U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

D14

DATE: SEP 2 6 2011 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks nonimmigrant classification under section 101(a)(15)(U) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(a)(15)(U), as an alien victim of certain qualifying criminal activity.

The director denied the petition determining that the petitioner did not establish that he was the victim of a qualifying crime or criminal activity and thus could also not establish the remaining eligibility criteria at section 101(a)(15)(U)(i) of the Act. On appeal, counsel submits a brief.

Section 101(a)(15)(U) of the Act, provides, in pertinent part, for U nonimmigrant classification to:

> (i) subject to section 214(p), an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that –
>
> (I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);
>
> (II) the alien . . . possesses information concerning criminal activity described in clause (iii);
>
> (III) the alien . . . has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and
>
> (IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States[.]
>
> ***
>
> (iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes[.]

The burden of proof is on the petitioner to demonstrate eligibility for U nonimmigrant classification. 8 C.F.R. § 214.14(c)(4). The AAO conducts appellate review on a de novo basis. *See Soltane v.*

DOJ, 381 F.3d 143, 145 (3d Cir. 2004). All credible evidence relevant to the petition will be considered. Section 214(p)(4) of the Act; *see also* 8 C.F.R. § 214.14(c)(4) (setting forth evidentiary standards and burden of proof).

Facts and Procedural History

The petitioner is a native and citizen of El Salvador who claims he entered the United States on or about October 30, 2005 without inspection. The petitioner was placed in removal proceedings on September 18, 2006. The petitioner filed the instant Form I-918 on July 20, 2009. On February 16, 2010, the director issued a request for evidence (RFE) to which the petitioner responded. Upon review of the record, including the petitioner's response to the RFE, the director found the evidence submitted insufficient to establish the petitioner's eligibility. Accordingly, the director denied the petition. The petitioner, through counsel, timely appealed the denial of the Form I-918 petition.

On appeal, counsel for the petitioner asserts that United States Citizenship and Immigration Services (USCIS) erred in finding that the petitioner did not qualify for U nonimmigrant status as offenses under California Vehicle Code (CVC) §§ 23153(a) and (b) are crimes substantially similar to felonious assault, one of the enumerated crimes listed at section 101(a)(15)(U)(iii) of the Act.

Analysis

Pursuant to the regulation at 8 C.F.R. § 214.14(c)(1), a Form I-918 U petition must be accompanied by certain supporting documentation or "initial evidence," including a Form I-918, Supplement B, U Nonimmigrant Status Certification (Form I-918 Supplement B) signed by a certifying official who must state, in part, that the petitioner has been a victim of qualifying criminal activity that the certifying official's agency is investigating or prosecuting; the petitioner possesses information concerning the qualifying criminal activity; the petitioner has been, is being, or is likely to be helpful to an investigation or prosecution of that qualifying criminal activity; and the qualifying criminal activity violated U.S. law, or occurred in the United States, its territories, its possessions, Indian country, or at military installations abroad.

In this matter, the petitioner initially did not submit a Form I-918 Supplement B. In response to the director's RFE, the petitioner submitted a certified Form I-918 Supplement B, signed by [redacted] in the [redacted] office. At Part 3.1 [redacted] identified the criminal act as felonious assault and related crime(s). [redacted] cited CVC 23153 (a) and (b) at Part 3.1 in the box labeled "other." Part 3.3, for the statutory citation of the criminal activity investigated or prosecuted, is blank and [redacted] refers to attached criminal and medical documents in response to the questions posed at Part 3.5 and Part 3.6 respectively for a description of the criminal activity and any known or documented injury to the victim. The attached documents included a notice of complaint filed against D-C-[1] charging D-C- with violation of sections 23153(a) and (b) of the CVC pursuant to his arrest on April 7, 2008.

The California Vehicle Code at section 23153 states in pertinent part:

[1] Name withheld to protect the individual's identity.

> (a) It is unlawful for any person, while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.
> (b) It is unlawful for any person, while having 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

In the petitioner's July 16, 2009 personal declaration, the petitioner described being a passenger in a vehicle involved in an accident on April 7, 2008 and being taken to a hospital. The petitioner also described being released from the hospital and his treatment by a chiropractor for misplaced discs in his back.

In the denial decision, the director determined that the petitioner was not a victim of qualifying criminal activity. The director also noted that the certifying official had not properly completed the Form I-918 Supplement B at Part 3.3 by failing to identify the statutory citation for the criminal activity that was being or had been investigated or prosecuted. Nevertheless, the director considered the cited violation noted in Part 3.1 of the Form I-918 Supplement B and determined that the activity involved in a violation of CVC § 23153 was not substantially similar to felonious assault, the criminal activity checked at Part 3.1 of the Form I-918 Supplement B. The director found that as the petitioner had not established that he was a victim of qualifying criminal activity, he had also not established the remaining essential elements necessary to establish eligibility for U nonimmigrant classification.

On appeal, counsel asserts that the elements of CVC § 23153(a) are very similar to the elements of felonious assault as found at California Penal Code (CPC) § 245. Counsel contends that a violent injury occurred in this matter and that a vehicle is a deadly weapon or instrument. Counsel extrapolates that although the conviction in this matter was not for assault with a deadly weapon, the elements were met for felonious assault under CVC § 23153(a).

The California Penal Code states in pertinent part:

> Section 240. An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.
>
> Section 245(a)(1). Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment.

The record does not include evidence that the petitioner was the victim of felonious assault or any other qualifying crime. Although the statute encompasses "any similar activity" to the enumerated qualifying crimes, the regulation defines "any similar activity" as "criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities." 8 C.F.R. § 214.14(a)(9). The violation of CVC § 23153(a) does not include elements substantially similar to those required of a felonious assault under CPC § 245(a)(1): an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. The nature of these two offenses also lack substantial similarities. Felonious assault under CPC § 245(a)(1) is a crime of intent to harm another with a weapon. In contrast, the offenses of driving under the influence (DUI) of alcohol at CVC § 23153 are liability crimes requiring no intent of the perpetrator to cause the harm inflicted. On appeal, counsel fails to demonstrate that the DUI offenses of CVC § 23153 are similar to felonious assault under CPC § 245(a)(1) or any other qualifying criminal activity.

Qualifying criminal activity may occur in the course of the commission of a non-qualifying crime. *See* 72 Fed. Reg. 179, 53014-53042, 53018 (Sept. 17, 2007). However, the qualifying criminal activity must still be investigated or prosecuted by the certifying agency. Sections 101(a)(15)(U)(i)(III) and 214(p)(1) of the Act, 8 U.S.C. §§ 1101(a)(15)(U)(i)(III), 1184(p)(1); 8 C.F.R. §§ 214.14(b)(3), (c)(2)(i). Here, as noted above, the record contains no evidence that the certifying agency investigated the perpetrator for felonious assault. The certifying official, although checking the box for felonious assault on the Form I-918 Supplement B as a possible qualifying crime, cites a statutory offense involving the operation of a vehicle while intoxicated that results in injury. The relevant evidence also contains no indication that the certifying agency intends to investigate or prosecute the driver of the vehicle for felonious assault or other qualifying crimes. The petitioner in this matter, therefore, does not meet the definition of "victim of qualifying criminal activity" at 8 C.F.R. § 214.14(a)(14).

Conclusion

Although the petitioner was affected by his involvement in a vehicle accident caused by a drunk driver, the petitioner has not established that the offense of which he was a victim constituted qualifying criminal activity, as required by section 101(a)(15)(U)(iii) of the Act. His failure to establish that the offense was a qualifying criminal activity also prevents him from meeting the other statutory requirements for U nonimmigrant classification at section 101(a)(15)(U)(i)(I) – (IV) of the Act.

As in all visa petition proceedings, the petitioner bears the burden of proving eligibility for U nonimmigrant status. Section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 214.14(c)(4). Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.