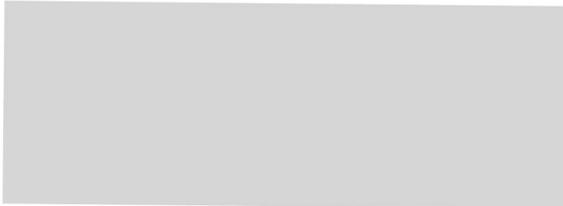




U.S. Citizenship  
and Immigration  
Services

(b)(6)



Date:

**MAY 11 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:



INSTRUCTIONS:

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](http://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,

Ben Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Acting 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 because the petitioner did not establish that: he was the victim of qualifying criminal activity; he suffered resultant substantial physical or mental abuse; he possessed information regarding qualifying criminal activity; that he was helpful in the investigation or prosecution of qualifying criminal activity; or 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. court. 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: . . . felonious assault; . . . 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 explained 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 last entered the United States in June 1994, with no inspection, admission, 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 May 31, 2012. On January 30, 2014, the director issued a Request for Evidence (RFE) for the petitioner to establish that the crime listed on the law enforcement certification was a qualifying crime.<sup>1</sup> 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 he is a victim of criminal threat, which is similar to felonious assault, a qualifying crime, because of an incident that occurred in his restaurant with a customer.

*Claimed Criminal Activity*

In his declaration, the petitioner recounted that he was working at his restaurant when a customer came in that he recognized. The petitioner's wife asked the customer what he wanted and the customer began spitting. The petitioner noticed the customer staring at a knife used to prepare salad and, since the customer had been acting strangely, the petitioner took the knife and began walking away. The customer demanded the knife, stating that he was "going to kill her." The petitioner told the customer he could not have the knife and continued walking away. The petitioner's wife came up to the customer and told him to calm down. The customer responded by throwing the jars of candy on the counter to the floor. After screaming and cursing, the customer left and went to the liquor store adjacent to the petitioner's restaurant. The petitioner saw him go into the parking lot shortly thereafter where he grabbed a woman by the hair and slapped her in the face. The petitioner's wife called the police and the couple told the police what had happened.

The Form I-918 Supplement B that the petitioner submitted was signed by [redacted] Director of Branch and Area Operations for the [redacted] California District Attorney's Office

<sup>1</sup> The director also issued an RFE dated August 21, 2013 relating to section 101(a)(15)(U)(i)(I) of the Act (substantial abuse).

(certifying official), on December 13, 2011. The certifying official listed the criminal activity of which the petitioner was a victim at Part 3.1 as false imprisonment and felonious assault. In Part 3.3, the certifying official referred to California Penal Code §§ 422 (criminal threat), 343(B) (sic) (domestic battery), 242 (battery), and 594(A) (vandalism), as the criminal activity that was investigated or prosecuted.<sup>2</sup> At Part 3.5, which asks the certifying official to briefly describe the criminal activity being investigated or prosecuted, he indicated that the criminal suspect entered the petitioner's workplace, demanded a knife and told the petitioner that he was going "to kill her." The petitioner said "no" and backed away at which point the criminal suspect walked closer and demanded the knife before the petitioner walked away. At Part 3.6, which asks for a description of any known or documented injury to the petitioner, the certifying official indicated that no injury was "reported but the [petitioner] was in fear for his life."

### *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.

### Criminal Threat under California Law is not Qualifying Criminal Activity

The incident/investigation report indicates that the offense investigated was criminal threat under section 422 of the California Penal Code. The crime of criminal threat 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, criminal threat, 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 California law,

any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety . . .

<sup>2</sup> The petitioner has stated that only the statutes dealing with criminal threat and vandalism apply to his involvement in the incident. The other statutes concern other actions by the customer perpetrated against other individuals.

Cal. Penal Code § 422(a) (West 2014). California law defines assault “as an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” Cal. Penal Code § 240. For an assault in California to be classified as a felony, there must be an aggravating factor involved. Felonious assault in California involves assault with a deadly weapon or force likely to produce great bodily injury, assault with caustic chemicals or flammable substances, or assault against a specific class of persons (such as peace officers, fire fighters, custodial officers or school employees). Cal. Penal Code §§ 244, 244.5, 245, 245.3, 245.5.

On appeal, the petitioner states that criminal threat involves substantially similar elements of intent and action to the crime of assault. Specifically, the petitioner notes that although the use of force is not present in the definition of criminal threat, the threat must involve an expression of the intent to use force. In addition, because the language of the threat must be unconditional, it is a means of using force on someone as well. The petitioner also cites the definition of assault from Black’s Law Dictionary, which provides: “the threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery.” BLACK’S LAW DICTIONARY 47 (3<sup>rd</sup> ed. 2006).

The California statutes involving criminal threat and felony assault are not substantially similar because felony assault may involve an action that either causes bodily harm or that could cause bodily harm, whereas a criminal threat is a statement of intent to commit violence against another without any action being taken to realize the threat made. The Model Penal Code similarly requires bodily injury as an element of assault. *See* Model Penal Code § 211.1(2) (aggravated assault occurs when a person “(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”). The petitioner’s claim that criminal threat is substantially similar to aggravated assault even though all of the elements of aggravated assault are not required for criminal threat is without merit. As stated above, the regulation at 8 C.F.R. § 214.14(a)(9) states that 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). Two crimes cannot be substantially similar if they do not involve the same general nature and elements.

As discussed above, felonious assault in California involves a viable attempt to commit violence against another person with one of the aggravating factors named above. The certifying official did not indicate that an attempted or actual felonious assault was investigated or prosecuted, and the crime of criminal threat is not substantially similar to assault, either simple or felonious. The petitioner has not demonstrated that the elements of criminal threat are substantially similar to the aggravating factors found in Cal. Penal Code §§ 244, 244.5, 245, 245.3, 245.5 (felonious assault) or any other qualifying crime at section 101(a)(15)(U)(iii) of the Act. The petitioner is, therefore, not the victim of any 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 he was the victim of qualifying criminal activity, he has also failed to establish that he 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 he was the victim of qualifying criminal activity, he has also failed to establish that he 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 he was the victim of qualifying criminal activity, he has also failed to establish that he 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 he was the victim of qualifying criminal activity, he 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 he was the victim of a qualifying crime. He 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.