



U.S. Citizenship  
and Immigration  
Services

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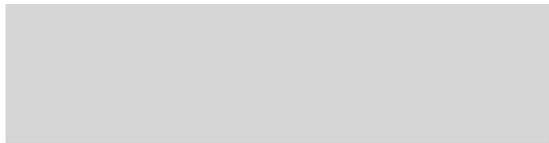
DATE: **AUG 12 2015**

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:



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](http://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,

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

 Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Acting Director, Vermont Service Center (the director), denied the petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now again before us on a motion to reconsider. The motion will be 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. . . ;
- (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 claims to have entered the United States as a minor in September 2008 without admission, inspection or parole. The petitioner filed the instant Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), with an accompanying Form I-918 Supplement B, U Nonimmigrant Status Certification (Form I-918 Supplement B), on

May 1, 2012. The director subsequently issued a Request for Evidence (RFE) establishing that the claimed criminal activity set forth on the Form I-918 Supplement B, namely battery, was a qualifying criminal activity or substantially similar to one of the qualifying criminal activities enumerated at section 101(a)(15)(U)(iii) of the Act. The petitioner responded to the RFE with additional evidence, which the director found insufficient to establish the petitioner's eligibility.

The director denied the petition, concluding that the petitioner had not established that misdemeanor battery under the California Penal Code (CPC) was a qualifying criminal activity or substantially similar to one of the qualifying crimes, and consequently, he did not demonstrate that he was a victim of qualifying criminal activity, had suffered resultant substantial physical or mental abuse, possesses information concerning the qualifying criminal activity, has been helpful to authorities investigating or prosecuting qualifying criminal activity, and that such qualifying activity occurred within the jurisdiction of the United States. The petitioner appealed the denial of the Form I-918 U petition. We subsequently dismissed the appeal, finding that the petitioner had not established that he was a victim of felony battery as asserted and that the misdemeanor battery offense certified on the Form I-918 Supplement B was not a qualifying criminal activity and not substantially similar to the qualifying crime of felonious assault. The petitioner has now filed a timely motion to reconsider, asserting that misdemeanor battery under California law is substantially similar to both simple and felonious assault and that he was a victim of felony assault given the substantial harm he suffered.

#### *Claimed Criminal Activity*

The Form I-918 Supplement B that the petitioner submitted was signed on April 18, 2012 by [REDACTED] Youth and Family Services Division, [REDACTED] Police Department, [REDACTED] California (certifying official). The certifying official marked the boxes for felonious assault and related crimes, and indicated "Battery PC 242" next to the box marked "other" in Part 3.1 of the certification, which inquires about the type of criminal activity of which the petitioner was a victim. In Part 3.3, the certifying official listed "PC 242 (Battery)" as the corresponding statutory citation for the criminal activity investigated or prosecuted. At Part 3.5, which asks the certifying official to briefly describe the criminal activity being investigated or prosecuted, he reiterated that the petitioner was a victim of a battery. In a subsequent letter proffered on appeal, another certifying official from the same certifying agency, [REDACTED] indicated that after review of the petitioner's case, he determined that the petitioner's injuries, "although not detected and documented by the responding officer," were traumatic and internal and that he believed that the "case should have been amended to felony battery" to qualify the petitioner for U nonimmigrant status.

#### *Analysis*

We conduct appellate review on a *de novo* basis. Upon a full review of the record, as supplemented on motion, the petitioner has not overcome the grounds for denial. The petitioner's submission does not meet the requirements for a motion to reconsider. A motion that does not meet the applicable requirements shall be denied. 8 C.F.R. § 103.5(a)(4). The petitioner does not cite binding precedent decisions or other legal authority establishing that our prior decision incorrectly applied the pertinent

law or agency policy, nor does he show that our prior decision was erroneous based on the evidence of record at the time. The motion to reconsider will be denied for the following reasons.

Misdemeanor Battery under California Law Is Not A Qualifying Crime And Is Not Substantially Similar to Any Qualifying Criminal Activity

Our prior decision, incorporated herein by reference, considered all the relevant evidence in the record and found that the petitioner had not overcome the director's determination that the criminal activity of which he was a victim was not a qualifying criminal activity and was not substantially similar to one of the enumerated qualifying crimes. In sum, we held that the record demonstrated that the petitioner was a victim of misdemeanor battery under CAL. PENAL CODE § 242 on November 16, 2011, and that he had not established that he was a victim of felony battery as asserted on appeal. Specifically, we found that the certifying official's letter submitted on appeal, asserting that the petitioner's case "should have been amended to felony battery," was insufficient to demonstrate that the certifying agency actually detected,<sup>1</sup> investigated or prosecuted a felony battery offense. We further determined that battery is not specifically listed as a qualifying crime at section 101(a)(15)(U)(iii) of the Act, and that misdemeanor battery, as defined under California law, is not substantially similar to the qualifying crime of felonious assault. Accordingly, we concluded that the petitioner had not established that he was a victim of a qualifying criminal activity, and thus, also did not satisfy the remaining eligibility requirements for U nonimmigrant status.<sup>2</sup> See Subsections 101(a)(15)(U)(i)(I)–(IV) of the Act.

The petitioner contends on motion that under California case law, battery is substantially similar in its nature and elements to felonious assault. As discussed in our previous decision, although the crime of battery is not specifically listed as a qualifying crime at section 101(a)(15)(U)(iii) of the Act, the statute encompasses "any similar activity" to the enumerated crimes, which the regulation defines 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). Consequentially, the nature and elements of the crime investigated or prosecuted here, namely misdemeanor battery, 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 a comparison of the nature and elements of the statutes in question.

Simple or misdemeanor battery<sup>3</sup> under California law is "any willful and unlawful use of force or violence upon the person of another." CAL. PENAL CODE § 242 (West 2014). Simple assault in

<sup>1</sup> The term "investigation or prosecution," as used in section 101(a)(15)(U)(iii) of the Act, also refers to the "detection" of a qualifying crime or criminal activity." 8 C.F.R. § 214.14(a)(5).

<sup>2</sup> The petitioner does not contest on motion our prior determination that because he did not establish that he was a victim of a qualifying criminal activity, he necessarily has not demonstrated the remaining statutory criteria for U nonimmigrant classification set forth under subsections (I)–(IV) of section 101(a)(15)(U)(i) of the Act. We will, therefore, incorporate our prior finding on this issue here without further discussion.

<sup>3</sup> *In re D.W.*, 236 Cal.App.4th 313, 323, 186 Cal.Rptr.3d 464, 471 (Cal.App.1<sup>st</sup> Dist. 2015) (distinguishing between simple battery under CAL. PENAL CODE § 242 and felony battery under CAL. PENAL CODE § 243(d),

California is defined as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” CAL. PENAL CODE § 240 (West 2014). The pertinent felony assault statute is found at CAL. PENAL CODE § 245(a)(4) (West 2014), which provides:

Any person who commits an assault upon the person of another by any means of force likely to produce great bodily injury shall 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.

A comparison of the statutory elements of California’s misdemeanor battery and felony assault statutes indicates that the two offenses are not substantially similar. A misdemeanor battery in California requires only the willful, unlawful use of force or violence upon another person to obtain a conviction, without the presence of an aggravating factor such as the infliction, or the attempted infliction, of serious bodily injury (as required for felony battery offenses). The statutory element of “use of force or violence” for a simple battery offense can be satisfied by the “least touching.” *In re D.W.*, 236 Cal.App.4th at 323. In contrast, felony assault under CAL. PENAL CODE § 245(a)(4) specifically requires the presence of an additional aggravating factor as an element of the offense, namely the use of force likely to produce “great bodily injury” to the victim, to elevate the offense from a misdemeanor offense to a felony. Accordingly, in comparing the statutory elements of misdemeanor battery under CAL. PENAL CODE § 242 and felony assault under CAL. PENAL CODE § 245(a)(4), the two offenses are not substantially similar. *See* 8 C.F.R. § 214.14(a)(9).

On motion, the petitioner compares the statutory elements of simple battery and simple assault and contends that they are similar, given that neither requires the actual infliction of injury. However, we compare here the statutory elements of misdemeanor battery with the qualifying crime of felonious assault, not simple assault, which is not one of the qualifying criminal activities set forth under section 101(a)(15)(U)(iii) of the Act. As noted, the elements of simple battery and felony assault under California law are not substantially similar. In addition, while the petitioner correctly contends that felony assault under CAL. PENAL CODE § 243(d) also does not require actual infliction of injury, the statute does require the use of force likely to produce great bodily injury, in contrast to simple battery under CAL. PENAL CODE § 242, where the “use of force” element is satisfied by even the “least touching.”

The petitioner further contends that he was a victim of the qualifying crime of felonious assault, because the underlying circumstances of the criminal offense (including the serious bodily injuries inflicted on him) demonstrate that the “assault against [him] was accomplished by means of force likely to produce great bodily injury.” As discussed, the inquiry here is not fact-based into whether conduct or facts identified by the certifying agency in its investigation may or may not establish that a qualifying criminal activity occurred. Rather, our inquiry focuses on whether the Form I-918 Supplement B and the record as a whole, establishes that the certifying agency detected, investigated or prosecuted a qualifying crime. Thus, while a qualifying crime may occur during the commission

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the latter requiring not only unlawful use of force or violence, but also the infliction of serious bodily injury to the victim to obtain a conviction).

of non-qualifying criminal activity, the certifying official must still provide evidence that the qualifying criminal activity was in fact detected, investigated or prosecuted. Here, the record does not indicate that the certifying agency ever detected, investigated or prosecuted the crime of felony assault. Although the certifying official marked the box for "felonious assault" in Part 3.1 of the Form I-918 Supplement B, he also specified therein that the petitioner was a victim of battery under CAL. PENAL CODE § 242 and at Part 3.3, and reiterated that battery under CAL. PENAL CODE § 242 was the offense investigated and prosecuted. Similarly, the police incident report in the record also documented the offense committed as battery under CAL. PENAL CODE § 242. There is nothing in the certification or underlying law enforcement documents demonstrating that the certifying agency ever detected a felony battery or assault. The certifying official's letter on appeal indicates that a review of the petitioner's case in hindsight revealed that the petitioner suffered traumatic injuries as a result of battery which had not been documented at the time of the reporting and which merit an amended classification of the offense as a felony, rather than as a misdemeanor as originally recorded. However, the letter confirms that the certifying agency never detected felonious battery at the time of reporting, and it does not overcome the certifying agency's certification of the misdemeanor battery offense as the crime that was investigated and prosecuted. Aside from the certifying official's letter indicating that the reported battery offense *should* have been amended to reflect a felony offense, the record otherwise lacks any evidence that the qualifying criminal activity of felonious assault was actually detected, investigated or prosecuted. Accordingly, a careful review of the record establishes that the criminal activity investigated and prosecuted was misdemeanor battery under CAL. PENAL CODE § 242.

The petitioner contends that we erred in limiting the inquiry into whether qualifying criminal activity has occurred to a statutory analysis or to what is set forth in the certification or relevant police reports, and he asserts that consideration of the underlying factual details of the criminal offense is permitted. As previously discussed, when the offense investigated is *not* a qualifying crime, a statutory comparison of the nature and elements of the offenses is required by the regulation at 8 C.F.R. § 214.14(a)(9) to determine whether the offense is substantially similar to one of the qualifying crimes enumerated under section 101(a)(15)(U)(iii) of the Act. An analysis of the factual details underlying the criminal activity is not permitted in such instances. While we may consider all credible evidence in determining whether the petitioner satisfies the statutory requirements for U nonimmigrant classification, including whether the petitioner is a victim of qualifying criminal activity, we determine, in our sole discretion, the evidentiary value of the evidence submitted in the record. Section 214(p)(4) of the Act, 8 U.S.C. § 1184(p)(4); 8 C.F.R. 214.14(c)(4). Here, the evidence of record does not establish that the certifying agency ever detected, investigated or prosecuted the offense of felony assault or an offense that was substantially similar to the qualifying crime of felonious assault. The petitioner, therefore, has not established that he was the victim of a qualifying crime, as required by section 101(a)(15)(U)(i) of the Act.

### *Conclusion*

On motion, the petitioner has failed to overcome the grounds for denial, as he has not demonstrated that the offense of misdemeanor battery under CAL. PENAL CODE § 242 is a qualifying crime or substantially similar to one of the qualifying criminal activities listed at section 101(a)(15)(U)(iii) of

the Act. Consequently, the petitioner has not demonstrated that he was a victim of qualifying criminal activity, as required by subsections 101(a)(15)(U)(i) and (iii) of the Act. He, therefore, does not meet the remaining eligibility requirements for U nonimmigrant status. See subsections 101(a)(15)(U)(i)(I)–(IV) of the Act (requiring qualifying criminal activity for all prongs of eligibility).

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 and the motion is denied.

**ORDER:** The motion is denied. Our January 15, 2015 is affirmed. The petition remains denied.