(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: MAR 17 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. 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 --
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> (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: . . . sexual assault; . . . 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 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.

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 Mexico who claims to have initially entered the United States on January 1, 1998, without admission, inspection or parole. The petitioner filed the instant Petition for U Nonimmigrant Status (Form I-918 U petition) on March 28, 2013. On December 10, 2013, the director issued a Request for Evidence (RFE) that the petitioner was the victim of a qualifying crime and that the petitioner suffered resultant substantial physical or mental abuse. 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 asserts that she is the victim of sexual assault, a qualifying crime.

Claimed Criminal Activity

In her March 21, 2013 statement, the petitioner recounted that she came home one evening in December (year not specified) and an unknown man suddenly came running towards her, her daughter and her sister-in-law. She and her family quickly went inside the house because they were "scared." Once inside the house, she looked through her window and saw the man naked, with his pants down, and without a shirt on in her backyard. She also observed that the man was "stroking his private parts while making funny faces." The petitioner instructed her daughter to call the police while she called her husband to come home. While waiting for the police to arrive, the petitioner stated that the man who remained in her backyard "continued to engage in lewd behavior for about 10 minutes." The police arrived and apprehended the man while the man was fleeing the petitioner's property.

In her March 4, 2013 statement, the petitioner recounted that one day she came home and noticed that an unknown individual had entered her home. She was frightened, ran to her neighbor's home and told her neighbor to call the police. The police arrived and arrested the suspect. The suspect was prosecuted and ultimately convicted.

The petitioner submitted two Forms I-918 Supplement B at the time of initial filing. The first Form I-918 Supplement B was signed by Chief of Police, California Police Department, on February 22, 2013 (certifying official). Chief listed the criminal activity of which the petitioner was a victim at Part 3.1 as residential burglary. In Part 3.3, Chief listed the statutory citation for the criminal activity that was investigated or prosecuted as California Penal Code (CPC) § 459. When describing the criminal activity being investigated or prosecuted, Chief indicated that the petitioner: "was the victim of a residential burglary." Chief indicated that there were no known or documented injuries to the petitioner.

The second Form I-918 Supplement B was also signed by Chief on February 22, 2013. The certifying official listed the criminal activity of which the petitioner was a victim at Part 3.1 as indecent exposure and listed the statutory citation for the crime at Part 3.3 as CPC § 314(1). 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 the victim of Cal. Penal Code § 314(1) (indecent exposure), and that there were no known or documented injuries to the petitioner.

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.

Victim of Qualifying Criminal Activity

The incident report from the California Police Department dated November 13, 2008 and the first Form I-918 Supplement B indicated that the crime investigated was residential burglary under CPC § 459. Burglary is not specifically listed as qualifying criminal activity 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 crimes investigated 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.

On appeal, the petitioner claims that she was the victim of home invasion/robbery. The petitioner, however, does not compare the elements of CPC § 459 (burglary) to the nature and elements of an offense under California's Penal Code that relates to a statutorily enumerated crime. Simply saying, as the petitioner does on appeal, that the burglary offense may be considered a home invasion/robbery based on the facts of the incident is insufficient. First, robbery is not listed as a qualifying crime at section 101(a)(15)(U)(iii) of the Act, and the petitioner did not provide a statutory analysis to demonstrate the substantial similarities between robbery and an enumerated crime. Second, there is no evidence that the certifying agency investigated the crime as a home invasion/robbery. Accordingly, as burglary is not a qualifying crime, the petitioner has not demonstrated her victimization under section 101(a)(15)(U) of the Act.

The second Form I-918 Supplement B and incident report from the California Police Department dated January 9, 2006 indicated that indecent exposure under CPC § 314(1) was investigated. The crime of indecent exposure is not specifically listed as a qualifying crime at section 101(a)(15)(U)(iii) of the Act. Under California law "Every person who willfully and lewdly either: (1) exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby . . . is guilty of a misdemeanor." Cal. Penal Code § 314 (West 2014).

On appeal, counsel claims that indecent exposure is a sex crime with elements that are substantially similar to sexual assault and that both crimes require the perpetrator to register under CPC § 290.[2] The petitioner did not compare and analyze the nature and elements of a relevant sexual assault statute to California's indecent exposure statute. Although the perpetrators of sexual assault and indecent exposure offenses must register as sex offenders as a form of punishment, this fact, by itself, does not make indecent exposure under California law substantially similar to the statutorily enumerated crime of sexual assault. On appeal, the petitioner describes the facts of the indecent exposure incident to demonstrate that it was a form of sexual assault; however, the proper inquiry is a statutory comparison between the crime that was investigated or prosecuted and a relevant state statute relating to a type of criminal activity described at section 101(a)(15)(U)(iii). Here, that statutory comparison has not been made.

Accordingly, the petitioner has, failed to establish that she was the victim of a qualifying crime, as required by section 101(a)(15)(U)(i) of the Act.

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.

[2] CPC § 290 provides that every sex offender, for the rest of his or her life, while residing in California, is required to register with the Chief of Police of the city in which he or she is residing. Cal. Penal Code § 290 (West 2014). The list of sexual crimes include among others, sexual assault and indecent exposure under CPC § 314.1.