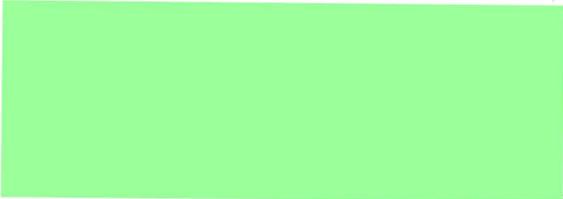
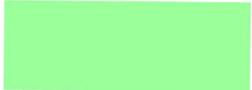




U.S. Citizenship
and Immigration
Services

(b)(6)



Date: JAN 07 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,

for 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 failed to establish that she was the victim of qualifying criminal activity and suffered resultant substantial physical or mental abuse. 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).

As used in section 101(a)(15)(U)(i)(I), 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 Ecuador who claims to have initially entered the United States in November, 2009, without admission, inspection 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 7, 2013. The petitioner also filed an Application for Advance Permission to Enter as Nonimmigrant (Form I-192) on the same day. On November 6, 2013, 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 timely appealed the denial of the Form I-918 U petition. On appeal, the petitioner asserts that although misdemeanor assault was prosecuted, the actual criminal activity was attempted

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felonious assault because the acts against the applicant were substantial steps towards the commission of a felonious assault.

Claimed Criminal Activity

In her affidavits, the petitioner recounted that on June 24, 2012, after she asked her co-worker to help her remove a pot of pasta from the stove, the restaurant manager started yelling at her. The restaurant manager slapped her in the face and punched her in the back of the head. The petitioner's co-worker took the petitioner outside and told their boss what had occurred. After speaking to their boss, they called the police. When the police arrived, the petitioner's co-worker gave a statement regarding the incident. The next day, the petitioner went to the emergency room because of the pain.

The Form I-918 Supplement B that the petitioner submitted was signed by Captain [REDACTED] Minnesota, Police Department (certifying official), on November 12, 2012. The certifying official listed the criminal activity of which the petitioner was a victim at Part 3.1 as attempted felonious assault. In Part 3.3, the certifying official referred to Minnesota Statutes Annotated (M.S.A.) § 609.224, misdemeanor assault, 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 indicated that on June 24, 2012, the petitioner was assaulted by her co-worker. The petitioner was "slapped by the perpetrator after the perpetrator became angry for not being asked for help on moving a heavy object. The perpetrator also verbally abused, threatened, and appeared at the hospital [the petitioner] was being seen for injuries." 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 had a head injury, and was "visibly upset and crying."

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.

Misdemeanor Assault under Minnesota Law is not Qualifying Criminal Activity

The Form I-918 Supplement B and case report from the [REDACTED] Police Department indicate that misdemeanor assault was investigated. The crime of misdemeanor assault 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 misdemeanor assault 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 Minnesota law, a person is guilty of assault in the fifth degree, a misdemeanor, when they commit "an act with intent to cause fear in another of immediate bodily harm or death" or "intentionally inflicts or

attempts to inflict bodily harm upon another.” M.S.A. § 609.224 (West 2014). In Minnesota, assault in the first degree through assault in the fourth degree are classified as felonies. Assault in the first degree occurs when great bodily harm is inflicted (M.S.A. § 609.221), assault in the second degree occurs when a dangerous weapon is used (M.S.A. § 609.222), assault in the third degree occurs when substantial bodily harm is inflicted (M.S.A. § 609.223), and assault in the fourth degree occurs when committed against a protected class (M.S.A. § 609.223.1) (West 2014).

No elements of misdemeanor assault under Minn. Stat. Ann. § 609.224 are similar to felonious assault under Minn. Stat. Ann. §§ 609.221, 609.222, 609.223, or 609.223.1. The statute investigated in this case involves committing an act with the intent to cause fear in another person of immediate bodily harm or death or the actual intentional infliction (or attempt) of bodily harm upon another. M.S.A. § 609.224. However, first, second, third, and fourth degree felony assault under Minnesota law require, as an element of the offense, the presence of an additional aggravating factor, such as the infliction of a greater level of harm (*great* or *substantial* bodily harm),¹ use of a dangerous weapon, or commission against a protected class. The distinction between the assault statutes is recognized under Minnesota law, which categorizes assault under M.S.A. § 609.224 as a misdemeanor. Therefore, the offenses are not substantially similar.

The certifying official’s indication at Part 3.1 that the petitioner was the victim of an attempted felonious assault is without support in the record. The only crime certified at Part 3.3 of the Form I-918 Supplement B was misdemeanor assault, and the case report noted that the crime was M.S.A. § 609.224 (misdemeanor assault). 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 misdemeanor assault, not felonious assault under Minnesota law, if a felonious assault against the petitioner was actually investigated or prosecuted.² 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 felony assault or attempted felony assault was investigated or prosecuted.

On appeal, the petitioner claims that she is a victim of attempted felonious assault because the physical assault was likely to escalate. However, as stated above, the proper inquiry is not an analysis of the factual details underlying the criminal activity, but a comparison of the nature and elements of the crime that was investigated and the qualifying crimes. *See* 8 C.F.R. § 214.14(a)(9). The petitioner has not provided the

¹ As defined in Chapter 609 of the M.S.A., the term “bodily harm” means “physical pain or injury, illness, or any impairment of physical condition;” substantial bodily harm “means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary or substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member;” and great bodily harm “means bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.” Minn. Stat. Ann § 609.02 (West 2014).

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).

requisite statutory analysis to demonstrate that the nature and elements of M.S.A. § 609.224 (misdemeanor assault) are substantially similar to felonious assault under Minn. Stat. Ann. §§ 609.221, 609.222, 609.223, or 609.223.1, 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 she was the victim of qualifying criminal activity, she has also failed to establish that she 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. Accordingly, we shall not further address this issue.

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.