THIS WAS PREVIOUSLY SENT TO AND RECEIVED BY YOUR OFFICE ON FEBRUARY 26, 2018. A TYPO WAS IDENTIFIED SO WE ARE RESENDING THE APPLICATION.

February 27, 2018

U.S. Citizenship and Immigratioon Services
Nebraska Service Center
850 "S" Street
Lincoln, NE 68508-1225

Re: [redacted] **- Principal**
Derivatives:
[redacted]

AMICUS BRIEF SUBMITTED IN SUPPORT OF PENDING APPEAL

On November 22, 2017, counsel submitted a brief in support of petitioner's I-290B appeal in the case of [redacted] and his above-mentioned derivative wife and child's denial of their U-Visa application. With the brief, counsel filed a petitioner's request to file an amicus brief by Asista and for permission to file it late. **Please find enclosed now the amicus brief in support of this appeal.**

Should you have any questions, please do not hesitate to contact me by phone at 917-841-2006 or email at yasmine.farhang@maketheroadny.org.

Sincerely,

Yasmine Farhang, Esq.
Lead Attorney
Make the Road New York
92-10 Roosevelt Avenue
Jackson Heights, NY 11372
Yasmine.farhang@maketheroadny.org

UNITED STATES DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
ADMINISTRATIVE APPEALS OFFICE
WASHINGTON, DC

In the Matter of: [redacted] Self-Petitioner	**File #:** [redacted] **Receipt #:** [redacted]

BRIEF OF AMICUS CURIAE ASISTA IMMIGRATION ASSISTANCE AND THE IMMIGRATION CENTER FOR WOMEN AND CHILDREN IN SUPPORT OF APPELLANT
[redacted]

ASISTA Immigration Assistance ("ASISTA") and the Immigration Center for Women and Children ("ICWC"), through its counsel, respectfully submits this amicus curiae brief in support of Petitioner-Appellant Mr. [redacted] in his appeal of the United States Immigration and Citizenship Service's ("USCIS") denial of his Petition for U Nonimmigrant Status, Form I-918, and Application for Advance Permission to Enter as a Nonimmigrant, Form I-192.

INTEREST OF AMICI CURIAE

ASISTA worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes, which were incorporated in the 1994 Violence Against Women Act (VAWA), as amended, and associated regulations and interim agency rulemaking. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, and legal services, non-profit, pro bono, and private attorneys working with immigrant crime survivors. ASISTA has previously filed amicus briefs in cases before the Supreme Court and the Second, Seventh, Eighth, and Ninth Circuits. *See United States v. Castleman*, 572 U.S. __,134 S. Ct. 1405 (2014); *State of Washington v. Trump*, 838 F.3d 1168 (9th Cir. 2017); *L.D.G. v. Holder*, 744 F.3d 1022 (7th Cir. 2014); *Torres-Tristan v. Holder*, 656 F.3d 653 (7th Cir. 2011); *Lopez-Birrueta v. Holder*, 633 F.3d 1211 (9th Cir. 2011); *Rosario v. Holder*, 627 F.3d 58 (2d Cir. 2010); *Sanchez v. Keisler*, 505 F.3d 641 (7th Cir. 2007). In this submission, ASISTA hopes to provide assistance to the AAO by presenting the legislative and regulatory background underlying the categories of qualifying crimes, and the regulatory scheme behind assessing whether a given crime qualifies a petition to seek U nonimmigrant status.

The ICWC is a non-profit legal aid organization providing affordable immigration services to underrepresented populations in California. ICWC has offices in Los Angeles, Oakland, San Diego, and San Francisco. Since ICWC was founded in 2004, it has served more than 30,000 vulnerable immigrants. ICWC helps an average of 1,000 victims of crimes apply for U nonimmigrant status each year. ICWC work extensively with over 100 law enforcement officials in support of their efforts to make the best use of U nonimmigrant status to make their communities safe from the violent crimes that most impact immigrant victims. ICWC therefore has an interest in USCIS and the AAO adjudicating the applications consistently regardless of the subject crime; inconsistency in adjudications can make it difficult for ICWC to advise law enforcement, hospitals, and other nonprofit and government agencies in their outreach to the immigrant community and referrals for service. The manner of adjudications therefore impact ICWC's work on behalf of vulnerable crime victims who are reluctant to expose themselves to Immigration Service attention without confidence that they will be granted U nonimmigrant status. In this submission, the ICWC hopes to provide assistance to the AAO by presenting the legislative and regulatory background underlying the categories of qualifying crimes, and the regulatory scheme behind assessing whether a given crime qualifies a petition to seek U nonimmigrant status.

PRELIMINARY STATEMENT

In adjudicating the issue of whether a U visa petitioner was a victim of a "qualifying offense" under the Immigration & Nationality Act § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii), and 8 C.F.R. § 214.14, USCIS and the AAO are tasked with answering the question of whether the facts that gave rise to the certification on Form I-918 Supplement B fit within the categories of crimes in the enumerated list. In doing so, USCIS and the AAO should

follow USCIS's own interim rule, issued under 72 Fed. Reg. 53014-01, and give a broad interpretation of the categories of qualifying crimes.

An analysis under the interim rule requires adjudicators to look beyond the specific crimes that were charged upon arrest or prosecuted, and to review the underlying record in determining whether the petitioner was the victim of a crime that fits within one of the categories of enumerated crimes. This is regardless of whether the perpetrator was prosecuted for the qualifying crime, or a different crime, or not prosecuted at all. The Interim Rule makes plain that adjudicators should take this broad view, which accounts for the fact that the enumerated list sets forth "general *categories* of criminal activity." USCIS and the AAO therefore should not view qualifying crime narrowly, or simply be looking to see what crime was charged, but instead should consider the facts surrounding the criminal conduct and view those facts broadly. The interim rule states that:

> [t]he statutory list of qualifying criminal activity in section 101(a)(15)(U)(iii) of the INA, 8 U.S.C. 1101(a)(15)(U)(iii), is not a list of specific statutory violations, but instead *a list of general categories of criminal activity*. It is also a *non*-exclusive list. *Any similar activity* to the activities listed may be a qualifying criminal activity. . . . [Q]ualifying criminal activity may occur during the commission of non-qualifying criminal activity. For varying reasons, the perpetrator may not be charged or prosecuted for the qualifying criminal activity, but instead, for the non-qualifying criminal activity. For example, in the course of investigating Federal embezzlement and fraud charges, the investigators discover that the perpetrator is also abusing his wife and children, but because there are no applicable Federal domestic violence laws, he is charged only with non-qualifying Federal embezzlement and fraud crimes.

New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,018 (Sept. 17, 2007) (to be codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a & 299) (emphasis added) (the "Interim Rule").

The Interim Rule elucidates two nuances in the qualifying crime list, made clear by the italicized sections in the quote above: (1) that the list is a set of "categories"; and (2) that the statutory "similar" language means that other crimes may be included in certain circumstances. Amici posit that USCIS is now conflating the two concepts and applying only the "similar activity" analysis to crimes that do not, on their face, fit a qualifying category. This is a false equation and undermines the purpose of the law, as is illustrated by its application to the domestic violence context. In that context, USCIS has, in the past, employed the "category" analysis, concluding that a wide variety of crimes fit within the "domestic violence" category, from contempt of court to harassment, to assault, to attempted murder. In those cases, adjudicators look to the record underlying the certification to see whether, as a factual matter, the underlying facts show that the case involved domestic violence. In contrast, if USCIS had insisted on using a "similar" framework to adjudicate petitions based on domestic violence, those crimes would have failed to qualify as domestic violence because the regulations on "similar crimes" focus narrowly on statutory elements and do not contemplate using facts in the record to show such elements. *See* 8 C.F.R. § 214.14(a)(9) ("The term 'any similar activity' refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities.")

For other crime categories, however, USCIS has failed to look beyond the statutory elements of various crimes in assessing petitions. Instead, USCIS and the AAO have frequently employed a mechanical "similar" analysis comparing the elements of one statutory offense to the elements of another, and ignoring the underlying record which shows what crimes were detected, investigated or prosecuted. By narrowly viewing the crime charged, USCIS and the AAO are

ignoring entirely the Interim Rule's mandate to take a broad view of the listed categories of qualifying crime. This analysis produces incorrect results and frustrates the statutory scheme.

For example, the Interim Rule states that "[f]or varying reasons, the perpetrator may not be charged or prosecuted for the qualifying criminal activity, but instead, for the non-qualifying criminal activity." Interim Rule at 53,018. There, the Interim Rule envisions a case like this one, where the perpetrator was ultimately prosecuted for a less serious form of the crime than the crime that was certified, and yet the petitioner still was a victim of a qualifying crime.

In the case at bar, the New York County District Attorney's Office certified that the petitioner, Mr. [redacted] was a victim of felonious assault. Such an assault requires that he have suffered "serious physical injury", which he has proven to have suffered. Mr. [redacted] was viciously attacked, and suffered "eye contusions, head contusion and a broken nose" as well as serious leg, neck and back injuries. His spinal discs were displaced, and he was for a time adjudged to be totally disabled due to his injuries. That the District Attorney ultimately determined to charge Mr. [redacted] assailant with misdemeanor assault is not determinative of whether a felonious assault was detected or investigated. Where criminal activity (here, felonious assault) occurs during the commission of non-qualifying criminal activity (here, misdemeanor assault), qualifying criminal activity is sufficiently similar if the given criminal conduct is comparable to the nature and elements of an enumerated offense *or* the facts and elements of the criminal conduct are substantially similar to an enumerated offense. Rather than analyzing this issue based on the elements and statutory title of the crime, USCIS should have looked at the underlying facts of the crime, the extent of Mr. [redacted] injuries, and the investigatory record, and concluded that the certifying official was correct.

This interpretation best reflects the plain meaning of the statute, the congressional intent underlying U visa legislation, and DHS and USCIS administrative guidance. It is clearly the correct interpretation because it is consistent with longstanding USCIS treatment of victims of many petitioners who are victims of domestic violence crimes but it is not peculiar to this category. Amici respectfully suggest that the agency must apply the same analytical framework to all U visa crime categories.

ARGUMENT

I. The USCIS Interim Rule is the Governing Interpretation of the Plain and Unambiguous and Statutory Scheme Protecting Petitioners Who Were Victims of Qualifying Crimes that Were Detected, Investigated, or Prosecuted

The Interim Rule makes clear that the list of enumerated crimes "is not a list of specific statutory violations, but instead a list of general categories of criminal activity." *See* 72 Fed. Reg. at 53,018 (emphasis added). USCIS explained in the Interim Rule that the thousands of applicable criminal statutes (promulgated by all 50 states and the federal government) may have different names than the general categories of criminal activities listed in the federal U visa statute. *Id.* The Interim Rule therefore directs adjudicators to look *broadly* at the conduct underlying criminal charges, because "qualifying criminal activity may occur during the commission of a non-qualifying criminal activity." *Id.* Importantly, a prosecutor can charge an entirely different crime, but if the investigation uncovers facts to show that the victim was also victim of a qualifying crime, it is appropriate to certify that crime, and for USCIS to consider the petitioner eligible for U nonimmigrant status nonetheless. *Id.*; *see Matter of E-O-L-P-*, ID# 378994 (AAO Nov. 22, 2017) (petitioner was victim of qualifying crime where robbery was charged but investigative record shows that felonious assault also occurred); *see also Redacted*

Decision dated Dec. 2, 2011, attached as Exh. A[1] ("[B]ecause the regulation at 8 C.F.R. § 214.14(c)(4) provides USCIS the discretion to determine the evidentiary value of a Form 1-918 Supplement B, we can look to other parts of the law enforcement certification to determine whether a certifying agency investigated or prosecuted qualifying criminal activity."). In *E-O-L-P-*, the AAO determined that the petitioner was properly the victim of "felonious assault" where he was "cut/stabbed" and "hit/assaulted" despite that the crimes certified and prosecuted were robbery and burglary. *Matter of E-O-L-P-*, ID# 378994 (AAO Nov. 22, 2017). The AAO reached this conclusion by looking at the record, and crediting the certification based on the facts of what happened rather than relying only upon the crime charged. *Id.*

That the Interim Rule provides the correct framework for the inquiry, one which focuses on facts as well as crime elements, is illuminated by the statutory scheme and congressional intent. *First*, the conference report on the proposed U visa legislation affirmed that the purpose of the U visa "section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to *detect, investigate, and prosecute*." H.R. Conf. Rep. 106-939, at 72 (2000) (emphasis added). Congress always intended that qualifying criminal activity would be activity that law enforcement detects, investigates and prosecutes. Congress never intended to include only conduct charged upon arrest, or ultimately prosecuted.

Second, Congress purposefully included the conjugated terms for "investigate" and "prosecute" in INA section 101(a)(15)(U)(i), which describes qualifying crime and states:

> 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

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[1] Available at: https://www.uscis.gov/sites/default/files/err/D14%20-%20Application%20for%20U%20Nonimmigrant%20Status/Decisions_Issued_in_2011/Dec022011_01D14101.pdf.

> *investigating or prosecuting criminal activity* described in clause (iii);

INA § 101(a)(15)(U)(i)(III) (emphasis added). The broad view of qualifying crime is further supported by the enabling regulations set forth at 8 C.F.R. § 214.14(a)(5), which adds the word "detect" from the committee report to the disjunctive "investigating or prosecuting." 8 C.F.R. § 214.14(a)(5) ("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.").

Other clear agency guidance on the proper adjudication of petitions for U nonimmigrant status make it clear that qualifying criminal conduct does not need to have been charged or prosecuted. For example, DHS's U visa and T visa enforcement guide directs adjudicators to consider crimes detected *in addition* to those charged:

> [Question] [f]or a U visa, if one crime is initially detected or investigated but a different crime is eventually prosecuted, does that have an impact on the certification?"
>
> [Answer] "A certification is valid regardless of whether the initial criminal activity detected or investigated is different from the crime that is eventually prosecuted. As long as the person is a victim of a qualifying criminal activity, that person is eligible for a U visa.

Department of Homeland Security, *U and T Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies* ("*U and T Enforcement Guide*") at 22[2]; *see also In re B-K-V-C*, ID# 12948 (AAO Feb. 22, 2016) ("qualifying criminal activities . . . are not listed as specific statutory violations but rather in more broad terms"; holding that where contempt of court was certified, petitioner was a victim of domestic violence).

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2 Available at: https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf.

In many decisions both in the domestic violence context and in other contexts, the AAO has followed this guidance, making factual inquiries and looking beyond the elements of the charged crimes. *See, e.g., Redacted Decision dated Dec. 2, 2011* (because petitioner was kidnapped, and kidnapping is a qualifying crime that was investigated during the course of the sexual assault investigation, petitioner established that he was a victim of a qualifying crime); *Matter of B-K-V-C-*, ID# 12948 (AAO Feb. 22, 2016) ("The Petitioner has demonstrated that the certified crime was one related to domestic violence, which is qualifying criminal activity under section 101(a)(l5)(U)(iii) of the Act."); *Redacted Decision dated Dec. 8, 2014*, attached as Exh. B[3] (Finding that "[a]lthough the [Revised Code of Washington] provides for a general definition of harassment, the certifying official investigated the criminal activity as a domestic violence offense based upon the petitioner's relationship to the perpetrator, with the offense being harassment" and holding that petitioner was the victim of a qualifying crime.).

In many instances, however, the AAO has failed to apply this analytical framework when analyzing whether a given petitioner is the victim of a qualifying crime in a case involving non-domestic violence crimes. Instead, in some cases the AAO has erroneously employed a formulaic analysis, applying only the "similar" construct which compares elements of one section of a given criminal statute to another, ignoring the underlying facts of the case. Amici contend that this improper conflation of two distinct legal concepts violates the regulations, the statute and the Congressional intent underlying the law. *See, e.g., Matter of F-C-C-*, ID# 10638 (AAO Sept. 12, 2016) ("The inquiry, therefore, is not fact-based, but rather entails comparing the nature and elements of the statutes in question."); *Matter of A-G-S-*, ID# 16515 (AAO May 26, 2016); *Matter of G-H-*, ID# 6452067 (AAO Nov. 21, 2017). By failing to consider crimes that

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[3] Available at: https://www.uscis.gov/sites/default/files/err/D14%20-%20Application%20for%20U%20Nonimmigrant%20Status/Decisions_Issued_in_2014/DEC082014_02D14101.pdf.

were detected or investigated, but not prosecuted, and by failing to focus on facts as well as elements, the AAO and USCIS thwart the ameliorative statutory scheme underlying U nonimmigrant status, which is intended to aid law enforcement and promote justice throughout immigrant communities in the United States. Moreover, when USCIS second guesses law enforcement's expertise on what crimes it detects or investigates, it undermines law enforcement confidence in the U visa system. The U visa system is a crucial law enforcement tool that brings crime victims who are fearful to access justice out of the shadows. Amici posit that, since Congress intended this to be a tool for law enforcement, and since it required an official certification from law enforcement for crime survivors to qualify for status, USCIS should give great deference to that expertise. *See* H.R. Conf. Rep. 106-939, at 72; Interim Rule at 53,018 ("The purpose of the U nonimmigrant classification is to strengthen the ability of law enforcement agencies to investigate and prosecute such crimes as domestic violence, sexual assault, and trafficking in persons"). It should only supplant law enforcement expertise with its own analysis in unusual circumstances.

II. Applying the Category Framework to This Case Makes Plain That Mr. [redacted] is a Victim of the Certified Crime of Felonious Assault.

The New York District Attorney's I-918 Supplement B certification and accompanying record of the felonious assault against Mr. [redacted] is sufficient evidence that Mr. [redacted] is a victim of a qualifying crime. On August 31, 2013, Mr. [redacted]'s co-worker, [redacted] physically assaulted him, punching Mr. [redacted] with a closed fist to his right eye. Despite Mr. [redacted] falling to the ground, Mr. [redacted] continued to hit him. After a sustained period of violent assault against Mr. [redacted] another co-worker attempted to remove Mr. [redacted] off of Mr. [redacted] Mr. [redacted] and many of his co-workers wished to contact authorities, but his employer refused to allow them to do so. The facts underlying the investigation here make clear

that his attacker intentionally caused serious injury, thus satisfying the New York definition of assault as a felony. *See* N.Y.P.L. § 120.05-1. This is why the crime was certified as a felonious assault by the prosecuting law enforcement agency, the New York County District Attorney's Office.

Mr. [redacted] injuries were undoubtedly serious. He was not able to return to work after the assault because he suffered serious physical injuries. At the time of the assault, he suffered a broken and bloody nose, a bloody lip, and contusions around his eye and head. He also suffered from injuries to his leg, neck, and back. And his nose required surgery, of which he still feels pain and discomfort today. Mr. [redacted] also underwent intensive physical therapy where he was also diagnosed with cervical disc displacement, a sprained left wrist, and pain in his lumbar spine by his physical therapist. And after the assault, Mr. [redacted] was deemed to be fully disabled due to the extent of his physical injuries.

The prosecutor charged the defendant with misdemeanor assault charges, N.Y.P.L. § 120.00(1), N.Y.P.L. § 120.00(2), N.Y.P.L. § 110/120.00(1), and N.Y.P.L. § 240.26(1), but certified the criminal activity as felonious in nature because the facts would have allowed a charge of felony assault under N.Y.P.L. § 120.05-1 (A person is guilty of assault in the second degree when. . . [w]ith intent to cause serious physical injury to another person, he causes such injury to such person or to a third person. . . .). That the District Attorney chose to charge Mr. [redacted] with misdemeanor assault is inconsequential to the analysis because the record clearly contains facts showing the crime fits the felonious assault category. Here, essentially, the man who assaulted Mr. [redacted] committed both qualifying and nonqualifying criminal activity in the course of the same activity.

The certifier in this case specifically marked the felonious assault category on page one of the form, as well as the categories for Attempt and Related Crimes. *Id.*; *e.g., Matter of E-O-L-P-*, ID# 378994 (AAO Nov. 22, 2017) (certifier in first instance indicated felonious assault where a robbery and burglary took place). The certifier also specifically described on page two of the form a number of the severe injuries Mr. [redacted] sustained, and attached the criminal complaint in this case. *Redacted Decision dated December 2, 2011* (qualifying criminal activity found where certifier at Parts 3.5 and 4.5 indicated qualifying criminal activity but did not list in Parts 3.1 and 3.3). Further, though the criminal complaint shows that the DA's office chose to charge the defendant with misdemeanor assault, attempted assault, and harassment, the complaint contains language specifically cataloguing the obviously "serious physical injuries" inflicted upon Mr. [redacted] *See Matter of B-K-V-C-*, ID# 12948 (AAO Feb. 22, 2016) (though the Supplement B indicated that the investigated and prosecuted criminal activity "was Criminal Contempt in the Second Degree under New York Penal Law § 215.50(3), the record of proceedings, which includes the incident report from the police department, a copy of [the assailant's] arrest warrant, and the court's order of protection that the Petitioner obtained against [the assailant], supports the certifying official's certification of the crime as a domestic violence offense.")

Among the purposes of the U visa statute, the Congressional committee report specifically states that "[p]roviding temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States." H.R. Conf. Rep. 106-939, at 72 (2000). Mr. [redacted] was a victim of a brutal assault resulting in lasting physical and mental damage. USCIS's Interim Rule, setting forth the broad

"category" interpretation that adjudicators should use in a qualifying crime analysis, clearly comports with Congress's humanitarian interest in implementing the U nonimmigrant status statutory scheme, promotes its usefulness as a tool for law enforcement, which in turn enhances the safety of all our communities.

CONCLUSION

The AAO should withdraw the director's decision and examine the full factual record, including the Supplement B, the investigated criminal conduct, and the police report for a determination of whether Mr. [redacted] was a victim of a category of qualifying crime. Amici respectfully contend that such an analysis will reveal Mr. [redacted]s precisely the kind of crime victim Congress intended to benefit from the law. Amici also request that the AAO end the current reign of confusion and concept conflation by (1) clearly articulating the analytical distinction between the "category" and "similar" analysis; (2) highlighting the relevance of facts in the record in addition to elements; and (3) recognizing the expertise Congress assumed rests with law enforcement in determining what crimes it detects.

Respectfully submitted,

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Attorneys for Amici Curiae

ASISTA Immigration Assistance
The Immigration Center for Women and Children

On the brief: Daniel Fishbein

EXHIBIT A

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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

[redacted]

D14

Date: DEC 02 2011 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]

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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the U nonimmigrant visa petition. On appeal, the Administrative Appeals Office (AAO) withdrew the director's decision and remanded the matter for further action. The director again denied the petition and has certified that decision to the AAO for review. The director's decision shall be withdrawn and the matter returned to the director for further action in accordance with the following decision.

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.

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: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes[.]

Section 214(p) of the Act, 8 U.S.C. § 1184(p), further prescribes, in pertinent part:

(1) Petitioning Procedures for Section 101(a)(15)(U) Visas

> The petition filed by an alien under section 101(a)(15)(U)(i) shall contain a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity described in section 101(a)(15)(U)(iii). This certification may also be provided by an official of the Service whose ability to provide such certification is not limited to information concerning immigration violations. This certification shall state that the alien "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of criminal activity described in section 101(a)(15)(U)(iii).

The burden of proof is on the petitioner to demonstrate eligibility for U nonimmigrant classification, and U.S. Citizenship and Immigration Services (USCIS) will determine, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence, including the Form I-918 Supplement B, U Nonimmigrant Status Certification. 8 C.F.R. § 214.14(c)(4). All credible evidence relevant to the petition will be considered. Section 214(p)(4) of the Act, 8 U.S.C. § 1184(p)(4).

Factual and Procedural History

As our prior decision adequately addressed the factual and procedural history of this matter, we shall repeat only certain facts as necessary. The director initially denied the petition because the certifying agency indicated on the law enforcement certification (Form I-918 Supplement B) that the petitioner, as a witness to the criminal acts of sexual assault and trafficking, was not a victim of qualifying criminal activity. On September 27, 2010, we withdrew the director's decision on that matter, determining that the Form I-918 Supplement B contained sufficient evidence to establish that during its investigation of the sexual assault and trafficking crimes, the certifying agency detected and investigated the petitioner's kidnapping allegations. Accordingly, we withdrew the director's finding that the petitioner was not the victim of a qualifying crime; determined that the petitioner had been the victim of the qualifying crime of kidnapping; and remanded the matter for the issuance of a Request for Evidence (RFE) and a determination of whether the petitioner had suffered substantial physical or mental abuse as a result of having been kidnapped.

The director issued an RFE on February 14, 2011. In the RFE, the director noted that the petitioner had not submitted a Form I-918 Supplement B that "list[s] kidnapping or hostage taking as a crime being certified," and subsequently concluded that "[the petitioner has] not demonstrated qualifying criminal activity." The director further stated: "To establish your eligibility under this requirement, you must demonstrate that you were the victim of substantial physical or mental abuse as a result of the certified criminal activity of aggravated sexual assault OR provide a new . . . . Form I-918, Supplement B certifying the criminal activity of which you were the victim." (Emphasis in original). The director

also requested a victim impact statement to demonstrate that that petitioner suffered substantial physical or mental abuse "as a result of qualifying criminal activity of aggravated sexual assault." The petitioner through counsel responded to the RFE by submitting a victim impact statement.

The director again denied the petition and has certified this decision to the AAO for review. In the Notice of Certification, the director notes that the Form I-918 Supplement B in the record does not certify the crimes of kidnapping or hostage taking and that the only crime that was certified was aggravated sexual assault, of which the petitioner was not a victim. The director concluded that because the petitioner was not a victim of the sexual assault, he has not demonstrated that he was the victim of qualifying criminal activity. The director further indicated that the petitioner failed to submit sufficient evidence that he suffered substantial physical or mental abuse "as a victim of sexual assault and trafficking." The director properly notified the petitioner that he had 30 days to submit a legal brief or other written statement to the AAO in response to the Notice of Certification.

On certification, counsel submits a brief arguing that the director had no jurisdiction to again look at the issue of whether the petitioner was the victim of qualifying criminal activity, as the AAO had already decided that matter. Counsel maintains that the petitioner has suffered substantial physical and mental abuse as a result of his kidnapping and being a witness to sexual assaults on several females.

Analysis

We again withdraw the director's determination that the petitioner was not a victim of qualifying criminal activity.

The director found that the petitioner was not the victim of qualifying criminal activity because the crime of kidnapping was not listed at Parts 3.1 and 3.3 of the Form I-918 Supplement B. However, because the regulation at 8 C.F.R. § 214.14(c)(4) provides USCIS the discretion to determine the evidentiary value of a Form I-918 Supplement B, we can look to other parts of the law enforcement certification to determine whether a certifying agency investigated or prosecuted qualifying criminal activity.[1] A review of the Form I-918 Supplement B establishes that the petitioner's kidnapping, which is a qualifying crime, was investigated during the course of the sexual assault investigation. At Part 3.5 of the Form I-918 Supplement B, the certifying agency stated that the petitioner "was kidnapped and held hostage at gun point for ransom" and that the petitioner "is collaborating with the Sheriff's Department in the investigation by identifying the individuals that held him." In addition, the certifying agency noted at Part 4.5 that the petitioner "identified several of the individuals who kidnapped him through a photo line-up" and that the petitioner "also answered the ICE investigator's questions." Thus, although it did not specifically list kidnapping at Parts 3.1 and 3.3 of Form I-918 Supplement B, the certifying agency acknowledged at other parts of the form that it detected and

[1] The term *investigated or prosecuted* "refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity." (Emphasis added). 8 C.F.R. § 214.14(a)(5).

investigated the petitioner's kidnapping in the past and that the petitioner helped investigators when he identified the kidnappers. As the petitioner assisted in the investigation, including the detection of the qualifying crime of kidnapping as stated by the certifying agency on the Form I-918 Supplement B, the AAO finds again that the petitioner in this instance has established that he was a victim of a qualifying crime or criminal activity. Accordingly, the director's determinations to the contrary are again withdrawn.

The record shows that the crime took place in the United States, the petitioner possessed information relating to the criminal activity, and that he helped in the detection and investigation of the qualifying crime of kidnapping. The final eligibility criterion that the petitioner must establish in this matter is whether he suffered substantial physical or mental abuse as a result of the qualifying crime. At the time of our last decision, we noted that the petitioner had not provided a detailed description of the mental abuse he suffered, if any; he failed to provide a detailed probative statement regarding any mental harm that occurred from his experiences; and there was nothing in the record to show that the petitioner suffered permanent or serious harm to his appearance, health, physical, or mental soundness. In response to the director's February 14, 2011 RFE, the petitioner submitted a victim impact statement, addressing the issues that we found deficient at the time of our prior decision. Thus, under the standard and factors described in the regulation at 8 C.F.R. § 214.14(b)(1), the relevant evidence establishes that the petitioner suffered the requisite, substantial mental abuse. The director's decision to the contrary is withdrawn. The petitioner has met the statutory eligibility requirements for U nonimmigrant status at section 101(a)(15)(U)(i) of the Act.

The Petitioner's Admissibility to the United States

The regulation at 8 C.F.R. § 214.1(a)(3)(i) provides the general requirement that all nonimmigrants must establish their admissibility or show that any grounds of inadmissibility have been waived at the time they apply for admission to, or for an extension of stay within, the United States. For U nonimmigrant status in particular, the regulations at 8 C.F.R §§ 212.17, 214.14(c)(2)(iv) require the filing of an Application for Advance Permission to Enter as a Nonimmigrant (Form I-192), in order to waive a ground of inadmissibility.

Here, the director denied the petitioner's Form I-192 solely on the basis of the denial of the Form I-918 petition. We have no jurisdiction to review the denial of a Form I-192 submitted in connection with a U petition. 8 C.F.R. § 212.17(b)(3). However, because the grounds for denial of the petitioner's Form I-918 U petition have been overcome on notice of certification, we will return the matter to the director for reconsideration of the Form I-192.

Conclusion

In these proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 214.14(c)(4). Here, that burden has been met as to the petitioner's statutory eligibility for U nonimmigrant status under section

101(a)(15)(U)(i) of the Act. The director's certification decision is withdrawn and the matter will be returned to the director for reconsideration of the petitioner's Form I-192.

ORDER: The director's certification decision is withdrawn. Because the petitioner is statutorily eligible for U nonimmigrant classification, the matter is returned to the director for reconsideration of the petitioner's Application for Advance Permission to Enter as a Nonimmigrant (Form I-192) and entry of a new decision on the Form I-918, Petition for U Nonimmigrant Status, which shall be certified to the AAO if adverse to the petitioner.

EXHIBIT B

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

Date: DEC 0 8 2014 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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The 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 director's decision will be withdrawn and the matter remanded for entry of a new decision.

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 and consequently did not meet any of the eligibility criteria for U classification. On appeal, counsel submits a statement and copies of documents already included in the record.

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[.]

Domestic violence is listed as a qualifying criminal activity in clause (iii) of section 101(a)(15)(U) of the Act.

As used in section 101(a)(15)(U)(i)(I), the term *physical or mental* abuse is defined at 8 C.F.R. § 214.14(a)(8) as "injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim."

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 in July 1995 without inspection, admission or parole. On an unknown date, she departed the United States and attempted to reenter on October 7, 1998 without inspection, admission or parole. She was expeditiously removed from the United States on the same day, and reentered on an unknown date without inspection, admission or parole. The petitioner filed the instant Form I-918 U petition with an accompanying U Nonimmigrant Status Certification (Form I-918 Supplement B) on April 3, 2012. On May 3, 2013, the director issued a Request for Evidence (RFE) that the crime listed on the law enforcement certification was a qualifying crime and the petitioner was a victim of substantial or physical abuse as a result of the qualifying crime. Counsel responded to the RFE with additional evidence, which the director found insufficient to establish the petitioner's eligibility. The director denied the Form I-918 U petition and Application for Advance Permission to Enter as a Nonimmigrant (Form I-192). The petitioner, through counsel, timely appealed the denial of the Form I-918 U petition.

On appeal, counsel claims that the petitioner was a victim of domestic violence harassment which is a "subset of 'Domestic Violence' and should be considered a qualifying crime."

Claimed Criminal Activity

In her declaration, the petitioner recounted that she started dating her ex-boyfriend in 2003, but they never lived together. He sold and used drugs but he repeatedly told her that he would stop and wanted a stable family. He did not stop selling or using drugs, and in 2006, the petitioner told her ex-boyfriend that she did not want to be with him anymore. The petitioner's ex-boyfriend was also controlling and mentally abusive to her, and she had even witnessed him pointing his gun at other people over disagreements. About a week after telling him that she did not want to be with him anymore, the petitioner's ex-boyfriend started calling and threatening her that if she did not get back together with him, he would "burn down [their] house, he would rob [her], and that he would kill [her] whole family."

The day after the petitioner's ex-boyfriend started calling her, he showed up to her mother's house, and when she went outside to speak to him, he refused to leave. The petitioner's daughter called the police and when they arrived, they arrested the petitioner's ex-boyfriend for harassment. He was released several days later, and started calling the petitioner again, threatening to tell police that the petitioner was prostituting her daughters. During one incident when she decided to meet her ex-boyfriend at the park, he grabbed her keys and stole her car. She went to the police to report the incident, but they said there was nothing they could do.

Several months after his arrest, the petitioner's ex-boyfriend showed up at her mother's house again, and said he wanted to come in. The petitioner said "no" and called the police. However, when the police arrived, her ex-boyfriend had fled. The police waited for her ex-boyfriend to call, and when he did, the police officer told him that he would be arrested if he came back to the petitioner's home. The petitioner's ex-boyfriend made fun of the police officer, and the petitioner decided to obtain a restraining order against him. She was "very afraid of him, and he continued to make threatening calls;" however, she heard that he was arrested on the east coast and is now in jail.

The Form I-918 Supplement B that the petitioner submitted was signed by Chief City of Police Department (certifying official), on November 29, 2011. The certifying official lists the criminal activity of which the petitioner was a victim at Part 3.1 as domestic violence and harassment. In Part 3.3, the certifying official refers to Revised Code of Washington (R.C.W.) § 9A.46.020, domestic violence harassment, as the criminal activity that was investigated or prosecuted. 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 continuously threatened and subjugated [sic] to mental and emotional abuse by her boyfriend." At Part 3.6, which asks for a description of any known or documented injury to the petitioner, the certifying official indicated that the petitioner "has suffered for many years from mental and emotional hardship as a result of her abusive relationship."

Analysis

We review these proceedings *de novo*. A full review of the record, including the evidence submitted on appeal, establishes that the petitioner was the victim of qualifying criminal activity for the following reasons.

Domestic Violence Harassment under Washington Law is a Qualifying Crime

The certifying official at Part 3.3 in the Form I-918 Supplement B indicated that he investigated or prosecuted the crime of "domestic violence, harassment." The crime of harassment 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 harassment offense 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 the Revised Code of Washington, a person is guilty of harassment if: "(a) Without lawful authority, the person knowingly threatens: (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or (ii) To cause physical damage to the property of a person other than the actor; or (iii) To subject the person threatened or any other person to physical confinement or restraint; or (iv) Maliciously to do any other act which is intended to substantially

harm the person threatened or another with respect to his or her physical or mental health or safety; and (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out." Wash. Rev. Code Ann. § 9A.46.020 (West 2014). Domestic violence harassment is committed against a family or household member. A family or household member can be "[p]ersons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship . . . ." Wash. Rev. Code Ann. § 10.99.020(3) (West 2014).

Although R.C.W. § 9A.46.020 provides for a general definition of harassment, the certifying official investigated the criminal activity as a domestic violence offense based upon the petitioner's relationship to the perpetrator, with the offense being harassment. *See* R.C.W. § 10.99.020(5)(which provides that the term *domestic violence* includes crimes when committed by one family or household member against another). Here, the certifying official has certified and the record demonstrates that the petitioner was a victim of a domestic violence crime. Accordingly, she has established the requisite victimization under section 101(a)(15)(U)(i) of Act and we withdraw the director's contrary determination.

Substantial Physical or Mental Abuse

At Part 3.6 of the Form I-918 Supplement B, the certifying official indicated that the petitioner has suffered many years of mental and emotional hardship from her ex-boyfriend. In the incident report, a police officer indicated that according to the petitioner's daughters, the petitioner did not want to be with her ex-boyfriend anymore but she was "afraid of him." The police officer stated that the petitioner was "apprehensive" about giving a statement and it was apparent that the petitioner was afraid of her ex-boyfriend but she did answer the police officer's questions. The petitioner stated that her ex-boyfriend had been to jail before but he always got out and she fears he would retaliate against her and her family. The petitioner states she is afraid of meeting new people, and fears her ex-boyfriend will look for her or her family when he is released from jail. In his letter dated March 5, 2012, Pastor indicates that he provided counseling to the petitioner and she "lives with the constant fear of always looking over her shoulder" and believes that her ex-boyfriend will retaliate against her when he gets out of prison.

In her mental health evaluation dated May 25, 2013, Ms. a licensed mental health counselor, diagnoses the petitioner with dysthymic disorder, posttraumatic stress disorder, and adjustment disorder with mixed anxiety and depression. She indicates that the petitioner's dysthymic disorder stems from being raised in a "violent, alcoholic and impoverished family"; witnessing domestic violence between her parents; and experiencing physical and emotional neglect as a child in Mexico. Ms. states that according to the petitioner, she was "psychologically, physically and sexually abused and harassed" by her ex-boyfriend and he was very violent. The petitioner is still afraid of her ex-boyfriend, and has nightmares and anxiety when she thinks about him. Ms. recommends that the petitioner receive mental health treatment.

A preponderance of the relevant evidence demonstrates that the petitioner suffered substantial mental abuse as the result of her victimization. The evidence in the record, including the Form I-918 Supplement B, the temporary restraining order and incident report, mental health documents, and

nonimmigrant classification. The petition is not approvable, however, because the petitioner remains inadmissible to the United States and her waiver application was denied. Because the sole basis for denial of the petitioner's waiver application has been overcome on appeal, the matter will be remanded to the director for further action and issuance of a new decision.

ORDER: The November 12, 2013 decision of the Vermont Service Center is withdrawn. The matter is remanded to the Vermont Service Center for reconsideration of the Form I-192 waiver application and issuance of a new decision on the Form I-918 U petition, which if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.