

UNITED STATES DEPARTMENT OF HOMELAND SECURITY  
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES  
VERMONT SERVICE CENTER  
ST. ALBANS, VERMONT

Re: Bob SMITH  
A000 000 000

I-290B Motion to Reconsider  
Forms I-192 and I-918

**APPLICANT'S MEMORANDUM IN SUPPORT OF HIS MOTION TO RECONSIDER**

I. INTRODUCTION

The applicant, Bob Smith, moves U.S. Citizenship and Immigration Services, pursuant to 8 CFR §103.5(a)(3), to reconsider its July 24, 2015 decision denying his I-192 application for a waiver of the grounds of inadmissibility under section 212(d)(14) of the Immigration and Nationality Act (“Act”) and his I-918 application for Nonimmigrant Status (U visa status). In the alternative, Mr. Smith moves USCIS to reopen and reconsider its denial of his I-192 and I-918 in order to consider additional evidence attached to the memorandum.

The applicant contends, for the reasons stated more fully below, that USCIS’ decision to deny his waiver and application was erroneous as a matter of law and as a matter of facts as applied to law. USCIS denied the waiver application solely because Mr. Smith admitted that he attempted to obtain permanent residence through marriage fraud, an action that he affirmatively admitted to in his initial filing. USCIS did not adjudicate the waiver under the standard set forth in INA § 212(d)(14) despite the clear statutory language that U visa waivers are to be adjudicated under this section. *See also*, 8 C.F.R. § 212.17(b)(1) regarding the treatment of U visa waiver applications. (“USCIS, in its discretion, may grant the waiver based on section 212(d)(14) of the Act,.....if it determines that it is in the public or national interest to exercise discretion to waive the applicable ground(s) of inadmissibility....”). The decision did not weigh the evidence provided in support of the waiver application, instead applying an unlawful *per se* bar to a

waiver application based on marriage fraud. The decision errs in failing to balance the positive and negative factors in denying the waiver application.

Mr. Smith's eligibility for U status is based on being the victim of felonious assault, stemming from an armed robbery in which he was shot after positioning himself to get a good look at the armed robber so he could identify him to the police, even though the armed felon had ordered him to stay down. The Boston Police Department District E-18 readily certified the I-918 Supplement B, because of Mr. Smith's valor and his cooperation in the investigation of the robbery and the felonious assault against him.

## II. ARGUMENT

### A. USCIS Erred By Applying Section 212(d)(3) To Mr. Smith's Waiver Application Instead of Section 212(d)(14) Which Is The Exclusive Statutory Section For U Visa Waivers.

The U visa was created by Congress to allow people to feel safe to reach out to law enforcement to report crimes and seek protection for doing so.<sup>1</sup> INA section 101(a)(15)(U) provides that U status is available to an alien who has suffered substantial physical or mental abuse as a result of having been a victim of certain criminal activity, including felonious assault and is helpful to law enforcement personnel in investigating, and or, prosecuting the crime.<sup>2</sup>

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<sup>1</sup> In enacting INA section 101(a)(15)(U), Congress made findings that: Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. It also gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions. Providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States. [P.L. 106-386, Page 114 STAT. 1534]

<sup>2</sup> INA section 101(a)(15)(U) provides for U visa status for an alien who has suffered "substantial physical or mental abuse" as the result of specified forms of criminal activity (or "similar" activity); possesses information concerning the criminal activity; and provides a certification from a federal, state, or local law enforcement official, prosecutor,

To ensure that their purpose could be carried out, Congress also enacted a very generous waiver provision so that only the worst criminals, i.e., participants in Nazi persecutions, genocide, acts of torture, or extrajudicial killings, would be ineligible for its benefits. INA section 212(d)(14). Congress deliberately did not create any other bars or limitations to eligibility for the waiver.

In rendering its decision on July 24, 2015, USCIS specifically stated on page 1:

As an individual seeking classification as a U nonimmigrant, the waivers available to you are found in section 212(d)(3) of the Act based on the Secretary of Homeland Security's discretion and section 212(d)(14) of the Act as a matter of national or public interest.

The reference to, and reliance on INA section 212(d)(3) is wrong as a matter of law. INA section 212(d)(14) provides the sole basis for adjudicating a waiver for a U visa application.

INA § 212(d)(14) explicitly reads:

The Secretary of Homeland Security shall determine whether a ground of inadmissibility exists with respect to a nonimmigrant described in section 101(a)(15)(U) of this title. The Secretary of Homeland Security, in the Attorney General's discretion, may waive the application of subsection (a) of this section (other than paragraph 3(E)) in the case of a nonimmigrant described in section 101(a)(15)(U) of this title, if the Secretary of Homeland Security considers it to be in the public or national interest to do so. (emphasis added).

The statute is clear and unambiguous. Waivers for U visa applicants must be adjudicated under this section of the statute and this section alone. Despite this, USCIS actually, and improperly, based its denial of Mr. Smith's waiver application on INA § 212(d)(3). Although section 212(d)(3) governs the adjudication of nonimmigrant waivers, generally, it does not apply to those waiver applications that are expressly exempt from its reach, including waivers for U visa applicants which are governed by section 212(d)(14). INA § 212(d)(3) states, in pertinent part:

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judge, or authority investigating criminal activity designated in the statute that states that the U visa applicant is being, has been or is likely to be helpful to the investigation or prosecution of designated criminal activity.

**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 by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted despite his inadmissibility, be granted such a visa....” (Emphasis added).

As the statute specifically provides, § 212(d)(3) is to be used except as provided in this subsection, i.e. INA § 212(d)(14), which exists solely to adjudicate waivers for U visa applicants. Therefore, it was clearly erroneous and improper for USCIS to consider the waiver application under any section other than INA § 212(d)(14). Moreover, 8 C.F.R. § 212.17 states that an alien applying for a U nonimmigrant status may apply for a waiver of inadmissibility under either INA § 212(d)(3)(B) or § 212(d)(14). Since § 212(d)(3)(B) is a waiver specifically for aliens who are inadmissible for terrorist activities as defined by INA § 212(a)(3)(B), it is clear that a waiver application submitted in conjunction with a U visa petition is only to be adjudicated under section 212(d)(14).

The decision states that USCIS, in a request for evidence issued January 31, 2014 asked for “evidence to demonstrate why USCIS should exercise its discretion to approve your waiver under section INA 212(d)(3) or that approving your waiver is in the national or public interest, pursuant to INA 212(d)(14).” There can be no question that USCIS, despite paying lip service to INA § 212(d)(14) in its decision, made its determination under 212(d)(3) alone and did not take 212(d)(14) into consideration at all. The decision set forth the criteria that USCIS considered in reviewing a waiver:

1. The risk of harm to society if an applicant is admitted;
2. The seriousness of the applicant’s prior immigration law, or criminal law violations, if any, and;
3. The reason for wishing to enter the United States

These criteria come directly from Matter of Hranka, 16 I&N Dec. 491, 492 (BIA 1978), which addressed applications filed under then INA § 212(d)(3)(B), and not applications filed

under § 212(d)(14). It held, “In deciding whether or not to grant an application under section 212(d)(3)(B)<sup>3</sup>, there are essentially three factors which we weigh together. The first is the risk of harm to society if the applicant is admitted. The second is the seriousness of the applicant's prior immigration law, or criminal law, violations, if any. The third factor is the nature of the applicant's reasons for wishing to enter the United States.” (emphasis added). Thus, the criteria used by USCIS in denying Mr. Smith’s waiver, comes directly from the waiver used for section 212(d)(3), and is therefore erroneous. Section 212(d)(14) is the Congressionally mandated waiver to use for U visa applicants. Using section 212(d)(3) would render (d)(14) superfluous. The criteria USCIS should have, but did not, consider in evaluating the waiver is that it be in public or national interest to do so. *See*, INA § 212(d)(14) and 8 C.F.R. § 212.17(b)(1) .

B. USCIS Erred By Applying A *Per Se* Bar To U Visa Status For Marriage Fraud.

To compound its error, USCIS appears to have applied a *per se* rule against granting waivers to those who engaged in marriage fraud. However, the Battered Immigrant Women Protection Act of 2000 (BIWPA), which created a special waiver for U visa nonimmigrant status, contains no rule against granting a waiver to a U visa applicant who committed marriage fraud. Under the rules of statutory construction, if the statutory language is clear, that is the end of the inquiry, as the adjudicator “must give effect to the unambiguously expressed intent of Congress.” Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). It is assumed that the legislative purpose is expressed by the ordinary or plain meaning of the words used. INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).

While Congress specifically excluded participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing from the U visa inadmissibility waiver, it

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<sup>3</sup> The waiver under INA section 212(d)(3)(B) in 1978 is now found at section 212(d)(3)(ii). The waiver is not used for terrorist activities but for other grounds of exclusion in applications, generally, for nonimmigrant visas.

did not exclude marriage fraud. INA § 212(d)(14). If Congress wanted to exclude marriage fraud from eligibility for a 212(d)(14) waiver, Congress could easily have done so, but it chose not to. Congress knows how to ban benefits for those who committed marriage fraud, as it did in INA § 204(c), which explicitly bars the approval of immigrant visa petitions to those who committed marriage fraud. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." INS v. Cardoza-Fonseca, 480 U.S. at 432 (internal quotation marks omitted). A *per se* bar for marriage fraud to a waiver application for a U visa applicant contradicts clear Congressional intent. Thus, USCIS' denial provides the grounds for reconsideration because it effectively used a *per se* bar to avoid considering the factors mandated by section 212(d)(14).

INA section 212(d)(14) states that the Secretary of Homeland Security must determine that a waiver would be in the public or national interest. When DHS promulgated the regulations for U visas and attendant waivers, it stated:

“Under this waiver, the Secretary of Homeland Security has the discretion to waive any ground of inadmissibility with respect to applicants for U nonimmigrant status, except the ground applicable to participants in Nazi persecutions, genocide, acts of torture, or extrajudicial killings. INA sec. 212(d)(14), 8 U.S.C. 1182(d)(14).” 72 FR 53021 (September 17, 2007); *see* 8 C.F.R. § 212.17(b)(1).

The regulations also explicitly list categories of inadmissible aliens who are required to demonstrate “extraordinary circumstances” to merit a favorable exercise of discretion, such as violent or dangerous criminals and threats to national security. 8 C.F.R. § 212.17(b)(2). DHS did not include individuals who have committed marriage fraud within either of these categories. *See id.*

C. USCIS Erred By Not Analyzing Whether The Waiver Application Should Be Granted In The Public Or National Interest

A waiver under INA § 212(d)(14) can be granted when it is in “the public or national interest to do so.” Black’s Law Dictionary defines “public interest” as “the welfare of the public as compared to the welfare of a private 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.” Mr. Smith’s courageous cooperation with law enforcement authorities, which included putting his life at risk to try to identify the perpetrator of an armed robbery, and being shot by the robber as a result, and his giving statements to the police to try to identify the perpetrator, should be determined to be in the national and public interest as intended by Congress in creating the U visa and the U visa waiver.

1. Mr. Smith’s admission as a U nonimmigrant is in the national and public interest and he merits a favorable exercise of discretion.

In light of Mr. Smith’s contribution to criminal justice, his compelling positive equities, and the lack of any threat to U.S. security or safety in his admission, it is contrary to the purposes of the waiver authority authorized by INA § 212(d)(14) to deny his admission based on a seemingly *per se* rule for marriage fraud, absent any individualized consideration of the public or national interest. *See Judulang v. Holder*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 476, 490 (rejecting legal standard found to be “unmoored from the purposes and concerns of the immigration laws.”).

The U visa exists because it is in the U.S. public and national interest that victims of violent crimes and other enumerated offenses come forward to assist law enforcement in its mission to pursue justice. These interests were considered so strong that Congress made the U visa waiver standard lower, and made more grounds of inadmissibility waivable, than in many other contexts. For example, even T visa trafficking victims are not able to waive all the inadmissibility grounds that U visa applicants are eligible to waive. Encouraging victims of

violent crimes to come forward, without fear of immigration consequences, is clearly in the national and public interest. Mr. Smith risked his life to try and get a good look so he could identify an armed robber. As a result of his heroic attempt to help the police, he was shot by the robber. The bullet is still in his leg. That is why the police signed the certification. They recognized what Mr. Smith was willing to do to help them, an act of bravery that most people would not have been willing to do.

Mr. Smith's brave and selfless act and his willingness to cooperate with the police are precisely why the U visa was created by Congress, and why the standard for the waiver is so liberal. Congress wanted to encourage people's cooperation with law enforcement when their unlawful status might make them otherwise afraid to come forward. Society benefits when people assist law enforcement in investigating and prosecuting crimes. U visa applicants are eligible to apply for waivers of most grounds of inadmissibility because the importance of preventing and prosecuting violent crime outweighs the importance of penalizing the immigration violations of the noncitizen victims. An individual like Mr. Smith, who risked his life to cooperate with the police, has established that it would be in the national and public interest to grant his application for a waiver. The Boston Police Department clearly agrees.

While Mr. Smith presents truly compelling reasons for desiring to remain in the U.S., his request for a waiver of inadmissibility need only meet the normal standards for whether his admission to the U.S. is in the "public or national interest." USCIS did not even consider that. It simply cited marriage fraud as the basis for denial and, without any analysis, stated that Mr. Smith did not establish that approving the waiver would be in the national or public interest. Neither did USCIS undertake any balancing of his numerous equities against the one adverse factor.



In addition to the important policy grounds for his meeting the national and public interest standard, Mr. Smith has demonstrated meeting the standard because of his personal situation. He and his wife live in Worcester, MA and they are raising their four U.S. citizen children together, ages 14, 11, 7 and 4. He is a very involved father, and the main economic support of the household. Without Mr. Smith's support, these children would have absolutely no means of supporting themselves. They would have no choice but to turn to public assistance for their support. A stable, self-supporting, tax-paying family would be turned into a welfare-dependent, single parent household. The values represented by this family are ones we, as a society, aspire to – loving, hard working and self-supporting. Mr. Smith has been working at one job for the past seven years, advancing to become a valued employee, while supporting his children and giving them the opportunity for success in life. He is paying taxes and contributing to the community. It is clearly not in the national or public interest to push these children into poverty and welfare dependence. As Doris Meissner, former Commissioner of the Immigration and Naturalization Service stated, "Both U.S. and international law recognize the unique relationship between parent and child, and family reunification has long been a cornerstone of both American immigration law and INS practice."<sup>4</sup>

Although the U visa regulations appear to go beyond the statute in setting standards for granting a waiver, even in that context, Mr. Smith amply demonstrates he is deserving of a favorable exercise of discretion. In promulgating the U visa waiver regulations, DHS referred to an analogous context where "the Board of Immigration Appeals has held that, in assessing whether an applicant has met the burden that a waiver is warranted in the exercise of discretion, the adjudicator must balance adverse factors evidencing inadmissibility as a lawful permanent resident with the social and humane considerations presented to determine if the grant of the

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<sup>4</sup> DeYoung, "U.S. Orders Return of Cuban Boy," *The Washington Post*, January 6, 2000, p. A11

waiver appears to be in the best interests of the United States. Matter of Mendez-Moralez, 21 I&N Dec. 296 (BIA 1996).” 72 FR 53021.

In assessing Mr. Smith’s waiver, USCIS ignored evidence in the record pertaining to hardship and discretion and did not balance the factors in considering whether to grant the waiver. USCIS did not count in the applicant’s favor the fact that he voluntarily admitted that he committed marriage fraud. His honesty should be a factor that weighs in his favor because it shows the rehabilitation he has undergone since his immigration violation. Members of the community wrote affidavits attesting to Mr. Smith’s good character. The applicant filed all income tax returns and paid all taxes since 2008 and he has a stable work history, employed by the same company, Herb Chambers of Auburn, since January 2008.

The decision denying this waiver application did not balance the positive and negative factors in the case, but simply and improperly referred to Mr. Smith’s marriage fraud as the reason for the denial. Matter of Mendez-Moralez references Matter of Marin, 16 I&N Dec. 581, 584 (BIA 1978) as a guide to discretionary determinations of a waiver request. The Board of Immigration Appeals set out a list of factors for exercising discretion. Some of the factors deemed adverse to an alien are:

1. The nature and underlying circumstances of the inadmissibility ground at issue;
2. The presence of additional significant violations of this country's immigration laws;
3. The existence of a criminal record and, if so, its nature, recency, and seriousness; and;
4. The presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. Id.

Favorable considerations include:

1. Family ties in the United States;
2. Residence of long duration, especially if applicant entered at a young age;
3. Hardship to the respondent and family if deportation occurs;
4. Military service;
5. History of employment;

6. Property ownership or business ties;
7. Value and service to the community;
8. Rehabilitation after criminal convictions; and
9. Evidence of good character. Id.

In the present case, the many positive factors present in Respondent's case outweigh the few negative factors.

2. Balancing the Positive Equities Against the Adverse Factors in Respondent's Case Provides Compelling Justification for Granting His Waiver of Inadmissibility

The outstanding equities in Mr. Smith's case outweigh the one negative factor – his participation in marriage fraud. First, the applicant came forward and admitted his fraud. DHS did not make a finding of marriage fraud nor charge him on the NTA as having committed fraud. Instead, Mr. Smith wanted to come clean and be honest about his immigration violation because, as explained below, of his rehabilitation and remorse for what he has done. As explained in his affidavit, Mr. Smith is remorseful for what he did. Mr. Smith, by his own admission, had no excuse for his actions. He committed fraud and sincerely regrets having done so.

Mr. Smith's equities consist of his long residence in the United States, fifteen years; his extensive family ties in the United States, including four U.S. citizen children, whom he lives with and supports, his U.S. citizen parents, and most of his extended family members; his work history and payment of income taxes; his outstanding rehabilitation, having earned the respect of his employer by virtue of his character and his work ethic; and his acceptance of responsibility and sincere remorse for his actions. Balancing the long list of equities against the adverse factor compels a finding that Mr. Smith merits a favorable exercise of discretion.

As already stated, Mr. Smith is a very involved father, and the main economic support of the household. He has been working at the same company, Herb Chambers of Auburn, since

January 2008. His immediate supervisor submitted a letter in response to the request for evidence indicating that he consistently strives toward better results, has an endless desire to obtain training and develop new skills, has a kind nature, and is a valuable team member.

Mr. Smith's removal would cause serious and irreparable damage to his family, particularly to his children. His children are all in school. For them to be deprived of their father's presence, especially during their teenage years, could result in serious and perhaps long-lasting damage to their emotional well-being and development. In addition, the loss of his financial contributions would have a substantial and negative impact on their day-to-day lives. If Mr. Smith was deported to St. Lucia, it is unlikely he could get a job paying enough to support his children in the United States. Thus, his wife, Paula, would be solely responsible for supporting their four children here in the United States. Moreover, St. Lucia has an unemployment rate of 22% according to the World Bank, which further reflects the extreme difficulty Mr. Smith can expect to face in finding a job and supporting his family if he were deported to St. Lucia.

Rehabilitation is a significant factor to be considered in the exercise of discretion, Matter of Edwards, 20 I&N Dec. 191 (BIA 1990). Part of showing rehabilitation is accepting responsibility for the crime and demonstrating genuine remorse. Matter of Mendez-Moralez, 21 I&N Dec. at 304. Mr. Smith has repeatedly expressed remorse for what he has done. He has forthrightly admitted to his fraud in his affidavit. It is important to emphasize again that his fraud was not discovered by DHS, he came forward with the information. His honesty should be taken into account in considering his application. His genuine remorse led him to affirmatively admit to his fraud, showing that he has changed and would not repeat his actions.

As an alien's positive equities are weighed against the adverse factors, and the circumstances of his or her case are viewed in the totality, evidence of genuine rehabilitation may be the ultimate factor that tips the scale to warrant a favorable exercise of discretion. Matter of Mendez-Moralez, 21 I&N Dec. at 305. In Matter of Arreguin, 21 I&N Dec. 38, 42 (BIA 1995), the Board found that the IJ's denial of the respondent's application for 212 (c) relief erroneously gave insufficient weight to the respondent's equities when balanced against her single criminal conviction. The Board, in its reversal of the IJ's denial, gave greater weight to the respondent's efforts at rehabilitation, even though she was incarcerated, as well as other factors weighing heavily in her favor. Id. at 40. The Board recognized that the respondent demonstrated significant efforts towards rehabilitation, including her acceptance of responsibility for the crime she committed, expression of remorse, and achievements while in prison. Id. The Board concluded that the respondent warranted relief where she had been convicted of only one drug offense, had accepted responsibility for her actions, demonstrated substantial efforts toward rehabilitation, and presented outstanding equities. Id.

In Matter of Mendez-Moralez, the Board denied a waiver of inadmissibility because, unlike respondent, the applicant had been convicted of a most egregious crime. As a 40 year old man, the applicant was convicted of sexually penetrating a 13 year old girl. The Board found that the circumstances of the crime far outweighed the positive factors, particularly because the equities did not include any persuasive evidence of rehabilitation, as the applicant denied he had committed a sexual assault, and expressed no remorse for his crime. Similarly, the regulations require a demonstration of extraordinary circumstances for a U visa waiver only when violent or dangerous crimes are involved.

Mr. Smith is the antithesis of Mendez-Moralez. He was not convicted of any crime; he not only took responsibility for his actions, he volunteered the information where USCIS had not made a finding that he had committed any violation; and he expressed deep remorse for his actions. He further demonstrated extensive rehabilitation and outstanding equities.

Although marriage fraud is a serious violation, Congress, in creating the U visa, allowed it to be waived. Mr. Smith's immigration violation is in no way representative of his present character or respect for the law. What is representative of his character and respect for the law is his honesty in admitting to marriage fraud. Coming forward and admitting what he did, shows the genuine rehabilitation that Mr. Smith has gone through.

The positive factors in this case, many of which must be considered as "unusual" or "outstanding" equities, should outweigh his immigration record. The only adverse factors besides the fraud are a 2005 unlicensed operation of a motor vehicle and uninsured motor vehicle charges where he admitted to sufficient facts, and the charges were dismissed upon payment of court costs only; and a 2001 miscellaneous municipal ordinance/bylaw violation. The sole reason for the denial of the waiver is that he admitted to committing marriage fraud. This factor alone should not outweigh the ample equities that Mr. Smith has demonstrated. There is no other evidence supporting a conclusion that admitting Mr. Smith would be against the public or national interest. On the contrary, there is much evidence of his desirability as a permanent resident.

### **III. CONCLUSION**

USCIS erred in denying the waiver because it used an incorrect standard and failed to balance the many equities presented by Mr. Smith, against the one negative factor. His history

does not demonstrate that this is an individual whose presence is detrimental to the best interests of the United States. To the contrary, the evidence establishes the national and public interest would be best served by granting this waiver. For Mr. Smith and his family to be penalized forever by denying his application would not serve the purpose of the U visa.

Accordingly, the applicant respectfully asks U.S. Citizenship and Immigration Services to reconsider the denial of his I-192 and I-918 and grant his waiver and U visa applications. In the alternative, the applicant respectfully asks USCIS to reopen and reconsider its denial of his I-192 and I-918 in order to consider additional evidence attached to the memorandum.

Respectfully submitted,  
on behalf of the Applicant,

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DATED: August 24, 2015