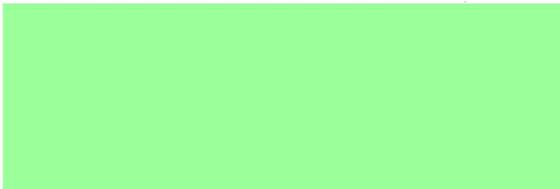


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

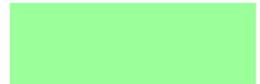
(b)(6)



Date: JAN 22 2015 Office:

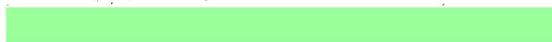
VERMONT SERVICE CENTER

FILE:



IN RE:

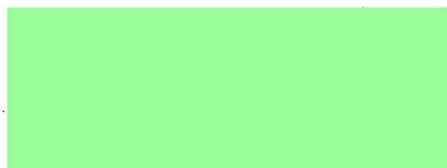
PETITIONER:



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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

Page 2

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 The director's decision will be withdrawn and the matter returned for entry of a new decision.

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 he was the victim of qualifying criminal activity. On appeal, the petitioner submits a brief.

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: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in 18 U.S.C. § 1351); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes[.]¹

¹ The crimes of stalking and fraud in labor contracting as defined in 18 U.S.C. § 1351 were not listed as qualifying criminal activities when the petitioner filed the instant Form I-918 U petition. The Violence Against Women

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 Mexico who claims to have entered the United States in December, 2010, 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 December 17, 2012. On the same day, the petitioner also filed an Application for Advance Permission to Enter as Nonimmigrant (Form I-192). On November 21, 2013, the director issued a Request for Evidence (RFE) that the petitioner was the victim of qualifying criminal activity and suffered resultant substantial physical or mental abuse. The director also requested a copy of the petitioner’s valid passport or border crossing card. 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. In her decision denying the Form I-918 U petition, the director noted that although the petitioner established that he suffered substantial mental abuse as a result of the certified criminal activity, robbery under Texas law is not similar to felonious assault or any other qualifying crime, and therefore, he did not establish that he was the victim of qualifying criminal activity. The petitioner timely appealed the denial of the Form I-918 U petition.

On appeal, the petitioner claims that he was a victim of robbery by assault which is substantially similar to the qualifying crime of felonious assault.

Reauthorization Act of 2013, Public Law No. 113-4 (VAWA 2013), which came into effect on March 7, 2013, amended section 101(a)(15)(U)(iii) of the Act to include these two crimes as qualifying criminal activities.

Claimed Criminal Activity

In his declaration, the petitioner recounted that he was a victim of assault and robbery, and that he believes it was a hate crime because of his sexual orientation.

The Form I-918 Supplement B that the petitioner submitted was signed by Sergeant [REDACTED] Robbery Unit, [REDACTED] Texas, Police Department (certifying official), on November 21, 2012. The certifying official listed the criminal activity of which the petitioner was a victim at Part 3.1 as robbery by assault. In Part 3.3, the certifying official referred to Texas Penal Code (TPC) § 29.02, 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 indicated that the petitioner “was approached by suspect in a parking lot. Suspect asked for cigarette, and then for [the petitioner’s] wallet. When [the petitioner] did not give his wallet, suspect struck him in the mouth, knoscking [sic] him to the ground. Suspect continued to strike him approximately 4 more times, then kicked him in the legs.” 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 bloody lip, scratches to faces [sic], left shoulder, left arm, and right arm and shoulder.”

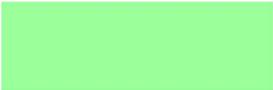
Analysis

We conduct appellate review on a *de novo* basis. Based on the evidence in the record, we withdraw the director’s decision to deny the petitioner’s Form I-918 U petition.

Robbery under Texas Law is a Qualifying Crime

The Form I-918 Supplement B and the Incident Report from the Austin 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 in the statutorily enumerated list. *Id.* The inquiry, therefore, is not fact-based, but rather entails comparing the nature and elements of the statutes in question.

Under Tex. Penal Code, a person commits robbery when “if, in the course of committing theft . . . and with intent to obtain or maintain control of the property, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.” Tex. Penal Code § 29.02 (West 2014). In addition, an offense under Tex. Penal Code § 29.02 is a felony. *Id.* Under the Model Penal Code, “[a] person is guilty of aggravated assault if he: (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.” Model Penal Code § 211.1(2) (West 2014).


Page 5

The statute investigated in this case involves causing bodily injury while committing theft. Aggravated assault under the Model Penal Code also involves causing a bodily injury upon another. At Part 3.5 of the Form I-918 Supplement B, the certifying official indicated that after the petitioner did not give his wallet to the suspect, he was struck in the mouth, hit four times, and kicked in the legs. The evidence in the record establishes that the nature and elements of the criminal offense of which the petitioner was a victim, robbery, are substantially similar to felonious assault under section 101(a)(15)(U)(iii) of the Act. Accordingly, the petitioner has established the requisite victimization under section 101(a)(15)(U)(i) of Act and we withdraw the director's contrary determination.

Substantial Physical or Mental Abuse

As the petitioner established that he was the victim of qualifying criminal activity and the director determined in her decision that the petitioner had suffered substantial mental abuse as a result of having been a victim of the certified crime, the petitioner has established that he has suffered substantial mental abuse as required under section 101(a)(15)(U)(i)(I) of the Act.

Admissibility

Although the petitioner has established his statutory eligibility for U nonimmigrant classification, the petition may not be approved because he remains inadmissible to the United States and his waiver application was denied. Section 212(d)(14) of the Act, 8 U.S.C. § 1182(d)(14), 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 regulation at 8 C.F.R. § 214.1(a)(3)(i) provides the general requirement that all nonimmigrants must establish their admissibility or show that any grounds of inadmissibility have been waived at the time they apply for admission to, or for an extension of stay within, the United States. For U nonimmigrant status in particular, the regulations at 8 C.F.R §§ 212.17, 214.14(c)(2)(iv) require the filing of a Form I-192 in order to waive a ground of inadmissibility. We have no jurisdiction to review the denial of a Form I-192 submitted in connection with a Form I-918 U petition. 8 C.F.R. § 212.17(b)(3).

In this case, the director determined that the petitioner was inadmissible under sections 212(a)(6)(A)(i) (entry without inspection), (a)(2)(D)(i) (engaging in prostitution within 10 years of his admission to the United States), (a)(9)(B)(i)(II) (unlawful presence), (a)(9)(C)(i)(I) (unlawfully present for one year and reentering the United States without being admitted), and (a)(9)(C)(i)(II) (ordered removed from the United States and reentering the United States without being admitted) of the Act without analysis and denied the petitioner's Form I-192 waiver application solely on the basis of the denial of the Form I-918 U petition. *See Decision of the Director Denying Petitioner's Form I-192*, dated February 10, 2014. Because the petitioner has overcome this basis for denial on appeal, we will remand the matter to the director for reconsideration of the petitioner's Form I-192 waiver application.

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 been met as to the petitioner's statutory eligibility for U nonimmigrant classification. The petition is not approvable, however, because the petitioner remains inadmissible to the United States and his waiver application was denied. Because the sole basis for denial of the petitioner's waiver application has been overcome on appeal, the matter will be remanded to the director for further action and issuance of a new decision.

ORDER: The February 10, 2014, decision of the Vermont Service Center is withdrawn. The matter is remanded to the Vermont Service Center for reconsideration of the Form I-192 waiver application and issuance of a new decision on the Form I-918 U petition, which if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.