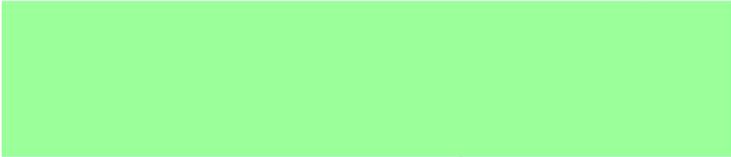




U.S. Citizenship
and Immigration
Services

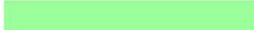
(b)(6)



Date: **MAR 09 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:

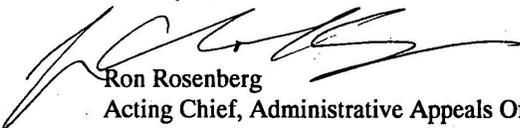


INSTRUCTIONS:

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,


Ron Rosenberg
Acting 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 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 petition was denied accordingly. On appeal, the petitioner's representative submits a brief.

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; 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.” 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. 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 India who entered the United States on December 12, 2002 as a nonimmigrant visitor. The petitioner filed a Petition for U Nonimmigrant Status (Form I-918)

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on March 22, 2011. On November 23, 2011, the director issued a Request for Evidence (RFE) that, among other things, the petitioner was the victim of a qualifying crime and that he had suffered substantial abuse as a result of qualifying criminal activity. 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. 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 robbery, which he claims is similar to the qualifying crime of felonious assault.

Claimed Criminal Activity

According to the petitioner in his personal statement, on July 13, 2009, he ran after an individual who attempted to steal a case of beer from the petitioner's gas station. The petitioner claims that he caught up to the man near a gas pump, and that when he grabbed the man's shoulder to stop him, he turned around and kicked the petitioner in the left leg. The petitioner also reported that the man pushed the petitioner and threw the case of beer against him. He stated that the man pulled a knife out, verbally abused him, and then ran away. Once the police arrived, the petitioner filed an incident report.

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] the [REDACTED] Washington Police Department (certifying official). The certifying official listed the criminal acts of which the petitioner was a victim at Part 3.1 as felonious assault and "Other: Robbery 2nd." At Part 3.3, however, the certifying official listed the statutory citation of the crime investigated or prosecuted as Revised Code of Washington (Wash. Rev. Code Ann.) section 9A.56.210 (second degree robbery). At Part 3.5, which provides for a brief description of the criminal activity, the certifying official stated that the petitioner was working at [REDACTED] when a man shoplifted beer, and that the petitioner was assaulted when the assailant threw and struck him with a beer can. Regarding any known injuries to the petitioner, the certifying official indicated at Part 3.6 that a beer can struck the petitioner in the right arm.

Counsel contends that it is not necessary for the petitioner to demonstrate that robbery is substantially similar to the qualifying crime of felonious assault, but only that he was the victim of an assault. Counsel offers no legal analysis to support this claim, and counsel is mistaken. 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 second degree robbery. The police report was forwarded for investigation of second degree robbery, shoplifting, and assault, but the assault citation provided in the report does not correspond to the sections for assault in the Washington Penal Code provided by counsel. 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 second degree robbery was investigated or prosecuted by the law enforcement agency.

Furthermore, the petitioner has not shown that he was the victim of a qualifying crime. The particular crime that was certified, second degree robbery, 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). The inquiry, therefore, is not fact-based, but rather entails comparing the nature and elements of the statutes in question.

Under the Washington Penal Code, second degree robbery is defined as follows:

- (1) A person is guilty of robbery in the second degree if he or she commits robbery.
- (2) Robbery in the second degree is a class B felony.

Wash. Rev. Code Ann. § 9A.56.210 (West 2013).

Robbery is defined as:

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

Wash. Rev. Code Ann. § 9A.56.190 (West 2013).

Under the Washington Penal Code, second degree assault, a felony, is defined, in pertinent part, as:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

- (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or . . .
- (c) Assaults another with a deadly weapon; or . . .
- (e) With intent to commit a felony, assaults another; or
- (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
- (g) Assaults another by strangulation or suffocation.

(2) (a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony. . . .

Wash. Rev. Code Ann. § 9A.36.021 (West 2013).

No elements of robbery in the second degree under Wash. Rev. Code Ann. § 9A.56.210 are similar to assault in the second degree under Wash. Rev. Code Ann. § 9A.36.021. The statute investigated in this case involves taking personal property from an individual through the use or threatened use of force or fear and does not require assault. Felonious assault, however, involves assaulting another with a deadly weapon, in such a manner that causes bodily harm, or with the intent to commit another felony. 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 investigated or prosecuted. Here, the certifying official did not indicate that his office or any other law enforcement authority investigated the perpetrator for any crime other than robbery in the second degree.

On appeal, counsel claims that the facts of what occurred to the petitioner, or the perpetrators actions, meet the statutory elements of assault or attempted assault. 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 crimes that were investigated and the qualifying crimes. See 8 C.F.R. § 214.14(a)(9). The petitioner has not demonstrated that the nature and elements of the criminal offense of which he was a victim, robbery in the second degree, 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.

Here, the evidence in the record and counsel's contentions fail to establish that the criminal offense of which the petitioner was a victim, second degree robbery, is substantially similar to any of the qualifying crimes at section 101(a)(15)(U)(iii) of the Act, including 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

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. Even if his victimization was established, however, the record does not show that he suffered substantial physical or mental abuse as a result.¹

In his March 15, 2011 statement, the petitioner recounted that the assailant kicked him in the leg, pushed him, and threw the case of beer against the petitioner. The petitioner indicated that the assailant also threatened him with a knife and verbally abused him. He stated that the day after the attack, he began feeling pain in his right arm, which he continues to experience. He also reported that after the incident, he was diagnosed with depression and that he believes his assault contributed to the depression because he worried about being attacked again and is afraid at work. In his February 9, 2012 statement, the petitioner indicated that the pain in his arm did not start until a few days after the incident, and that he continues to wear a brace and has difficulty moving the arm to this day. He also noted that he suffered mentally because he learned the perpetrator is in a gang and he is even more afraid. The petitioner also submitted a "witness" statement from [REDACTED] who claimed that he was at the gas station and saw the perpetrator kick and push the owner, and then throw a case of beer at him.²

The information in the three statements, however, is not supported by the Form I-918 Supplement B, the police report, or the other evidence in the record. On his Form I-918 Supplement B, the certifying

¹ In her brief on appeal, counsel claims that USCIS did not rely on the issue of substantial abuse in the denial so it must be satisfied by the evidence submitted in response to the RFE. Counsel is again mistaken. The director's denial includes a section titled "Qualifying Criminal Activity/Substantial Mental or Physical Abuse" in which the director explained why the petitioner had not established that he suffered from substantial physical or mental abuse.

² As noted in the Director's decision, there is no evidence other than his statement that [REDACTED] was a witness to the crime, as he was not listed as a witness in the police report.

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official listed the known injuries as that the beer can struck the petitioner in the right arm. There was no mention of the petitioner being kicked, pushed, or threatened with a knife. Similarly, the police report noted only that the perpetrator turned and threw the case of beer at the petitioner, and further stated that the petitioner "moved away enough that he was not hurt." The letter from [REDACTED] regarding the petitioner's injury to his arm noted that the petitioner reported that "for a long time" he did not realize his elbow pain was connected to the robbery. This contradicts the petitioner's first statement where he stated that his elbow pain began the day after the attack, and his second statement which states that the elbow pain began a few days after the attack. Regardless of when the arm pain began, the record does not establish that any physical injury the petitioner may have suffered during the robbery rises to the level of substantial physical abuse.

Furthermore, we recognize the petitioner's fear about the robbery, however, the petitioner's affidavits and relevant evidence do not contain probative details of the mental harm he claims to have suffered. The February 7, 2011 letter from [REDACTED] of the [REDACTED] indicated that the petitioner had mental health issues but made no mention whatsoever of the robbery. The February 2, 2012 letter from [REDACTED] noted that the petitioner's symptoms began in India, and [REDACTED] does not explain how the symptoms were "further aggravated" by the robbery other than to say that the petitioner has nightmares. While the petitioner himself recounts that his depression has worsened and that he is afraid, the petitioner has not provided any further information or sufficient evidence that would indicate that any abuse he suffered was substantial under the factors and standard explicated in the regulation at 8 C.F.R. § 214.14(b)(1).

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.