**DEPARTMENT OF HOMELAND SECURITY**

**UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES**

**VERMONT SERVICE CENTER**

**ST. ALBANS, VERMONT**

Applicant, )

 )

AAG )

 )

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_)

**Brief in Response to Request for Evidence on Application for U Nonimmigrant Status**

 AAG, by and through counsel, offers this brief in response to United States Citizenship and Immigration Services’ (“USCIS”) Request for Evidence dated January 25, 2016. USCIS requested more evidence to establish that the investigated or prosecuted crime noted on I-918, Supplement B, robbery, is similar to felonious assault, which is the qualifying crime indicated by the certifying official, Peter Newsham, Assistant Chief of Investigative Services at the District of Columbia Metropolitan Police Department, on Form I-918, Supplement B. Based on the nature and elements of robbery and felonious assault under D.C. law, the nature and elements of assault and extortion under federal law, Congress’s and the Department of Homeland Security’s intent when creating the U visa and its accompanying regulations, as well as the factual circumstances of this case, Ms. AG is eligible to receive a U visa. For the following reasons, Ms. AG is eligible to receive a U visa as a result of being a victim of a qualifying crime under INA § 101(a)(15)(U)(iii) and 8 C.F.R. § 214.14(a)(9).

**Statement of Facts**

In July 2008, Alma AG was a victim of a robbery on the 1000 block of H Street Northeast in Washington, DC. She was walking through an alleyway as a shortcut to get to her home when she heard someone yell “Stop!” When she turned around she noticed a man walking quickly towards her, so she started to walk faster to try to avoid him. When the man saw her walking faster, he ran after her, yelling at her to stop. She looked at him and thought that he had a gun because of the way that his hand was underneath his shirt. He ordered Ms. AG to give him everything she had, grabbed her shoulder, and then took her phone and purse. He ran away.

Ms. AG began crying. A man close by heard her and called the police. The police arrived a few minutes later and reported that they had found a man who fit the description that Ms. AG gave of the assailant. She went with the police to identify him. The man had somehow gotten rid of the purse but Ms. A positively identified the man as the person who robbed her. The police arrested the man. Although he had thrown away the purse, she later found out that someone was using her stolen checks. She contacted the police to let them know about the checks and cooperated fully in their investigation of the crime.[[1]](#footnote-1)

On Ms. AG’s I-918, Supplement B, the certifying official, Peter Newsham, Assistant Chief of Investigative Services at the D.C. Metropolitan Police Department, marked that Ms. AG was a victim of felonious assault. The official also noted that the crime to be investigated or prosecuted was robbery under D.C. Code § 22-2801. On May 29, 2014, USCIS issued a conditional approval for Ms. AG’s U visa application, indicating that she appeared to qualify for the U visa but that the final status could not be granted to her due to the statutory cap on the issuance of U visas every year. Inexplicably, despite earlier indicating Ms. AG’s eligibility for the U visa, USCIS abruptly reversed course and requested more evidence to establish that the crime of robbery is similar to felonious assault and thus a qualifying crime under the INA.

**Argument**

To establish eligibility for a U visa under INA § 101(a)(15)(U), an applicant must have suffered substantial mental of physical abuse due to having been a victim of a qualifying criminal activity. *See* INA § 101(a)(15)(U)(i)(I). The applicant must also have information regarding the criminal activity and must have been helpful to law enforcement in investigating or prosecuting the crime. *Id.* § 101(a)(15)(U)(i)(II)-(III). Finally, the criminal activity has to occur in the United States or violate the laws of the United States. *Id.* § 101(a)(15)(U)(i)(IV). The criminal activity must violate Federal, State or local law, and that criminal activity must be one or more of the crimes listed in the statute or is similar activity to those crimes listed in the statute. *Id.* § 101(a)(15)(U)(iii). For a crime to qualify for the purposes of U visa status, the crime has to be one of those listed in the statute or regulation, or the elements of the crime must be “substantially similar” to the elements of the qualifying enumerated crime. 8 C.F.R. § 214.14(a)(9).

1. **Ms. AG is eligible to receive a U visa because robbery falls into the category of felonious assault under D.C. law and federal law, as well as extortion under federal law.**

When Congress created the U visa, it specifically stated that a qualifying crime for the purposes of U visa status “[I]nvolve[s] one or more of the following or any similar activity . . .” referring to the enumerated offenses. *See* INA § 101(a)(15)(U)(iii). Although the regulations state that the term “any similar activity” means that the nature and elements of the crime are substantially similar to one or more enumerated crimes, the interim rule regarding U visa status further clarifies the meaning of “any similar activity.” *See* 8 C.F.R. § 214.14(a)(9); New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,015 (Sept. 17, 2007) (to be codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a & 299).

According to the DHS regulatory comments, the list of enumerated crimes, “is not a list of specific statutory violations, but instead a list of general *categories* of criminal activity.” *See* Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. at 53,018(emphasis added). DHS explained that criminal statutes may have different names than the criminal activities listed in the federal U visa statute. *Id.* The comments also clarified that “qualifying criminal activity may occur during the commission of a non-qualifying criminal activity.” *Id.* The perpetrator does not have to be charged or prosecuted for the qualifying criminal activity and it is acceptable if the perpetrator is prosecuted for a non-qualifying criminal activity. *Id.* Therefore, the proper inquiry is whether robbery is substantially similar to one or more *categories* of criminal activity or behavior enumerated in the statute.

First, the elements of robbery and felonious assault under D.C. law are substantially similar. Under District of Columbia law, robbery falls into the category of felonious assault. Robbery is defined as:

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 2 years . . .

 D.C. Code § 22-2801.

In addition, D.C. law specifically recognizes that robbery can occur during a felonious assault, as D.C. law criminalizes assault with the intent to rob. *Id.* § 22-401. Section 22-401 states that “Every person convicted of any assault with intent . . . to commit robbery . . . shall be sentenced to imprisonment for not less than 2 years . . .” *Id.*

Case law further explains the elements of assault with intent to rob. *See id.*; *Singleton v. United States*, 488 A.2d 1365, 1367 n. 2 (D.C. 1985); *Anthony v. United States*, 361 A.2d 202, 204 (D.C. 1976). The elements of assault with the intent to rob are (1) that the perpetrator assaulted the complainant, and (2) at the time of the assault, the perpetrator acted with specific intent to rob the complainant. *Singleton*, 488 A.2d at 1367 n. 2. Moreover, assault with the intent to rob includes the common law definition of assault, which is “[a]n attempt with force or violence to do a corporal injury to another; and may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time of the intention, coupled with the present ability, of using actual violence against the person.” *See Anthony*, 361 A.2d at 204.

Robbery and assault with the intent to rob have substantially similar elements. Both require the ability to act with force or violence against the victim. Both crimes also require that the person attempt to take something from the victim, either through their intent to rob or by actually taking possession of something with value. Moreover, both robbery and assault with intent to rob prescribe a minimum of two years’ imprisonment.

Second, robbery falls into the *category* of felonious assault under District of Columbia law. The definition, nature, and elements of assault with the intent to rob inherently recognize that a felonious assault can occur in the context of a robbery such that under D.C. law, robbery is a category of felonious assault. Importantly, as the regulatory comments suggest, the perpetrator does not have to be charged with the qualifying criminal activity. *See* 72 Fed. Reg. at 53,018. It is certainly possible that someone is charged and prosecuted for robbery even though a felonious assault occurred. *See id.* Therefore, the crime of robbery under D.C. law qualifies as felonious assault under D.C. law and in turn INA § 101(a)(15)(U)(iii).

Third, USCIS has the right to exercise *de novo* review over U visa applications. *See* 8 C.F.R. § 214.14(c)(4). Although a certifying official may mark a specific crime on I-918, Supplement B, USCIS can still determine that the person was the victim of a different, unmarked, qualifying criminal activity. Therefore, USCIS could also find that Ms. AG was a victim of a combination of felonious assault and extortion due to the nature and elements of those crimes.

Similar to D.C. law, federal law also criminalizes assault with the intent to commit a felony, such as extortion. *See* 18 U.S.C. § 113(a)(2). The U visa statute and regulations specifically list extortion as a qualifying criminal activity. INA § 101(a)(15)(U)(iii). Extortion under federal law means “obtaining property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.” 18 U.S.C. § 1951(b)(2).

Although robbery and extortion have different requirements regarding consent, they still have the same basic elements of obtaining property due to actual or threatened force. *See id.* § 1951(a)-(b)(2); D.C. Code § 22-2801. Moreover, Congress included both robbery and extortion in the same title, part, chapter, and section of the federal code, which strongly suggests that Congress categorizes robbery and extortion as similar offenses despite minor differences regarding consent. *See* 18 U.S.C. § 1951(b)(1)-(2).

Although robbery is not specifically enumerated in the U visa statute, robbery is a category of criminal activity or behavior that is a qualifying criminal activity for the purposes of U visa status. Comparing the nature and elements of robbery to felonious assault under D.C. law, assault with an attempt to commit a felony under federal law, and extortion under federal law demonstrates that robbery fits within at least one of the enumerated categories of offenses that the U visa statute encompasses.

1. **Congress intended for the U visa to create greater cooperation between immigrant communities and law enforcement to combat crime.**

Congress created U visa nonimmigrant status to help undocumented immigrants who become victims of certain qualifying criminal activities and help law enforcement with the investigation and prosecution of the crime. Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1533-37 (2000). Congress wanted to “encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.” *Id.* § 1513(a)(2)(A), 114 Stat. at 1533-34.

The wording of the legislation suggests that Congress wanted to avoid an overly-restrictive scheme regarding eligibility for U nonimmigrant status. This is also suggested by the fact that the statute states that the criminal activity can violate federal, state *or* local laws. The vagueness in the requirement gives law enforcement the ability to certify crimes based on local statutory schemes and the specific facts of each case.

Because Congress intended to increase cooperation between law enforcement and immigrant communities, the government should not disregard the certifying official’s determination of the crime experienced by the complainant. Doing so would jeopardize the entire U visa program. Therefore, the determination should not be based solely on the name of the crime versus the qualifying criminal activity that the certifying official marked on I-918 Supplement B. Instead, the determination should be based on all of the facts as well as the record from the certifying official.

1. **The Department of Homeland Security intended for the U visa regulations to encompass crimes such as robbery although it is not a crime specifically enumerated in the statute.**

On September 17, 2007, the Department of Homeland Security (“DHS”) issued an interim rule regarding U visa requirements and regulations. *See* 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). In pertinent part, DHS specifically discussed the fact that criminal statutes may have different names than the criminal activities listed in the federal U visa statute and that qualifying crimes can occur during the commission of a non-qualifying crime. *Id.* To bridge that gap, DHS created I-918, Supplement B. Further, the perpetrator does not necessarily have to be investigated or prosecuted for one of the enumerated crimes. *Id.* Although this is an interim rule, the DHS has not issued any other rules that would preempt this rule; therefore, the interim rule from September 17, 2007 remains the guiding rule for U visa eligibility and requirements. *A Guide to the Federal Register*, Office of the Federal Register, 9, https://www.federalregister.gov/uploads/2011/01/the\_rulemaking\_process.pdf.

DHS also recognized that immigrants may be particularly vulnerable to criminal activity.[[2]](#footnote-2) *See* Exec. Order No. 12,866, 73 Fed. Reg. 75,552 (Dec. 12 2008). In 2005, the National Crime Victimization Survey reported that immigrants without immigration status are reluctant to assist in the investigation and prosecution of crimes. *Id.* The survey also suggested that, based on the higher rates of robbery and assault for persons in households with an annual income of less than $7,500, immigrants without status are victims of these crimes more than persons with higher household incomes. *Id.*

Basing the determination of a person’s U visa eligibility solely on the crime prosecuted and/or investigated contradicts DHS’s intent regarding U visa adjudication. DHS itself acknowledged that crimes in various jurisdictions will not have a name similar to those enumerated in the statute. DHS also understood that every single element may not be the same, but that the crime investigated and the enumerated crime may have comparable nature and elements, making the crime investigated substantially similar to a listed crime. Moreover, robbery is the exact type of crime to which immigrants are most vulnerable. Eliminating robbery as a similar qualifying criminal activity simply due to its name would fly in the face of DHS’s intent and the entire purpose of the U visa program. Thus, the certifying official’s determination should be given more weight because doing otherwise demonstrates distrust for law enforcement’s ability to certify the I-918, Supplement B.

1. **The factual circumstances of Ms. AG’s case indicate that she is statutorily eligible for U nonimmigrant status.**

The factual circumstances in Ms. AG’s case demonstrate that she was the victim of a felonious assault. *See* Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. at 53,018. On Ms. AG’s I-918, Supplement B, the certifying official specifically found that she was the victim of a felonious assault. The certifying official also noted in part 3.3 that the criminal activity that was investigated or prosecuted was robbery under D.C. Code § 22-2801 and explained that she was “forcibly robbed” in part 3.5. In addition, in part 4.5, the certifying official further explained that Ms. AG reported a “criminal assault.”

The perpetrator in Ms. AG’s case assaulted her when he grabbed her shoulder. The elements of assault with the intent to rob do not take into account whether corporal injury *actually* resulted from the force, but whether the perpetrator’s actions *could* have caused corporal injury. *See Anthony*, 361 A.2d at 204. Moreover, he assaulted her with the specific intent to rob her. When he caught up to Ms. AG, he demanded that she give him all of her possessions while he grabbed her shoulder. His demand demonstrates that he had the specific intent to rob Ms. AG. Therefore, the perpetrator in Ms. AG’s case committed assault with intent to rob, or felonious assault. *See Singleton*, 488 A.2d at 1367 n. 2.

The intent of both Congress and DHS was to increase cooperation between immigrant populations and law enforcement and in turn improve the safety and security of the community. DHS also recognized that crimes in different jurisdictions will have different names than the enumerated list of qualifying criminal activity in the U visa statute. In creating Form I-918, Supplement B, DHS created a way to bridge that gap. Indeed, disregarding the certifying official’s finding that a complaining witness was a victim of a qualifying crime would go against the intent of the entire U visa program. Basing a U visa determination *solely* based on the crime investigated or prosecuted marked on Form I-918, Supplement B would erroneously disqualify victims of qualifying criminal activity from U nonimmigrant status.

 The only way for the U visa program to be successful is if law enforcement officials are trusted to make jurisdiction-specific determinations regarding investigations and prosecutions. The community relationships that the U visa program seeks to create would be in jeopardy if DHS disregards the certifying official’s findings. Based on Congress’s and DHS’s intent regarding the U visa, Ms. AG is the exact type of crime victim that the U visa is supposed to benefit.

**Conclusion**

 Ms. AG has demonstrated that she is statutorily eligible for a U nonimmigrant visa because she is the victim of a qualifying crime under INA § 101(a)(15)(U)(iii). Although the certifying official noted that the perpetrator of the crime in this case was being investigated or prosecuted for robbery, the certifying law enforcement official determined that Ms. AG was the victim of felonious assault. D.C. law recognizes that robbery can be a category of felonious assault and those crimes have substantially similar elements. Moreover, USCIS can find that robbery is similar to federal law regarding assault and extortion through its exercise of *de novo* review. Further, Congress’s and DHS’s intent for the U visa, as well as the facts of this case also demonstrate that Ms. AG is the exact type of victim that the U visa is supposed to help. Therefore, we respectfully request that USCIS grant Ms. AG U nonimmigrant status as the victim of a qualifying criminal activity.

Sincerely,

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Anna Gallagher, Esq.

Maggio + Kattar

11 Dupont Circle NW

Washington, DC 20036

1. These facts come from Ms. AG’s declaration, which was submitted with her original U visa application. [↑](#footnote-ref-1)
2. S*ee also* *Critical Issues in Policing Series: Police Chiefs and Sheriffs Speak Out On Local Immigration Enforcement*, Police Executive Res. F. 1, 14-16 (2008), http://www.policeforum.org/assets/docs/Free\_Online\_Documents/Immigration/police%20chiefs%20and%20sheriffs%20speak%20out%20on%20local%20immigration%20enforcement%202008.pdf; Laura Sullivan, *Police, Banks Help Undocumented Workers Shake ‘Walking ATM’ Label*, NPR (Jan. 20, 2014, 3:27 AM), http://www.npr.org/2014/01/20/263505387/police-banks-help-undocumented-workers-shake-walking-atm-label (last visited Apr. 11, 2016); Ernesto Londoño & Theresa Vargas, *Robbers Stalk Hispanic Immigrants, Seeing Ideal Prey*, Wash. Post (Oct. 26, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/10/25/AR2007102502740.html (last visited Apr. 11, 2016). [↑](#footnote-ref-2)