



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF E-E-M-

DATE: SEPT. 4, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-918, PETITION FOR U NONIMMIGRANT STATUS

The Petitioner seeks nonimmigrant classification as a victim of certain qualifying criminal activity. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director denied the Form I-918, Petition for U Nonimmigrant Status, finding that the Petitioner is inadmissible to the United States and that his Form I-192, Application for Advance Permission to Enter as a Nonimmigrant, had been denied. The Petitioner timely appealed the denial of the Form I-918. On appeal, the Petitioner submits a statement and additional evidence.

**I. APPLICABLE LAW AND APPELLATE JURISDICTION**

An individual may qualify for U nonimmigrant classification as a victim of a qualifying crime under section 101(a)(15)(U) of the Act if:

- (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 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.”

Section 212(d)(14) of the Act requires USCIS to determine whether any grounds of inadmissibility exist when adjudicating a Form I-918 and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion. The petitioner bears the burden of establishing that he or she is admissible to the United States or that any grounds of inadmissibility have been waived. 8 C.F.R. § 214.1(a)(3)(i).

For petitioners seeking U nonimmigrant status who are inadmissible to the United States, the regulations at 8 C.F.R. §§ 212.17 and 214.14(c)(2)(iv) require the filing of a Form I-192 waiver in conjunction with a Form I-918 to waive any ground of inadmissibility. The regulation at 8 C.F.R. § 212.17(b)(3) states in pertinent part: “There is no appeal of a decision to deny a waiver.” As we do not have jurisdiction to review whether the director properly denied the Form I-192, we do not consider whether approval of the Form I-192 should have been granted. The only issue that may come before us is whether the director was correct in finding the Petitioner inadmissible to the United States and, therefore, requiring an approved Form I-192 pursuant to 8 C.F.R. §§ 212.17 and 214.14(c)(2)(iv).

(b)(6)

## II. FACTS AND PROCEDURAL HISTORY

The Petitioner is a citizen of Tanzania who entered the United States as an F-1 nonimmigrant student on January 18, 2001. The Petitioner filed the instant Form I-918 on June 3, 2013, with an accompanying Form I-918 Supplement B, U Nonimmigrant Status Certification. The Director subsequently issued a request for evidence (RFE) that the Petitioner was the victim of qualifying criminal activity, and documentation of the Petitioner's conviction records and entry into the United States. The Petitioner responded with additional evidence, which the Director determined did not establish that a favorable exercise of discretion was warranted on the waiver application and denied the Form I-192. As the Form I-192 was denied, the Petitioner was determined to be inadmissible to the United States and his Form I-918 was subsequently also denied. The Petitioner filed a timely appeal of the denial of the Form I-918.

## III. ANALYSIS

We conduct appellate review on a *de novo* basis.

The Director denied the Form I-192, finding that the Petitioner was inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude and section 212(a)(7)(B)(i)(I) of the Act as a nonimmigrant without a valid passport.

### A. Nonimmigrant Without a Valid Passport

On appeal, the Petitioner has not provided a copy of a valid passport and he does not dispute that he is inadmissible as a nonimmigrant without a valid passport. As such the petitioner is inadmissible under section 212(a)(7)(B)(i)(I) of the Act.<sup>1</sup>

### B. The Petitioner's Crimes Involving Moral Turpitude

The record reflects that on [REDACTED] 2005, the Petitioner was convicted of disorderly conduct under Kansas Statutes § 21-4101. He was sentenced to six months confinement and ordered to pay a fine and court costs.

On [REDACTED] 2006, the Petitioner was convicted of domestic battery under Kansas Statutes § 21-3412a and criminal damage to property under Kansas Statutes § 21-3720. The Petitioner was sentenced to two consecutive terms of six months in confinement, and placed on twelve months of probation.

On May 4, 2008, the Petitioner was arrested for assault (domestic violence) in violation of section 5.10.010 of the [REDACTED] Kansas Code of Ordinances ([REDACTED] Ordinances) and criminal damage to property (domestic violence) in violation of section 5.66.010 of the [REDACTED] Ordinances. On [REDACTED]

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<sup>1</sup> On the first page of the Director's decision she mistakenly stated that the Petitioner is inadmissible under section 212(a)(6)(A)(i) of the Act as an individual who is present without permission or parole. The Petitioner was not prejudiced by this error, however, because the Director later clarified that the Petitioner is inadmissible under section 212(a)(7)(B)(i)(I) of the Act as a nonimmigrant without a valid passport.

(b)(6)

2008, the Petitioner was arrested for domestic battery in violation of section 5.10.025 of the [REDACTED] Ordinances and criminal damage to property (domestic violence) in violation of section 5.66.010 of the [REDACTED] Ordinances. On [REDACTED] 2008, he was convicted of the crimes as charged and sentenced to six months confinement for each count, placed on probation, and ordered to pay a fine and court costs.<sup>2</sup>

The Director stated on the Form I-192 denial notice that the Petitioner was convicted of robbery in 2001. On appeal, the Petitioner contends, and we concur, that the [REDACTED] Kansas, Police Department “Transcript of Conviction and/or Nonconviction Information” shows that the 2001 charge of aggravated robbery against the Petitioner was dismissed for lack of prosecution.

The Petitioner also contends that he is not inadmissible for having been convicted of crimes involving moral turpitude because his [REDACTED] 2006 domestic battery conviction was set aside. He submits a “Journal Entry” from the Kansas District Court stating that “[b]ased upon the mandate issued by the Kansas Court of Appeals, [the Petitioner’s] conviction for domestic battery (Count 1) is hereby set aside.” In applying the definition of a conviction under section 101(a)(48)(A) of the Act, the Board of Immigration Appeals (Board) found that there is a distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events such as rehabilitation or immigration hardships. *See Matter of Adamiak*, 23 I&N Dec. 878, 879 (BIA 2006) (holding that a conviction vacated for failure of the trial court to advise the defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes). Thus, “when a court vacates an alien’s conviction for reasons solely related to rehabilitation or to avoid adverse immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes.” *Pickering v. Gonzales*, 465 F.3d 263, 266 (6<sup>th</sup> Cir. 2006)(affirming this interpretation of conviction at section 101(a)(48)(A) of the Act, as stated by the Board in *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), while vacating that decision on other grounds).

Although the Kansas Court of Appeals set aside the Petitioner’s [REDACTED] 2006 domestic battery conviction, the Petitioner has not provided any evidence on appeal showing that the domestic battery conviction was vacated on account of a procedural or substantive defect in the underlying criminal proceeding. Even if the Petitioner had demonstrated that his [REDACTED] 2006 conviction was vacated due to a legal defect in the underlying criminal proceeding, the Petitioner was convicted on [REDACTED] 2008 of domestic battery, assault, and two counts of criminal damage to property, and he has not provided any substantive legal arguments or evidence to establish that these convictions do not involve moral turpitude. The Petitioner, therefore, has not established that he is admissible to the United States. *See* 8 C.F.R. § 214.1(a)(3)(i).

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<sup>2</sup> The conviction records do not specify if the sentences were concurrent or consecutive.

#### IV. ADDITIONAL GROUNDS FOR DENIAL

Beyond the decision of the Director, the Petitioner has failed to establish that he is the victim of qualifying criminal activity, as required by section 101(a)(15)(U)(i)(I) of the Act.<sup>3</sup> The Form I-918 Supplement B was signed by [REDACTED] Section Supervisor, [REDACTED] Police Department, [REDACTED] Kansas (certifying official), on May 17, 2013. The certifying official listed the criminal activity of which the petitioner was a victim at Part 3.1 as “Other” and specified that the criminal offense was “Battery.” In Part 3.3, the certifying official listed Kansas Statutes § 21-3412, as the criminal activity that was investigated or prosecuted.

Although battery is not specifically listed as a qualifying crime or criminal activity at section 101(a)(15)(U)(iii) of the Act, the statute also provides for any “similar activity” to those listed qualifying 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 certified crime of battery must be substantially similar to one of the qualifying criminal activities in the statutorily enumerated list. The inquiry, therefore, is not fact-based, but rather entails a comparison of the nature and elements of the statutes in question.

Kansas Statutes § 21-3412 defines battery as:

(a) Battery is:

(1) Intentionally or recklessly causing bodily harm to another person; or

(2) intentionally causing physical contact with another person when done in a rude, insulting or angry manner.

Kan. Stat. Ann. § 21-3412 (West 2010).<sup>4</sup>

The statute investigated in this case involves causing harm or physical contact with another person in a rude, insulting or angry manner. In contrast, felonious assault under the Kansas Statutes involves use of a deadly weapon or with intent to commit any felony. *See* Kan. Stat. Ann. § 21-5412. The nature and elements of battery under Kansas Statutes § 21-3412 do not include the aggravating factors found in aggravated assault under Kansas Statutes § 21-5412 to make battery substantially

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<sup>3</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

<sup>4</sup> The [REDACTED] Police Department report and the Form I-918 Supplement B both indicate that the criminal activity occurred on [REDACTED] 2012. However, Kansas Statutes § 21-3412 was repealed on [REDACTED], 2011. At the time of the offense, “battery” was defined under Kansas Statutes § 21-5413. Kansas Statutes § 21-5413 defines battery as: “(1) [k]nowingly or recklessly causing bodily harm to another person; or (2) knowingly causing physical contact with another person when done in a rude, insulting or angry manner.”

similar to a qualifying criminal activity, such as felonious assault. The certifying official did not indicate on the Form I-918 Supplement B that the petitioner was a victim of felonious assault or that the certifying agency investigated felonious assault against the petitioner arising from the certified incident. The Petitioner has not shown that any crime other than simple battery was investigated or prosecuted by the certifying agency.

Here, the evidence in the record fails to establish that the criminal offense of which the Petitioner was a victim, simple battery, is substantially similar to any of the qualifying crimes at section 101(a)(15)(U)(iii) of the Act, including felonious assault. The Petitioner has, therefore, not established that he is the victim of a qualifying crime or any qualifying criminal activity, as required by section 101(a)(15)(U)(i) of the Act.

## V. CONCLUSION

The Petitioner is inadmissible to the United States and his grounds of inadmissibility have not been waived. Furthermore, the Petitioner failed to establish that he was the victim of a qualifying crime or criminal activity. The Petitioner is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U) of the Act and his petition must be denied.

In visa petition proceedings, the petitioner bears the burden of proving eligibility for U nonimmigrant status. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of E-E-M-*, ID# 13197 (AAO Sept. 4, 2015)