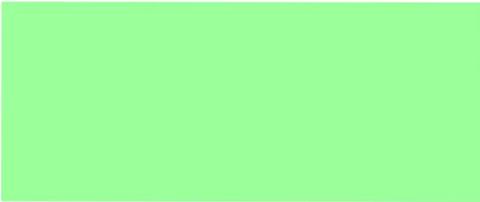


(b)(6)

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

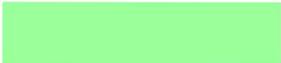


Date: FEB 05 2015

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:

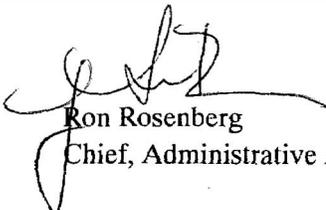


INSTRUCTIONS:

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 Acting 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 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 director also specifically found that the petitioner had not established that he suffered substantial physical or mental abuse as a result of the qualifying criminal activity as required under section 101(a)(15)(U)(i)(I) of the Act. The petitioner filed a timely appeal and submitted a supporting brief and additional evidence.

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: . . . trafficking; . . . kidnapping; . . . or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes[.]

The eligibility requirements for U nonimmigrant classification are further explicated in the regulation at 8 C.F.R. § 214.14(b). 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).

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 record indicates that the petitioner is a native and citizen of India who last entered the United States on November 6, 2003 without admission, inspection or parole. A Notice to Appear was issued against the petitioner on November 7, 2003, placing him into removal proceedings. On June 23, 2005, an immigration judge ordered the petitioner removed from the United States, and on July 2006, the Board of Immigration Appeals (Board) dismissed his appeal. On November 2, 2006, the Board reopened and then administratively closed the petitioner’s removal proceedings on a joint motion of the parties. The petitioner’s removal proceedings remain pending.

The petitioner filed the instant Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), with an accompanying Form I-918, U Nonimmigrant Status Certification (Form I-918 Supplement B), and Form I-192, Application for Advance Permission to Enter as Nonimmigrant (Form I-192), on November 19, 2012.¹ On September 6, 2013, the director issued a Request for Evidence (RFE) for the petitioner to establish that the criminal activity of which the petitioner was a victim, is substantially similar to qualifying criminal activity enumerated at section 101(a)(15)(U)(i) of the Act. The petitioner responded to the RFE with a brief and additional evidence. The director found the evidence insufficient to establish the petitioner’s eligibility and denied the petition accordingly on April 24, 2014. The petitioner timely appealed the denial of the Form I-918 U petition. On appeal, the petitioner asserts that he was a victim of a qualifying criminal activity, namely trafficking, and alternatively, that he was victim of criminal activity that is substantially similar to the qualifying criminal activities of trafficking and kidnapping.

¹ The director denied the petitioner’s previously filed Form I-918 U petition ([REDACTED]) on September 8, 2011. We dismissed a subsequently filed appeal and motion to reopen or reconsider.

Claimed Criminal Activity

The petitioner, in his declarations, asserts that he, his wife, and minor son were victims of human trafficking and kidnapping. Approximately one month after gaining admission on a visitor's visa to Canada, the petitioner, who was having difficulties finding gainful employment there, was introduced to individuals who were to help him enter the United States. The petitioner stated that he believed that he was meeting up to get information about gaining entry into the United States. Instead, the petitioner and his family were picked up and transported by different individuals over land and water en route to the United States. At one point in their journey, a female driver and another male drove them in a van to a ferry that was destined for the United States. As they were getting off, a police car stopped them and took them all to the police station. The petitioner answered all the questions posed by the police. His wife and son were released the next morning, but the petitioner was not released until two weeks later. The petitioner stated that the entire ordeal was terrifying and that he had been forced to watch his wife being sexually assaulted by one of the men during their transport to the United States for fear that his wife and son would be harmed if he intervened. The petitioner subsequently testified in the federal prosecution of the female driver, who was ultimately convicted in federal district court of transporting aliens within the United States for commercial advantage or private gain in violation of sections 1324(a)(1)(A)(ii), (B)(i) of Title 8 of the United States Code (U.S.C.).

The Form I-918 Supplement B that the petitioner submitted was signed on October 5, 2012 by Hon. Judge [REDACTED] Federal District Judge, U.S. District Court for the Eastern District of Michigan, Detroit, Michigan (certifying official). The certifying official marked the box for "trafficking" in Part 3.1, which inquires about the criminal activity of which the petitioner was a victim. In Part 3.3, the certifying official cited 8 U.S.C. §§ 1324(a)(1)(A)(ii), (B)(i), which relate to the offense of Bringing in and Harboring Certain Aliens², 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, he stated that the petitioner and his family were victims of human trafficking. At Part 3.6, which asks for a description of any known or documented injury to the petitioner, the certifying official stated that the petitioner suffers from post-traumatic stress disorder.

Analysis

We conduct appellate review on a *de novo* basis. Upon review, we find no error in the director's decision to deny the petition based on the stated grounds.

Qualifying Criminal Activity

The record shows that the petitioner was a victim of criminal activity, namely transportation of aliens within the United States for commercial advantage or private gain in violation of 8 U.S.C. §§ 1324(a)(1)(A)(ii), (B)(i) from November 5 to November 6, 2003. The petitioner asserts on appeal that "the certifying official

² Although the statute at 8 U.S.C. § 1324 is entitled "Bringing in and Harboring Certain Aliens," the specific offense under subsections (a)(1)(A)(ii) and (B)(i) of the statute which was investigated and prosecuted here is transporting aliens within the United States for commercial advantage or private gain.

possesses unrivaled knowledge regarding the facts of the investigation and prosecution” and, therefore, we should give significant weight to the assertions made on the Form I-918 Supplement B. The certifying official marked the box for “trafficking” in Part 3.1 of the Form I-918 Supplement B and asserted at Part 3.5 that the petitioner was a victim of human trafficking. However, the certifying official’s assertion alone is insufficient here to establish that the petitioner is a victim of human trafficking. In the first instance, the certifying official did not cite the corresponding statute for a trafficking offense in Part 3.3, which specifically inquires about the statutes for the criminal activity investigated or prosecuted by the certifying agency. Instead, the certifying official cited the federal statute for the offense of transporting aliens within the United States for commercial advantage or private gain. Additionally, the record does not contain any evidence that the qualifying criminal activity of trafficking was also detected, investigated or prosecuted at any time during the course of the law enforcement investigation under 8 U.S.C. § 1324, as maintained by the petitioner on appeal. Our review of record, including the assertions made on the Form I-918 Supplement B, reveals no support for the petitioner’s claim that a human trafficking crime was investigated or prosecuted by the certifying agency.³

Transporting Aliens Within the United States under Federal Law is Not Substantially Similar to the Qualifying Crime of Trafficking

The offense of transporting aliens within the United States for commercial advantage or private gain 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 here, namely transportation of aliens within the United States for commercial advantage or private gain, 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 2003, the offense of transporting aliens within the United States for commercial advantage or private gain at 8 U.S.C. §§ 1324(a)(1)(A)(ii), (B)(i) provided, in pertinent part, as follows:

§ 1324. Bringing in and harboring certain aliens

(1)(A) Any person who—

* * *

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

* * *

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation

³ We maintain discretion to determine the evidentiary value of the evidence, including the Form I-918 Supplement B. See 8 C.F.R. § 214.14(c)(4).

occurs—

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under Title 18, imprisoned not more than 10 years, or both;

* * *

In 2003, the offense of trafficking at 18 U.S.C. § 1590, provided as follows:⁴

§ 1590. Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor

Whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person *for labor or services in violation of this chapter* shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse, or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

18 U.S.C. § 1590 (West 2003) (emphasis added)

The crime of transporting aliens within the United States lacks the element of moving or obtaining such aliens for the purpose of securing their labor or services, which is central to the crime of human trafficking. The two crimes are also dissimilar because the nature of transporting aliens lies in the mere movement or concealment of such aliens. In contrast, the nature of human trafficking centers on the movement of individuals in order to obtain the benefits of their labor or services. Accordingly, a statutory analysis does not demonstrate substantial similarities between 8 U.S.C. § 1324 and 18 U.S.C. § 1590.

Transporting Aliens Within the United States under Federal Law is Not Substantially Similar to the Qualifying Crime of Kidnapping

In 2003, the offense of kidnapping at 18 U.S.C. § 1201, provided as follows:

§ 1201. Kidnapping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away *and holds for ransom or reward* or otherwise any person, except in the case of a minor by the parent thereof, when—

(1) the person is willfully transported in interstate or foreign commerce, regardless of

⁴ The petitioner in his brief also cites 18 U.S.C. § 1593A, in conjunction with 18 USC § 1590, as a relevant federal trafficking statute for the proposition that the offense of transporting aliens within the United States for commercial advantage or private gain under 8 U.S.C. § 1324 is substantially similar to a federal trafficking offense. However, 18 U.S.C. § 1593A refers to penalties associated with violations of 18 USC §§ 1581, 1592 or 1995 and contains no similarities to 8 U.S.C. § 1324.

whether the person was alive when transported across a State boundary if the person was alive when the transportation began;

* * *

shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

(b) With respect to subsection (a) (1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away shall create a rebuttable presumption that such person has been transported to interstate or foreign commerce [].

* * *

18 U.S.C. § 1201 (West 2003) (emphasis added).

The nature and elements of transporting aliens within the United States are not substantially similar to those of kidnapping under 18 U.S.C. § 1201. Although the texts of 8 U.S.C. § 1324 and 18 U.S.C. § 1201 use varying versions of the term “transport,” kidnapping under 18 U.S.C. § 1201 occurs when the transportation involves other factors, such as the seizure and confinement of an individual for the purpose of obtaining a ransom or reward. The text of 8 U.S.C. § 1324 does not contain any similar additional factors; a violation of 8 U.S.C. § 1324 may occur based solely on the transportation or concealment of an alien in furtherance of the alien’s violation of the immigration laws. Accordingly, the offense of transportation of aliens within the United States for commercial advantage and private gain under 8 U.S.C. § 1324 is not substantially similar to the qualifying criminal activity of kidnapping.⁵

The petitioner contends that the facts of his transportation from Canada to the United States demonstrate that he was trafficked and kidnapped. However, as discussed, the proper inquiry is not an analysis of the factual details underlying the criminal activity, but rather 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 offenses that were investigated and/or prosecuted here are not substantially similar to the federal offenses of trafficking or kidnapping. 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

On appeal, the petitioner asserts that the director erred in finding that he didn’t suffer substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity. However, as the petitioner did not establish that he was the victim of qualifying criminal activity, he has necessarily failed to establish this eligibility criteria for U nonimmigrant classification, as required by section 101(a)(15)(U)(i)(I) of the Act.

⁵ The petitioner also contends that an offense under 8 U.S.C. § 1324 is substantially similar to kidnapping under Michigan law. The petitioner’s contentions fail, however, for the same reason that offenses under 8 U.S.C. § 1324 and 18 U.S.C. § 1201 are not substantially similar.

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 criminal offense of which he was a victim, transporting aliens within the United States for commercial advantage and private gain, is a qualifying criminal activity under section 101(a)(15)(U)(iii) of the Act, or that it is substantially similar to qualifying criminal activity. 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.

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