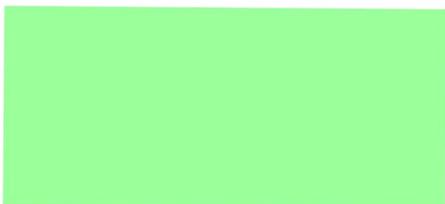


(b)(6)

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: **JAN 20 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 did not establish that: she was the victim of qualifying criminal activity; she suffered resultant substantial physical or mental abuse; she possessed information regarding qualifying criminal activity; or that she 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;

\* \* \*

(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: . . . abusive sexual contact; . . . 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. 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 Uganda who entered the United States on January 30, 2009, on a B-2 nonimmigrant visa with authorization to remain until July 29, 2009. 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 March 4, 2013. On February 7, 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. The petitioner timely appealed the denial of the Form I-918 U petition.

On appeal, the petitioner claims that she is a victim of abusive sexual contact, a qualifying crime, because her ex-husband knowingly exposed her to the human immunodeficiency virus (HIV). She states that although knowingly transferring HIV to other individuals, a violation of the Maryland Health Code, was investigated, it is similar to abusive sexual contact as defined by Maryland law.

#### *Claimed Criminal Activity*

In her statement, the petitioner recounted that she met her ex-husband in November 2007, and when the relationship began to get serious and they were considering being physically intimate, they discussed getting tested for HIV. The petitioner was tested for HIV every six months in Uganda and when she came to the United States in January 2009, she came with her latest HIV test results. She asked her ex-husband for his results, and he claimed they were at his employers and he tested negative. She continued to ask for his results and eventually she "let it go." On March [REDACTED] they got married and shortly after the wedding, she got sick with flu-like symptoms. At the end of 2011, she went to the doctor to get tested for HIV again and the test came back positive. She believes she was infected by her ex-husband shortly after their wedding when she was sick with flu-like symptoms. When she confronted her ex-husband about her HIV status, he admitted to her that he knew he was HIV positive since 2005. They separated and when he got sick and was admitted into the hospital, the petitioner called his sister to tell her to take care of him and then she called the police to report him. One day she received a call from her ex-husband and he told her that the police had called him and fearing that he would be arrested, he fled to Zimbabwe. She feels like every time she was intimate with her ex-husband, he violated her and she would have never "consented to sex with him had [she] known the truth."

The Form I-918 Supplement B that the petitioner submitted was signed by Acting Director [REDACTED] Family Crimes, [REDACTED] County, Maryland, Police Department (certifying official), on December 4, 2012. The certifying official listed the criminal activity of which the petitioner was a victim at Part 3.1 as abusive sexual contact. In Part 3.3, the certifying official referred to Maryland Health Code Annotated § 18-601.1, knowing transfer of HIV prohibited, 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 in March 2012, the petitioner discovered that her husband “had transmitted (HIV) to her and that she was HIV positive. [The petitioner] had tested negative for HIV prior to her marriage and was not HIV positive. [The petitioner’s husband] admitted that he had known he was HIV positive when they began their relationship. [The petitioner] called to report this information, as she would not have consented to a sexual relationship knowing [her husband] was infected.” At Part 3.6, which asks for a description of any known or documented injury to the petitioner, the certifying official indicated that according to the petitioner, “she is now HIV positive.”

### *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.

### Knowingly Transferring HIV under Maryland Law is not Qualifying Criminal Activity

The incident-offense report indicates that the offense investigated was non-criminal and the Form I-918 Supplement B indicates that knowingly transferring HIV was investigated. The crime of knowingly transferring HIV 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, knowingly transferring HIV, 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 Maryland law, “[a]n individual who has the human immunodeficiency virus may not knowingly transfer or attempt to transfer the human immunodeficiency virus to another individual.” Md. Health Code Ann. § 18-601.1 (West 2014). A violation of this section is a misdemeanor. *Id.* In Maryland, sexual offense in the fourth degree, in pertinent part, occurs when there is “sexual contact with another without the consent of the other.” Md. Crim. Law Code Ann. § 3-308(a)(1) (West 2014).

The petitioner claims that although Maryland has not made knowingly transferring HIV a felony, it would fall under sexual offense in the fourth degree because of the inherent lack of consent element in the statute. No elements of knowingly transferring HIV under Md. Health Code Ann. § 18-601.1 are similar to sexual offense in the fourth degree under Md. Crim. Law Code Ann. § 3-308(a)(1). The statute investigated in this case involves an individual knowingly transferring or attempting to transfer HIV to another individual, and does not include a consent element. Md. Health Code Ann. § 18-601.1. However, sexual offense in the fourth degree under Maryland law occurs when there is sexual contact with another without the consent of

the other. Md. Crim. Law Code Ann. § 3-308(a)(1).<sup>1</sup> The petitioner has not demonstrated that the nature and elements of the non-criminal offense of which she was a victim, knowingly transferring HIV, are substantially similar to abusive sexual contact under Maryland law or any of the other qualifying crimes at section 101(a)(15)(U)(iii) of the Act.

In addition, 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. The certifying official's indication at Part 3.1 that the petitioner was the victim of abusive sexual contact is without support in the record. On appeal, the petitioner contends that had her ex-husband not fled, his actions would have been investigated as a crime, and likely as sex offense in the fourth degree. Brief on Appeal at 5. While the petitioner is correct that it is not necessary for a crime to be fully investigated or prosecuted for an individual to qualify for U nonimmigrant status, there is no evidence in the record from the certifying official that indicates that sexual assault in the fourth degree was or would have been investigated, and the unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The only crime certified at Part 3.3 of the Form I-918 Supplement B was knowingly transferring HIV, and the incident report did not note that any other crime was investigated. There is no evidence that the certifying agency investigated an attempted or actual abusive sexual contact against the petitioner, and the certifying official does not explain why at Part 3.3 he provided a citation for knowingly transferring HIV, not abusive sexual contact under Maryland law, if abusive sexual contact against the petitioner was actually investigated or prosecuted.<sup>2</sup> Here, the evidence of record does not demonstrate that the crime of abusive sexual contact or attempted abusive sexual contact was investigated or prosecuted.

The petitioner claims that because her ex-husband knowingly exposed her to HIV, she is a victim of abusive sexual contact. 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 crimes that were investigated and the qualifying crimes. See 8 C.F.R. § 214.14(a)(9). The petitioner has not shown that any crime was investigated by the law enforcement agency, or that knowingly transferring HIV is substantially similar to any qualifying criminal activity, including abusive sexual contact. The petitioner is, therefore, not the victim of any qualifying criminal activity, as required by section 101(a)(15)(U)(i) of the Act.

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<sup>1</sup> In her brief on appeal, the petitioner also cites to the federal definition of abusive sexual contact, 18 U.S.C. § 2244(b). Brief on Appeal at 8. The federal statute involves engaging in sexual contact with another without the person's permission in specific situations. Again, the statute investigated in this case, Md. Health Code Ann. § 18-601.1, does not involve an element regarding consent or engaging in sexual contact with another without their permission.

<sup>2</sup> 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).

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.

Possession of Information Concerning Qualifying Criminal Activity

As the petitioner did not establish that she was the victim of qualifying criminal activity, she has also failed to establish that she 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 she was the victim of qualifying criminal activity, she has also failed to establish that she 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 she was the victim of qualifying criminal activity, she 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 she was the victim of a qualifying crime. She 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.

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