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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

PUBLIC COPY

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DATE: **DEC 12 2011** Office: VERMONT SERVICE CENTER

IN RE:

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)

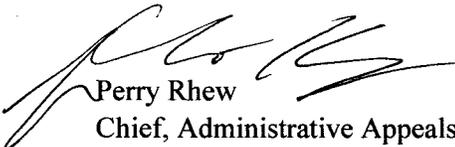
ON BEHALF OF PETITIONER:

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, 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 (“the director”), 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)(i) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1101(a)(15)(U)(i), as an alien victim of certain qualifying criminal activity.

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[.]

The burden of proof is on the petitioner to demonstrate eligibility for U nonimmigrant classification, and U.S. Citizenship and Immigration Services (USCIS) will determine, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence, including the Form I-918 Supplement B, U Nonimmigrant Status Certification. 8 C.F.R. § 214.14(c)(4). All credible evidence relevant to the petition will be considered. Section 214(p)(4) of the Act, 8 U.S.C. § 1184(p)(4).

Factual and Procedural History

The petitioner is a native and citizen of Mexico. In March 2010, U.S. Immigration and Customs Enforcement (USICE) reinstated the petitioner's prior removal order. In April 2010, the petitioner was convicted of battery in the State of California and sentenced to 60 days in jail and 36 months of probation.¹

The petitioner filed the instant Form I-918 on July 26, 2010. On November 3, 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.

Analysis

The record contains a law enforcement certification (Form I-918 Supplement B), signed by Russell Bence, Detective Sargent of the San Jose, California Police Department ("certifying official"). At Part 3.1 the certifying official identified the criminal act of which the petitioner was a victim as a hit and run accident, and cited California Vehicle Code (CVC) §§ 20002(a) and 23152(b) at Part 3.3 as the criminal activity investigated or prosecuted. According to the certifying official at Part 3.5, the petitioner, as well as his spouse and child, were driving in their vehicle when their car was struck by a drunk driver who ran through a stop sign and fled from the scene.

California defines driving under the influence as, in pertinent part: "It is unlawful for any person who has a 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle." Cal. Veh. Code § 23152(b) (West 2011). Under California law, a hit and run accident occurs upon violation of the following: "The driver of any vehicle involved in an accident resulting only in damage to any property, including vehicles, shall immediately stop the vehicle at the nearest location that will not impede traffic or otherwise jeopardize the safety of other motorists" Cal. Veh. Code § 20002(a) (West 2011).

The particular crimes that were certified are not specifically listed as qualifying criminal activity 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).

On appeal, counsel for the petitioner asserts that offenses under CVC §§ 23152(b) and 20002(a) are substantially similar to felonious assault as found at California Penal Code (CPC) § 245.²

¹ Superior Court of California, County of Stanislaus, Case No. 1415248.

² In her brief, counsel presents arguments relating to the director's denial of the petitioner's Application for Advance Permission to Enter as a Nonimmigrant (Form I-192). However, the denial of a Form I-192 may not be appealed. 8 C.F.R. § 212.17(b)(3). Accordingly, this part of counsel's brief shall not be addressed further.

California law defines assault as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” Cal. Penal Code § 240 (West 2011). Felonious assault occurs under California law when:

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.

Cal. Penal Code § 245(a)(1) (West 2011).

Counsel has not established that the petitioner was the victim of felonious assault or any other qualifying crime. The nature and statutory elements of driving under the influence of alcohol and hit-and-run under CVC §§ 23152(b) and 20002(a) are not substantially similar to felonious assault under CPC § 245(a)(1). Under CPC § 245(a)(1), felonious assault requires an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another with the intent to harm another with a weapon. In contrast, the offenses of driving under the influence of alcohol and hit-and-run at CVC §§ 23152(b) and 20002(a) are liability crimes requiring no specific intent of the perpetrator to cause the harm inflicted.

Counsel cites decisions by California courts, which equate being struck by a vehicle to being assaulted by a deadly weapon. Counsel fails, however, to engage in the requisite statutory analysis to show that the certified crimes in this case are substantially similar to felonious assault or any other qualifying crime.

Even if counsel had shown that the certified crimes in this case were substantially similar to the qualifying crime of felonious assault, the record contains no evidence that the San Jose Police department ever investigated or prosecuted that qualifying crime, as required by sections 101(a)(15)(U)(i)(III) and 214(p)(1) of the Act and the regulations at 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 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) for having been the victim of a hit and run accident where the driver was under the influence of alcohol.

Conclusion

Although the petitioner was injured 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 prevents him from meeting the statutory requirements for U nonimmigrant classification at section 101(a)(15)(U)(i) 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. The petition remains denied.