

**2012 Immig. Rptr. LEXIS 9124**

Administrative Appeals Office

Date: AUG 17, 2012

FILE: [redacted]--Office: VERMONT SERVICE CENTER

***BIA & AAU Non-Precedent Decisions***

**Reporter**

2012 Immig. Rptr. LEXIS 9124 \*

**IN RE: Applicant: [redacted]**

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**Core Terms**

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redact, traffic, physical presence, nonimmigrant, law enforcement, clear chance, severe form, visa, borrow, blade, alien, applicable period, eligibility, arrival, extreme hardship, recount

**Counsel**

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[\*1]

ON BEHALF OF APPLICANT:

[redacted]

**Opinion By:** Decision transmittal issued by: Perry Rhew, Chief, Administrative Appeals Office

**Opinion**

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**AAO Designation: D12**

**APPLICATION:** Application for T Nonimmigrant Status under section 101(a)(15)(T)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(T)(i).

**DISCUSSION:** The Director, Vermont Service Center, ("the director") denied the application for T nonimmigrant status and the Administrative Appeals Office (AAO) dismissed the applicant's appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The appeal will remain dismissed.

The applicant seeks nonimmigrant classification under section 101(a)(15)(T)(i) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(a)(15)(T)(i), as a victim of a severe form of trafficking in persons. *Procedural History*

The applicant filed this Form I-914 on August 25, 2009. The director subsequently issued a Request for Evidence (RFE) of, *inter alia*, the applicant's victimization and his resultant presence in the United States. The director [\*2] found prior counsel's response to the RFE insufficient to establish the applicant's eligibility and denied the application for failure to establish that the applicant was a victim of a severe form of trafficking in persons and was present in the United States on account of such trafficking. On appeal, counsel submitted additional evidence and legal briefs reasserting the applicant's eligibility.<sup>1</sup>

The AAO issued a request for additional evidence (RFE) on October 6, 2011 regarding the applicant's physical presence in the United States on account of his trafficking. Having received no response from counsel, the AAO dismissed the appeal on March 30, 2012, determining that the applicant had established that he was a victim of a severe form of trafficking in persons, but had not overcome the director's conclusion that he was not physically present in the United States on account of the trafficking. On April 30, 2012, the AAO received a letter from counsel stating that her office had mistakenly sent the RFE [\*3] response to the Vermont Service Center rather than the AAO. On May 2, 2011, counsel filed the instant motion to reopen and reconsider with a copy of her RFE response, which included counsel's letter brief, a supplemental statement from the applicant, copies of non-precedent AAO decisions in other T cases and a copy of a December 20, 2011 joint letter from law professors. The AAO reviews these proceedings *de novo*. 8 C.F.R. § 214.11(1)(1). See also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The applicant has still not demonstrated that he is physically present in the United States on account of his trafficking and the appeal will remain dismissed.

### ***Applicable Law***

Section 101(a)(15)(T) of the Act provides, in pertinent part, that an applicant may be classified as a T-1 nonimmigrant if he or she is:

(i) [S]ubject to section 214(o), an alien who the Secretary of Homeland Security, or in the case of subclause (III)(aa) the Secretary of Homeland Security, in consultation with the Attorney General, determines-

(I) is or has been a victim of a severe form of trafficking in persons, as defined in section [\*4] 103 of the Trafficking Victims Protection Act of 2000,

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<sup>1</sup>Footnote 1. On appeal, counsel requested the opportunity for oral argument "[d]ue to the multiple complicated legal issues involved" and "to answer any remaining questions" The record contains numerous supporting documents and multiple legal memoranda. Because the facts and legal issues are fully represented in the record, we find no need for oral argument and counsel's request is denied pursuant to the regulation at 8 C.F.R. § 103.3(b)(2).

(II) is physically present in the United States... on account of such trafficking, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking;

(III) (aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime ... and

(IV) the alien would suffer extreme hardship involving unusual and severe harm upon removal [.]

Section 103(8) of the Trafficking Victims Protection Act of 2000 (TVPA), codified at [22 U.S.C § 7102\(8\)](#) and incorporated into the regulation at [8 C.F.R. § 214.11\(a\)](#), defines the term "severe forms of trafficking in persons" as, in pertinent part:

the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, [\*5] fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

The regulation at [8 C.F.R. § 214.11\(g\)](#) prescribes the evidentiary burden to establish the physical presence requirement at section 101(a)(15)(T)(i)(II) of the Act and states, in pertinent part:

[T]he physical presence requirement reaches an alien who: is present because he or she is being subjected to a severe form of trafficking in persons; was recently liberated from a severe form of trafficking in persons; or was subject to severe forms of trafficking in persons at some point in the past and whose continuing presence in the United States is directly related to the original trafficking in persons.

\* \* \*

(2) *Opportunity to depart* If the alien has escaped the traffickers before law enforcement became involved in the matter, he or she must show that he or she did not have a clear chance to leave the United States in the interim. The Service will consider whether an applicant had a clear chance to leave in light of the individual applicant's circumstances. Information relevant to this determination may include, [\*6] but is not limited to, circumstances attributable to the trafficking in persons situation, such as trauma, injury, lack of resources, or travel documents that have been seized by the traffickers. This determination may reach both those who entered the United States lawfully and those who entered without being admitted or paroled. The Service will consider all evidence presented to determine the physical presence requirement, including asking the alien to answer questions on Form I-914, about when he or she escaped from the trafficker, what activities he or she has undertaken since that time, including the steps he or she may have taken to deal with the consequences of having been trafficked, and the applicant's ability to leave the United States.

The regulation at [8 C.F.R. § 214.11\(1\)](#) prescribes, in pertinent part, the standard of review and the applicant's burden of proof in these proceedings:

(1) *De novo review*. The Service shall conduct a de novo review of all evidence submitted and is not bound by its previous factual determinations as to any essential elements of the T nonimmigrant status application... The Service will [\*7] determine, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence.

(2) *Burden of proof.* At all stages of the processing of an application for any benefits under T nonimmigrant status, the burden shall be on the applicant to present to the Service evidence that fully establishes eligibility for the desired benefit.

### ***Pertinent Facts***

The applicant is a citizen of India who entered the United States on April 3, 2007, as the beneficiary of a temporary worker's visa (H2B) filed by [redacted] In his July 29, 2009 statement submitted below, the applicant provided the following account of his journey to the United States. In September 2006 when the applicant was working as a welding foreman in Dubai, he went to the office of [redacted] in response to a newspaper advertisement for welders to work in the United States and obtain "green cards" for themselves and their families. [redacted] told the applicant that the opportunity would cost [redacted] (U.S. dollars), payable in installments, and that [redacted] would renew his visa twice and then provide him with a "green card" with which he could bring his family [\*8] to join him in the United States. The applicant paid the first installment at his initial meeting with [redacted] and paid his second installment of approximately [redacted] in October 2006, after passing a practical test.

Shortly before the applicant's visa interview on February 13, 2007 at the U.S. consulate in Chennai, a [redacted] employee told him that to ensure he passed the interview, he had to tell the consular officer that he had not paid any money to anyone else to receive his visa and that he would return to India upon his visa's expiration. After the interview, [redacted] told the applicant that his visa was issued, but that his departure had been delayed because there had been problems at the [redacted] During this time, the applicant informed his employer in [redacted] of his plans and his employer became angry and told him that he would never be able to return to his old job.

On March 28, 2007, [redacted] told the applicant that the problems at [redacted] had been resolved and the applicant paid his last installment of approximately [redacted] made the applicant sign a blank piece of paper and refused to issue the applicant [\*9] a receipt, [redacted] told him that if U.S. officials would not stamp his passport and returned him to India, then [redacted] would refund him approximately [redacted] but that if his passport was stamped and he later encountered a problem, [redacted] would not refund any of his money.

The applicant and four other Indian workers flew together to the United States. Upon their arrival in New Orleans, no one from [redacted] met them at the airport and eventually an acquaintance of one of the workers drove the applicant and his companions to Mississippi where they went to the [redacted] worksite. A [redacted] official told them the company had informed [redacted] that they did not want any more workers and he called [redacted] who said that he had just sent the applicant and the others to the United States to work somewhere, but not at [redacted] The [redacted] official then let the applicant and his companions speak to [redacted] angrily asked why they had said he had sent them. [redacted] told the applicant and his companions that they had come to the United States on their own. The applicant and the others then realized they had [\*10] been cheated by [redacted] and he had likely printed some kind of disclaimer on the blank documents he had forced them to sign before they left India. The [redacted] official made copies of the workers' passports and told them the company could not employ them.

The applicant then went to South Carolina where other workers told him he might be able to find a job through another individual. For a fee of \$125, that individual helped the applicant and some other workers

obtain their social security cards and work at a [redacted] which paid approximately [redacted]. The applicant worked at the [redacted] for about a month and then went to [redacted] In June 2007, the applicant went to [redacted] for ten days. The applicant then worked at a [redacted] for two months. The applicant was subsequently employed at a [redacted] for three months and paid an attorney [redacted] to renew his work visa until July 2008.

In March 2008, the applicant joined a strike against [redacted] and afterwards attended a meeting at a charitable organization in [redacted] that was preparing to file a lawsuit against [redacted] The applicant agreed to join [\*11] the lawsuit and on or about March 6, 2008, reported himself to the U.S. Department of Justice (DOJ) as a trafficking victim. The applicant then Went to [redacted] where he worked for two months. The applicant returned to [redacted] where he was unemployed for about two to three months. The applicant explained that he later had other periods of unemployment, but "for the most part" he tried to find work so he could send money back home.

### *Physical Presence in the United States on Account of Trafficking*

The record in this case shows that the applicant escaped his traffickers nearly one year before law enforcement became involved. The applicant indicated that he had no further contact with [redacted] or [redacted] after he departed the Mississippi worksite shortly after his arrival in the United States in April 2007. To meet the physical presence requirement individuals such as the applicant who escaped their traffickers before law enforcement became involved must show that they did not have a clear chance to leave the United States in the interim. [8 C.F.R. § 214.11\(g\)\(2\)](#).

In her December 7, 2011 letter brief, [\*12] counsel asserted that during the relevant period, the applicant "was coping with considerable shame and trauma at being defrauded and coerced to incur massive debts." On motion, counsel reiterates that the applicant feared shame and harassment if he had to return to India without repaying his debt. The applicant himself, however, has provided an inconsistent account of the amount of his debt and the record does not fully support counsel's claims. In his first affidavit submitted below, the applicant recounted that after he realized he had been cheated by [redacted], he could not return to India because he had paid approximately [redacted] to come to the United States, he knew that [redacted] would not refund his money, he had lost his job in [redacted] and he "had to try to make some money here. It was the only way to support [his] family and pay off [his] lenders." The applicant also stated: "In order to pay these costs, I sold some land that I owned." In addition, the applicant recounted that he used gold as collateral for a loan of an unspecified amount and borrowed [redacted] from blade men (loan sharks) and [redacted] from a bank.

In his second affidavit [\*13] dated December 17, 2011, the applicant stated, "In order to pay these costs, I had to borrow money against my land." The applicant did not state how much money he borrowed using his land as collateral, but indicated that this loan was separate from the [redacted] he borrowed from blade men. The applicant also did not explain why he had earlier stated that he sold his land, rather than using his land as collateral to obtain a loan. In his supplemental affidavit dated April 26, 2012 and submitted on motion, the applicant states: "When I arrived in the United States in April 2007, I owed the entire 6 lakhs ([redacted]) that I had borrowed to pay [redacted]... When I reported myself to law enforcement in March 2008, I still owed the entire principal of 6 lakhs ([redacted]) that I had borrowed." The applicant also indicates that this sum was borrowed entirely from the blade men. He does not explain the discrepancy between his earlier statements that he sold some of his land and borrowed [redacted] from blade men and his statement on motion that the principal of his debt to the blade men was

[redacted] during the applicable period. These discrepancies detract from [\*14] the credibility of the applicant's claims.

The applicant also expressed his fear that if he was unable to repay his debts, the blade men would abuse and shame his family and take their home and land. Counsel submitted an expert affidavit by [redacted] regarding the social and psychological costs of debts incurred by international laborers from India. However, the applicant has not shown that he or his family was subjected to or faced physical harm or the specific types of social humiliation described by [redacted] during the period in question. To the contrary, the applicant indicated that during the applicable period, he successfully negotiated with the blade men to delay his payments. In his third statement, the applicant recounted that he "made several phone calls asking the blade men to give three or four more months to start paying" and that "three or four months later, [he] started paying off the interest."

The record also fails to support the applicant's assertion that during the applicable period, he lacked the resources to return to India. In his April 26, 2012 affidavit, the applicant asserted that when he reported himself as a trafficking victim to DOJ in [\*15] March 2008, he still owed the principal of his debt because he "had very little work" and could only afford to pay the interest after paying for his and his family's living expenses. However, the applicant's administrative file contains a copy of his 2008 federal income tax return, which states his adjusted gross income as [redacted] Accompanying the applicant's 2008 tax returns are Forms W-2 Wage and Tax Statements showing that the applicant was paid [redacted] by [redacted] These documents do not indicate how much money the applicant earned during the first few months of 2008 and the applicant did not state how much he earned during the applicable period. The record also does not contain the applicant's 2007 tax returns or other documentation of his income between April 2007 and March 2008. Nonetheless, the preponderance of the evidence shows that he was gainfully employed for the majority of that time.

In his second and third affidavits, the applicant explains that he could not return to India because he would not be able to find employment there sufficient to repay his loans and his former employer in Dubai would not rehire him. The applicant repeatedly refers to [\*16] his related worries about his family and particularly his wife in India if he had returned unable to work and repay his debts. Although these affidavits are dated December 17, 2011 and April 26, 2012, the applicant's administrative file contains an affidavit from the petitioner's wife stating that she divorced him on September 17, 2009. The applicant's file also contains a copy of a marriage certificate showing that the applicant married another woman in [redacted] on November 23, 2011. <sup>2</sup>

In his second affidavit, the applicant mentioned "having problems" with his wife and family in India during the relevant period, but he did not disclose his second marriage or when that relationship began. The applicant's repeated references to his wife in India after they had divorced and he had remarried another woman further detract from the credibility of his claims regarding his inability to leave the United States during the applicable period.

In her December 7, 2011 letter brief, counsel claims that the [\*17] applicant did not have a clear chance to leave the United States before law enforcement became involved in the matter because it "reasonably

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<sup>2</sup>Footnote 2. The applicant's first wife's affidavit and the certificate of his second marriage were submitted in connection with the applicant's Form I-485, application to adjust status, based on a [\*23] Form I-130, petition for alien relative, filed by the applicant's second wife, a U.S. citizen, on his behalf. The Form I-130 and the applicant's corresponding Form I-485 remain pending before the New Orleans Field Office.

took the Applicant eleven months to overcome his fear, to locate and consult with pro bono legal counsel, and to assert his rights." In their December 20, 2011 letter, the law professors claim that lack of a reasonable opportunity to report to law enforcement should be sufficient to show that an applicant did not have a clear chance to depart the United States. However, the issue is not how long it took the applicant to report his trafficking to law enforcement authorities or if the delay was reasonable, but whether he had a clear chance to leave the United States after he escaped his traffickers and before law enforcement became involved. There are many reasons why trafficking victims do not initially report their circumstances to law enforcement agencies. As both counsel and the law professors note, there is no filing deadline for T nonimmigrant status for victims who have escaped their traffickers. In addition to cultural and linguistic barriers and fears of reprisal or other serious harm, many victims are unaware of the laws in the United [\*18] States that could protect them.<sup>3</sup> In this case, the applicant credibly explained his reasons for not reporting himself as a trafficking victim until 11 months after his arrival in the United States. Those reasons are not at issue in this proceeding.

In their letter, the law professors also claim that USCIS should find that applicants who meet the extreme hardship requirement of subsection 101(a)(15)(T)(i)(IV) of the Act also meet the physical presence requirement of subsection 101(a)(15)(T)(i)(II) of the Act. Their letter states:

If the T visa applicant demonstrates that he or she is present in the United States due to a reasonable fear of extreme hardship upon departure, USCIS should conclude that the victim is physically present on account of trafficking and did not have a clear chance to leave the United States after escaping the trafficking situation.

The physical presence and extreme hardship elements are distinct statutory requirements for T nonimmigrant classification that must be demonstrated [\*19] independently. While some evidence may be relevant to both determinations, the applicant bears the burden to "submit evidence that fully establishes eligibility for each element of the T nonimmigrant status." [8 C.F.R. § 214.11\(f\)](#). See also [8 C.F.R. § 214.11\(1\)\(2\)](#) ("the burden shall be on the applicant to present to the Service evidence that fully establishes eligibility"). Moreover, the situation of extreme hardship in this case predominately arose *after* the period in question. At the time of filing, the applicant was a potential class member in the civil litigation against [redacted] and credibly explained his inability to continue his participation in the litigation from India. The record also indicates that the applicant may have faced retaliation from [redacted] and his associates for his participation if he was subsequently removed to India. These circumstances all arose after the applicant reported his trafficking to law enforcement and are not relevant to whether he had a clear chance to depart the United States before that time.<sup>4</sup>

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<sup>3</sup>Footnote 3. See [22 U.S.C. § 7101\(b\)\(20\)](#) ("victims of trafficking are frequently unfamiliar with the laws... of the countries into which they have been trafficked,..."). See also T Nonimmigrant Status Interim Rule, [67 Fed. Reg. 4784](#) (Jan. 31, 2002) (noting the reluctance of victims without legal status in the United States to cooperate with law enforcement).

<sup>4</sup>Footnote 4. Editor's Note: Since it is unclear in the original documentation where the footnote target is located, the footnote has been placed here.

The civil litigation against [redacted] and other defendants [\*24] was filed in 2008 and requested certification of a class of all Indian workers who were recruited by one or more of the defendants and who entered the United States at any time through September 30, 2007, pursuant to an H2B visa obtained by Signal. The court subsequently denied the plaintiffs' motions for class certification. *David v. Signal International*, No. 08-1220 (E.D. La. Jan. 4, 2012).



Under the standard and factors prescribed by the regulation at [8 C.F.R. § 214.11\(g\)\(2\)](#), the applicant has failed to show that he did not have a clear chance to depart the United States between his last contact with [redacted] in April 2007 and his first contact with a law enforcement agency regarding his trafficking in March 2008. The record shows that at the time of his arrival, the applicant was 37 years old. Although he recounted experiencing several difficulties upon realizing that he would not be working for [redacted], the record lacks sufficient evidence that the applicant suffered physical or psychological trauma or injury during this time. Upon his arrival in the United States, the applicant retained possession of his passport, obtained a social security card and a driver's license and was gainfully employed for the majority of the applicable period. While the applicant recounted his fear of returning to India without having repaid his debt, the record lacks sufficient [\*21] evidence that the applicant's personal circumstances prevented his return during this time.

In sum, the record shows that the applicant escaped his traffickers before law enforcement became involved and the applicant has failed to demonstrate that he did not have a clear chance to leave the United States in the interim under the standard and factors explicated in the regulation at [8 C.F.R. § 214.11\(g\)\(2\)](#). Consequently, the applicant has not established that he is physically present in the United States on account of his trafficking, as required by section 101(a)(15)(T)(i)(II) of the Act.

### *Conclusion*

The applicant bears the burden of proof to establish his eligibility for T nonimmigrant status. Section 291 of the Act, [8 U.S.C. § 1361](#); [8 C.F.R. § 214.11\(1\)\(2\)](#). On motion, the applicant has demonstrated that he was a victim of a severe form of trafficking in persons in the past, but he has still not established that he is physically present in the United States on account of such trafficking, as required by section 101(a)(15)(T)(i)(II) of the Act. Consequently, [\*22] the appeal will remain dismissed and the application will remain denied.

**ORDER:** The motion is granted. The appeal remains dismissed.

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