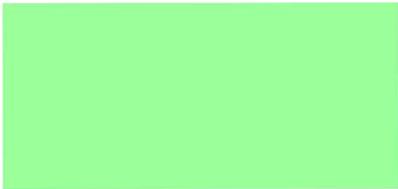


(b)(6)

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

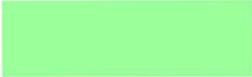


U.S. Citizenship
and Immigration
Services



Date: **MAR 29 2013**

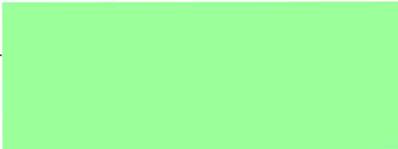
Office: VERMONT SERVICE CENTER

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. The Administrative Appeals Office (AAO) dismissed the subsequent appeal. The petitioner's second appeal was rejected for lack of jurisdiction. The matter is now before the AAO on a motion to reconsider. The motion to reconsider will be granted. The appeal will remain dismissed and the petition will remain denied.

The petitioner seeks nonimmigrant classification pursuant to 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 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 motion, counsel 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 defines qualifying criminal activity as:

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.

* * *

(ii) A petitioner may be considered a victim of witness tampering, obstruction of justice, or perjury, including any attempt, solicitation, or conspiracy to commit one or more of those offenses, if:

(A) The petitioner has been directly and proximately harmed by the perpetrator of the witness tampering, obstruction of justice, or perjury; and

(B) There are reasonable grounds to conclude that the perpetrator committed the witness tampering, obstruction of justice, or perjury offense, at least in principal part, as a means:

(1) To avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring to justice the perpetrator for other criminal activity; or

(2) To further the perpetrator's abuse or exploitation of or undue control over the petitioner through manipulation of the legal system.

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 Trinidad and Tobago who entered the United States on February 10, 1996 as a nonimmigrant visitor. The petitioner was placed into removal proceedings before the New York, New York Immigration Court in 2005 after he overstayed his nonimmigrant

visa. The petitioner was granted voluntary departure on August 10, 2005.

The petitioner filed a Petition for U Nonimmigrant Status (Form I-918) on March 25, 2010. On July 9, 2010, the director issued a Request for Evidence (RFE) to provide the petitioner with an opportunity to submit additional evidence in support of his claim. The petitioner responded 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 and the AAO dismissed the petitioner's subsequent appeal in a decision dated October 28, 2011, incorporated here by reference. On motion, counsel repeats many of the same arguments made on appeal, which will not be addressed here as they were addressed in the AAO's October 28, 2011 decision. Counsel further contends that the petitioner is eligible for U nonimmigrant classification because mail fraud has the same mens rea and similar actus rea as perjury, and because mail fraud should have been included in the list of qualifying crimes.

Analysis

In its prior decision, the AAO determined that the petitioner had not established that he was the victim of a qualifying criminal activity. On motion, counsel again contends that the acts committed by the perpetrator amount to perjury and subordination of perjury, but as explained in the AAO's October 28, 2011 decision, the proper inquiry when determining if two crimes are substantially similar under 8 C.F.R. § 214.14(a)(9) is not an analysis of the acts or factual details of the criminal activity, but a comparison of the nature and elements of "frauds and swindles" under 18 U.S.C. § 1341 and perjury. As also noted in the AAO decision, although we recognize that qualifying criminal activity can occur during the commission of a nonqualifying crime, there is no evidence in this case that law enforcement investigated or prosecuted any qualifying criminal activity such as perjury.

Counsel next asserts that because mail fraud and perjury both require specific intent and have to do with defrauding someone, they are substantially similar. As required by the regulation at 8 C.F.R. § 214.14 (a)(9), both the nature and elements of the two crimes must be substantially similar. While both crimes involve specific intent, that one commonality is insufficient to show that they are *substantially* similar. As required by the regulation at 8 C.F.R. § 214.14(a)(9), both the nature and the elements of the two crimes must have substantial similarities. Counsel is also mistaken that defrauding is similar to the submission of a written declaration or statement under penalty of perjury that the person does not believe to be true. To defraud does not mean, as counsel attests, "to make a false representation." *Black's Law Dictionary* defines defraud as "To cause injury or loss to (a person) by deceit." The nature and elements of perjury do not include any aspect that is similar to the definition of what it means to defraud. As stated in the previous AAO decision, the petitioner has not demonstrated that the crime of which he was a victim, "frauds and swindles," is substantially similar to any enumerated qualifying criminal activity, including perjury.

Even if the petitioner could establish that frauds and swindles was substantially similar to perjury, the evidence does not demonstrate that he was a victim of perjury. The petitioner must demonstrate that the perpetrator committed the perjury offense, at least in part, as a means: (1) to avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring her to justice for other criminal activity; or (2) to further her abuse or exploitation of or undue control over the petitioner through manipulation of the legal system. 8 C.F.R. § 214.14(a)(14)(ii). The evidence in the record does not demonstrate that the perpetrator committed perjury as a way to avoid or frustrate efforts by law enforcement personnel to bring her to justice for other criminal activity, or as a means to further her abuse or exploitation over the petitioner through manipulation of the legal system. The record lacks evidence that the perpetrator was engaged in any other criminal activity at the time, and there is no basis to conclude that any commission of perjury was done to avoid or frustrate any ongoing law enforcement investigation of her. The record also fails to show that the perpetrator committed a perjury offense to further abuse, exploit or exert undue control over the petitioner through the manipulation of the legal system.

Counsel also contends that U.S. Citizenship and Immigration Services (USCIS) should recognize immigration related mail fraud as a qualifying criminal activity to comply with Congressional intent. However, subsection 101(a)(15)(U)(iii) of the Act does not list frauds and swindles as qualifying criminal activity and USCIS lacks authority to waive the requirements of the statute. *See United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (holding that government officials are bound to adhere to the governing statute and regulations).

Both the statute and the regulation at 8 C.F.R. § 214.14(a)(9) allow for “any similar activity” to be considered a qualifying crime when the nature and elements of a particular criminal offense are substantially similar to one of the criminal activities listed at subsection 101(a)(15)(U)(iii) of the Act. Here, the petitioner has not demonstrated that the criminal offense of which he was a victim, mail fraud, is substantially similar to any of the qualifying crimes at subsection 101(a)(15)(U)(iii) of the Act, including perjury. The petitioner is, therefore, not the victim of a qualifying crime or any qualifying criminal activity, as required by subsection 101(a)(15)(U)(i) of the Act.

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. 369, 375 (AAO 2010). Here, that burden has not been met. Upon reopening, the prior decision of the AAO will be affirmed. The appeal will remain dismissed and the petition will remain denied.

ORDER: The motion is granted. The appeal remains dismissed and the petition remains denied.