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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: OCT 13 2010

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:



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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 U 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 because the petitioner did not establish that she had been the victim of a qualifying crime or criminal activity, as set out at Section 101(a)(15)(U)(iii) of the Act, and the petitioner consequently could not establish any of the statutory eligibility requirements which all require that the crime be a qualifying crime or criminal activity.

On appeal, counsel submits a brief and other documentation.

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: 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[.]

Section 214(p) of the Act, 8 U.S.C. § 1184(p), further prescribes, in pertinent part:

(1) Petitioning Procedures for Section 101(a)(15)(U) Visas

The petition filed by an alien under section 101(a)(15)(U)(i) shall contain a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity described in section 101(a)(15)(U)(iii). This certification may also be provided by an official of the Service whose ability to provide such certification is not limited to information concerning immigration violations. This certification shall state that the alien "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of criminal activity described in section 101(a)(15)(U)(iii).

* * *

(4) Credible Evidence Considered

In acting on any petition filed under this subsection, the consular officer or the [Secretary of Homeland Security], as appropriate, shall consider any credible evidence relevant to the petition.

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."

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

(2) *Certifying agency* means a Federal, State, or local law enforcement agency,

prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity. This definition includes agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.

(3) *Certifying official* means:

- (i) The head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency; or
- (ii) A Federal, State, or local judge.

(9) *Qualifying crime or qualifying criminal activity* includes one or more of the following or any similar activities in violation of Federal, State or local criminal law of the United States: 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 term "any similar activity" refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities.

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.

Facts and Procedural History

The record in this matter provides the following pertinent facts and procedural history. The petitioner is a native and citizen of Mexico. She entered the United States on or about February 24, 1996, as a border crosser or nonimmigrant visitor at a Mexican border port-of-entry for a temporary period not to exceed 72 hours to visit in the area within 25 miles of the United States border with Mexico. On June 3, 2007, the petitioner was served with a Form I-862, Notice to Appear (NTA) and placed into removal proceedings before the immigration court.

The petitioner filed the instant Form I-918 on June 11, 2008. On September 24, 2009, the director issued a Request for Evidence (RFE) to demonstrate that the petitioner was the victim of substantial physical or mental abuse as a result of qualifying criminal activity. Counsel for the petitioner responded to the RFE on December 18, 2009, with documentation relating to the harm the petitioner had suffered due to acts perpetrated by B-V-¹. The director found the petitioner's response insufficient to establish the petitioner's eligibility as the petitioner had not established that she was a victim of a qualifying crime. Accordingly, the director denied the petition. The petitioner timely appealed.

On appeal, counsel maintains that the petitioner's right to due process was violated because the director's RFE did not request additional evidence demonstrating that arson is similar to the crimes listed in the statute. Counsel avers that the petitioner was prejudiced because she was not put on notice that United States Citizenship and Immigration Services (USCIS) required additional evidence to establish that arson is similar to one or more of the statutorily listed crimes. Counsel contends that the

¹ Name withheld to protect individual's identity.

director failed to consider any of the submitted evidence related to the other crimes that were perpetrated against the petitioner, and the evidence of other crimes establishes a pattern of abusive behavior over a period of time. Counsel avers that the “overall pattern of abuse is such that it is similar to crimes listed in the statute and therefore is sufficiently similar activity to constitute a qualifying criminal activity.” Counsel also asserts, on appeal, that although arson is a crime against property, the statute does not limit qualifying crimes to crimes that require intent to harm a person or cause injury. Counsel notes that Texas courts have found that violence is inherent in the crime of arson and although the Texas statute regarding arson does not require intent to harm a person, it is a violent crime similar to felonious assault, kidnapping, rape, torture, and murder, crimes listed in Section 101(1)(15)(U)(iii) of the Act. Counsel claims that the director’s decision is overly restrictive and violates Congressional intent in protecting undocumented crime victims who report criminal activity to the authorities.

Preliminarily, the AAO does not find that the petitioner’s right to due process has been violated, as she has not shown that she has been subjected to substantial prejudice. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien “must make an initial showing of substantial prejudice” to prevail on a due process challenge). The petitioner has fallen short of meeting this standard. A review of the record and the adverse decision shows that the director properly applied the statute and regulations to this matter. The petitioner’s primary complaint is that the director denied the petition. As will be discussed, the petitioner has not met her burden of proof and the denial was the proper result under the statute and regulation. Moreover, the petitioner in this matter has supplemented the record on appeal with argument comparing the crime of arson to qualifying crimes. The AAO finds that it would serve no useful purpose to remand the matter simply to afford the petitioner another opportunity to further supplement the record.

The AAO also acknowledges that the petitioner reported other acts and behavior exhibited by B-V-, the perpetrator, against her to the police. However, the petitioner did not submit a Form I-918 Supplement B signed by a certifying official indicating that she had been helpful in the investigation or prosecution of the other alleged criminal acts. USCIS looks at the statutory citation at item #3, Part 3, along with any related documentation, to determine whether the crime or criminal activity is qualifying pursuant to section 101(a)(15)(U)(iii) of the Act. Here, the Supplement B lists only section 28-02 of the Texas Penal Code as the statutory citation for the criminal activity. Accordingly, we assess only whether a violation of section 28-02 of the Texas Penal Code (“Arson”) is a qualifying crime or criminal activity or is substantially similar to a qualifying crime or criminal activity.

The Offense of Which the Petitioner was a Victim

When filing her U petition, the petitioner submitted a Form I-918 Supplement B, U Nonimmigrant Status Verification (Form I-918 Supplement B) that was signed by [REDACTED] San Benito, Texas Fire Marshall, on May 21, 2008. The criminal act listed at item #1, Part 3 of the form was other – arson. At item #3, Part 3 of the form [REDACTED] listed the statutory citation for the criminal activity that is or was being investigated or prosecuted as “Texas Pen. C. 28.02.” The Texas Penal Code section 28.02 sets out the elements of arson and states in pertinent part:

(a) A person commits an offense if the person starts a fire, regardless of whether the fire continues after ignition, or causes an explosion with intent to destroy or damage:

- (1) any vegetation, fence, or structure on open-space land; or
- (2) any building, habitation, or vehicle . . .

(d) An offense under Subsection (a) is a felony of the second degree, except that the offense is a felony of the first degree if it is shown on the trial of the offense that:

- (1) bodily injury or death was suffered by any person by reason of the commission of the offense; or
- (2) the property intended to be damaged or destroyed by the actor was a habitation or a place of assembly or worship.

described the criminal activity being investigated and/or prosecuted as:

[The petitioner's] trailer was burned and was completely destroyed. Our investigation concluded that the fire had been intentionally set.

The crime of arson is not specifically listed at section 101(a)(15)(U)(iii) of the Act as a qualifying crime. A particular crime of arson could, however, be a qualifying crime if a petitioner establishes that it is a "similar activity" to qualifying criminal activity under section 101(a)(15)(U)(iii) of the Act. Thus, the nature and elements of the arson offense must be substantially similar to one of the qualifying criminal activities in the statutorily enumerated list. 8 C.F.R. § 214.14(a)(9).

Counsel for the petitioner avers that as the Texas courts have found that the crime of arson in some circumstances is an inherently violent crime, the crime of arson is similar to felonious assault, kidnapping, rape, torture, and murder, crimes that are listed in Section 101(1)(15)(U)(iii) of the Act. The AAO disagrees. The record contains no evidence that the Fire Marshall of San Benito, Texas, the certifying agency in this matter, or any state or federal authority ever investigated or sought to prosecute the perpetrator of the arson for a qualifying crime, including the crime of felonious assault or other crimes listed by counsel. The AAO recognizes that the 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, again, 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, the record contains no evidence that the certifying agency investigated the crime as a felonious assault, or other violent crime.

Arson under Texas Law is Not Substantially Similar to any of the Qualifying Crimes

For an offense to constitute a “similar activity” to a qualifying crime under section 101(a)(15)(U)(iii) of the Act, the nature and elements of the offense must be substantially similar to one of the qualifying criminal activities in the statutorily enumerated list. 8 C.F.R. § 214.14(a)(9). Upon review, the nature and elements of the offense of arson does not include substantially similar elements as found in the offenses of kidnapping, rape, torture, murder or felonious assault. The central element of these crimes is that they are crimes against the person. Arson as set out in Texas Penal Code 28 -02 is a crime against property. The AAO acknowledges that the crimes listed in Section 101(1)(15)(U)(iii) of the Act are not limited to acts against the person. However, counsel does not persuasively articulate how the crime of arson is substantially similar to any of the qualifying crimes listed. Whether or not arson is a crime of violence, counsel has failed to establish that the elements as set out in the Texas statute incorporate the same or substantially similar elements as any of the qualifying crimes. The relevant evidence also contains no indication that the certifying agency intends to investigate or prosecute the perpetrator for any crime other than arson.

Substantial Physical or Mental Abuse

As the petitioner did not establish that she was the victim of a qualifying crime or criminal activity, she has also failed to establish that she suffered substantial physical or mental abuse as a result of having been victim of qualifying criminal activity. Accordingly, the petitioner has not as established the requirement of section 101(a)(15)(U)(i)(I) of the Act, 8 U.S.C. § 1101(a)(15)(U)(i)(I).

Possession of Information Concerning Qualifying Criminal Activity

As the petitioner did not establish that she was the victim of a qualifying crime or criminal activity, she has also failed to establish that she possesses information concerning such a crime or activity, as required by section 101(a)(15)(U)(i)(II) of the Act, 8 U.S.C. § 1101(a)(15)(U)(i)(II).

Helpfulness to Law Enforcement

As the petitioner did not establish that she was the victim of a qualifying crime or criminal activity, she has also failed to establish that she has been helpful, is being helpful, or is likely to be helpful to the certifying agency in the investigation or prosecution of the qualifying criminal activity upon which her petition is based, as required by section 101(a)(15)(U)(i)(III) of the Act, 8 U.S.C. § 1101(a)(15)(U)(i)(III).

Qualifying Criminal Activity in Violation of U.S. Laws

As the petitioner did not establish that she was the victim of a qualifying crime or criminal activity, she has also failed to establish that the qualifying criminal activity violated the laws of the United States or occurred in the United States, as required by section 101(a)(15)(U)(i)(IV) of the Act.

Conclusion

Arson under Texas Penal Code 28-02 is not a qualifying crime or substantially similar to any other qualifying criminal activity listed at section 101(a)(15)(U)(iii) of the Act. The petitioner has also not demonstrated that the perpetrator was investigated or prosecuted for any other qualifying crime or similar activity, as described in section 101(a)(15)(U)(iii) of the Act. Accordingly, the petitioner has not demonstrated that she meets any of the statutory eligibility requirements for U nonimmigrant classification at section 101(a)(15)(U)(i)(I) – (IV) of the Act. The petitioner is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U) of the Act and her petition must be denied.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In these proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. 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.