No. 13-1011

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

L.D.G.,

Petitioner,

v.
ERIC H. HOLDER, JR.,

Attorney General of the United States

Respondent.

PETITION FOR REVIEW FROM AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

REDACTED BRIEF FOR RESPONDENT

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Dated: August 29, 2013

TABLE OF CONTENTS

NOTE

TABLE OF AUTHORITIES

CASES

STATUTES

Immigration and Nationality Act of 1952, as amended:

REGULATIONS

OTHER AUTHORITIES

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STATEMENT OF JURISDICTION

The jurisdictional statement in Petitioner's opening brief is not complete and correct. 7th Cir. R. 28(b). What follows is a complete jurisdictional summary. *See* 7th Cir. R. 28(a). The Court has jurisdiction under 8 U.S.C. § 1252(a)(5) to review the final order of removal issued by the Board of Immigration Appeals ("Board")

[1] Petitioner requested to proceed under a pseudonym and keep records under seal to protect her identity. This Brief is written without any mention of identifying information, although citation is made to the unredacted Administrative Record ("A.R.") on file with the Court. A Confidential version of this Brief will be filed with Petitioner's full name and A Number.

on December 3, 2012. A.R. 3. Petitioner timely filed her petition for review on January 2, 2013, within thirty days of the Board's Order. *See* 8 U.S.C. § 1252(b)(1). Venue is proper in this Court because the hearing was held in Chicago, Illinois, within this judicial circuit. *See* 8 U.S.C. § 1252(b)(2). Jurisdiction in this Court does not extend to the Secretary of Homeland Security's denial of Petitioner's petition for a "U" visa, and accompanying request for a waiver of inadmissibility. *See Torres-Tristan v. Holder*, 656 F.3d 653 (7th Cir. 2011); *Lee v. Holder*, 599 F.3d 973, 975-76 (9th Cir. 2010); *Fonseca-Sanchez v. Gonzales*, 484 F.3d 439, 442 n.5 (7th Cir. 2007). The Court has jurisdiction over the limited question whether the Board correctly held the Immigration Judge lacked authority to adjudicate the waiver application.

STATEMENT OF THE ISSUE

Whether the Immigration Judge and the Board had authority to adjudicate Petitioner's request for a waiver of inadmissibility in support of her application for a U visa, which the statute places in the exclusive jurisdiction of the Secretary of Homeland Security.

STATEMENT OF THE CASE AND RELEVANT FACTS

A. Petitioner Entered The United States Without Inspection, Is Convicted of The Unlawful Possession of Drugs With Intent To Deliver, And Is Ordered Removed.

Petitioner's illegal entry into the United States and subsequent drug trafficking conviction are not disputed. She is a native and citizen of Mexico who entered the United States in November 1985, without being admitted or paroled. A.R. 95, 717. Petitioner's husband is also an undocumented alien, and they have several citizen children born in the United States. A.R. 129. The family lived in another state for many years, but in 2005 they moved to Illinois to be closer to her husband's family. A.R. 638.

In January 2006, Petitioner's husband and his younger brother went into business together as owners of a restaurant. A.R. 494. Soon, the family had difficulty with Petitioner's brother-in-law because of his drug use, and he stopped coming to the restaurant. A.R. 495. The restaurant was doing well when on August 19, 2006, five armed men entered, kidnapped the family, a cook, and a customer. *Id.* The armed men demanded "the money" and they took all the money from the cash register. *Id.* The kidnappers then took the hostages to another town and held them for many hours. A.R. *Id.*, 639. The kidnappers severely beat Petitioner's husband, threatened to rape her daughter, and demanded to know where her brother-in-law was, and that Petitioner and her husband give them money. *Id.*,

A.R. 644. Eventually the police arrived and arrested the kidnappers. A.R. 135, 361, 395.

The family did not return to the restaurant business after the kidnapping and, according to Petitioner's affidavit, their finances became more difficult. A.R. 640. One day in June of 2007, petitioner ran several errands for her husband when she bought paint supplies at one store and several containers of a diet supplement at another store. *Id.* Petitioner was later stopped by the police as she took her child to a practice and they searched for drugs in her car. *Id.* Petitioner later learned that the police had executed a search warrant at their house and found two kilos of cocaine, and drug paraphernalia used to cut and brick cocaine, including the items she had purchased that day. *Id.*, A.R. 519-21, 640, 609-11.

Petitioner asserts that she was not aware that her husband was involved with selling drugs. A.R. 640. However, at the suggestion of her counsel, she pleaded guilty to a controlled substance offense, served 180 days in jail and returned to be with her children. *Id.; see* A.R. 480. Her husband was sentenced to five years in state prison. A.R. 129.

On November 16, 2007, Petitioner was served with a Notice to Appear ("NTA") by the Department of Homeland Security, Immigration and Customs Enforcement. A.R. 717-18. The NTA alleged that Petitioner is not a citizen of the United States, but is a citizen of Mexico, and is removable from the United States

under 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled. A.R. 717.

B. Petitioner Appears Before The Immigration Judge And Applies For A U Visa And A Waiver of Inadmissibility From CIS

Petitioner appeared *pro se* before the Immigration Judge on January 30, 2008, when she was advised of her rights to retain counsel and apply for relief from removal. A.R. 87-90. On July 17, 2008, Petitioner appeared before the Immigration Judge with counsel who acknowledged that Petitioner was not eligible for cancellation of removal because of her drug conviction. A.R. 93. However, counsel believed that Petitioner might be eligible for a U visa under 8 U.S.C. § 1101(a)(15(U), and explained to the Immigration Judge that she had applied to United States Citizenship and Immigration Services ("CIS") for that visa, and requested a continuance for the agency to consider that application. A.R. 96-98. Counsel explained that with the waiver available for a U visa, CIS may waive even an aggravated felony. A.R. 106. Further continuances were granted on April 8, 2008 (A.R. 103), and January 20, 2010. A.R. 107.

On November 17, 2010, Petitioner again appeared before the Immigration Judge, and her attorney informed the court that CIS had denied Petitioner's application for a U visa, because the application for a waiver of admissibility associated with the visa had been denied. A.R. 110-11. Counsel again explained that because Petitioner had a drug conviction she is not eligible for cancellation of

removal under Section 240A, 8 U.S.C. § 1229B, or other relief from removal. A.R. 111. Petitioner's counsel asked for a further continuance so that Petitioner could challenge her conviction in criminal court under the Supreme Court's decision in *Padilla v Kentucky*, 559 U.S. 356 (2010), and allege the ineffective assistance of counsel. A.R. 114.

On March 30, 2011, Petitioner and her counsel again appeared before the Immigration Judge. A.R. 117. Counsel explained that Petitioner had asked CIS to reconsider the denial of the application for a U visa, and although the agency had reopened the waiver application, it had again denied the waiver. A.R. 122, *see* A.R. 161-63.

In all, Petitioner had made two separate applications to CIS. *See* A.R. 157, 159. On July 11, 2008, she had filed the Petition for U Nonimmigrant Status, Form I-918. A.R. 170, *see* A.R. 157. On January 19, 2010, she filed the Form I-192, Application For Advance Permission to Enter as Nonimmigrant. A.R. 370, *see* A.R. 159. Those applications were denied separately on April 20, 2010. A.R. 157, 161. Petitioner did not challenge the denial of the U visa application, but she moved to reopen the denial of the waiver of inadmissibility, and that was denied on September 27, 2010. A.R. 161.

CIS denied the application for a waiver of inadmissibility in the exercise of discretion. A.R. 162. Evaluating the basis of a waiver under Section 212(d)(3), 8

U.S.C. § 1182(d)(3), CIS first noted that, although the risk to society of allowing Petitioner to be admitted was unknown, her drug conviction was a serious crime. *Id.* As to the seriousness of her immigration violation, CIS explained that Petitioner had not established that she was not guilty of the serious crime, and that the grand jury testimony suggested that she was seriously involved. *Id.* Petitioner's statement was "not sufficiently persuasive to warrant a favorable exercise of discretion." *Id.* Her reasons for wishing to remain in the United States were similarly unpersuasive to warrant a favorable exercise of discretion. *Id.*

Addressing the national or public interest under Section 212(d)(14), 8 U.S.C. § 1182(d)(14), CIS noted that it was not disputed that she was the victim of criminal activity. A.R. 163. However she was inadmissible to the United States for being present without admission, for committing a crime involving moral turpitude, and as a controlled substance trafficker. *Id.* CIS concluded that the evidence with her application does not establish sufficient rehabilitation, or why it would be in the national or public interest to exercise discretion in her favor. *Id.*

Counsel argued to the Immigration Judge that, although the immigration court had no authority over the U visa, the court had jurisdiction to adjudicate the waiver of inadmissibility. A.R. 124. Counsel argued that although the U visa regulation referred to the U visa waiver at Section 212(d)(14), which is limited to the discretion of the Secretary of Homeland Security, the implementing regulations

also refer to the Section 212(d)(3) waiver, which refers to the Attorney General. A.R. 125.

C. The Immigration Judge Declines to Consider the Waiver For A U Visa

In the decision of March 30, 2011, the Immigration Judge rejected Petitioner's argument that the immigration court may adjudicate the waiver of inadmissibility associated with an application for a U visa. A.R. 38-44. The Immigration Judge noted the regulations implementing the U visa provision provide that "USCIS has sole jurisdiction for U non-immigrant status." A.R. 40 (citing 8 C.F.R. § 214.14(c)(1)). Even though an alien in removal proceedings may apply for a U visa, jurisdiction remains with USCIS, and denials of U visas may only be appealed to the Administrative Appeals Office ("AAO") of DHS. A.R. 41 (citations omitted). The regulation provides that if the applicant is inadmissible, she must also file a Form I-192, "Application for Advance Permission To Enter as Non-Immigrant," in accordance with 8 C.F.R. § 212.17." 8 C.F.R. § 214.14(c)(2)(iv).

The Immigration Judge distinguished this Court's decision in *Atunnise v. Mukasey*, 523 F.3d 830 (7th Cir. 2008). A.R. 41-43. In *Atunnise*, the Court had remanded the case of an applicant for a K visa to the BIA to consider a waiver of inadmissibility under Section 212(d)(3), 8 U.S.C. § 1182(d)(3), even though the regulations provide that the waiver must be requested from the consular office.

A.R. 41. That case was limited to its unique facts, because the Court found the agency had used an "incoherent" form which did not properly instruct the applicant to apply for the waiver, and she had already been granted the visa. A.R. 42. Also, that case relied on case law issued before the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which the Immigration Judge noted eliminated the immigration court's consideration of Section 212(d)(3) waivers. A.R. 43. The Immigration Judge ordered Petitioner removed to Mexico on the charge alleged in the NTA. A.R. 44.

D. The Board Affirms The Decision of The Immigration Judge and Does Not Review The U Visa Waiver

Petitioner appealed to the BIA and reiterated her argument that the Immigration Judge had authority to adjudicate a waiver for inadmissibility under INA Section 212(d)(3). A.R. 21 (Petitioner's brief to the Board). The BIA agreed with the Immigration Judge and adopted and affirmed his decision. A.R. 3. The Board explained that although an applicant for a U visa who is inadmissible must file a Form I-192 for a waiver of inadmissibility, the regulations provide that the decision whether to grant the waiver is exclusively within the jurisdiction of DHS. A.R. 4.

The Board again distinguished this Court's decision in *Atunnise* because in that case the Immigration Judge had not properly informed the applicant of the available relief (in part because of the incoherent form), and therefore the applicant

had not waived her right to apply for a waiver. *Id.* The Board further noted that *Atunnise* did not involve the waiver of inadmissibility or a U visa, and compared this case to this Court's decision in *Borrego v. Mukasey*, 539 F.3d 689, 693 (7th Cir. 2008). *Id.* The Board rejected Petitioner's argument that the Immigration Judge had the authority to adjudicate Petitioner's application for a waiver of inadmissibility. A.R. 5.

SUMMARY OF THE ARGUMENT

Petitioner applied for a U visa for authorization to enter the United States as the victim of or witness to a crime. An applicant for a U visa who is inadmissible into the United States must apply for a waiver of inadmissibility under Section 212(d)(14), the waiver specifically established by Congress for applicants for U visas. Both the decision to grant the U visa and the decision to grant the waiver are within the exclusive authority of the Secretary, and not subject to review by an Immigration Judge, the BIA, or this Court under Section 242 review. The regulations implementing the U visa provisions require, that if the applicant is inadmissible under grounds which may be waived under Section 212(d)(3), the applicant for a U visa must file a Form I-192 addressing eligibility for those grounds for a waiver. The ultimate responsibility for granting the U visa, and the U visa waiver, remains exclusively with the Secretary.

ARGUMENT

A. Standard of Review

The Court conducts a *de novo* review of questions involving its own jurisdiction and law. *Alvarado-Fonseca v. Holder*, 631 F.3d 385, 389 (7th Cir. 2011); *Muratoski v. Holder*, 622 F.3d 824, 829 (7th Cir. 2010). Deference is accorded to an agency's interpretation of its own regulation, *see Auer v. Robbins*, 519 U.S. 452, 461-62 (1997), and an ambiguous section of the INA, to the extent the power to interpret such sections is within the agency's purview, *see INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). If the statute is clear the Court must give effect to the plain meaning of the Act. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *See Chevron USA v. Natural Res. Defense Council, Inc*., 467 U.S. 837, 842–43 (1984).

B. It Is Plain On The Face of The Statute That The U Visa And The Waiver Are Reserved Exclusively To The Discretion of the Secretary

By enacting the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, 114 Stat. 1464 (2000), Congress created the U visa classification for victims of certain specified criminal acts. An applicant may obtain such a visa "**if the Secretary of Homeland Security determines that**": (1) she has experienced "substantial physical or mental abuse" as a result of qualifying criminal activity that was in violation of Federal, State, or municipal criminal law;

(2) the criminal act occurred within the United States; and (3) the applicant "has been helpful, is being helpful, or is likely to be helpful" to law enforcement authorities that are investigating or prosecuting the crime. 8 U.S.C. § 1101(a)(15)(U)(i) & (iii) (emphasis added); *see also* 8 U.S.C. § 1184(p)(1); 8 C.F.R. §§ 214.14(a)(2), (3), (8), & (9), 214.14(b). An alien in removal proceedings must file her U visa petition with CIS, which has sole jurisdiction to adjudicate such petitions. 8 C.F.R. § 214.14(c)(1)(i), (c)(5)(ii); *see also Lee v. Holder*, 599 F.3d 973, 976 (9th Cir. 2010).

It is the alien's burden to demonstrate her eligibility for the visa. 8 C.F.R. § 214.14(c)(4). In support of her petition, an alien must file Form I-918, Petition for U Nonimmigrant Status, in addition to documentary evidence showing the alien has experienced physical or mental injuries directly or proximately caused by criminal activity, evidence that the criminal act occurred within the United States, a personal statement, and any other evidence she possesses regarding the criminal activity. *See* 8 C.F.R. §§ 214.14 (c)(1), (c)(2)(ii)-(iii). While all credible evidence in support of a visa petition will be considered, to demonstrate eligibility for a U visa, an alien must submit a certificate signed by a designated law enforcement official certifying to CIS that the alien has been, currently is being, or is likely to be helpful in the investigation or prosecution of qualifying criminal activity

occurring within the United States. 8 U.S.C. §§ 1184(p)(1) & (4)[2]; 8 C.F.R. § 214.14(c)(2)(i); *Matter of Sanchez Sosa*, 25 I&N Dec. 807, 811 (BIA 2012) (describing the conditions for a continuance by an Immigration Judge for a U visa application).

In addition, only aliens admissible to the United States or granted a waiver of inadmissibility by CIS are eligible for a U visa. *See* 8 U.S.C. § 1182(d)(14); 8 C.F.R. §§ 212.17(a), 214.1(a)(3)(i), 214.14(c)(2)(iv). The Section 212(d)(14) waiver of inadmissibility available to applicants for U visas is exclusively in the jurisdiction of the Secretary to determine the public or national interest.

> (14) The **Secretary of Homeland Security shall determine** whether a ground of inadmissibility exists with respect to a nonimmigrant described in section 1101(a)(15)(U) of this title. The Secretary of Homeland Security, in the Attorney General's [sic] discretion, may waive the application of subsection (a) of this section (other than paragraph 3(E)) in the case of a nonimmigrant described in 1101(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.

[2] Section 214(p)(3), 8 U.S.C. § 1184(p)(3), specifically addresses the "Duties of the Attorney General with respect to "U" visa nonimmigrants." Those duties include providing references to nongovernmental resources, and employment authorization. *Id.* The reference to the Attorney General and the "Service" in that Section refers to the former Immigration and Naturalization Service ("INS"), and should be read to refer to DHS. The INS's functions were transferred to DHS on March 1, 2003. *See* 6 U.S.C. § 542, and 8 U.S.C. § 1551 note.

8 U.S.C. § 1182(d)(14) (emphasis added).[3]

An alien receiving an approved U visa petition is eligible for work authorization and may remain in the United States as a nonimmigrant for a four-year period, and this period may be extended if the alien's presence is required to continue in the investigation or prosecution of criminal activity, or if the DHS determines that exceptional circumstances warrant an extension of her nonimmigrant status. 8 U.S.C. § 1184(p)(6). In addition, an alien may apply for Lawful Permanent Resident status if she has been continuously physically present in the United States for the three years prior to her admission as a nonimmigrant under Section 101(a)(15)(U), and she demonstrates that her continued presence in this country is required for humanitarian reasons, to preserve family unity, or is otherwise in the public interest. 8 U.S.C. § 1255(m)(1); 8 C.F.R. § 245.24(a)(1), (b); *Matter of Sanchez Sosa*, 25 I&N Dec. at 810.

The regulations implementing the U visa classification make clear that the Secretary has exclusive authority over the availability of U visas. The "Application procedures for U nonimmigrant status" provide, "**USCIS has sole jurisdiction**

[3] Ironically perhaps, the official reporter notes in a footnote to the statute that the reference to the Attorney General in the original should refer to the "Secretary." 8 U.S.C. § 1182 n.4. Section 212(d)(14) is not discussed in Petitioner's Brief to this Court, and therefore she has waived any argument that she is eligible for a Section 212(d)(14) waiver of inadmissibility, or that the Court may review the Secretary's decision to deny the 212(d)(14) waiver. *See Haxhiu v. Mukasey*, 519 F.3d 685, 692 (7th Cir. 2008).

over all petitions for U nonimmigrant status." 8 C.F.R. § 214.14(c)(1) (emphasis added). For applicants in removal proceedings such as Petitioner, the Form I-918, "Petition For U Nonimmigrant Status," must be filed directly with CIS. 8 C.F.R. § 214.14(c)(1)(i). The agency attorney representing the Secretary in the removal proceedings may agree to terminate proceedings without prejudice before the Immigration Judge or the Board while the application is pending with CIS. *Id.*

C. The Use of A Form I-192 To Gather Evidence Does Not Divest The Secretary of Her Authority To Decide U Visa Applications

The application procedures described in the CIS regulations provide; "If the petitioner is inadmissible, [a] Form I-192, 'Application For Advance Permission To Enter as Nonimmigrant,' [must be filed] in accordance with 8 C.F.R. § 212.17." 8 C.F.R. § 214.14(c)(2)(iv).[4] In its comments to the rules implementing the U visa regulations, CIS explained that the Form I-192 is listed in the rule "as initial evidence which must be filed concurrently with Form I-918, along with a separate filing fee. . . . Form I-192 is an established form to waive grounds of inadmissibility for aliens seeking immigration benefits. *See, e.g.*, 8 C.F.R. § 212.4 (general authority for waivers in nonimmigrant cases); 8 C.F.R. § 212.16 (providing for use of Form I-192 in T nonimmigrant status cases)." *New*

[4] The implementing regulation, 8 C.F.R. § 212.17, "Applications for exercise of discretion relating to U nonimmigrant status," is set out in full as a Note to this Brief.

Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg 53014-01 (September 17, 2007).

Parenthetically, the subtitle of the Form I-192 uses the phrase, provides "Pursuant to Section 212(d)(3)(A)(ii) of the INA." *See* A.R. 370 (Petitioner's Form I-192). In turn, Section 212(d)(3)(A)(ii) refers to the authority of the Attorney General to grant a waiver under that Section. 8 U.S.C. § 1182(d)(3)(A)(ii). However, the CIS U visa regulations make clear that the Form I-192 is used here because it is an established form to gather evidence to waive grounds of inadmissibility. The regulation provides that "**USCIS, in its discretion, may grant the waiver based on Section 212(d)(3)**, . . . , except where [the ground of inadmissibility arises under certain security and foreign policy grounds]." 8 C.F.R. § 212.17(b)(1)(emphasis added).

The regulations further provide that, in cases of applicants like Petitioner who are inadmissible on criminal grounds, "in exercising its discretion USCIS will consider the number and severity of the offenses of which the applicant has been convicted." 8 C.F.R. § 212.17(b)(2). There is "no appeal of a decision to deny a waiver," although nothing prevents an applicant from re-filing a request. 8 C.F.R. § 212.17(b)(3). The Secretary may revoke a waiver previously authorized at any time. 8 C.F.R. § 212.17(c). "Under no circumstances" may anyone appeal from a decision to revoke a waiver. *Id.*

Thus, the statute specifically provides that the waiver of inadmissibility for a U visa is exclusively within the discretion of the Secretary. 8 U.S.C. § 212(d)(14). The implementing regulations consistently explain that the waiver is within the discretion of the Secretary. 8 C.F.R. §§ 212.17, 214.14. Although the regulation refers to "the waiver based on Section 212(d)(3)," the decision to grant that waiver is reserved to the discretion of USCIS. 8 C.F.R. § 212.17(b)(1). So too, although Form I-192 refers to Section 212(d)(3)(A)(ii), which in turn refers to the Attorney General, the regulations make clear that the Form I-192 is used under this regulation as an established form (with an established fee) to collect initial evidence to allow CIS to exercise its discretion. The use of the Form I-192 does not amend the statute to vest the Secretary's discretion in the Attorney General.

Petitioner argues that the plain language of Section 212(d)(3)(A) "bestows jurisdiction upon the Attorney General to adjudicate waivers of inadmissibility in the U visa context." Pet. Br. 15. Nothing in Section 212(d)(3)(A) refers to the U visa context. Petitioner applied for a waiver of inadmissibility under Section 212(d)(14) pertaining to U visas. The plain language of Section 212(d)(14) of the INA limits the waiver to the discretion of the Secretary.

"[P]lain and unambiguous statutes must be applied as written." *Atunnise v. Mukasey*, 523 F.3d 830, 836 (7th Cir. 2008) (citing *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002); *United States v. Farr*, 419 F.3d 621, 625 (7th Cir.

2005)). Section 101(a)(15)(U), and Section 212(d)(14), are plain and unambiguous, and provide that the U visa and the waiver of inadmissibility are exclusively within the domain of the Secretary.

The Courts have consistently held that the adjudication of a U visa application is exclusive to the Secretary. *See Torres-Tristan v. Holder,* 656 F.3d 653, 663 (7th Cir. 2011) ("We do not have jurisdiction to review the denial of Torres–Tristan's application for a waiver of inadmissibility or his petition for a U Visa."); *Lee v. Holder* 599 F.3d 973, 975-976 (9th Cir. 2010)("Even under the new regulations, petitioners who are denied U visas may appeal only to the Administrative Appeals Office of USCIS rather than the immigration court. . . . Because USCIS, and not the IJ, had jurisdiction over Lee's request for interim relief, Lee's appeal fails."); *see also Ramirez Sanchez v. Mukasey*, 508 F.3d 1254, 1255 -1256 (9th Cir.2007) (per curiam) (USCIS has sole jurisdiction over the issuance of U Visa petitions). That there are other waivers of inadmissibility available in other contexts which may involve the Attorney General, consular officers, or the Secretary of State, does not provide a basis for departure from the plain meaning of Section 212(d)(14). *See* Pet. Br. 24-27 (referring to refugees and other applicants for admission where the authority to grant a waiver rests with the Attorney General).

This Court's decision in *Atunnise v. Mukasey*, 523 F.3d 830 (7th Cir. 2008), is not to the contrary. In that case, an applicant for admission applied for a K-3 non-immigrant visa under Section 101(a)(15)(K), 8 U.S.C. § 1101(a)(15)(K), as the spouse of a United States citizen, who, in turn, had applied for an immigrant visa on her behalf. *Atunnise*, 523 F.3d at 832. As an applicant for a K-3 visa, she may have been eligible for a waiver of inadmissibility under Section 212(d)(3). *Id.* at 833. The Court held that because of the use of an "incoherent" form and other reasons, Atunnise had not waived her opportunity to apply for the Section 212(d)(3) waiver of inadmissibility when she failed to apply for that waiver during consular processing abroad. *Id.* at 838. The Court remanded to the Board to consider whether the applicant was eligible for a Section 212(d)(3) waiver. *Id.* at 839. In this case, Petitioner was not deprived of her opportunity to apply for a waiver of inadmissibility in conjunction with her application for a U-visa. She applied for that waiver in conjunction with her U-visa application and it was denied by the Secretary. In fact, the Secretary twice adjudicated, and twice denied the waiver – on her original application and on her motion to reopen.

The Secretary's full adjudication of Petitioner's waiver application also distinguishes this case from that presented to this Court in *Borrego v. Mukasey*, 539 F.3d 689 (7th Cir. 2008). In *Borrego*, the applicant had the opportunity to apply for a waiver of inadmissibility, but instead failed to disclose her

inadmissibility and apply for a waiver at the proper time. *Id*. at 693. Atunnise was deprived of her opportunity to apply for a waiver by an incoherent form. *Atunnise*, 523 F.3d at 832. In contrast, Petitioner knew she required the waiver, she applied for it, and it was denied. More significantly, unlike both Atunnise and Borrego, she applied for a Section 212(d)(14) waiver, which is entrusted exclusively to the discretion of the Secretary.[5]

D. Petitioner's Request For Confidentiality Under 8 U.S.C. § 1367

Along with establishing the U visa category, the 2000 amendments to the INA established new confidentiality and non-disclosure protections for victims of crimes, witnesses, and others. 8 U.S.C. § 1367(a)(2). In this case Petitioner requested that she be permitted to proceed under a pseudonym and file personal information under seal. In its Order of January 30, 2013, this Court directed the parties to address in their briefs whether the information should remain under seal. Specifically, the Court directed the parties to address the hanging paragraph of 8 U.S.C. § 1367(a)(2), which provides that the protection "ends when the application for relief is denied and all opportunities for appeal of the denial have been exhausted."

[5] Insofar as the Board relied on the distinction drawn in *Borrego* between admitted and unadmitted aliens, Respondent does not rely on the Board's reasoning, which appears to overlook the fact that Petitioner was never admitted to the United States. *See* Pet. Br. 30. However, the Board's reasoning relying on the U-visa context of this case is sound and sufficient to sustain the agency decision.

Despite the Court's directive, Petitioner has not addressed this issue in her Brief. However, Petitioner claims in her Brief that she has appealed the denial of her application for a U visa waiver to the Administrative Appeals Office of DHS and that appeal is pending. Pet. Br. 10.[6] Because Petitioner has appealed the denial of her application for a U visa waiver, Respondent does not object to portions of the record remaining under seal.

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[6] If the Immigration Judge and the Board had authority to adjudicate Petitioner's application for a waiver of inadmissibility under Section 212(d)(14), the appeal to the AAO would suggest that Petitioner has not exhausted administrative remedies and the issue would not be within the jurisdiction of this Court for that reason. *See* 8 U.S.C. § 1252(d)(1).

CONCLUSION

Because, the decision to waive inadmissibility pursuant to Section 212(d)(14), in conjunction with a U visa application, is exclusively within the authority of the Secretary, this Court should deny the petition for review.

Respectfully submitted,

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Dated: August 29, 2013

STATEMENT OF RELATED CASES

I hereby certify that I am not aware of any pending case in this court that may be related to, or present the same issues as, the instant case.

s/Anthony W. Norwood
ANTHONY W. NORWOOD

Dated: August 29, 2013

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) the attached Brief For Respondent is proportionately spaced, (font: Times New Roman) and has a typeface of 14 points and contains 5,177 total words.

s/Anthony W. Norwood
ANTHONY W. NORWOOD

Dated: August 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2013, I electronically filed the foregoing REDACTED BRIEF FOR RESPONDENT with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. All participants in the case will be served by the appellate CM/ECF system.

s/Anthony W. Norwood
ANTHONY W. NORWOOD

NOTE

8 CFR § 212.17

Applications for the exercise of discretion relating to U nonimmigrant status.

(a) Filing the waiver application. An alien applying for a waiver of inadmissibility under section 212(d)(3)(B) or (d)(14) of the Act (waivers of inadmissibility), 8 U.S.C. 1182(d)(3)(B) or (d)(14), in connection with a petition for U nonimmigrant status being filed pursuant to 8 CFR 214.14, must submit the waiver request and the petition for U nonimmigrant status on the forms designated by USCIS in accordance with the form instructions. An alien in U nonimmigrant status who is seeking a waiver of section 212(a)(9)(B) of the Act, 8 U.S.C. 1182(a)(9)(B) (unlawful presence ground of inadmissibility triggered by departure from the United States), must file the waiver request prior to his or her application for reentry to the United States in accordance with the form instructions.

(b) Treatment of waiver application.

(1) USCIS, in its discretion, may grant the waiver based on section 212(d)(14) of the Act, 8 U.S.C. 1182(d)(14), if it determines that it is in the public or national interest to exercise discretion to waive the applicable ground(s) of inadmissibility. USCIS may not waive a ground of inadmissibility based upon section 212(a)(3)(E) of the Act, 8 U.S.C. 1182(a)(3)(E). USCIS, in its discretion, may grant the waiver based on section 212(d)(3) of the Act, 8 U.S.C. 1182(d)(3), except where the ground of inadmissibility arises under sections 212(a)(3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), or (3)(E) of the Act, 8 U.S.C. 1182(a)(3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), or (3)(E).

(2) In the case of applicants inadmissible on criminal or related grounds, in exercising its discretion USCIS will consider the number and severity of the offenses of which the applicant has been convicted. In cases involving violent or dangerous crimes or inadmissibility based on the security and related grounds in section 212(a)(3) of the Act, USCIS will only exercise favorable discretion in extraordinary circumstances.

(3) There is no appeal of a decision to deny a waiver. However, nothing in this paragraph is intended to prevent an applicant from re-filing a request for a waiver of ground of inadmissibility in appropriate cases.

(c) Revocation. The Secretary of Homeland Security, at any time, may revoke a waiver previously authorized under section 212(d) of the Act, 8 U.S.C. 118(d). Under no circumstances will the alien or any party acting on his or her behalf have a right to appeal from a decision to revoke a waiver.

[72 FR 53035, Sept. 17, 2007; 76 FR 53788, Aug. 29, 2011]