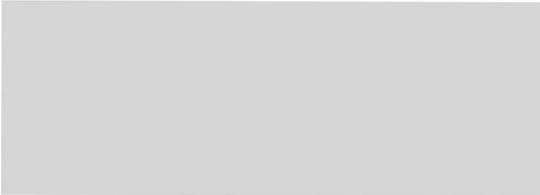


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **APR 30 2015**

FILE #: [Redacted]
PETITION RECEIPT #: [Redacted]

IN RE: Petitioner: [Redacted]

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:
[Redacted]

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center (the director), denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 did not establish that: he was the victim of qualifying criminal activity; he suffered resultant substantial physical or mental abuse; he possessed information regarding qualifying criminal activity; or that he was helpful in the investigation or prosecution of qualifying criminal activity. On appeal, the petitioner submits a brief and additional evidence.

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 qualifying criminal activity in clause (iii) of section 101(a)(15)(U) of the Act.

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 Mexico who states that he entered the United States in 2003 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 August 5, 2013. The petitioner also filed an Application for Advance Permission to Enter as Nonimmigrant (Form I-192) on the same day. On March 6, 2014, the director issued a Request for Evidence (RFE) that the crime listed on the law enforcement certification was a qualifying crime. 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. On appeal, the petitioner claims that he was a victim of robbery / carjacking which includes in its definition the same requirements as felonious assault, a qualifying crime.

Claimed Criminal Activity

In his declaration, the petitioner recounted that on [REDACTED] 2013, he was sitting in the passenger seat of his car in the parking lot of a local grocery store when a woman entered the driver's side of the car. The woman pushed the petitioner out of the car and told him to get out. He stated that he was scared that she might have a weapon in her purse. The woman drove the car away very quickly, almost crashing on her way out of the parking lot. The petitioner walked home and called the police from his house where he had identifying information about the car. He states that he identified the woman who took his car after she was apprehended by the police.

The Form I-918 Supplement B that the petitioner submitted was signed by [REDACTED] Deputy District Attorney, [REDACTED] District Attorney's Office, California (certifying official), on June 3, 2013. The certifying official listed the criminal activity of which the petitioner was a victim at Part 3.1 as felonious assault and other: carjacking. In Part 3.3, the certifying official referred to California Penal Code (CPC) §§ 215(a) and 211 and California Vehicular Code (CVC) § 10851, punishment for carjacking, robbery, and vehicle theft respectively, as the criminal activities that were investigated or prosecuted. At Part 3.5, which asks the certifying official to briefly describe the criminal activity being investigated or prosecuted, she indicated that the petitioner was pushed out of the passenger seat of the car and that the suspect drove away in the car. 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 was pushed out of the car.

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.

Carjacking and Robbery under California Law are not Qualifying Criminal Activities

The Form I-918 Supplement B and incident report from the [REDACTED] District Attorney's Office indicate that carjacking, robbery, and vehicle theft were investigated. None of the investigated crimes are 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, “[c]arjacking” is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.” Cal. Penal Code § 215(a) (West 2014). “Robbery 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. Under Cal. Vehicular Code, “[a]ny person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense.” Cal. Veh. Code § 10851. 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. 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.

No elements of carjacking under Cal. Penal Code § 215(a), robbery under Cal. Penal Code § 211, or vehicle theft under Cal. Veh. Code § 10851 are similar to felonious assault under Cal. Penal Code §§ 244, 244.5, 245, 245.3, or 245.5. The statute investigated in this case involves taking personal property, specifically in the case of carjacking, a vehicle, 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.¹ 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 crimes certified at Part 3.3 of the Form I-918 Supplement B were carjacking, robbery, and vehicle theft, and the incident report noted that the crime was carjacking. 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 she provided a citation for carjacking, robbery, and vehicle theft, and not felonious assault under California law, if a felonious assault against the petitioner was actually investigated or prosecuted.² We recognize that qualifying criminal activity may

¹ On appeal, the petitioner asserts that force was used in the instant case to push the petitioner from the car and that this push was likely to produce great bodily injury, in keeping with the elements of felonious assault. The petitioner relies upon the individual facts of his case, however, instead of undertaking a statutory analysis as is required to determine whether carjacking or robbery is substantially similar to the crime of felonious assault.

² We determine, in our sole discretion, the evidentiary value of a Form I-918 Supplement B. See 8 C.F.R. § 214.14(c)(4).

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 evidence of record does not demonstrate that the crime of felony assault was investigated or prosecuted.

On appeal, the petitioner claims that the crimes of carjacking and robbery are similar to felonious assault because when either carjacking or robbery is committed by force or attempted force, an assault also occurs. The petitioner states that in his case, the carjacking / robbery was accomplished with violence and he suffered injury as a result of the crime. The petitioner urges us to adopt a modified categorical approach when considering whether robbery is substantially similar to felonious assault, stating that by separating out robberies committed by fraud as opposed to those committed by force, some robberies will be substantially similar to felonious assault. The modified categorical approach is inapplicable here. The cases cited by the petitioner; *People v. Donohoe*, 200 Cal.App.2d 17 (Cal.Ct.App. 1962); and *People v. Ridley*, 63 Cal.2d 671 (Cal. 1965), discuss double punishment and provide no support for a conclusion that there are substantial similarities between felony assault and robbery/carjacking. As stated above, the analysis of whether a non-qualifying crime is substantially similar to a qualifying crime concerns whether the nature and elements of the crime investigated or prosecuted are substantially similar to qualifying criminal activity and is not a factually based inquiry. Therefore, although the carjacking / robbery and assault statutes may share some similar elements, the petitioner has not provided sufficient evidence to establish that carjacking or robbery is substantially similar to felonious assault.

The petitioner has not provided the requisite statutory analysis to demonstrate that the nature and elements of Cal. Penal Code §§ 215(a) (carjacking) or 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.

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 Information 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 information concerning such a crime or 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.

Jurisdiction

As the petitioner did not establish that he was the victim of qualifying criminal activity, he has also failed to establish that 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, as required by section 101(a)(15)(U)(i)(IV) of the Act.

Conclusion

The petitioner has failed to establish that he was the victim of a qualifying crime. He is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U)(i) of the Act and the appeal must be dismissed.

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.