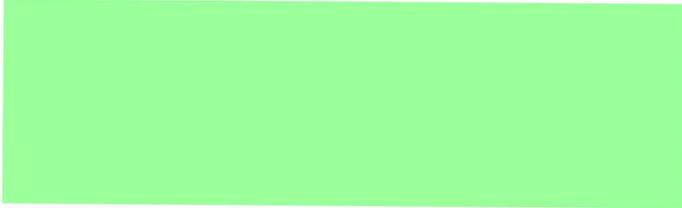




U.S. Citizenship
and Immigration
Services

(b)(6)

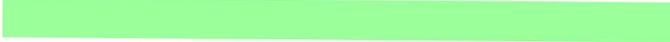


Date: FEB 19 2015

Office: VERMONT SERVICE CENTER

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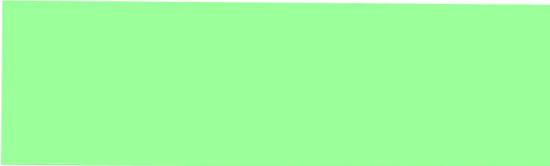
IN RE:

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 Vermont Service Center director (the director) denied the U nonimmigrant visa petition and the petitioner appealed to the Administrative Appeals Office (AAO). On appeal, the Administrative Appeals Office (AAO) remanded the matter for further action. The matter is now before the AAO upon certification of the director's subsequent, adverse decision. The decision of the director will be affirmed 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 certified her adverse decision to the AAO because she determined that the petitioner failed to establish that he was the victim of qualifying criminal activity, and because the petitioner is inadmissible to the United States and his Form I-192, Advance Permission to Enter as a Nonimmigrant (Form I-192) has been denied. In response to the certification, 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;

* * *

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

Robbery is not listed as a 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).

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 Ecuador who claims to have entered the United States in 1997 and has not shown that he was admitted, inspected or paroled. He then left the United States with an advance parole document and was paroled back in to the United States in 2002. The petitioner filed the instant Petition for U Nonimmigrant Status (Form I-918 U petition) on June 13, 2011. The director issued a Request for Evidence (RFE) asking the petitioner to submit dispositions for his 2003 and 2011 criminal arrests. The petitioner subsequently filed a Form I-192, Application for Advance Permission to Enter as a Nonimmigrant, on April 2, 2012. On October 11, 2012, the director denied the Form I-918 and the Form I-192 finding that the petitioner met all the statutory eligibility criteria for nonimmigrant status, but concluding that the status could not be granted because the petitioner is inadmissible and his Form I-192 was denied.

In our prior decision, incorporated here by reference, we determined that the director erred in finding that the petitioner was the victim of qualifying criminal activity and had met the statutory eligibility requirements at section 101(a)(15)(U)(i) of the Act. Accordingly, we withdrew the director’s decision and remanded the matter for entry of a new decision.¹

The director subsequently issued correspondence to the petitioner on January 27, 2014, requesting that he submit additional evidence, within 87 days, to establish that he was the victim of qualifying criminal activity and evidence regarding his previous arrests and grounds of inadmissibility. On August 11, 2014, the director certified the matter to us for review, noting that no response to the correspondence had been received and consequently, the petitioner had not overcome the grounds for denial. The petitioner

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. sup. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003).

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subsequently replied, contending that he had timely responded by submitting a personal statement and a brief on April 4, 2014. Although the director did not receive and review the petitioner's timely submission before certifying the matter to us, we have reviewed the documents *de novo*.²

Claimed Criminal Activity

On certification, the petitioner has not overcome our earlier determination that he was not the victim of qualifying criminal activity. The Form I-918 Supplement B that the petitioner submitted was signed by Captain [REDACTED] Robbery and SAU Division, [REDACTED] North Carolina, Police Department (certifying official), on May 12, 2011. The certifying official listed the criminal activity of which the petitioner was a victim at Part 3.1 as robbery. In Part 3.3, the certifying official referred to section 14-87 of the North Carolina General Statutes (N.C. Gen. Stat. Ann. § 14-87), 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: "As the petitioner was exiting his vehicle, the suspects pulled up, pointed a gun and demanded money." At Part 3.6, which asks the certifying official to provide a description of any known or documented injury to the victim, he indicated that none were noted.

Robbery under North Carolina Law is not Qualifying Criminal Activity

The Form I-918 Supplement B and crime 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 appearing on a 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.

In response to the certification, the petitioner asserts that robbery under N.C. Gen. Stat. Ann. § 14-87 is substantially similar to kidnapping and felonious assault, two of the qualifying criminal activities enumerated at section 101(a)(15)(U)(iii) of the Act.

Under the North Carolina penal code, robbery is defined as follows:

- (a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

² We conduct appellate review on a *de novo* basis.

N.C. Gen. Stat. Ann. § 14-87 (West 2014).

Kidnapping is defined as follows:

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

- (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
- (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
- (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
- (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.12.
- (5) Trafficking another person with the intent that the other person be held in involuntary servitude or sexual servitude in violation of G.S. 14-43.11.
- (6) Subjecting or maintaining such other person for sexual servitude in violation of G.S. 14-43.13.

N.C. Gen. Stat. Ann. § 14-39 (West 2014).

No elements of kidnapping under N.C. Gen. Stat. Ann. § 14-39 are similar to robbery under N.C. Gen. Stat. Ann. § 14-87. Kidnapping requires not only that the actor unlawfully confine, restrain, or remove the victim from one place to another, but that he or she do so “for the purpose” of a list of enumerated illegal activities, none of which appear in the robbery statute. Robbery, however, requires the possession, use, or threatened use of a dangerous weapon in order to take or attempt to take the personal property of another.

Similarly, under the North Carolina penal code, felonious assault requires an assault with the use of a deadly weapon with either the intent to kill or which inflicts serious injury:

- (a) Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon.
- (b) Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon.
- (c) Any person who assaults another person with a deadly weapon with intent to kill shall be punished as a Class E felon.

N.C. Gen. Stat. Ann. § 14-32 (West 2014).

The nature and elements of felonious assault under N.C. Gen. Stat. Ann. § 14-32 are not substantially similar to those of robbery under N.C. Gen. Stat. Ann. § 14-87 as felonious assault involves the use of a deadly weapon with intent to kill or causing serious injury, while robbery does not require an intent to kill or

for serious injury to occur. Furthermore, In *State v. Richardson*, 279 N.C. 621, 185 S.E.2d 102 (1971), the Supreme Court of North Carolina observed:

“The crime of robbery includes an assault on the person. *State v. Hicks*, 241 N.C. 156, 159, 84 S.E.2d 545, 547 (1954). The crime of armed robbery defined in G.S. s 14-87 includes an assault on the person with a deadly weapon. The crime of felonious assault defined in G.S. s. 14-32(a) is an assault with a deadly weapon which is made with intent to kill and which inflicts serious injury. These additional elements of the crime of felonious assault are not elements of the crime of armed robbery defined in G.S. s. 14-87.”

See also *State v. Alexander*, 284 N.C. 87, 93, 199 S.E.2d 450 (1973).

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). The inquiry, therefore, is not fact-based, but rather entails comparing the nature and elements of the statutes in question. On certification, the petitioner has not demonstrated that the nature and elements of which he was a victim, robbery, are substantially similar to those of kidnapping, felonious assault, or any of the qualifying crimes at section 101(a)(15)(U)(iii) of the Act. There is no evidence that the certifying agency investigated an attempted or actual kidnapping or felonious assault against the petitioner, and the certifying official does not explain why at Part 3.3 he provided a citation for robbery, not kidnapping or felonious assault under North Carolina law, if either crime against the petitioner was actually investigated or prosecuted.³ We recognize that qualifying criminal activity may 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 kidnapping or felonious assault was investigated or prosecuted. Consequently, the petitioner is not the victim of a qualifying crime or any qualifying criminal activity, as required by section 101(a)(15)(U)(i) of the Act.

Remaining Eligibility Criteria

The petitioner’s failure to establish that he was the victim of qualifying criminal activity prevents him from meeting any of the statutory requirements for U nonimmigrant classification at subsections 101(a)(15)(U)(i)(I) – (IV) of the Act. In this case, the certifying official did not indicate that the petitioner was helpful in the investigation or prosecution of any *qualifying* criminal activity.⁴ Accordingly, the petitioner’s Form I-918 Supplement B does not meet the requirements under section 214(p)(1) of the Act, and the petition may not be approved for this additional reason.

³ 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).

⁴ We also note that on the Form I-918 Supplement B the certifying official indicated that he did not support the petitioner’s application.

Inadmissibility

Section 212(d)(14) of the Act requires USCIS to determine whether any grounds of inadmissibility exist when adjudicating a Form I-918 U petition and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion. The petitioner bears the burden of establishing that he or she is admissible to the United States or that any grounds of inadmissibility have been waived. *See* 8 C.F.R. § 214.1(a)(3)(i).

For aliens seeking U nonimmigrant status who are inadmissible to the United States, the regulations at 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv) require the filing of a Form I-192 waiver in conjunction with a Form I-918 U petition in order to waive any ground of inadmissibility. The regulation at 8 C.F.R. § 212.17(b)(3) states in pertinent part: “There is no appeal of a decision to deny a waiver.” As we do not have jurisdiction to review whether the director properly denied the Form I-192, we do not consider whether approval of the Form I-192 should have been granted. The only issue that may come before us is whether the director was correct in finding the petitioner inadmissible to the United States and, therefore, requiring an approved Form I-192 pursuant to 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv).

A full review of the record shows that the petitioner is inadmissible under sections 212(a)(6)(A)(i) of the Act (present without admission or parole), and 212(a)(9)(B)(i)(II) of the Act (unlawful presence for one year or more).⁵ The record shows that the petitioner entered the United States in 1997 and he has not shown that he was inspected, admitted or paroled at that time. After his entry on an unspecified date in 1997, he remained in the United States until an unspecified date in 2002. As he had been unlawfully present in the United States in excess of one year, the unlawful presence provisions of the Act were triggered upon his departure. The record also shows that the petitioner was paroled into the United States on an unspecified date in 2002 and that the period of his authorized parole subsequently expired. Consequently, he is inadmissible under section 212(a)(6)(A)(i) of the Act. The petitioner does not dispute that he is inadmissible to the United States on the stated grounds but asserts that his inadmissibility grounds should be waived and that he merits a favorable exercise of discretion. However, the director determined that the petitioner did not merit a favorable exercise of discretion and denied his Form I-192 application for a waiver of inadmissibility accordingly. We have no jurisdiction to review the denial of a Form I-192 submitted in connection with a Form I-918 U petition. *See* 8 C.F.R. § 212.17(b)(3).

Conclusion

The petitioner has failed to establish that he was the victim of a qualifying crime, as required by section 101(a)(15)(U)(i) of the Act. In addition, the petitioner has not established that he is admissible to the United States or that his grounds of inadmissibility have been waived. He is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U)(i) of the Act.

⁵ In previous submissions, the petitioner asserted that his convictions did not render him inadmissible as crimes involving moral turpitude, however, the director did not find the petitioner inadmissible under section 212(a)(2)(A)(i)(I) (crimes involving moral turpitude).

(b)(6)

NON-PRECEDENT DECISION

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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 director's decision dated August 11, 2014, is affirmed. The petition remains denied.