



U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **JUL 03 2014** Office: VERMONT SERVICE CENTER FILE:

IN RE: PETITIONER:

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

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 because the petitioner did not establish that she was the victim of qualifying criminal activity, that she suffered substantial physical or mental abuse as a result of being a victim of qualifying criminal activity, or that she has been helpful in the investigation or prosecution of a qualifying criminal activity. On appeal, counsel submits a brief.

Applicable Law

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: . . . sexual assault; . . . obstruction of justice; . . . or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes[.]

The regulation at 8 C.F.R. § 214.14(a) provides the following pertinent definitions:

(8) *Physical or mental abuse* means injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim.

* * *

(14) *Victim of qualifying criminal activity* generally means an alien who has suffered direct and proximate harm as a result of the commission of qualifying criminal activity.

* * *

(ii) A petitioner may be considered a victim of witness tampering, obstruction of justice, or perjury, including any attempt, solicitation, or conspiracy to commit one of more of these offenses, if:

(A)The petitioner has been directly or proximately harmed by the perpetrator of the witness tampering, obstruction of justice or perjury; and

(B)There are reasonable grounds to conclude that the perpetrator committed the witness tampering, obstruction of justice, or perjury offense, at least in principal part, as a means:

(1)To avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring to justice the perpetrator for other criminal activity; or

(2)To further the perpetrator's abuse or exploitation of or undue control over the petitioner through manipulation of the legal system.

The eligibility requirements for U nonimmigrant classification are further explicated in the regulation at 8 C.F.R. § 214.14, which states, in pertinent part:

(b) *Eligibility*. An alien is eligible for U-1 nonimmigrant status if he or she demonstrates all of the following . . . :

(1) The alien has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity. Whether abuse is substantial is based on a number of factors, including but not limited to: The nature of the injury inflicted or suffered; the severity of the perpetrator's conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions. No single factor is a prerequisite to establish that the abuse suffered was substantial. Also, the existence of one or more of the factors automatically does not create a presumption that the abuse suffered was substantial. A series of acts taken together may be considered to constitute substantial physical or mental abuse even where no single act alone rises to that level;

(2) The alien possesses credible and reliable information establishing that he or she has knowledge of the details concerning the qualifying criminal activity upon which his or her

petition is based. The alien must possess specific facts regarding the criminal activity leading a certifying official to determine that the petitioner has, is, or is likely to provide assistance to the investigation or prosecution of the qualifying criminal activity. . . .

(3) The alien has been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is based, and since the initiation of cooperation, has not refused or failed to provide information and assistance reasonably requested. . . .; and

(4) The qualifying criminal activity occurred in the United States (including Indian country and U.S. military installations) or in the territories or possessions of the United States, or violated a U.S. federal law that provides for extraterritorial jurisdiction to prosecute the offense in a U.S. federal court.

In addition, the regulation at 8 C.F.R. § 214.14(c)(4), prescribes the evidentiary standards and burden of proof in these proceedings:

The burden shall be on the petitioner to demonstrate eligibility for U-1 nonimmigrant status. The petitioner may submit any credible evidence relating to his or her Form I-918 for consideration by [U.S. Citizenship and Immigration Services (USCIS)]. USCIS shall conduct a de novo review of all evidence submitted in connection with Form I-918 and may investigate any aspect of the petition. Evidence previously submitted for this or other immigration benefit or relief may be used by USCIS in evaluating the eligibility of a petitioner for U-1 nonimmigrant status. However, USCIS will not be bound by its previous factual determinations. USCIS will determine, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence, including Form I-918, Supplement B, "U Nonimmigrant Status Certification."

Facts and Procedural History

The petitioner is a native and citizen of Guatemala who claims to have entered the United States in February 2004 without admission, inspection or parole. The petitioner filed the instant Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), with an accompanying U Nonimmigrant Status Certification (Form I-918 Supplement B) on January 26, 2012. On the same day, she filed an Application for Advance Permission to Enter as Nonimmigrant (Form I-192), to waive her grounds of inadmissibility. On January 3, 2013, the director issued a Request for Evidence (RFE) that the petitioner was the victim of qualifying criminal activity, that she suffered resultant substantial physical and mental abuse, and that she was helpful to the investigation or prosecution of the qualifying criminal activity. The petitioner responded to the RFE with an updated Form I-918 Supplement B and additional evidence, which the director found insufficient to establish the petitioner's eligibility. Accordingly, the director denied the petition and the Form I-192. The petitioner timely appealed the denial of the Form I-918 U petition.

On appeal, counsel claims that the petitioner is a victim of indecent exposure which is a "sexual assault-natured crime" and she is suffering from post-traumatic stress as a result of the sexual assault.

Claimed Criminal Activity

In her statements, the petitioner recounted that on October 20, 2009, while she was washing laundry in the laundry room of her apartment complex, a teenage boy masturbated in front of her. She screamed and the boy ran out of the laundry room. After approximately 10 minutes, she went to her friend's apartment and called the police. She recognized the boy and when the police arrived, she told them where he lived. After she identified the suspect, the police arrested him. About a week later on her way to the grocery store, she saw the boy in the streets and he laughed at her. She was terrified and scared that he might come after her.

The first Form I-918 Supplement B that the petitioner submitted was signed by Captain [REDACTED] Juvenile Investigations, [REDACTED] Minnesota Police Department (certifying official), on October 3, 2011. The certifying official lists the criminal activities of which the petitioner was a victim at Part 3.1 as obstruction of justice and indecent exposure. In Part 3.3, the certifying official refers to Minnesota Statute § 617.23, indecent exposure, as the criminal activity that was investigated or prosecuted. At Part 3.5, which asks the certifying official to briefly describe the criminal activity being investigated or prosecuted, he indicated that on October 20, 2009, while the petitioner was doing her laundry, a teenage neighbor "indecently exposed himself and sexually assaulted [the petitioner] by masturbating in front of her." At Part 3.6, which asks for a description of any known or documented injury to the petitioner, the certifying official indicated that the petitioner has "suffered depression, insecurity and fear of being sexually assaulted." At Part 4.4, the certifying official indicated that the petitioner has unreasonably refused to provide assistance in the investigation or prosecution of the crime.

In response to the RFE, the petitioner submitted an updated Form I-918 Supplement B signed by Captain [REDACTED] dated February 13, 2013. The second Form I-918 Supplement B is essentially the same as the first Form I-918 Supplement B but at Part 4.4 the certifying official indicated that the petitioner has not unreasonably refused to provide assistance in the investigation or prosecution of the crime.

Analysis

The Petitioner was Not a Victim of Obstruction of Justice

The certifying official indicated at Part 3.1 of the Form I-918 Supplement B that the petitioner was the victim of obstruction of justice; however, there is no indication on any other part of the Form I-918 Supplement B that he or any other law enforcement entity investigated an obstruction of justice crime where the petitioner was the victim, and the police report attached to the Form I-918 Supplement B also contains no evidence of the detection, investigation or prosecution of an obstruction of justice crime. The petitioner is, therefore, not the victim of the qualifying crime of obstruction of justice.

Indecent Exposure under Minnesota Law is Not Substantially Similar to Qualifying Criminal Activity

The Form I-918 Supplement B indicates that the crime of indecent exposure, under Minn. Stat. § 617.23, was investigated. The crime of indecent exposure is not specifically listed as a qualifying crime at section

101(a)(15)(U)(iii) of the Act. Although the statute encompasses “any similar activity” to the enumerated 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). Thus, the nature and elements of the crime investigated, indecent exposure, must be substantially similar to one of the qualifying criminal activities in the statutorily enumerated list. 8 C.F.R. § 214.14(a)(9). The inquiry, therefore, is not fact-based, but rather entails comparing the nature and elements of the statutes in question.

Under Minnesota law, “[a] person who commits any of the following acts in any public place, or in any place where others are present, is guilty of a misdemeanor: (1) willfully and lewdly exposes the person’s body, or the private parts thereof; (2) procures another to expose private parts; or (3) engages in any open or gross lewdness or lascivious behavior, or any public indecency other than behavior specified in this subdivision.” Minn. Stat. (M.S.A.) § 617.23 (West 2014). On appeal, counsel claims that even though the suspect was convicted of indecent exposure, the actual crime committed was attempt of criminal sexual conduct in the fifth degree, which is a “sexual assault-natured crime.” Under Minnesota law, a person is guilty of criminal sexual conduct in the fifth degree “(1) if the person engages in nonconsensual sexual contact; or (2) the person engages in masturbation or lewd exhibition of the genitals in the presence of a minor under the age of 16, knowing or having reason to know the minor is present.” Minn. Stat. § 609.3451 (West 2014). Counsel contends that it is irrelevant that the petitioner is over 16 years of age because she suffered substantial harm.

No elements of indecent exposure under Minn. Stat. § 617.23 are similar to criminal sexual conduct in the fifth degree under Minn. Stat. § 609.3451. The statute investigated in this case involves a person exposing his body or private parts, procuring another to expose his body parts, or engaging in lewd behavior. Criminal sexual conduct in the fifth degree involves nonconsensual sexual conduct or a person masturbating or exhibiting his genitals in the presence of a minor under 16 years of age. While at Part 3.5, the certifying official stated that the petitioner was sexually assaulted by the suspect when he masturbated in front of her, the record, which includes the police report accompanying the Form I-918 Supplement B, contains no evidence that the certifying official or any other law enforcement entity detected or investigated the incident in the laundry room as a sexual assault crime under Minnesota law.

Counsel indicates that the suspect’s actions, including being in a locked room with the petitioner, removing his pants, and masturbating in front of her, “could be defined as an attempt to commit a sexual assault,” which could “have escalated into a more violent-natured offense had [the petitioner] not been able to escape.” As stated above, the proper inquiry is not an analysis of the factual details underlying the criminal activity, but a comparison of the nature and elements of the crime that was investigated and one of the qualifying crimes. *See* 8 C.F.R. § 214.14(a)(9). In her brief, counsel does not provide the requisite statutory analysis to demonstrate the substantial similarities in the nature and elements of M.S.A §§ 617.23 and 609.3451. The petitioner has, therefore, failed to establish that she was the victim of a qualifying crime, as required by section 101(a)(15)(U)(i) of the Act.

Substantial Physical or Mental Abuse

As the petitioner did not establish that she was the victim of qualifying criminal activity, she has also failed to establish that she suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity, as required by section 101(a)(15)(U)(i)(I) of the Act.

Helpfulness to Authorities Investigating or Prosecuting the Qualifying Criminal Activity

As the petitioner did not establish that she was the victim of qualifying criminal activity, she has also failed to establish that she has been, is being or is likely to be helpful to a federal, state, or local law enforcement official, prosecutor, federal or state judge, USCIS or other federal, state or local authorities investigating or prosecuting qualifying criminal activity, as required by subsection 101(a)(15)(U)(i)(III) of the Act.

Conclusion

Although the petitioner was helpful to the Minneapolis, Minnesota, Police Department in the investigation of an indecent exposure crime against her, she has not demonstrated that the offense of indecent exposure under M.S.A. § 617.23 is a qualifying crime or substantially similar to any other qualifying criminal activity listed at section 101(a)(15)(U)(iii) of the Act. Qualifying criminal activity is a requisite to each statutory element of U nonimmigrant classification. The petitioner's failure to establish that the offense of which she was the victim is qualifying criminal activity prevents her from meeting any of the eligibility criteria for U nonimmigrant classification at section 101(a)(15)(U)(i) of the Act.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The petition remains denied.