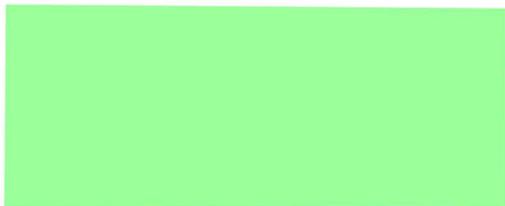


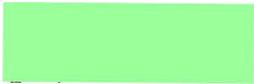
(b)(6)

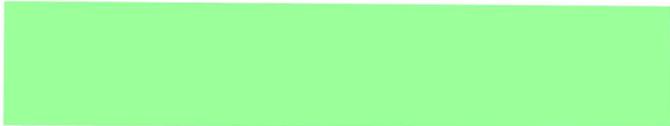
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



Date: **OCT 10 2014** 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

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

Ron Rosenberg
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) 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.

Applicable Law

Section 101(a)(15)(U) of the Act provides 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: . . . felonious assault; . . . or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes[.]

According to the regulation at 8 C.F.R. § 214.14(a)(9), the term “any similar activity” as used in section 101(a)(15)(U)(iii) of the Act “refers to criminal offenses in which the nature and elements of the offenses are *substantially similar* to the statutorily enumerated list of criminal activities.” (Emphasis added).

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.

In addition, 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 [U.S. Citizenship and Immigration Services (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."

Facts and Procedural History

The petitioner is a native and citizen of Colombia who entered the United States on February 21, 2002 as a C-1 nonimmigrant crew member. On July 8, 2004, the petitioner was ordered removed by an immigration

Page 4

judge. The Board of Immigration Appeals (Board) affirmed the removal order on appeal. The petitioner filed the instant Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), with an accompanying U Nonimmigrant Status Certification (Form I-918 Supplement B) and a Form I-192, Application for Advance Permission to Enter as Nonimmigrant (Form I-192), on April 23, 2012. On June 10, 2013, the director issued a Request for Evidence (RFE) for the petitioner to establish: (1) that the crime of simple assault is substantially similar to one of the qualifying criminal activities set forth in section 101(a)(15)(U)(iii) of the Act; and (2) that the petitioner was a victim of substantial physical or mental abuse as a result of the qualifying criminal activity. The petitioner responded to the RFE with an updated statement, a psychological evaluation by [REDACTED] a letter from Dr. [REDACTED], and other evidence. The director found the evidence insufficient to establish the petitioner's eligibility and denied the petition accordingly on February 5, 2014, concluding that the petitioner had not established that he was the victim of qualifying criminal activity and, therefore, was unable to meet the eligibility criteria at section 101(a)(15)(U)(i) of the Act. The petitioner timely appealed the denial of the Form I-918 U petition. On appeal, counsel submits a brief, asserting that the crime of simple assault is similar to the qualifying crime of felonious assault.

Claimed Criminal Activity

The petitioner, in his personal statement, indicated that he was a victim of assault on June [REDACTED] at 10 pm at night. On that date, the petitioner stated that he was outside a bar talking on his cellphone when he was approached by two or three young men who appeared drunk. One of them came and shoved the petitioner on his shoulder. The perpetrator did not respond to the petitioner's query as to why he was pushing the petitioner. The petitioner turned away and continued speaking on his phone, when the perpetrator came over to him and punched the petitioner in the nose, causing it to bleed. The petitioner went back into the bar and locked the door. The petitioner, who could still hear the men outside the bar, called the police. The petitioner told the police what happened when they arrived although the perpetrators were no longer in the area. However, the police caught one of them a few blocks away. The petitioner was taken to the police station where he identified his attacker and filed a complaint for assault against him. The petitioner is unaware of the outcome of the complaint. The petitioner stated although his nose was not broken, he was in a lot of pain and five days later, went to a clinic because he was having trouble sleeping and breathing through his nose. He did not get the results of the x-ray he took. Today, the petitioner has a deviated septum and one of his nasal passages is blocked.

The Form I-918 Supplement B that the petitioner submitted was signed on February 10, 2012 by Lieutenant [REDACTED] Investigations Division, [REDACTED] Police Department, [REDACTED] New Jersey (certifying official). The certifying official checked the box for "other" at Part 3.1, indicating that the criminal activity of which the petitioner was a victim was assault. In Part 3.3, the certifying official cited section 2C:12-1 of the New Jersey Statutes Annotated (N.J.S.A.), which relates to the general offense of assault, as the relevant criminal statute for the criminal activity that was investigated or prosecuted. At Part 3.5, which asks for a brief description of the criminal activity being investigated or prosecuted, the certifying official stated that the petitioner was a victim of simple assault on June [REDACTED] where one of three men who approached him punched the petitioner in the nose. At Part 3.6, which asks for a description of any known or documented injury to the petitioner, it indicates that the petitioner suffered a bloody nose and that there was no other known injury.

Analysis

We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review, we find no error in the director's decision to deny the petition based on the stated grounds.

Simple Assault is Not Substantially Similar to Any Qualifying Criminal Activity

The record shows that the petitioner was a victim of simple assault on June [REDACTED]. The certifying official specifically cited only N.J.S.A. § 2C:12-1 at Part 3.3, the general assault statute under New Jersey law, as the relevant statute for the criminal activity that was investigated or prosecuted. In Part 3.5 of the Form I-918 Supplement B, the certifying official specifically indicated that the criminal activity investigated or prosecuted was simple assault. The certifying official did not indicate, and the record otherwise lacks any evidence, that felonious assault, which is a qualifying criminal activity, was also investigated or prosecuted.

The crime of simple assault 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). Thus, the nature and elements of the crime investigated, criminal threats, must be substantially similar to one of the qualifying criminal activities in the statutorily enumerated list. 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.

Counsel maintains on appeal that the assault offense of which the petitioner was a victim is substantially similar to the offense of aggravated assault under N.J.S.A. § 2C:12-1(b).

At the time of the commission of the criminal activity in 2006, the offense of assault was codified at N.J.S.A. § 2C:12-1, which provided, in pertinent part, as follows:

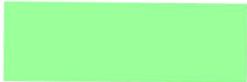
a. Simple assault. A person is guilty of assault if he:

- (1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another;
or
- (2) Negligently causes bodily injury to another with a deadly weapon; or
- (3) Attempts by physical menace to put another in fear of imminent serious bodily injury.

Simple assault is a disorderly persons offense unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty disorderly persons offense.

b. Aggravated assault. A person is guilty of aggravated assault if he:

- (1) Attempts to cause serious bodily injury to another, or causes such injury purposely or knowingly or under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury; or
- (2) Attempts to cause or purposely or knowingly causes bodily injury to another with a



deadly weapon; or

(3) Recklessly causes bodily injury to another with a deadly weapon; or

(4) Knowingly under circumstances manifesting extreme indifference to the value of human life points a firearm, as defined in section 2C:39-1f., at or in the direction of another, whether or not the actor believes it to be loaded; or . . .

* * *

(7) Attempts to cause significant bodily injury to another or causes significant bodily injury purposely or knowingly or, under circumstances manifesting extreme indifference to the value of human life recklessly causes such significant bodily injury; or

* * *

N.J. Stat. Ann. § 2C:12-1 (West 2005) (emphasis added).

The statutory elements of simple assault under N.J.S.A. § 2C:12-1(a) are not substantially similar to those for felonious assault, as defined under N.J.S.A. § 2C:12-1(b) (aggravated assault). A simple assault offense under New Jersey law involves an attempt to cause, or purposely, knowingly or recklessly causing bodily injury to another; negligently causing serious bodily injury with a deadly weapon, or attempting to put another in fear of imminent serious bodily injury. N.J.S.A. § 2C:12-1(a). However, aggravated assault requires, as an element of the offense, the presence of an additional aggravating factor, such as the infliction of a greater level of harm (*serious* bodily injury)¹ to the victim, a more culpable mental state, or the reckless use of a deadly weapon. N.J.S.A. § 2C:12-1(b). The distinction between the two offenses is recognized under New Jersey law, which categorizes simple assault as a disorderly persons offense, while aggravated assault is designated as a “crime” of varying degrees, depending on the aggravating factor present, which is more analogous to a felony offense. *See* N.J.S.A. § 2C:12-1. Accordingly, in comparing the statutory elements of simple and aggravated assault, we find that the two offenses are not substantially similar. *See* 8 C.F.R. § 214.14(a)(9).

Counsel contends that the severity of the injuries sustained by the petitioner, and the perpetrator’s behavior during and following the assault, evidence a *mens rea* on the part of the perpetrator that is analogous to that required for aggravated assault, as defined under N.J.S.A. § 2C:12-1(b). As stated above, however, 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 crime that was investigated and one of the qualifying crimes. *See* 8 C.F.R. § 214.14(a)(9). The record indicates that the offense investigated was simple assault. As discussed, the statutory elements of simple assault and felony assault under New Jersey law are not substantially similar, and counsel does not provide the requisite statutory analysis to demonstrate the claimed similarities between

¹ As used in N.J.S.A. § 2C:12-1, the term “bodily injury” means “physical pain, illness or any impairment of physical condition,” while “serious bodily injury” means “bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” N.J. Stat. Ann. § 2C:11-1 (West 2005).

the two offenses. The petitioner has, therefore, failed to establish that he was the victim of a qualifying crime, as required by section 101(a)(15)(U)(i) of the Act.

Substantial Physical or Mental Abuse

As the petitioner did not establish that he was the victim of qualifying criminal activity, he has also failed to establish that he suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity, as required by section 101(a)(15)(U)(i)(I) of the Act.

Possession of Credible or Reliable Information Establishing Knowledge Concerning Qualifying Criminal Activity

As the petitioner did not establish that he was the victim of qualifying criminal activity, he has also failed to establish that he possesses credible or reliable information establishing knowledge concerning details of the qualifying criminal activity, as required by section 101(a)(15)(U)(i)(II) of the Act.

Helpfulness to Authorities Investigating or Prosecuting the Qualifying Criminal Activity

As the petitioner did not establish that he was the victim of qualifying criminal activity, he has also failed to establish that he has been, is being or is likely to be helpful to a federal, state, or local law enforcement official, prosecutor, federal or state judge, USCIS or other federal, state or local authorities investigating or prosecuting qualifying criminal activity, as required by subsection 101(a)(15)(U)(i)(III) of the Act.

Conclusion

The petitioner has failed to demonstrate that the offense of simple assault under N.J.S.A. § 2C:12-1(a) is a qualifying crime or substantially similar to qualifying criminal activity listed at section 101(a)(15)(U)(iii) of the Act. Qualifying criminal activity is a requisite to each statutory element of U nonimmigrant classification. The petitioner's failure to establish that the offense of which he was the victim is qualifying criminal activity prevents him from meeting any of the eligibility criteria for U nonimmigrant classification at section 101(a)(15)(U)(i) of the Act. Consequently, he is statutorily ineligible for U nonimmigrant status.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the appeal will be dismissed.

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