



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **SEP 04 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,

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 (ii);
- (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

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The petitioner is a native and citizen of Honduras who claims to have entered the United States in July 2004 without admission, inspection or parole. On June 14, 2011, the petitioner was ordered removed *in absentia* by an immigration judge. 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), on March 13, 2012. On April 18, 2013, the director issued a Request for Evidence (RFE): (1) that the crime of criminal threats cited by statute on the Form I-918 Supplement B 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, the statement of his counsel, a psychological evaluation by [REDACTED], a letter from the certifying official relating to the preparation of the law enforcement certification, and an earlier draft of the Form I-918 Supplement B containing the certifying official's edits. The director found the evidence insufficient to establish the petitioner's eligibility and denied the petition accordingly on November 7, 2013, concluding that the petitioner had not established that he was the victim of qualifying criminal activity and, therefore, 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 criminal threats 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 August 30, 2010. On that date, the petitioner stated that he and his family heard screams and heavy pushing and shoving against the wall from their neighbors' apartment. Later, one of the neighbors, [REDACTED] his face covered in blood and heavily swollen, ran to the petitioner's apartment screaming for help. The petitioner hugged his neighbor as he saw the latter's partner coming from behind with a large wooden stick. The neighbor's partner grabbed some rocks and threw them at the petitioner, along with a planter. The petitioner recounted how the assailant threatened him with death and told him to leave the country because he was illegally in the United States. Thereafter, the police arrived and arrested the assailant.

The Form I-918 Supplement B that the petitioner submitted was signed on January 24, 2012 by [REDACTED] Chief of Victims Services Unit, [REDACTED] District Attorney's Office, in [REDACTED] California (certifying official). The certifying official checked the box for felonious assault in Part 3.1, which lists the criminal activity of which the petitioner was a victim. In Part 3.3, however, the certifying official cited California Penal Code (CPC) section 422, which relates to the offense of criminal threats, as the relevant criminal statute for the criminal activity that was investigated or prosecuted. At Part 3.5, which asks the certifying official to briefly describe the criminal activity being investigated or prosecuted, a first person narrative from the petitioner of the events that took place was provided instead. At Part 3.6, which asks for a description of any known or documented injury to the petitioner, it indicates that the petitioner suffered severe stress from the incident causing him sleepless nights due to fears that the assailant would carry out his threats.

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.

Criminal Threats under California Law is Not Substantially Similar to Any Qualifying Criminal Activity

The record shows that the petitioner was a victim of criminal threats on August 30, 2010. Although the Form I-918 Supplement B at Part 3.1 indicates that the petitioner was a victim of felonious assault, the certifying official specifically cited only the statute for criminal threats under CPC § 422 as the relevant statute for the criminal activity that was investigated or prosecuted. The certifying official did not indicate, and the record otherwise lacks any evidence, that felonious assault was also investigated or prosecuted.

The crime of criminal threats 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.

At the time of the offense in 2010, CPC § 422, provided, in pertinent part, as follows:

Elements of offense; punishment

(a) Any person who willfully *threatens* to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, *is to be taken as a threat, even if there is no intent of actually carrying it out*, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety

Cal. Penal Code § 422 (West 2010) (emphasis added). Counsel maintains on appeal that the criminal threats offense is similar to the qualifying criminal offense of felonious assault, as defined under CPC § 245(a)(1)¹. In 2010, CPC § 245(a)(1), provided, in pertinent part, as follows:

§ 245. Assault with deadly weapon or force likely to produce great bodily injury; punishment

(a)(1) 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

¹ On brief, counsel references CPC § 245(a)(4) for the cited language relating to felony assault under the California Penal Code. However, at the time of the criminal activity discussed here, which occurred in 2010, the statutory language cited by counsel was located at CPC § 245(a)(1) (West 2010).

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 2010). The statutory elements of the offense of criminal threats are not substantially similar to those for assault under CPC § 245(a)(1). Section 422 of the CPC relates to an offense where the perpetrator makes a threat to carry out a crime that would result in death or great bodily injury, even when there is no intention to actually carry out the crime. In contrast, CPC § 245(a)(1) involves an actual attempt, combined with the ability, to commit violent injury against another person through the use of a deadly weapon or by means of force likely to produce great bodily injury. *See also* CPC § 240 (West 2010) (defining assault). The distinction between the two offenses is recognized in the CPC, which separately categorizes assault as a crime against the person under Title 8 of the CPC, while criminal threats is found elsewhere under Title 11.5. Accordingly, the two offenses are not substantially similar. *See* 8 C.F.R. § 214.14(a)(9).

Counsel contends that the acts perpetrated against the petitioner, including being threatened with death and having rocks thrown at him, demonstrate that petitioner was assaulted in a manner likely to produce death or great bodily injury, as defined under CPC § 245(a)(1), and thus, constitute felonious assault. 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 crime that was investigated and one of the qualifying crimes. *See* 8 C.F.R. § 214.14(a)(9). As indicated, the statutory elements of the two offenses are not substantially similar. Counsel does not provide the requisite statutory analysis to demonstrate the substantial similarities in the nature and elements of criminal threats under CPC § 422 and CPC § 245. 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 criminal threats under CPC § 422 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 petitioner has failed to overcome these grounds for denial on appeal.

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.