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

(b)(6)

U.S. Citizenship and Immigration Services

Date: JUL 29 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 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 he was a victim of qualifying criminal activity or that he had suffered substantial physical or mental abuse as a result of being a victim of qualifying criminal activity. In addition, the director noted that the petitioner did not demonstrate that he is admissible to the United States. On appeal, counsel submits a statement and indicates that a brief or other evidence will be submitted within 30 days, or by April 2, 2014. As of the date of this decision, however, the AAO has received no additional statements or evidence.

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;

Murder is listed as a qualifying criminal activity in clause (iii) of section 101(a)(15)(U) of the Act.

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

> (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.

(i) The alien spouse, children under 21 years of age and, if the direct victim is under 21 years of age, parents and unmarried siblings under 18 years of age, will be considered victims of qualifying criminal activity where the direct victim is deceased due to murder or manslaughter, or is incompetent or incapacitated, and therefore unable to provide information concerning the criminal activity or be helpful in the investigation or prosecution of the criminal activity. For purposes of determining eligibility under this definition, [U.S. Citizenship and Immigration Services (USCIS)] will consider the age of the victim at the time the qualifying criminal activity occurred.

In addition, section 212(d)(14) of the Act requires USCIS to determine whether any grounds of inadmissibility exist when adjudicating a Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion.

Section 212(a) of the Act sets forth the grounds of inadmissibility to the United States, and states, in pertinent part:

(6) Illegal Entrants and Immigration Violators

(A) Aliens Present Without Permission or Parole

(i) In general.-An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

* * *

(7) Documentation requirements.-

* * *

(B) Nonimmigrants.-

(i) In general.-Any nonimmigrant who-

(I) Not in possession of a passport valid for a minimum of six months from the date of expiration . . .

* * *

is inadmissible.

* * *

(9) Aliens Previously Removed

* * *

(B) Aliens Unlawfully Present.-

(i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible.

* * *

(C) Aliens Unlawfully Present After Previous Immigration Violations

(i) In general.-Any alien who –

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

* * *

and who enters or attempts to reenter the United States without being admitted is inadmissible.

Further, 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 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 Mexico who claims to have initially entered the United States in January 2001 without inspection, admission or parole. The petitioner claims to have departed the United States in May 2008 and reentered during the same month without inspection, admission or parole. The petitioner filed the instant Form I-918 U petition with an accompanying I-918 Supplement B, U Nonimmigrant Status Certification (Form I-918 Supplement B), on December 9, 2011. On June 26, 2012, the director issued a Request for Evidence (RFE) of the petitioner's qualifying relationship with his brother. In addition, the director requested that the petitioner submit his brother's death certificate and documentation regarding the petitioner's arrests and convictions. Counsel responded to the RFE with additional statements and evidence, which the director found insufficient to establish the petitioner's eligibility. Accordingly, the director denied the Form I-918 U petition and the petitioner's Application for Advance Permission to Enter as a Nonimmigrant (Form I-192). In denying the Form I-192, the director found that the petitioner was inadmissible under sections 212(a)(6)(A)(i) (present without admission or parole), 212(a)(9)(B)(i)(II) (unlawful presence), and 212(a)(9)(C)(i)(I) (unlawfully present in the United States for one year or more and reentering the United States without being admitted) of the Act. The petitioner, through counsel, timely appealed the denial of the Form I-918 U petition.

On appeal, counsel claims that the petitioner has suffered direct and proximate harm as a result of his brother's murder. She states that although the petitioner was not present when his brother was shot, he was in the hospital when his brother died and consequently has suffered substantial mental abuse.

Claimed Criminal Activity

In his declarations, the petitioner recounted that in April 2003, his brother went missing for three days. When he found him, he was in the hospital. The doctors told the petitioner that his brother was brain dead after being shot in the back while riding his bike. The petitioner's brother was shot by a fellow gang member after he attempted to leave the gang.

The Form I-918 Supplement B that the petitioner submitted was signed by Juvenile Investigations, Police Department (certifying official), on November 9, 2011. The certifying official listed the criminal activity of which the petitioner was a victim at Part 3.1 as murder. In Part 3.3, the certifying official refers to Minnesota Statute §§ 609.19-1 (murder in the second degree), 609.222-1 (assault in the second degree), and 609.229 (crimes committed for benefit of gang) as the criminal activities that were 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 the petitioner's brother died four days after being shot in the back and the petitioner was helpful in the prosecution and sentencing of the suspect. At Part 3.6, which asks for a description of any known or documented injury to the petitioner, the certifying official stated the petitioner's "brother was killed as a result of the criminal activity."

Analysis

Victim of Qualifying Criminal Activity

When a person is deceased due to murder or manslaughter and was over the age of 21 at the time of death, only the deceased's spouse and children under the age of 21 will be considered victims of qualifying criminal activity. 8 C.F.R. § 214.14(a)(14)(i). On April 14, 2003, the date that the petitioner's brother died as a result of homicide, he was 21 years of age. Therefore, as the direct victim's sibling, the petitioner cannot qualify as an indirect victim based solely on his familial relationship to his brother.

In her statement on appeal, counsel claims that the petitioner has suffered direct and proximate harm as a result of his brother's murder. The regulation at 8 C.F.R. § 214.14(a)(14) defines "victim of qualifying criminal activity" as an alien who is directly and proximately harmed by qualifying criminal activity. The Attorney General Guidelines for Victim and Witness Assistance (AG Guidelines) clarify that "direct and proximate harm" means that "the harm must generally be a 'but for' consequence of the conduct that constitutes the crime" and that the "harm must have been a reasonably foreseeable result" of the crime. *Attorney General Guidelines for Victim and Witness Assistance*, 2011 Edition (Rev. May 2012), at 8-9. In its Preamble to the U visa rule, USCIS stated:

> The AG Guidelines also state that individuals whose injuries arise only indirectly from an offense are not generally entitled to rights or services as victims. AG Guidelines at 10. The AG Guidelines, however, provide DOJ personnel discretion to treat as victims bystanders who suffer unusually direct injuries as victims. USCIS . . . will exercise its discretion on a case-by-case basis to treat bystanders as victims where that bystander suffers an unusually direct injury as a result of a qualifying crime[.]

72 Fed. Reg. 53014, 53016 (Sept. 17, 2007). Counsel claims that according to the petitioner's wife and mother-in-law, his brother's death has changed the petitioner's "health, physical and mental soundness - that he is not the same." In her affidavit, the petitioner's mother-in-law explains that the petitioner was "forever damaged by his brother's murder." She claims that before the murder, the petitioner was innocent, "very tender and soft-hearted," and after the murder, he started drinking and all he talked about was getting revenge, but he realized the best revenge would be to help the police find his brother's killer.

In his affidavit, the petitioner states that for a long time after his brother was murdered, he "could barely function," he was angry, he began drinking and "shut out many friends and family." In his declaration, the petitioner claims that his family moved away because they were afraid of the gang, and he became depressed and cried every day. He explains that he felt alone and that his life was unimportant. He states that he still thinks about his brother daily, but he has "grown to accept" that his brother was murdered and has "found better ways, healthier ways to handle [his] grief and despair." He notes that he cannot afford therapy but has found help through his wife's support and in his Alcoholics Anonymous group.

While there may be circumstances where a bystander to a qualifying crime may suffer "unusually direct injuries" as a result of witnessing a violent crime, the record shows that the petitioner was not present when his brother was shot and later died from his injuries, and did not witness any aspect of the commission of the

qualifying criminal activity. We recognize that the petitioner has been emotionally impacted by this event; however, the submitted evidence does not establish that he can be considered a victim under the regulation at 8 C.F.R. § 214.14(a)(14) as a direct victim of the crime or as a bystander who suffered an unusually direct injury as a result of witnessing the crime committed against his brother. Although the Form I-918 Supplement B identifies the petitioner as a victim, the certifying official did not indicate that the petitioner suffered any physical or mental injury. The petitioner has, therefore, failed to establish that he was the victim of a qualifying crime or criminal activity, as required by section 101(a)(15)(U)(i) of the Act.

Substantial Physical or Mental Abuse

As the petitioner did not establish that he was the victim of a qualifying crime, he has also failed to establish that he suffered substantial physical or mental abuse as a result of having been a victim of a qualifying crime, as required by section 101(a)(15)(U)(i)(I) of the Act. Accordingly, we shall not further address this issue.

The Petitioner's Inadmissibility

All nonimmigrants must establish their admissibility to the United States or show that any grounds of inadmissibility have been waived. 8 C.F.R § 214.1(a)(3)(i). For aliens seeking U nonimmigrant status who are inadmissible to the United States, the regulations at 8 C.F.R §§ 212.17, 214.14(c)(2)(iv) require the filing of a Form I-192 in conjunction with a Form I-918 U petition in order to waive any ground of inadmissibility. The regulation at 8 C.F.R. § 212.17(b)(3) states in pertinent part: "There is no appeal of a decision to deny a waiver." As we do not have jurisdiction to review whether the director properly denied the Form I-192, we do not consider whether approval of the Form I-192 should have been granted. The only issue before us is whether the director was correct in finding the petitioner inadmissible to the United States and, therefore, requiring an approved Form I-192 pursuant to 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv).

A full review of the record supports the director's determination that the petitioner is inadmissible under sections 212(a)(6)(A)(i) (present without admission or parole) of the Act. The petitioner does not dispute that he is present in the United States without admission or parole. As noted above, the petitioner admits to last entering the United States in May 2008 without inspection. As such, the petitioner is inadmissible under section 212(a)(6)(A)(i) of the Act.

In addition, the director found the petitioner inadmissible under sections 212(a)(9)(B)(i)(II) (unlawful presence) and 212(a)(9)(C)(i)(I) (unlawfully present in the United States for one year or more and reentering the United States without being admitted) of the Act. Under section 212(a)(9)(B)(ii) of the Act, an "alien is deemed to be unlawfully present in the United States if the alien is present . . . without being admitted or paroled." However, "[n]o period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence . . . ." *See* section 212(a)(9)(B)(iii) of the Act. The petitioner was born on October 4, 1986, and he initially entered the United States in January 2001 without admission, inspection or parole. He also departed the United States in May 2008 and reentered without admission, inspection or parole in the same month. The petitioner accrued unlawful presence from October 4, 2004, the date he turned 18 years of age, until May 2008, when he departed the United States. The

petitioner's departure from the United States following this period of unlawful presence triggered the petitioner's inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, and his reentry without admission after this period of unlawful presence triggered the petitioner's inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. Therefore, the petitioner is inadmissible under sections 212(a)(9)(B)(i)(II) and 212(a)(9)(C)(i)(I) of the Act.

Although in her denial decision, the director only indicated that the petitioner was inadmissible to the United States under sections 212(a)(6)(A)(i) (present without admission or parole), 212(a)(9)(B)(i)(II) (unlawful presence), and 212(a)(9)(C)(i)(I) (unlawfully present in the United States for one year or more and reentering the United States without being admitted) of the Act, a full review of the record shows that the petitioner is also inadmissible under section 212(a)(7)(B)(i)(I) (not in possession of a valid passport) of the Act.[1] The petitioner has not provided a copy of a valid passport, nor does he dispute his lack of a valid passport. As such, the petitioner is inadmissible under section 212(a)(7)(B)(i)(I) of the Act as well.

Conclusion

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). The petitioner has failed to establish that he was the victim of a qualifying crime. In addition, the petitioner has not established that he is admissible to the United States or that his grounds of inadmissibility have been waived. He is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U)(i) of the Act and the appeal must be dismissed.

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

[1] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).