August 4, 2016

USCIS Vermont Service Center Attention: VAWA Product Line St. Albans, VT 05479-0001

RE:

RESPONSE TO NOTICE OF INTENT TO DENY I-192 WAIVER OF INADMISSIBILITY

Dear Sir/Madam,

This brief is being submitted in response to the Service's July 5, 2016, Notice of Intent to Deny Ms. request for a waiver of inadmissibility. We believe that the Service has misapplied the law to Ms. case and ignored the current evidence of record, all of which demonstrate that Ms. is entitled to a waiver of inadmissibility as a matter of discretion.

Procedural Background

On May 10, 2013, Ms. Submitted Form I-918 Petition for U Nonimmigrant Status and Form I-918 Supplement A for her daughter, Science Construction. Upon adjudication of the petition, the Service, on April 17, 2014, placed Ms. Science Construction on the U visa wait list due to the unavailability of U nonimmigrant visas. However, on May 8, 2015, the Service removed Ms. Science from the wait list and issued a Notice of Intent to Deny (NOID) Ms. Science U status on account of the Service's conclusion that she had previously entered into a marriage for the purpose of evading the immigration laws pursuant to §204(c) of the Immigration and Nationality Act (INA).

On June 11, 2015, Ms. Submitted Form I-192 requesting a waiver of inadmissibility. Included in that request was an affidavit from Ms. Submitted, as well as a statement from her husband, and other evidence in support of her waiver request (*see* June 11, 2015 filing accompanying Form I-192). Without indicating why the evidence Ms. Submitted with her request for a waiver was insufficient, the Service once again issued a NOID concluding this time, that Ms. Was inadmissible for fraud and/or misrepresentation under INA §212(a)(6)(C)(i). For the reasons set forth below, we believe that the Service in reviewing Ms. Submitted of evidence does not satisfy favorable exercise discretion to grant her waiver request.

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<u>via FedEx</u>



Legal Argument

A. <u>The Service Has Erroneously Applied INA §212(d)(3) and *Matter of Hranka* to the Case At Hand</u>

Under the law, an applicant who has suffered substantial physical and/or mental abuse as a result of a crime and who has assisted federal, state or local law enforcement officials with the investigation and/or prosecution of a statutorily based criminal activity may be eligible for U status.¹ In addition, an applicant for U status may request a waiver of inadmissibility pursuant to INA 214(d)(14). In enacting this waiver provision, Congress' goal was to ensure that crime victims would come forward not only to report crimes to law enforcement, but also to assist officials in either investigating or prosecuting the criminal activity. The waiver under INA 214(d)(14) was broadly crafted to waive almost all conduct except for conduct involving Nazi persecution, genocide, acts of torture, or extrajudicial killings. *See* INA 214(d)(14). In essence, in enacting the waiver provision for U visa applicants, Congress ensured that only persons who had committed the most depraved acts would be denied admission to the United States.

In determining that Ms. \square does not merit a waiver because she was involved in fraud, the Service in its NOID cites to INA §212(d)(3) and *Matter of Hranka*, 16 I&N Dec. 491 (BIA 1978) as the standard that Ms. \square must meet to warrant a favorable exercise of discretion for waiver approval. However, the application of INA §212(d)(3) to Ms. \square scale is an erroneous application of the law. Although §212(d)(3) is a broad waiver that allows applicants for nonimmigrant visas to overcome many grounds of inadmissibility found in §212(a) of the Act,² it is inapplicable to U visa applicants seeking a waiver of inadmissibility. In fact, §212(d)(3) specifically states:

Except as provided in this subsection, an alien (i) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such a visa under subsection (a) of this section . . . may, after approval of the Attorney General of a recommendation by the Secretary of the State or by the consular officer that the alien be admitted despite his inadmissibility, be granted such a visa . . .

The statute makes clear that those applicants requiring a waiver under \$212(d)(3) of the Act are individuals subject to the grounds of inadmissibility listed in INA \$212(a). These include applicants for nonimmigrant visas who are ineligible for admission to the United States based on health grounds, criminal activity, security, terrorist, public charge grounds, etc. *See* INA \$212(a). Nowhere in \$212(a)are U visa applicants mentioned. Even though an individual who engaged in misrepresentation can seek a waiver under \$212(d)(3), it is still not the appropriate section of law for the adjudication of waivers filed by U applicants. Congress specifically created a separate and distinct waiver provision for U applicants that requires the Service, in its discretion, to excuse most unlawful conduct committed by a U visa applicant, including conduct listed under \$212(a) of the Act, as a matter of national or public interest. *See* INA \$214(d)(14). If Congress had meant to encompass \$212(d)(3) in the U statute, it would have done so. It has been long held by the Supreme Court that a statute should be interpreted by

¹ INA §101(a)(15)(U)

 $^{^{2}}$ §212(d)(3) does not waive inadmissibility grounds relating to Nazi persecution of foreign policy considerations.

its plain language unless Congress expressly states otherwise. *Chevron, USA., Inc. v Natural Resources Defense Council*, 467 U.S. 837, 843 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (both standing for the proposition that under the rules of statutory construction, if a the statutory language is clear, the adjudicator "must give effect to the unambiguously expressed intent of Congress"). Given that §212(d)(3) does not encompass U visa applicants, the waiver found at INA §214(d)(14) and not the waiver provision at INA §212(d)(3) is the proper legal standard to be applied in this case.

When applying INA §212(d)(14) to Ms. case, she merits a favorable exercise of discretion for a grant of a waiver. Clearly there is no evidence that Ms. is a Nazi or has been involved in genocide, torture, extrajudicial killings or the persecution of others. Thus, the statutory bars to granting a waiver do not exist here. The sole conduct that makes her inadmissible is that she previously engaged in fraud. Her fraudulent conduct falls squarely within conduct that may be waived by INA §212(d)(14) and the Service must take into account the humanitarian factors and family unity considerations in Ms. case. As she explains in her statement, her husband is recovering from cancer; a cancer that could return and must be consistently monitored (see Exhibit A and C, enclosed). This is a compelling humanitarian concern contemplated by the U statute. It would be cruel to separate Ms. from her spouse, who heavily relies on her for love and support as he battles a serious illness that could a waiver would also certainly go against the reoccur (see Exhibit B, enclosed). Denying Ms. Service's stated purpose to take into account the public interest and humanitarian concerns affecting U visa applicants.

Likewise the criteria listed in *Matter of Hranka* are inapplicable to Ms. Case. Under *Matter of Hranka*, the BIA ruled that in deciding whether to approve or deny a waiver under §212(d)(3), the Service must evaluate whether the applicant for the nonimmigrant visa is: 1) a risk to society if admitted to the U.S.; 2) the seriousness of the applicant's prior immigration or criminal law violations, if any; and 3) the reasons the applicants wishes to enter the U.S. As already noted, §212(d)(3) is not the proper section of law for adjudication of U visa waivers. As a result, the factors listed in *Matter of Hranka* are also inappropriate when assessing whether a U visa applicant should be granted a waiver of inadmissibility. What the Service must do is evaluate whether granting a waiver to a U applicant is in the national or public interest, and not make a determination on whether to approve or deny the waiver based on case law that is directly associated with a statute that is inapposite to the U statute.

Even when the *Hranka* standards are applied to Ms. , she merits approval of her waiver request. has not committed a violent crime or been charged with or convicted of committing any Ms. crime that would cause injury to society at large. She has lived in this country for nine years and has engaged in no criminal activity whatsoever that would threaten society. In fact, after being granted work found work caring for disabled children, a vocation that requires immense authorization. Ms. skill and patience and where she has received ongoing training to enhance her expertise (see Exhibit F, enclosed). A person holding such a job and working with such a vulnerable population is undoubtly an asset to society. Further, although her act of entering a marriage that was not bona fide should not be condoned, such conduct is certainly not as serious as alien smuggling, drug trafficking, re-entry after removal or being convicted of a violent crime. She also has legitimate reasons for being in the U.S. and wanting to continue living here. Namely, she is married to a U.S. citizen who has multiple health ailments and who is recovering from cancer (see Exhibits A, B, and C, enclosed and Exhibits 1, 2 and 3 in June 11, 2015 filing). Her husband requires frequent trips to the doctor because his condition must be continuously monitored. Id. In addition, Ms. is a crime victim (see Exhibit B, statement of Ms. in May 7, 2013 U visa filing and **Exhibit A** enclosed and **Exhibit 1** in June 2015 filing). She was first brutalized at age 15 when she was raped. Id. While in the U.S. she was battered and based

on her cooperation with the New York City Police Department and the King County District Attorney's Office was issued a U visa certification. *Id.* She is the exact person Congress had in mind when it created the U visa. She and her husband also pay their taxes and she is a devoted member of her church (*see* Exhibits E, enclosed and Exhibit 4, in June 2015 filing). Clearly, all her actions since her fraudulent act demonstrate that Ms.

B. Ms. Conduct does not meet the Legal Standard for Fraud or Misrepresentation

Even if, arguendo, the Service was to hold that the *Kungys* factors apply to Ms. The doctrine, she made a timely retraction when she was asked whether she shared a marital home with N The doctrine of timely retraction or timely recantation generally holds that a statement will not be held against the person where the person corrects herself voluntarily and in a timely fashion. *Matter of Namio*, 14 I&N Dec. 412 (BIA 1973); *Matter of M-*, 9 I& N Dec. 118 (BIA 1960). A retraction is also "timely" if it was made prior to the conclusion of the proceeding or interview. Llanos-Senarrilos, 177 F.2d 164 (9th Cir. 1949).

In this case, the Service made no official finding that Ms. was engaged in marriage fraud. The Service did not even adjudicate the I-130 filed by Mr. or the I-485 submitted by Ms. and issued no final decision that Ms. had engaged in marriage fraud. The Service instead allowed to withdraw her application for adjustment of status in compliance with the regulations at Ms. 8 C.F.R. §103.2. The regulations specifically state that, "an applicant or petitioner may withdraw a benefit request at any time until a decision is issued by USCIS or, in the case of an approved petition, until the person is admitted or granted adjustment or change of status, based on the petition." 8 C.F.R. \$103.2(b)(6). Further, the BIA has ruled where an applicant has withdrawn a petition, DHS may not then adjudicate that petition. Matter of Cintron, 16 I&N Dec. 9 (BIA 1996). Since Mr withdrew the I-130 petition he submitted on Ms. Franklyn's behalf and Ms. also withdrew her application for adjustment of status, there was nothing for USCIS to adjudicate. Ms. act of recanting her testimony about living with M as done voluntarily and before conclusion of her adjustment interview; while the withdrawal of her request for adjustment of status occurred well before the Service issued any decision on the matter. As noted in 9 FAM 302.9-4(B)(3)(f), "a timely retraction will purge a misrepresentation and remove it from further consideration," therefore not requiring a waiver. See also Matter of R-R-, 3 I&N Dec. 823 (BIA 1949) and Matter of M-, 9 I&N Dec. 118 (BIA

1960).³ Thus, Ms. committed no fraud that would make her inadmissible and ineligible for U nonimmigrant status.

In addition, per the Adjudicator's Field Manual (AFM), an alien must demonstrate by the preponderance of the evidence that she is not inadmissible for fraud or misrepresentation. The Service, however, must have some evidence that Ms. Franklyn is inadmissible under §212(a)(6)(C)(i). *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992). The evidence that the Service points to as being definitive of Ms. inadmissibility is her marriage to Mr. which it finds to be fraudulent and therefore a bar to her obtaining U status. However as already argued, the marriage fraud provision at INA §204(c) is not a ground of inadmissibility for individuals requesting nonimmigrant visas (*see* arguments submitted on June 11, 2015). §204(c) of the Act is a non-waivable prohibition against the issuance of *immigrant petitions* filed under INA §204. The marriage fraud bar cannot be an inadmissibility factor for a U visa applicant since U petitions are nonimmigrant visa petitions and are not filed under INA §204, but are filed under INA §214.

The Board of Immigration Appeals (BIA) and the courts have repeatedly held that INA §204(c) only applies to immigrant visa petitions. In *Matter of Tawfik*, the BIA ruled that "Section 204(c) of the Act, 8 U.S.C. § 1154(c) (1988), prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. Accordingly, the district director must deny any subsequent visa petition for immigrant classification filed on behalf of such alien, regardless of whether the alien received a benefit through the attempt or conspiracy." 20 I & N Dec. 166 (BIA 1990). Similarly, the federal courts have stated that INA §204(c) bars approval of I-140 and I-130 immigrant petitions, which are filed pursuant to INA §204. See Oddo v. Reno, 17 F. Supp.2d 529 (E.D. Va 1998); Ghaly v INS., 48 F.3d 1426 (7th Cir. 1995). The Administrative Appeals Office (AAO) has also ruled that applicants for nonimmigrant visas are **not** subject to the prohibition outlined in §204(c). (see AAO Decision of October 18, 2011 at Exhibit 5 in filing of June 11, 2015 where the AAO refused to uphold the denial of a K-1 nonimmigrant visa petition for supposed marriage fraud). The prohibition outlined in INA §204(c) barring approval of immigrant visa petitions is inapplicable to Ms. Franklyn's case as she is applying for a nonimmigrant and not an immigrant visa. INA §204(c), therefore, cannot be a basis to find that Ms. Franklyn engaged in fraud and is inadmissible.⁴

C. <u>Approval of Ms.</u> <u>U Visa is in the National and Public interest, and Comports with the</u> <u>Humanitarian intent of the U Visa Program</u>

Pursuant to INA 212(d)(14), an applicant for U Nonimmigrant Status may request a waiver of all grounds of inadmissibility except INA 212(a)(3)(E) that refers to "Participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing." Furthermore, the statute provides that a waiver may be granted if it is in the "public and national interest." Black's Law Dictionary defines "public interest" as "the welfare of the public as compared to the welfare of a private

³ See also 9 FAM 302.9-4(b)(5)(c)(2)(b) indicating that where the truth is available through the visa lookout system or the post's own files, the applicant's misrepresentation is not material.

⁴ Even where an applicant is inadmissible for marriage fraud under INA §204(c), a waiver may be available pursuant to INA §237(a)(I)(H). See *Vasquez v. Holder*, 602 F.3d 1003 (9th Cir. 2010) (allowing for a waiver of marriage fraud for conditional residents) and *Matter of Da Lomba*, I&N Dec. 616 (BIA 1978).

individual or company. All of society has a stake in this interest and the government recognises the promotion of and protection of the general public."

acted in the welfare of the public by reporting domestic violence crimes In this case, Ms. committed against her by her former intimate partner . As per statistics reported by the National Coalition Against Domestic Violence, domestic violence is a national epidemic.⁵ For example, 1 in 3 women and 1 in 4 men have been victims of physical violence by an intimate partner within their lifetime, and on average, nearly 20 people per minute are physically abused by an intimate partner in the United States. *Id.* Survivors such as Ms. have assisted in combating this epidemic by reporting the crimes, in spite of fears of retribution by the abuser, and continuing trauma. As Ms. stated in her initial affidavit that accompanied her U visa application, "broke me and I am so ashamed. After the attempted rape in January, I became very depressed and had difficulty eating. I lay in bed for days and had no strength or desire to do anything. I was also anxious all the time. Because I feared would show up again." By reporting the domestic violence, Ms. acted in the public interest. Our society has a stake in ensuring that the occurrence of domestic violence is reduced with the ultimate goal of eradication, since the human and economic toll is well documented. Id.

Furthermore, U-nonimmigrant cases present compelling humanitarian concerns that should be considered when adjudicating INA § 212(d)(14) waivers. As per the intent of the U visa program as set forth in the Victims of Trafficking and Violence Protection Act of 2000, "Providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States." Therefore, the continued fulfillment of Congressional intent requires that the Service adjudicate I-192 waivers of inadmissibility taking into consideration the humanitarian factors according to the broad INA § 212(d)(14) standard, and failure to do so would frustrate the intent of the U Nonimmigrant Status Petitions, making it less likely for victims of the certified crimes to trust and cooperate with law enforcement investigations and prosecutions.

In this case, the humanitarian factors strongly support the granting of the INA § 212(d)(14) waiver to Ms. Franklyn. As set forth in her affidavit in support of her waiver on Form I-192, Ms. has faced a lifetime of violence, and has emerged as a survivor who has stabilized her life. From the young age of 15, when she was still living in Grenada, Ms. was raped, and her first child was conceived as a result of the rape. When she was 22 years old, she married Joseph Franklyn, who . In the U.S., she did not escape the violence but suffered abuse from her former raped . Ms. has been severely victimized in both her home country and intimate partner the U.S., and has cooperated with law enforcement in reporting the domestic violence crimes committed against her in the U.S. The Service, recognizing the humanitarian intent behind the U Visa program, should now grant to Ms. the waiver pursuant to INA § 212(d)(14). She has experienced a history of abuse and trauma, and failure to grant her the humanitarian protections inherent in the U Visa program would frustrate the very intent of the program.

D. <u>Balancing the Positive Equities Against the Adverse Factors Provides Compelling Justification</u> for Granting the Waiver of Inadmissibility

Even in discretionary decisions, the adjudicator must provide a reasoned decision when denying an application for a waiver of inadmissibility. For example, the BIA established a clear standard in deciding inadmissibility waivers under INA §212(h) (8 U.S.C. §1182(h)). "The immigration judge must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social

⁵ http://www.ncadv.org/learn-more/statistics

and human considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interest of this country." *Matter of Mendez-Moralez*,

21 I. & N. Dec. 296, 301 (1996). Therefore, when determining when a fraudulent act may be waived the Service must look at the severity of the fraud and balance it against the applicant's positive equities.

As explained in her previous affidavit that accompanied Form I-192, and in the statement she is now submitting, Ms. married Mr. ause she frantically was in need of work to support her children and her mother who was suffering from cancer (see Exhibits A, enclosed and Exhibit 1in filing of June 11, 2015). The only way that she could raise her earning potential was to obtain lawful work authorization. Id. And the only way she could get work authorization was to get married to a U.S. citizen who could petition for her and thereby allow her to apply for a work permit. Id. As she states, "I was uneasy with paying Ms. and following her directives because I knew it was all very wrong, but instead of listening to my conscience. I was letting myself be guided by the fact that I needed papers to work to support my mother, myself and children. I made getting papers so that I could work my sole priority." (See May 7, 2013 U visa filing at Exhibit B). Ms. fully understands that she broke the law and she is utterly remorseful and deeply repentant for her actions. But for this single indiscretion, admittedly a serious one, she has committed no other immigration or legal transgressions. She has improved her life by enrolling in GED classes, which she had to stop because of her concern for her daughter's behavioral problems. Id. In addition, she was employed full-time caring for children with special needs and she is active in her church. Id. (See also Exhibit 1 of June 11, 2015 filing and current statement at Exhibit A, enclosed). She is also trying to rebuild her life after suffering abuse from her ex-partner. Additionally, Ms. is the primary caretaker of her U.S. citizen spouse, , who is presently recovering from cancer after having surgery almost a year ago (see Exhibit C, enclosed and June 11, 2015 filing at Exhibit 3). Ms. 's presence in the U.S. is crucial for her husband's recovery because he relies on her to assist with his medical care and get him to his doctor appointments. Id. (See also statement from Mr. at **Exhibit B**). Her current actions prove that she is fully rehabilitated and has created a new life for herself.

The sole reason for the denial of the waiver is the allegation that Ms. **Constituted** committed marriage fraud. This factor alone should not outweigh the ample equities that Ms. **Constituted** has demonstrated. Therefore, a balancing of the positive equities in Ms. Franklyn's life against one sole adverse factor provides compelling justification for granting her a waiver of inadmissibility in the national and public interest.

E. Conclusion

One of the fundamental values of our immigration laws is the preservation of "family unity". As such, the laws offer waiver provisions to ensure that families are not separated and to alleviate hardships to U.S. citizen relatives. The immediate family unit is universally recognized as the fundamental unit of society, which is entitled to protection by society and the state. The Supreme Court has stated, "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because it is deeply rooted in the Nation's history and tradition." Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977). See also Matter of Cavazos, 17 I&N Dec. 215 (BIA 1980); Matter of Ibrahim, 18 I&N Dec. 55 (BIA 1981). Accordingly, UCIS's intent to deny Ms. Franklyn a waiver of inadmissibility not only violates existing law, but also goes against the national and public interest of the United States.