



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

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

MATTER OF E-V-C-

DATE: SEPT. 9, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE 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 Form I-918, Petition for U Nonimmigrant Status (U petition). The Director concluded the Petitioner did not establish that he has been a victim of qualifying criminal activity. Accordingly, the Director also determined the Petitioner did not establish that he meets any of the remaining eligibility criteria at section 101(a)(15)(U)(i)(I)-(IV) of the Act. We dismissed the Petitioner's subsequent appeal, concurring with the Director's decision that the Petitioner did not establish he was a victim of qualifying criminal activity.

The matter is now before us on a motion to reopen and to reconsider. On motion, the Petitioner submits a brief and new evidence.

Upon review, we will deny the motion to reopen and to reconsider.

#### I. APPLICABLE LAW

A motion to reopen must state the new facts to be proved and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

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 (AAO 2010). A petitioner may submit any evidence for us to consider; however, we determine, in our sole discretion, the 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

In our prior decision, we first determined that the crimes certified as being investigated or prosecuted<sup>1</sup> were theft, official misconduct, and robbery.<sup>2</sup> We then determined that these crimes were not qualifying crimes as enumerated by statute or substantially similar to any of those crimes, including extortion, as the Petitioner had argued. Specifically, we found that the federal extortion law contained as an element, a threat of force or inducement under color of official right, which was not an element of official misconduct. We further found that extortion required the element of consent which was not an element present in official misconduct.

### A. Motion to Reopen

On motion, the Petitioner submits a new Supplement B, signed by the certifying official on January 14, 2016, nearly three years after the filing of the U petition. As in the previous Supplement B initially filed with the U petition, the certifying official again refers to sections 35-43-4-2 (Theft; receiving stolen property) and 35-44-1-2<sup>3</sup> (Official misconduct) of the Indiana Code as the criminal activities that were investigated or prosecuted. However, in the new Supplement B, the certifying official refers to additional crimes under sections 35-44-3-4 (Obstruction of justice) and 35-42-3-3 (Criminal confinement) of the Indiana Code. The Petitioner asserts the new Supplement B demonstrates that the certifying agency investigated or prosecuted the qualifying criminal offenses of obstruction of justice and unlawful criminal restraint.

The submission of a Supplement B with a U petition is required by statute at section 214(p)(1) of the Act (“The petition filed by an alien under section 101(a)(15)(U)(i) shall contain a certification . . .”). Although there is no statutory filing deadline for a U petition, the regulation at 8 C.F.R. § 214.14(c)(2)(i) requires that, at filing, a Form I-918 “must include” as *initial* evidence a Supplement B “signed by a certifying official within the six months immediately *preceding* the filing of Form I-918.” (Emphasis added). The Supplement B proffered on motion was not submitted as initial evidence in these proceedings and was not executed within the 6 months preceding the filing of the U petition. Consequently, the Petitioner’s filing of a new Supplement B on motion, certifying

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<sup>1</sup> The term “investigation or prosecution,” as used in section 101(a)(15)(U) of the Act, also refers to the “detection” of a qualifying crime or criminal activity.” 8 C.F.R. § 214.14(a)(5).

<sup>2</sup> Although not certified on the Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B) as being investigated or prosecuted, we also considered the crime of robbery as it was listed as a crime in the “Amended Affidavit for Probable Cause.” We further concluded the Petitioner did not establish that the elements of theft or robbery were substantially similar to the elements of extortion. On motion, the Petitioner does not provide any further analyses regarding these two crimes.

<sup>3</sup> In our previous decision, we indicated that although the certifying official identified section 35-44.1-1-1 as the statutory provision for official misconduct, we would refer to the section of the Indiana Code at the time of the January 2011 offense; section 35-44-1-2. On motion, the Petitioner indicates that section 35-44.1-1-1 was in effect until July 1, 2014. A review of the Indiana Code reflects that as stated in our previous decision the offense of official misconduct was contained at section 35-44-1-2 of the statute in 2011, and that effective July 1, 2012, section 35-44.1.-1-1 repealed section 35.44-1-2. As there is no difference in the actual text of the statutes (other than the classification of felony from a Class D to a Level 6), the distinction between the two is of no consequence in our ultimate determination.

additional criminal offenses, does not conform to the regulatory requirements listed at 8 C.F.R. § 214.14(c)(2)(i) for requisite initial evidence. We lack the authority to waive the requirements of the statute, as implemented by the referenced regulation. *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).

Even if we could disregard the regulatory requirements, the new Supplement B is insufficient to demonstrate the Petitioner's eligibility. We determine, in our sole discretion, the evidentiary value of a Supplement B. *See* 8 C.F.R. § 214.14(c)(4). Here, neither the Petitioner nor the certifying official provides any explanation for the amended Supplement B submitted on motion. The certifying official does not include any statement or documents such as criminal investigative records to identify or explain any deficiency in the initial Supplement B, and to support the inclusion of the new crimes listed in the amended Supplement B to demonstrate that law enforcement officials actually detected, investigated, or prosecuted obstruction of justice and unlawful criminal restraint. Accordingly, the new evidence submitted on motion does not overcome our previous conclusion that the Petitioner has not established that he is a victim of qualifying criminal activity.

#### B. Motion to Reconsider

On motion, the Petitioner continues to generally assert that he was a victim of extortion. However, as discussed in our prior decision, the certifying official did not indicate that the crime of extortion was actually investigated or prosecuted. Instead, the certifying official indicated that the certified crimes of theft and official misconduct were crimes "involving or similar to" extortion. The Petitioner does not provide further evidence on motion to establish that extortion was a specific crime that was actually investigated or prosecuted.

In the alternative, the Petitioner asserts that he previously provided an analysis regarding how official misconduct in Indiana<sup>4</sup> and extortion are substantially similar and, contrary to our prior determination, the definition of extortion provided in 18 U.S.C. § 1951<sup>5</sup> does not require as a necessary element, a threat, demand, or affirmative act of inducement by a public official. In support of his assertions, the Petitioner refers to the decisions in *Evans v. U.S.*, 504 U.S. 255 (1992) (holding an "[a]ffirmative act of inducement by a public official, such as a demand, is not an element of the offense of extortion 'under color of official right' prohibited by the Hobbs Act [18 U.S.C. § 1951]") and *U.S. v. French*, 628 F.2d 1069, 1072 (8th Cir. 1980) (quoting "[e]xtortion 'under color of official right' will . . . be established whenever evidence shows beyond a reasonable doubt 'the

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<sup>4</sup> As defined under Indiana law, a public servant commits official misconduct when he or she knowingly or intentionally: commits an offense in the performance of his or her duties; solicits, accepts, or agrees to accept any property other than what is authorized by law; acquires or divests himself or herself of a pecuniary interest or aids another person to do so based on information obtained by virtue of the public servant's office that has not been made public; or fails to deliver public records and property in his or her custody to a successor in office. Ind. Code Ann. § 35-44-1-2 (West 2011).

<sup>5</sup> Extortion is defined at 18 U.S.C. § 1951(b)(2) as "the obtaining of property from another, with . . . consent induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

wrongful taking by a public officer of money not due him or his office, whether or not the taking was accomplished by force, threats, or use of fear.”)(citations omitted).<sup>6</sup>

In addition to the case law cited by the Petitioner, we note that in the Seventh Circuit, in which the matter before us arises, the Court of Appeals stated:

It is settled law in this Circuit as well as others (footnote omitted) that in . . . prosecution for extortion under color of official right [under 18 U.S.C. § 1951] it is unnecessary to show that the defendant induced the extortionate payment . . . [t]he government is merely required to prove that a public official obtained money to which he was not entitled and which he obtained only because of his official position.

*U.S. v. Hedman*, 630 F.2d 1184, 1195 (7th Cir. 1980).

Regarding the element of threat, we agree with the Petitioner that the federal definition of extortion does not require a threat or other affirmative act of inducement when an individual, like a police officer, is acting “under color of official right”; the coercive element is satisfied by the fact that the individual is a police officer. We, therefore, withdraw our prior determination on this specific issue.

However, as it relates to the element of consent, we do not agree with the Petitioner’s assertion on motion that because “[o]ne does not consent to be a victim of any crime,” consent is not a requisite element of extortion. In cases subsequent to *Evans*, courts have recognized that the elements of threat or “under color of right” are separate from the element of consent. For instance, when discussing the meaning of “consent” contained in 18 U.S.C. § 1951(b)(2), the Court of Appeals in *U.S. v. Coppola*, 671 F.3d 220, 240 (2nd Cir. 2012), determined that an essential element of the crime of extortion included the “victim’s consent” and concluded “the consent element serves . . . to distinguish between two illegal means of so obtaining property: extortion (with consent) and robbery (without consent).” Similarly, in *U.S. v. Taylor*, 993 F.2d 382 (4th Cir. 1993), the Fourth Circuit Court of Appeals, cited to specific language in *Evans* regarding whether to apply the element of threat or inducement to extortion “under color of official right,” and recognized that the element of consent was required no matter how the statute was interpreted. The *Taylor* court cited:

First, we think the word ‘induced’ is a part of the definition of the offense by the private individual, but not the offense by the public official. In the case of the private individual, the victim’s consent must be ‘induced by wrongful use of actual or threatened force, violence or fear.’ In the case of the public official, however, there is no such requirement. The statute merely requires of the public official that he obtain ‘property from another, with his consent . . . under color of

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<sup>6</sup> The Petitioner also cites *People v. Poindexter*, 361 N.W.2d 346 (Mich. Ct. App. 1984), which addresses extortion as defined in the Michigan statutes. However, this provision of the Michigan statutes does not appear to mirror the elements of extortion as defined in the federal law or official misconduct as defined in the Indiana Code. See 18 U.S.C. § 1951; see also Ind. Code § 35-44-1-2 (West 2011).

official right.’ The use of the word ‘or’ before ‘under color of official right’ supports this reading.

*Taylor*, 993 F.2d at 383 (citing *Evans*, 504 U.S. at 265).

Accordingly, courts clearly recognize that the element of consent is separate and distinct from the coercive element or when a person acts “under color of official right.” As defined in the Indiana Code, official misconduct lacks the element of consent. Moreover, official misconduct as defined in the Indiana Code, unlike the federal definition of extortion, includes additional activities such as accepting bribes, divesting property, and withholding documents. As there is a significant difference of the requisite elements between the two crimes, they cannot be considered substantially similar when those elements differ.

The Petitioner’s motion to reconsider does not overcome our prior determination that the crime of official misconduct under the Indiana Code is not substantially similar to extortion, a qualifying crime. The Petitioner, therefore, has not demonstrated that he is a victim of qualifying criminal activity.

### III. CONCLUSION

The Petitioner has not established that he is the victim of qualifying criminal activity, as required by section 101(a)(15)(U)(i)(I) of the Act, and he thereby cannot demonstrate that he meets any of the remaining eligibility criteria at section 101(a)(15)(U)(i)(I)-(IV) of the Act.

The Petitioner bears the burden of proof to establish his eligibility. 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. Accordingly, the motion to reopen and to reconsider will be denied.

**ORDER:** The motion to reopen is denied.

**FURTHER ORDER:** The motion to reconsider is denied.

Cite as *Matter of E-V-C-*, ID# 17504 (AAO Sept. 9, 2016)