



U.S. Citizenship  
and Immigration  
Services



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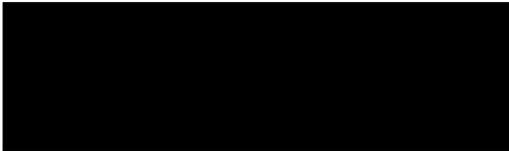
DATE: **OCT 24 2012** Office: VERMONT SERVICE CENTER

FILE: 

IN RE: Petitioner: 

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

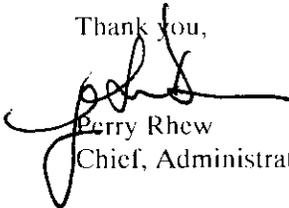
ON BEHALF OF PETITIONER:



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.

Thank you,



Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center (“the director”), denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director’s decision shall be withdrawn and the matter remanded for entry of a new decision.

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), as an alien victim of certain qualifying criminal activity.

#### *Applicable Law*

Section 101(a)(15)(U) of the Act, provides for U nonimmigrant classification to alien victims of certain criminal activity who assist government officials in investigating or prosecuting such criminal activity. Section 212(d)(14) of the Act, 8 U.S.C. § 1182(d)(14), requires U.S. Citizenship and Immigration Services (USCIS) to determine whether any grounds of inadmissibility exist when adjudicating a Form I-918 U petition, and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion.

Section 208(d) of the Act, 8 U.S.C. § 1158(d), states in pertinent part:

- (6) If the [Secretary of Homeland Security] determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this Act, effective as of the date of a final determination on such application.

#### *Factual and Procedural History*

The petitioner is a native and citizen of China who claims to have entered the United States on September 16, 1997. On September 30, 1997, a Notice to Appear (NTA) was issued to the petitioner, placing her into removal proceedings, where she applied for asylum, withholding under the Act, and protection under the Convention Against Torture (CAT) as forms of relief from removal. The petitioner was ordered removed on December 18, 2000. The immigration judge found that the petitioner had filed a frivolous asylum application.

On May 23, 2006, the petitioner filed a motion to reopen the prior immigration proceeding with a new asylum application and the immigration judge granted the petitioner’s motion “for all purposes.” On March 26, 2009 the immigration judge granted the petitioner’s application for withholding, considered her application under CAT withdrawn, and denied her asylum application as a matter of discretion. The immigration judge referenced the prior frivolous finding and found that the petitioner was not eligible for any discretionary relief with the exception of withholding of removal or protection under CAT; however, the immigration judge did not make a specific frivolity finding even though he had reopened the matter “for all purposes.” The immigration judge dismissed the petitioner’s subsequent motion to reconsider on June 26, 2009, and the petitioner timely appealed that decision to the Board of Immigration Appeals (BIA). On October 29, 2010, the BIA sustained the appeal and remanded the matter for a discussion of the merits of the frivolous

finding and directing that a new immigration judge consider the intervening pertinent precedential case law applicable to a frivolous finding when issuing the decision.

On July 7, 2010, the petitioner filed the instant Form I-918 U petition, accompanied by the requisite *U Nonimmigrant Status Certification* (Form I-918 Supplement B). On March 23, 2011, the director denied the Form I-918 U petition and the Form I-192 application. The director determined that section 208(d)(6) of the Act precluded the petitioner's eligibility for U nonimmigrant status. The director based his decision on the March 26, 2009 decision of the immigration judge. The director also stated that the petitioner had not established the statutory eligibility criteria for U nonimmigrant status, but did not further discuss the deficiencies in the record because he found that section 208(d)(6) of the Act precluded the petitioner's eligibility for any benefit. The petitioner timely appealed the director's denial. On appeal, counsel asserts that the immigration judge's finding that the petitioner had filed a frivolous asylum claim is not a final order and the issue remains pending in the Newark Immigration Court pursuant to the BIA's October 29, 2010 order. Counsel also asserts the petitioner has established her eligibility her U nonimmigrant status.

#### *Analysis and Conclusion*

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The burden of proof is on the petitioner to demonstrate eligibility for U nonimmigrant classification, and USCIS will determine, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence. 8 C.F.R. § 214.14(c)(4). All credible evidence relevant to the petition will be considered. Section 214(p)(4) of the Act, 8 U.S.C. § 1184(p)(4).

Upon review of the record, we withdraw the director's determination that the petitioner is currently subject to section 208(d)(6) of the Act. The record does not establish that a final determination has been made regarding the filing of a frivolous asylum claim by the petitioner, as the BIA reopened the petitioner's proceedings and remanded the matter for an immigration judge to make a new frivolous finding. Until such time an immigration judge makes a new decision, section 208(d)(6) of the Act is inapplicable.<sup>1</sup>

As the director has not discussed the merits of the petitioner's claim to eligibility for U nonimmigrant status, the matter must be remanded for a new decision. As always 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).

**ORDER:** The director's decision, dated March 23, 2011, is withdrawn and the matter remanded for entry of a new decision, which if adverse to the petitioner, shall be certified to the AAO for review.

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<sup>1</sup> According to Service records, the petitioner's next hearing before the immigration court is scheduled for March 14, 2013.