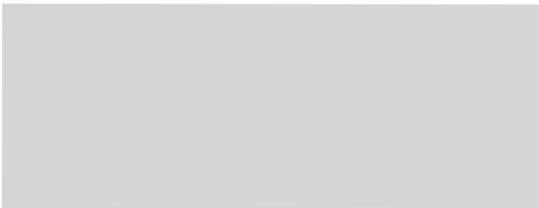


(b)(6)

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: **APR 13 2015** 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.

The director denied the petition because the petitioner failed to establish that she had suffered substantial physical or mental abuse as a result of her victimization. On appeal, the petitioner submits a brief.

Applicable Law

Section 101(a)(15)(U) of the Act provides, in pertinent part, 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[.]

Felonious assault is listed as a qualifying criminal activity in clause (iii) of section 101(a)(15)(U) of the Act.

As used in section 101(a)(15)(U)(i)(I) of the Act, the term *physical or mental* abuse is defined at 8 C.F.R. § 214.14(a)(8) 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 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[.]

* * *

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 Mexico who claims to have initially entered the United States in March, 2000, without inspection, admission or parole. The petitioner filed the instant Petition for U Nonimmigrant Status (Form I-918 U petition) with an accompanying U Nonimmigrant Status Certification (Form I-918 Supplement B) on January 22, 2013. On the same day, the petitioner filed an Application for Advance Permission to Enter as Nonimmigrant (Form I-192) for her ground of inadmissibility. On November 6, 2013, and March 4, 2014, the director issued two Requests for Evidence (RFE) that the crime listed on the law enforcement certification was a qualifying crime and that she suffered resultant substantial or physical abuse. The director also requested a detailed victim statement. The petitioner responded with additional evidence, which the director found insufficient to establish the petitioner's eligibility. Accordingly, the director denied the Form I-918 U petition and Form I-192. The petitioner appealed the denial of the Form I-918 U petition. The petitioner states on appeal that she suffered substantial mental abuse as result of the qualifying crime which aggravated her pre-existing trauma.

Analysis

We conduct appellate review on a *de novo* basis. Based on the evidence in the record, we find no error in the director's decision to deny the petitioner's Form I-918 U petition.

The Form I-918 Supplement B that the petitioner submitted was signed by [REDACTED] Special Victim Crime Unit, [REDACTED] California, Police Department (certifying official), on [REDACTED] 2012. The certifying official listed the criminal activity of which the petitioner was a victim at Part 3.1 as felonious assault and related crime(s). In Part 3.3, the certifying official referred to California Penal Code (CPC) § 211, robbery, as 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, he stated that the petitioner "was a victim of felonious assault at the hands of an unknown individual who robbed her using physical force in a public place." At Part 3.6, which asks for a description of any known or documented injury to the petitioner, the certifying official indicated that the petitioner "suffered physical injury to her hand."

In her declaration submitted in response to the first RFE, the petitioner recounted that on May 1, 2012, as she was walking to meet her son after school, a man walked up behind her, grabbed her hand, and twisted her left arm behind her. While the suspect held her arm, he reached for her phone in her right pocket, took it out, and fled to a waiting car. She was in shock and started crying, and some employees at a nearby store asked her what happened. She asked one of the employees if she could use their phone to call her husband and the police. The police arrived, she gave a statement, and the officer drove her to pick up her son. After the incident, she was sad and nervous, and her hand was "sore and swollen." She went to the emergency room a few days after the incident and the doctor gave her a splint for her finger. To this day, she still feels pain in her hand and when she walks outside, she "always look[s] over [her] shoulder."

In their letter dated December 20, 2013, Ms. [REDACTED] and Mr. [REDACTED] social workers at [REDACTED] indicate that the petitioner has "both depressive and trauma-based symptoms that impact her ability to function" as a result of the robbery. In addition, "her trauma response is more severe as a result" of trauma she suffered in the past, including witnessing her father being murdered and being threatened with violence and kidnapping. After evaluating the petitioner for less than two hours during one session, Ms. [REDACTED] and Mr. [REDACTED] administered tests whose results correspond to a diagnosis of post-traumatic stress disorder (PTSD) and depression. The petitioner reported to them that she is afraid of being around African American men, she panics when she sees someone running down the street, she is anxious in public places, she has nightmares, she is forgetful and easily distracted, she is more irritable, and she has developed a "heightened state of arousal" and is constantly alert. Ms. [REDACTED] and Mr. [REDACTED] note that the petitioner's PTSD and depression are treatable and recommend that the petitioner continue to receive counseling.

Factors relevant to a determination of substantial abuse include the severity and duration of the harm, and serious harm to the health or mental soundness of the victim, including aggravation of pre-existing conditions. See 8 C.F.R. § 214.14(b)(1). Although evidence establishes that the petitioner suffers from pain in her hand and she has been diagnosed with PTSD and depression, the Form I-918 Supplement B, the incident report, the statement from the petitioner, and the mental health document fail to probatively discuss

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any serious harm the incident caused to the petitioner's appearance, health, or physical or mental soundness. The record does not show that the severity of the harm and duration of the infliction of harm are sufficient to establish substantial abuse. The petitioner's statement submitted in response to the first RFE indicates that she suffered a traumatic experience when she was robbed and she still has pain in her hand, but she provided no further information in her statement regarding ongoing mental trauma, and her statement does not support the findings by Ms. [REDACTED] and Mr. [REDACTED] regarding the seriousness of her mental abuse. Moreover, although Ms. [REDACTED] and Mr. [REDACTED] diagnosed the petitioner with PTSD and depression, they indicate that "both PTSD and depression are treatable with therapy and/or medication" and the petitioner "would benefit greatly from such treatment." While we do not minimize the petitioner's victimization, the overall evidence does not establish that she has suffered resultant substantial physical or mental abuse. Under the relevant factors described at 8 C.F.R. § 214.14(b)(1), the evidence in the record does not demonstrate that the petitioner suffered substantial abuse, as required by section 101(a)(15)(U)(i)(I) of the Act.

Qualifying Criminal Activity

Beyond the director's decision, the record does not show that the petitioner was the victim of qualifying criminal activity.¹ The Form I-918 Supplement B and incident report from the [REDACTED] Police Department indicate that robbery was investigated. The crime of 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). Thus, the nature and elements of the robbery offense 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.

Under Cal. Penal Code, "[r]obbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Cal. Penal Code § 211 (West 2015). California law defines assault "as an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240 (West 2015). For an assault in California to be classified as a felony, there must be an aggravating factor involved. Felonious assault in California involves assault with a deadly weapon or force likely to produce great bodily injury, assault with caustic chemicals or flammable substances, or assault against a specific class of persons (such as peace officers, fire fighters, custodial officers or school employees). Cal. Penal Code §§ 244, 244.5, 245, 245.3, 245.5 (West 2015).

In response to the second RFE, the petitioner asserted that the crime of robbery under California law is similar to felonious assault because both robbery and (non-felonious) assault have an element of use of force. No elements of robbery under Cal. Penal Code § 211 are similar to felonious assault under Cal. Penal

¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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Code §§ 244, 244.5, 245, 245.3, or 245.5. The statute investigated in this case involves taking personal property from an individual through the use of force or fear, and does not require violent or great bodily injury, the use of a weapon or caustic/flammables substances, or assault against a protected class as a necessary component. Felonious assault in California, however, involves an attempt, with a present ability, to commit violent injury upon another with an aggravating factor such as those listed above. The certifying official's indication at Part 3.1 that the petitioner was the victim of a felonious assault is without support in the record. The only crime certified at Part 3.3 of the Form I-918 Supplement B was robbery, and the incident report noted that the crime was robbery. There is no evidence that the certifying agency investigated an attempted or actual felonious assault against the petitioner, and the certifying official does not explain why at Part 3.3 he provided a citation for robbery, not felonious assault under California law, if a felonious assault against the petitioner was actually investigated or prosecuted. We recognize that qualifying criminal activity may occur during the commission of a non-qualifying crime; however, the certifying official must provide evidence that the qualifying criminal activity was investigated or prosecuted. Here, the evidence of record does not demonstrate that the crime of felony assault was investigated or prosecuted.

The petitioner claims that the suspect used force when he grabbed her hand and twisted her arm, and she has been left with a prolonged injury to her hand. However, as stated above, the inquiry is not fact-based, but entails comparing the nature and elements of the statutes in question. *See* 8 C.F.R. § 214.14(a)(9). The petitioner has not provided the requisite statutory analysis to demonstrate that the nature and elements of Cal. Penal Code § 211 (robbery) are substantially similar to Cal. Penal Code §§ 244, 244.5, 245, 245.3, or 245.5 (felonious assault) or any other qualifying crime at section 101(a)(15)(U)(iii) of the Act. The petitioner is, therefore, not the victim of qualifying criminal activity, as required by section 101(a)(15)(U)(i) of the Act.

Conclusion

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.

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