



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

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

MATTER OF J-P-M-

DATE: OCT. 20, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner seeks "U-1" nonimmigrant classification as a victim of qualifying criminal activity. *See* Immigration and Nationality Act (the Act) sections 101(a)(15)(U) and 214(p), 8 U.S.C. §§ 1101(a)(15)(U) and 1184(p). The U-1 classification affords nonimmigrant status to victims of certain crimes who assist authorities investigating or prosecuting the criminal activity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner had not established that she was a victim of qualifying criminal activity or suffered resultant substantial physical or mental abuse.

The matter is now before us on appeal. On appeal, the Petitioner submits a brief, copies of legal decisions, scholarly articles, and guidelines and regulations related to the U visa. The record of proceedings also includes affidavits from the Petitioner, letters from psychologists, a New York family services report, and civil documents. The Petitioner claims that the record demonstrates that she was an indirect victim of child endangerment to her granddaughter and a direct victim of the murder of her daughter. She also asserts that she has suffered substantial physical and mental abuse as a result of said victimization.

Upon *de novo* review, we will dismiss the appeal.

I. 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: . . . domestic violence; . . . murder; . . . 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 regulations governing U nonimmigrant classification at 8 C.F.R. section 214.14(a) state, in pertinent part:

(14) *Victim of qualifying criminal activity* generally means an alien who has suffered direct and proximate harm as a result of the commission of qualifying criminal activity.

- (i) The alien spouse, children under 21 years of age and, if the direct victim is under 21 years of age, parents and unmarried siblings under 18 years of age, will be considered victims of qualifying criminal activity where the direct victim is deceased due to murder or manslaughter, or is incompetent or incapacitated, and therefore unable to provide information concerning the criminal activity or be helpful in the investigation or prosecution of the criminal activity. For purposes of determining eligibility under this definition, [U.S. Citizenship and Immigration Services (USCIS)] will consider the age of the victim at the time the qualifying criminal activity occurred.

The burden of proof is on a petitioner to demonstrate eligibility by a preponderance of the evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). A petitioner may submit any evidence for us to consider in our *de novo* review; however, we determine, in our sole discretion, the

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credibility of and the weight to give that evidence. *See* section 214(p)(4) of the Act; 8 C.F.R. § 214.14(c)(4).

II. ANALYSIS

The Petitioner filed the instant Form I-918, Petition for U Nonimmigrant Status (U petition), as an indirect victim, claiming that she is the legal guardian of her granddaughter who was the victim of child endangerment.¹ She also claims to be the direct victim of the murder of her daughter. Upon a full review of the record, as supplemented on appeal, the Petitioner has not overcome the Director's grounds for denial.

A. Criminal Activity Certified as Being Detected,² Investigated, or Prosecuted

The Petitioner submitted a Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B), signed by [REDACTED] Director of Advocacy, [REDACTED] New York (certifying official). At part 3.3 of the Supplement B, the certifying official cited to sections 125.25 and 260.10 of the New York Penal Code, corresponding to the offenses of second degree murder and endangering the welfare of a child, respectively, as the criminal activity that was investigated or prosecuted. At part 3.1, the certifying official asserted that the criminal activity committed against the Petitioner involved or is similar to the qualifying crimes of "Murder" and "Other: child endangerment." At Part 3.5, which asks the certifying official to describe the criminal activity being investigated, the certifying official noted that the Petitioner's "daughter was shot two times and killed by her boyfriend ... in the presence of their [REDACTED] month old child. . . ."

The record of proceedings also includes a police complaint form that classifies the occurrence of "homicide" under penal code section 125.15 (second degree manslaughter) and includes a narrative that shows the victim was shot. The record of proceedings also includes documentation from the New York Office of [REDACTED] detailing the investigation and substantiated allegations against the father of the Petitioner's granddaughter stemming from the murder of the Petitioner's daughter. Accordingly, our *de novo* review of the record establishes that the crimes certified are murder and child endangerment.

Under the New York Penal Code, a person is guilty of murder in the second degree when, with intent to cause the death of another person, he causes the death of such person or of a third person. McKinney's Penal Law § 125.25 (West 2007). Murder is listed as a qualifying criminal activity in clause (iii) of section 101(a)(15)(U) of the Act.

¹ *See* 8 C.F.R. § 214.14(a)(14)(i), which provides that a parent may be considered an indirect victim when the direct victim is incompetent or incapacitated.

² The term "investigation or prosecution," as used in section 101(a)(15)(U)(i) of the Act, also includes the "detection" of a qualifying crime or criminal activity. 8 C.F.R. § 214.14(a)(5).

1. The Petitioner was Not a Bystander Victim of Murder

Although we have found that murder is a qualifying crime, the Petitioner has not established that she was the direct victim of the criminal activity. The direct victim of the murder was the person murdered; in this case, the Petitioner's daughter. On appeal, the Petitioner argues that she is a bystander who suffered unusually direct emotional harm from her daughter's murder. She refers to the preamble of the U visa regulation, and the Attorney General Guidelines for Victim and Witness Assistance (AG Guidelines) that note harm suffered can be physical, emotional, or pecuniary, and that the injury must be a "but for" consequence of the conduct that constitutes the crime and must have been a reasonable foreseeable result. The Petitioner maintains that the emotional harm she suffered existed "but for" the qualifying crime of her daughter's murder and was the reasonable, foreseeable result of losing a loved child to a violent crime. The Petitioner argues that direct and proximate harm does not require the victim to be physically present at the scene of the crime.³ The Petitioner thus surmises that she is a bystander who suffered unusually direct injury, and describes her emotional difficulty dealing with the loss of her daughter and submits letters from mental health professionals diagnosing her with Post-Traumatic Stress Disorder (PTSD).

However, in the context of U nonimmigrant status eligibility, the regulations require that the individual be physically present to qualify as a bystander victim of a qualifying crime. The regulatory definition of victim was drawn in large part from the AG Guidelines. See *U Nonimmigrant Status Interim Rule*, 72 Fed. Reg. 53014, 53016 (Sept. 17, 2007) (citing the AG Guidelines as an informative resource in the rule's definition of victim). The AG Guidelines clarify that "direct and proximate harm" means that "the harm must generally be a 'but for' consequence of the conduct that constitutes the crime" and that the "harm must have been a reasonably foreseeable result" of the crime. *Attorney General Guidelines for Victim and Witness Assistance*, 2011 Edition (Rev. May 2012), at 8-9. In assessing harm to the victim, the AG Guidelines further explain that in "the absence of physical . . . harm, emotional harm may be presumed in violent crime cases where the individual was *actually present during a crime of violence*." *Id.* at 9 (emphasis added).

The evidence in the record of proceedings shows that the Petitioner was not present at the time of the murder of her daughter and only learned of it later from the police. The AG Guidelines specifically indicate "that individuals whose injuries arise only indirectly from an offense are not generally entitled to rights or services as victims[,] but the AG Guidelines . . . provide . . . discretion to treat as

³ To support her contention, the Petitioner cites to various court decisions discussing proximate harm in tort cases: *United States v. Bruck-Davis*, 504 F.3d, 991, 998 (9th Cir. 2007) (rejecting that an individual was not a victim under the Mandatory Restitution Act because she was not physically present at the crime); *United States v. Donaby*, 349 F.3d, 1046, 1054 (7th Cir. 2003) (finding that under a "but for" analysis a police department was directly and proximately harmed under the Mandatory Restitution Act despite harm arising after elements of the crime were completed); *United States v. Martinez*, 588 F.3d 301, 326 (6th Cir. 2009) (finding a doctor's signature on forms the direct and proximate cause of harm); and *In re Antrobus*, 219 F.3d 1123, 1126 (10th Cir. 2008) (discussing direct and proximate harm under the Crime Victims' Rights Act and noting that the victim must be directly harmed and the encompassing "but for" cause notion was met).

victims bystanders who suffer unusually direct injuries as victims.” See *U Nonimmigrant Status Interim Rule, supra*, at 53016 (citing the AG Guidelines).

In its Preamble to the U visa rule, USCIS stated:

The AG Guidelines also state that individuals whose injuries arise only indirectly from an offense are not generally entitled to rights or services as victims. AG Guidelines at 10. The AG Guidelines, however, provide DOJ personnel discretion to treat as victims bystanders who suffer unusually direct injuries as victims. USCIS . . . will exercise its discretion on a case-by-case basis to treat bystanders as victims where that bystander suffers an unusually direct injury as a result of a qualifying crime[.]

72 Fed. Reg. 53014, 53016 (Sept. 17, 2007).

While there may be circumstances where a bystander to a qualifying crime may suffer “unusually direct injuries” as a result of witnessing a violent crime, in the instant case the record shows that the Petitioner was not a bystander, did not witness any aspect of the commission of the qualifying criminal activity, and was not present in the immediate aftermath. While we empathize with the Petitioner’s loss, she has not demonstrated that she was directly and proximately harmed as a result of the commission of qualifying criminal activity. As such, she does not meet the definition of “victim of qualifying criminal activity” at 8 C.F.R. § 214.14(a)(14).

2. The Petitioner is Not an Indirect Victim of Murder

As noted above, the Petitioner was not the direct victim of the murder as she was not a bystander and did not suffer the direct and proximate harm of the murder. The regulation only includes as indirect victims the spouse and children of murder victims at least 21 years old; or the parents and unmarried siblings of victims under 21 years of age. 8 C.F.R. § 214.14(a)(14)(i). In this case, the Petitioner’s daughter was over the age of 21 years, so the Petitioner would not qualify as an indirect victim of the criminal activity under the regulations. See *id.*

Although the certifying official certified the Petitioner as a victim of qualifying criminal activity, the Supplement B and the record as a whole indicate that the direct victim of the qualifying crime of murder was the Petitioner’s daughter, with the granddaughter qualifying as an indirect victim were she an alien seeking status. Although the Petitioner argues she is an indirect victim as the granddaughter’s legal guardian, an indirect victim, as noted, must be a parent of a victim under 21 years of age. The Petitioner does not meet this criterion.

The Petitioner cites *United States v. Bruck-Davis* and *United States v. Donaby*, which involve determinations made in the context of victim restitution under 18 U.S.C.A. § 3663A Mandatory Restitution to Victims of Certain Crimes, and are not relevant to our determination whether the Petitioner is an indirect victim under section 101(a)(15)(U)(i) of the Act. *United States v. Martinez* is a Sixth Circuit Court decision that involves health care fraud resulting in the death of patients and

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harm to direct victims, but we have determined that the Petitioner here is not a direct victim. Although *In re Antrobus* includes discussion of proximate harm, it is not relevant to the instant case as the ruling related to appellate relief and is not relevant to our determination whether the Petitioner is an indirect victim here.

B. The Petitioner is Not a Direct or Indirect Victim of Child Endangerment

The Petitioner further asserts that when her daughter was murdered, her [redacted] month-old granddaughter was the only surviving direct victim, unable to assist in the investigations so she, the Petitioner, cooperated with social workers and became the granddaughter's legal guardian. The Petitioner contends that the investigated crime of child endangerment is a form of domestic violence, refers to the preamble of the U visa regulations, and states that any similar activity is meant to take into account the variety of criminal statutes where criminal activity may be named differently than that found on the statutory list.

In arguing that she is an indirect victim to a qualifying crime against her granddaughter, of whom she is legal guardian, the Petitioner states that she only needed to be her granddaughter's guardian at the time of filing the U petition, not at the commission of the crime, to be eligible for derivative status, citing the Federal Register (72 Fed. Reg. 53,014, 53,017 (Sep. 17, 2007)), regulations, and the Act. The Petitioner states that she became legal guardian of her granddaughter in 2007, three months after her daughter's murder. The Petitioner also refers to the Attorney General guidelines and the Federal Register to support her contention that being a grandmother and legal guardian rather than a natural parent makes no difference in analyzing whether she is an indirect victim. The Petitioner further maintains that family unity was the intent of U regulations, and that she had been a mother to her daughter's children before becoming the full-time caretaker. Although we recognize that family unity was part of the intent when Congress enacted the U nonimmigrant status provisions, we lack the authority to waive the requirements of the statute, as implemented by the regulations. *See United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (as long as regulations remain in force, they are binding on government officials); 8 C.F.R. § 214.14(b)(3).

Here the victim of child endangerment is the Petitioner's granddaughter, and to be an indirect victim the Petitioner must be a qualifying family member as noted in 8 CFR 214.14(a)(14)(i), which only includes as indirect victims the spouse and children of murder victims at least 21 years old; or the parents and unmarried siblings of victims under 21 years of age. Although legal guardian to her granddaughter, the Petitioner has not established that she qualifies under the definitions of "parent" and "child" in sections 101(b)(1) and (2) of the Act.⁴

As noted above, the regulation at 8 C.F.R. § 214.14(c)(4) provides USCIS with the authority to determine, in its sole discretion, the evidentiary value of evidence, including a Supplement B.

⁴According to section 101(b) of the Act: (1) The term "child" means an unmarried person under twenty-one years of age, (2) The term "parent", "father", or "mother" means a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in (1) above.

Although the record of proceedings shows that the Petitioner has been greatly affected by the murder of her daughter, it does not support the claim that she was a bystander to the criminal activity perpetrated against her daughter, or that she was the indirect victim of the criminal activity against her granddaughter. The Petitioner has, therefore, not shown that she is the victim of a qualifying crime or criminal activity, as required by section 101(a)(15)(U)(i) of the Act.

C. Substantial Physical or Mental Abuse

On appeal, the Petitioner asserts that the record demonstrates the substantial mental abuse that she suffered as a result of the crime. However, as the Petitioner did not establish that she was the victim of a qualifying crime or criminal activity, she necessarily has also not demonstrated that she suffered substantial physical or mental abuse as a result of having been a victim of a qualifying crime or criminal activity, as required by section 101(a)(15)(U)(i)(I) of the Act. We, therefore, do not engage in further review of the Director's determination on this issue.

III. CONCLUSION

The Petitioner has not demonstrated that she was a victim of qualifying criminal activity. She, therefore, necessarily cannot satisfy the remaining eligibility requirements for U nonimmigrant status. *See* subsections 101(a)(15)(U)(i)(I)–(IV) of the Act (requiring qualifying criminal activity for all prongs of eligibility).

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of J-P-M-*, ID# 10676 (AAO Oct. 20, 2016)