Proof of an intent to deceive is not required. *Id.* Rather, knowledge of the falsity of a representation is sufficient. *Id.* A timely retraction or recantation of the fraud or misrepresentation may prevent a finding of inadmissibility, but the retraction must be made without delay and voluntarily, before being confronted by a government official. *Valadez-Munoz v. Holder*, 623 F.3d 1304, 1309-10 (9th Cir. 2010).

Counsel contends that the petitioner’s involvement in the sham marriage to her uncle was neither willful nor voluntary and she thus is not inadmissible under section 212(a)(6)(C)(i) of the Act. Counsel references the petitioner’s mental health evaluation and her declaration submitted on motion as evidence that the petitioner was coerced, traumatized, and controlled into going through with the process to obtain lawful permanent residence status through a sham marriage with her uncle.

The issue in this proceeding is whether the petitioner willfully misrepresented her fraudulent marriage to government officials to gain a benefit under the Act. As stated earlier, willful misrepresentation occurs when the misrepresentation is deliberate and voluntary. *Forbes v. I.N.S.*, *supra*. Counsel focuses on the petitioner's statements to USCIS, claiming that the statements she made to USCIS officials were not voluntary as she was under the control of her aunt and uncle and her uncle was present at her adjustment interview. Counsel does not address any prior misrepresentations she made to other U.S. government officials in order to procure her K-1 visa and admission into the United States as a nonimmigrant fiancée. *See Matter of Y-G-*, 20 I&N Dec. 794, 796-97 (section 212(a)(6)(C)(i) of the Act applies when the fraud or misrepresentation is made to a U.S. government official to seek entry into the United States).

The record demonstrates that prior to being interviewed by a USCIS official regarding her adjustment of status application, the petitioner procured a K-1 visa through the U.S. Embassy in Manila, Philippines, which would have required her to attend an interview with a consular officer to determine, in part, that she had a bona intention to marry, as required of nonimmigrant fiancées at section 214(d)(1) of the Act.¹ After procuring her K-1 visa, the petitioner then presented it to a U.S. Customs and Border Patrol (USCBP) agent who inspected and admitted her into the United States as an alien fiancée intending to conclude a valid marriage with a U.S. citizen within 90 days of her entry. *See* section 214(d)(1) of the Act, 8 U.S.C. § 1184(d)(1). Thus, the petitioner's misrepresentations did not begin at the time of her adjustment interview, as she had already misrepresented her intentions for coming to the United States and her relationship with her uncle at the visa issuance stage and at the time she gained admission to the United States.

In her July 10, 2006 affidavit, the petitioner explained that her family was financially dependent on her aunt and that her aunt and uncle convinced her family to have the petitioner go to the United States as her uncle's fiancée. The petitioner recounted that she was raped by her uncle in the Philippines and forced to maintain a romantic correspondence with him which disgusted her. The petitioner stated that at the time of her consular interview on her fiancée visa application, she was afraid of what her aunt would do if she did not pass the interview and that her aunt was happy when she passed. In her January 3, 2011 declaration submitted on motion, the petitioner states, "I know that what I did was wrong," but that her aunt and uncle controlled her. In her mental health evaluation, [REDACTED] opines that the petitioner might have begun to exhibit some symptoms of PTSD while in the Philippines, which might have compromised her ability to make good choices. However, [REDACTED] predominately discusses the petitioner's mental health after her arrival in the United States. In sum, the relevant evidence shows that the petitioner knew that she was procuring a visa based on a false relationship with her uncle, but that she nonetheless participated in the scheme in order to enter the United States. While we do not discount the grave effects of the abuse the petitioner endured, the preponderance of the evidence shows that the petitioner's misrepresentations regarding her relationship with her uncle were material and willful rendering her inadmissible under section 212(a)(6)(C)(i) of the Act.

¹The Department of State's website discusses the K-1 visa issuance procedures at the U.S. Embassy in Manila. *See* <http://manila.usembassy.gov/wwwwh3204.html> (accessed Aug. 15, 2011).

The evidence also fails to demonstrate that the petitioner recanted the misrepresentations about her marriage before being confronted by a government official. *See Valadez-Munoz v. Holder, supra*. The petitioner explained the timing of her recantation, but her explanation does not overcome the evidence that such recantation took place only after being confronted by a government official. Counsel asserts that the presence of her uncle prevented the petitioner from recanting at the time of her adjustment of status interview in August 2004. However, the petitioner has not stated that she recanted her misrepresentations regarding the fraudulent marriage scheme at the time of her K-1 visa interview at the embassy, or at the time of her entry into the United States when she was inspected and admitted by a USCBP agent. As her recantation occurred only after a USICE officer confronted her about it over a year after she received her K-1 visa, the petitioner's explanation of why she did not admit her misrepresentations any earlier are insufficient. Thus, the petitioner's retraction was neither timely nor voluntary and does not discount her misrepresentations under section 212(a)(6)(C)(i) of the Act.

Counsel's Due Process Claims

On motion, counsel claims that the petitioner's due process rights have been violated because the petitioner has not been afforded an opportunity to review and respond to the evidence against her. Counsel also contends that the AAO unilaterally shortened the time for the petitioner to file her motion to because the AAO postmarked its decision one day after the date on the appeal decision. Neither of counsel's claims has merit, however, as the petitioner has not established that any alleged violation prejudiced her appeal. *Hassan v. INS*, 927 F.2d 465, 469 (9th Cir. 1991) (due process violation exists only where alien demonstrates resultant prejudice).

Regarding the petitioner's claim that she has been denied an opportunity to examine the record, counsel references a January 12, 2010 letter from the Federal Bureau of Investigation (FBI), noting that the AAO erroneously asserted that the petitioner submitted it in response to the RFE, and that the petitioner did not know that such evidence existed. Counsel also claims that the petitioner has not been provided with any documentation of an investigation into the petitioner's marriage.

Counsel's claims regarding his and the petitioner's ignorance of an investigation into the petitioner's marriage or the January 12, 2010 FBI letter is disingenuous. According to the FBI agent who wrote the letter, it was "being submitted at the request of [counsel] at the Alaska Immigration Justice Project regarding his client [the petitioner]." The agent goes on to assert: "[Counsel] requested that [FBI agent] provide U.S. Citizenship and Immigration Services a brief synopsis of the case." The FBI agent's statement indicates not only that the letter was submitted at the request of counsel as evidence in response to the RFE, but also that the petitioner and counsel knew that the petitioner had spoken with an FBI agent about her sham marriage. Had counsel not been aware of the petitioner's interview by the FBI and the reasons for such an interview, he would not have reached out to the agent to ask him to provide information to USCIS. Although the letter was not submitted by the petitioner along with her response to the RFE, it was submitted at her request, under separate cover.

Accordingly, we do not find that the petitioner has been denied a meaningful opportunity to respond to the evidence referenced in our prior decision. More importantly, our decision to affirm the director's finding of the petitioner's inadmissibility was not based on what transpired during the petitioner's interview with the FBI or the fact that she had been interviewed. As stated previously, because the petitioner did not recant her misrepresentations until confronted about them by a government official, she is inadmissible under section 212(a)(6)(C)(i) of the Act.

Counsel cites *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010), for the proposition that an alien's due process rights are violated when he or she is denied an opportunity to review evidence that a government agency maintains that is relevant to the alien's case. The record indicates that after we issued our prior decision in December 2010, the petitioner, through counsel, wrote a letter to the service center director, requesting a complete copy of her alien-registration file.

The regulation at 8 C.F.R. § 103.21 governs an alien's access to records about herself, and requires an alien to submit a Freedom of Information Act (FOIA) request "to the Freedom of Information/Privacy Act Officer" to obtain her records. In this matter, counsel directed his FOIA request to the service center director, not the FOIA officer as required by the regulation. While the court in *Dent v. Holder* found that the plaintiff's due process rights were violated because the government failed to provide him a copy of his alien-registration file, the court noted that the alien's removal proceedings were conducted under section 240 of the Act, and section 240(c)(2)(B) of the Act specified that the alien shall have access to documentation pertaining to his admission to and presence in the United States. *Dent v. Holder*, 627 F.3d at 374. These proceedings are being conducted under section 101(a)(15)(U) of the Act, which contains no similar provision. The petitioner has not demonstrated that she complied with the proper procedures to obtain a copy of her alien-registration file at 8 C.F.R. § 103.21, and that USCIS refused to respond to such a request or otherwise violated the applicable provisions of FOIA.

Counsel has also not shown any prejudice resulting from the fact that our appeal decision was postmarked one day after the date on the decision. The regulation at 8 C.F.R. § 103.5a(b) accounts for such minor delays due to mailing by affording an additional three days to any deadline imposed by a notice issued by mail. Counsel has prepared a complete motion filing addressing all aspects of our prior decision, and has submitted the motion within the required time period. Counsel has not explained how the petitioner has been prejudiced in this matter, as we have granted the motion and fully considered the evidence submitted. Although the petitioner's evidence does not overcome our or the director's prior decisions, there is nothing to suggest that had our appeal decision been dated and postmarked on the same day, the outcome of the petitioner's motion would have been any different. Thus, counsel has failed to demonstrate any resultant prejudice to the petitioner's case.

Conclusion

In these proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 214.14(c)(4). Although the petitioner has met the statutory eligibility requirements for U nonimmigrant classification, she is inadmissible



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under section 212(a)(6)(C)(i) of the Act and her application to waive her ground of inadmissibility has been denied. She is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U) of the Act pursuant to 8 C.F.R. § 214.1(a)(3).

ORDER: The previous decision of the AAO, dated December 8, 2010, is affirmed. The appeal remains dismissed and the petition remains denied.