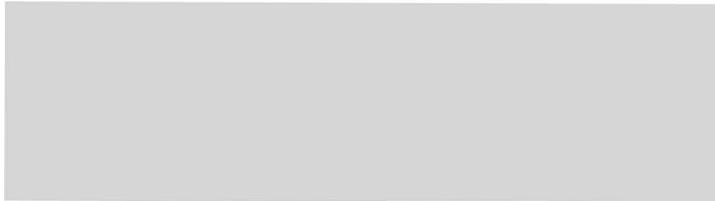




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE:

JUL 08 2015

FILE #:

PETITION RECEIPT #:

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 finding that the petitioner did not establish that he has been the victim of qualifying criminal activity. In consequence of the petitioner not having established that he was the victim of qualifying criminal activity, the director found the petitioner cannot meet the remaining statutory requirements for U nonimmigrant classification at subsections 101(a)(15)(U)(i)(II) – (IV) of the Act. The petitioner filed a timely appeal.

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

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.” 8 C.F.R. § 214.14(a)(9).

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.

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 citizen of Mexico who claims to have entered the United States without inspection, admission, or parole on August 23, 1997. The petitioner filed the instant Petition for U Nonimmigrant Status (Form I-918 petition) with an accompanying U Nonimmigrant Status Certification (Form I-918, Supplement B) on June 24, 2013. The petitioner also filed an Application for Advance Permission to Enter as Nonimmigrant (Form I-192). The director subsequently issued a Request for Evidence (RFE) for, among other evidence, that the petitioner was the victim of a qualifying criminal activity and has suffered substantial physical or mental abuse as a result of having been a victim of that criminal activity. The petitioner timely responded with additional evidence which the director found insufficient to establish the petitioner's eligibility. Accordingly, the director denied the Form I-918 petition and the Form I-192 application. The petitioner timely appealed the denial of the Form I-918 petition.

We conduct appellate review on a *de novo* basis. Based on the evidence in the record and the brief on appeal, the petitioner has not overcome the director's decision to deny the petitioner's Form I-918 petition.

Claimed Criminal Activity

The Form I-918, Supplement B was signed by Detective Sergeant [REDACTED] Violent Crimes, [REDACTED] Police Department, [REDACTED] California (certifying official) on March 14, 2013. He listed the criminal activity of which the petitioner was a victim at Part 3.1 as "Battery, Brandishing." In Part 3.3, he referred to California Penal Code (Cal. Penal Code) §§ 602 (trespass), 242 (battery), and 417 (brandishing) as the criminal activities that were investigated or prosecuted.

Trespass, Battery, and Brandishing under California Law are not Qualifying Criminal Activities

On appeal, the petitioner argues that he is "a victim of battery COMBINED with BRANDISHING a weapon [emphasis in original]," and the "combination of both criminal activities means that [he] was [sic] victim of . . . a "felonious assault." However, the crime of brandishing a weapon under Cal. Penal Code § 417 and the crime of assault under Cal. Penal Code § 242 are separate offenses. Further, neither of these are listed as qualifying criminal activities 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). The inquiry is not fact-based but rather entails comparing the nature and elements of the statutes in question. To establish that he was the victim of the qualifying crime of

felonious assault, the petitioner must demonstrate that the nature and elements of the certified crimes, battery, brandishing, or trespass under California law, are substantially similar to a federal or state law definition of felonious assault. A felonious assault occurs under California law when a perpetrator uses caustic chemicals or flammable substances (Cal. Penal Code § 244), a deadly weapon or force likely to produce bodily injury (Cal. Penal Code § 245), or when some other aggravating factor (Cal. Penal Code § 244.5- 245.5) is involved. These elements are not present in any of the certified crimes.

Battery is defined under California law as “any willful and unlawful use of force or violence upon the person of another.” Cal. Penal Code § 242. It does not require elements similar to a felonious assault under Cal. Penal Code §§ 244, 245, or 244.5-245.5, such as force likely to produce bodily injury, a deadly weapon, or an aggravating factor. Similarly, brandishing involves the drawing or exhibiting of a firearm. Cal. Penal Code § 417. The intent of Cal. Penal Code § 417 “is to deter the public exhibition of weapons in a context of potentially volatile confrontations.” *People v. McKinzie*, 179 Cal. App. 3d 789, 794, 224 Cal. Rptr. 891 (Ct. App. 1986). Brandishing does not require an intent to harm, or a likelihood of harming, any person. *People v. Hall*, 83 Cal. App. 4th 1084, 1091-92, 100 Cal. Rptr. 2d 279, 285 (2000). Although brandishing includes the drawing or exhibiting of a weapon, it does not include an intent to harm, any violent force, or any other factors similar to a felonious assault in California. Finally, trespass involves the destruction or taking of property. Cal. Penal Code § 602. It does not, however, require the use of violence upon a person or other aggravating factors.

The petitioner on appeal also states that “the police report mentions various incidents involving domestic violence issues.” However, trespass, battery, and brandishing are the only criminal activities that were certified. The petitioner has not established that the nature and elements of the crimes of which he was a victim -- trespass, battery, or brandishing -- are substantially similar to those of felonious assault or any of the other qualifying crimes at section 101 (a)(15)(U)(iii) of the Act. The petitioner, therefore, has not established that he is the victim of qualifying criminal activity, as required by section 101(a)(15)(U)(i) of the Act.

Conclusion

The petitioner has not established by a preponderance of evidence that he was the victim of a qualifying crime or criminal activity. In consequence of the petitioner’s not establishing that he was the victim of qualifying criminal activity, the petitioner cannot meet the remaining statutory requirements for U nonimmigrant classification at subsections 101(a)(15)(U)(i)(II) – (IV) of the Act. The petitioner is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U) of the Act and his petition must be denied.

As in all visa petition proceedings, the petitioner bears the burden of proving his eligibility for U nonimmigrant status. Section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 214.14(c)(4). *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met. Accordingly, the appeal will be dismissed.

(b)(6)



NON-PRECEDENT DECISION

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