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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

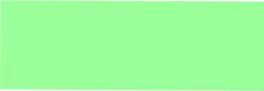


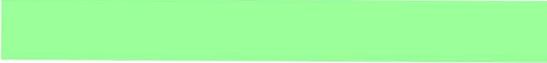
U.S. Citizenship
and Immigration
Services



Date: **JUL 05 2013**

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 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 AAO inappropriately applied the law 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 in accordance with the instructions on Form I-290B, Notice of Appeal or motion, with a fee of \$630, or a request for a fee waiver. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting 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)(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. The director determined that the petitioner did not establish that he was a victim of qualifying criminal activity, and therefore could not show that he met any of the eligibility criteria for U nonimmigrant classification. The director also noted that the petitioner had not established that he suffered substantial physical or mental abuse as the result of qualifying criminal activity. The petition was denied accordingly. On appeal, the petitioner's representative submits a brief and additional evidence.

Applicable Law

An individual may qualify for U nonimmigrant classification as a victim of a qualifying crime under section 101(a)(15)(U)(i) of the Act if:

- (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[.]

See also 8 C.F.R. § 214.14(b) (discussing eligibility criteria). Clause (iii) of section 101(a)(15)(U) of the Act lists qualifying criminal activity and states:

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; stalking; 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; fraud in labor contracting (as defined at 18 U.S.C.

§ 1351); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes[.]¹

“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.” 8 C.F.R. § 214.14(a)(9).

The regulation at 8 C.F.R. § 214.14(a) contains definitions that are used in the U nonimmigrant classification, and provides for the following:

(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.

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[.]

The regulation at 8 C.F.R. § 214.14(b)(8) defines *physical or mental abuse* as: “injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim.”

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.*

¹ The crimes of stalking and fraud in labor contracting as defined in 18 U.S.C. § 1351 were not listed as qualifying criminal activities when the petitioner filed the instant form I-918 U petition. The Violence Against Women Reauthorization Act of 2013, Public Law No. 113-4 (VAWA 2013), which came into effect on March 7, 2013, amended section 101(a)(15)(U)(iii) of the Act to include these two crimes as qualifying criminal activities.

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 Brazil who claims to have entered the United States on June 13, 2004, without inspection, admission, or parole. The petitioner filed a Petition for U Nonimmigrant Status (Form I-918) on March 25, 2011. On November 4, 2011, the director issued a Request for Evidence (RFE) that the petitioner was the victim of a qualifying crime. The petitioner responded to the RFE with additional evidence, which the director found insufficient to establish the petitioner's eligibility. The director determined that the petitioner did not establish that he was a victim of qualifying criminal activity and, therefore, could not show that he met any of the eligibility criteria for U nonimmigrant classification at section 101(a)(15)(U)(i) of the Act, and that he had not shown that he suffered substantial physical or mental abuse as a result of qualifying criminal activity. The petition was denied accordingly. On appeal, counsel contends that the petitioner is eligible for U nonimmigrant classification because he was the victim of a "hit and run," which she claims is similar to the qualifying crime of felonious assault, and that the petitioner has suffered substantial abuse as a result of his victimization.

Analysis

Upon review, we find no error in the director's decision to deny the petition. In support of his Form I-918 U petition, the petitioner submitted a Form I-918 Supplement B, U Nonimmigrant Status Certification (Form I-918 Supplement B), signed by [REDACTED] (certifying official). The certifying official listed the criminal act of which the petitioner was a victim at Part 3.1 as felonious assault. At Part 3.3, however, the certifying official listed the statutory citations of the crimes investigated or prosecuted as California Vehicle Code (Cal. Veh. Code) §§ 20002 and 23152(a) and (b). At Part 3.5, which provides for a brief description of the criminal activity, the certifying official stated that the petitioner was struck by a vehicle driving at a high rate of speed which caused his vehicle to flip over twice. The driver of the vehicle that struck the petitioner's vehicle fled on foot.

The petitioner bears the burden of proof to demonstrate his eligibility for U nonimmigrant classification. Section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 214.14(c)(4); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). That burden includes showing that the petitioner was the victim of a qualifying crime that was investigated or prosecuted by a certifying law enforcement agency. The regulation at 8 C.F.R. § 214.14(c)(4) provides U.S. Citizenship and Immigration Services (USCIS) with the authority to determine, in its sole discretion, the evidentiary value of evidence, including a Form I-918 Supplement B. Although the certifying official indicated at Part 3.1 of the Form I-918 Supplement B that the petitioner was the victim of felonious assault, the evidence in the record does not demonstrate that the crime of felonious assault or any similar crime was ever investigated or

prosecuted. The certifying official did not list a statutory citation for felonious assault as criminal activity that was investigated or prosecuted; he only cited to the Cal. Veh. Code for “hit and run” and driving under the influence (DUI). The traffic collision report does not indicate that a felonious assault was investigated or prosecuted, and no police report indicating that felonious assault was investigated or prosecuted was submitted. There is no evidence that the certifying agency investigated or prosecuted an attempted or actual felonious assault. The petitioner has not shown that any crime other than hit and run and DUI was investigated or prosecuted by the law enforcement agency.

The petitioner has not shown that he was the victim of a qualifying crime. The particular crimes that were certified, hit and run and DUI, are not specifically listed as a qualifying crimes 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). The inquiry, therefore, is not fact-based, but rather entails comparing the nature and elements of the statutes in question.²

Under the California Vehicular Code, Accident and Accident Reports – Duty where Property Damaged, or “hit and run” without injury or death,³ is defined in pertinent part as follows:

(a) 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. Moving the vehicle in accordance with this subdivision does not affect the question of fault. The driver shall also immediately do either of the following:

(1) Locate and notify the owner or person in charge of that property of the name and address of the driver and owner of the vehicle involved and, upon locating the driver of any other vehicle involved or the owner or person in charge of any damaged property, upon being requested, present his or her driver's license, and vehicle registration, to the other driver, property owner, or person in charge of that property. The information presented shall include the current residence address of the driver and of the registered owner. If the registered owner of an involved vehicle is present at the scene, he or she shall also, upon request, present his or her driver's license information, if available, or other valid identification to the other involved parties.

² Counsel contends that in his denial decision, the director did not identify the elements of assault. As stated above, the petitioner bears the burden of proof to demonstrate his eligibility for U nonimmigrant classification and that burden includes showing that the petitioner was the victim of a qualifying or substantially similar crime that was investigated or prosecuted by a certifying law enforcement agency. See Section 291 of the Act.

³ The California Vehicle Code includes a separate statutory section for “Duty Upon Injury or Death.” See Cal. Veh. Code § 20003.

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(2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol.

* * *

(c) Any person failing to comply with all the requirements of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine.

Cal. Veh. Code § 20002 (West 2013).

Driving under the influence is defined, in part, as follows:

(a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.

(b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

Cal. Veh. Code § 23152 (West 2013).

On appeal, counsel asserts that offenses under Cal. Veh. Code § 20002 are substantially similar to assault as defined in the California Penal Code § 240.⁴ Felonious assault is defined under the California Penal Code, in part, as follows:

(a)(1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm 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.

* * *

(4) Any person who commits an assault upon the person of another by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for

⁴ In her brief, counsel cites to Cal. Veh. Code § 20001, however, the certified crime is a violation of Cal. Veh. Code § 20002. See Form I-918 Supplement B; Petitioner's Brief on Appeal at 6.

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) (West 2013).

Counsel has not established that the petitioner was the victim of felonious assault or any other qualifying crime. No elements of hit and run under Cal. Veh. Code § 20002 or Cal. Veh. Code § 23152 are substantially similar to felonious assault under Cal. Penal Code § 245(a). Under Cal. Penal Code § 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 Cal. Veh. Code §§ 23152(a) and (b) and 20002 are liability crimes requiring no specific intent of the perpetrator to cause the harm inflicted. The statutes investigated and prosecuted in this case involve not staying at the scene of an accident where property damage is involved and driving under the influence of drugs or alcohol. Felonious assault, however, involves assaulting another with a deadly weapon or in such a manner that is likely to cause bodily harm. The difference in the nature of the offenses is further highlighted by the fact that the certified crimes in this case, Cal. Veh. Code § 20002 or Cal. Veh. Code § 23152, are part of the California Vehicle Code, while felonious assault is listed under the California Penal Code. Similarly, as counsel points out in her brief, felonious assault requires the commission of an act, while hit and run offenses in California require an omission, or failure to act.

We recognize that qualifying criminal activity may occur during the commission of a nonqualifying crime; however, the certifying official must provide evidence that the qualifying criminal activity was actually investigated or prosecuted. Here, the certifying official did not indicate that his office or any other law enforcement authority investigated the perpetrator for any crimes other than hit and run and DUI.

On appeal, counsel claims that the facts of what occurred to the petitioner, or the perpetrators actions, meet the statutory elements of assault and cites decisions by California courts which equate being struck by a vehicle to being assaulted by a deadly weapon. However, 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 criminal statutes of the crimes that were investigated and the qualifying crimes. *See* 8 C.F.R. § 214.14(a)(9). Counsel does not show how being struck by a vehicle is similar to the statutory language of felony assault or any of the other qualifying crimes. Counsel also asserts that USCIS's grant of U nonimmigrant status to a different individual who was the victim of a hit and run is persuasive evidence that the "similar activity" provision may extend to hit and run cases. The case counsel cites to does not hold any precedential value, and each case is reviewed on its own merits. *See* 8 C.F.R. § 103.3(c). In this case, the petitioner has not demonstrated that the nature and elements of the offenses of which he was a victim, hit and run and DUI, are substantially similar to those of any of the qualifying crimes at section 101(a)(15)(U)(iii) of the Act, including felonious assault or attempted felonious assault. The petitioner is, therefore, not

the victim of a qualifying crime or any qualifying criminal activity, as required by section 101(a)(15)(U)(i) of the Act.

The Petitioner Does Not Meet Any of the Eligibility Criteria

The petitioner's failure to establish that he was the victim of qualifying criminal activity prevents him from meeting the other statutory requirements for U nonimmigrant classification at subsections 101(a)(15)(U)(i)(I) – (IV) of the Act. In this case, the certifying official did not indicate that the petitioner was helpful in the investigation or prosecution of any *qualifying* criminal activity. Accordingly, the petitioner's Form I-918 Supplement B does not meet the requirements under section 214(p)(1) of the Act, and the petition may not be approved for this additional reason.

Substantial Physical or Mental Abuse

Although the petitioner was injured by his involvement in a vehicle accident caused by a drunk driver, because the petitioner has not established that he was the victim of *qualifying* criminal activity, he has also failed to demonstrate that he suffered substantial physical or mental abuse as a result of such victimization.

Conclusion

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); *Matter of Chawathe*, 25 I&N Dec. at 375. Here, that burden has not been met.

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