Practice Alert (March 2025):

Successful Arguments in Federal District Court
For Expansive Analysis of U Visa Qualifying Criminal Activity[1]

In January 2025, a U.S. district court examined USCIS's typical approach to analyzing qualifying criminal activity for a U visa and found it to be arbitrary, capricious, and otherwise unlawful.[2] In *Aquino-Martinez v. USCIS*, the applicant had suffered a felonious strong-arm robbery in Florida and asserted it constituted qualifying criminal activity (QCA) similar to felonious assault. USCIS denied the case after a mechanical analysis comparing the elements of strong-arm robbery (Fla. Stat. § 812.13(2)(c)) and the elements of aggravated assault (Fla. Stat. § 784.021), and finding they were not an identical match. In an APA claim before the Middle District of Florida, the applicant asserted the analysis was insufficient, and ASISTA, ICWC, and the AILA national amicus committee submitted a joint amicus brief in support of the claim. **The district court agreed USCIS's analysis was unreasonable** and remanded to the agency for a corrected approach.

Although USCIS's position is that the opinion is not precedential and binds only the parties, it is encouraging for survivors who may have received similar denials in their own cases. The decision is worth reading in full, but some **key findings** and their implications for practice are below.

- The facts of the underlying case matter, even when the agency is analyzing "similarity" between a charged crime and an enumerated crime. Typically the agency compares only the elements and refuses to consider facts in this analysis. With this decision as backup, applicants should argue the facts of their client's victimization support a finding they suffered something similar to a QCA.

- When comparing elements of a charged crime with an enumerated one, it is not reasonable to interpret the statute's requirement that they be "similar" or the regulation's requirement that they be "substantially similar" as requirements that the elements be *identical*. Similarity must be possible even where there are some

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[2] *Aquino-Martinez v. USCIS,* 2:23-cv-1037-SPC-NPM (M.D. Fla. Jan. 23, 2025).

differences. With this decision as backup, applicants should argue why any differences are insubstantial.

- Where a QCA is a lesser included offense in a formally investigated crime, this is a strong indicator the QCA was investigated (in addition to being a strong indicator of similarity). This includes all types of lesser included offenses—ones that are always inherently included, and ones that may be included if the facts of a particular case support them. With this decision as backup, applicants can and should look up state authorities, like jury instructions and case law, to see if they can present a "lesser-included" argument.

- For the felonious assault QCA in particular, there is room to argue that it be treated like a category of QCAs, much like domestic violence is. *See* ASISTA's briefs on this approach in a prior case and this case to understand this further. USCIS likes to say there is only one felonious assault statute in a jurisdiction: the statute the state calls an assault and classifies as a felony. But this opinion signals the agency must engage with arguments that a crime involving or substantially similar to a misdemeanor assault still fits in the felonious assault category if it, itself, is a felony. For instance, in this case, the plaintiff did this by showing simple assault was a lesser-included offense in robbery, and since this robbery was a felony, it could stand to reason that this robbery was a felonious assault. With this opinion as backup, applicants can make this kind of argument whenever the crime charged against their perpetrator is a felony that also incorporates the elements of a simple assault (or, arguably, incorporates elements that are just similar to those of a simple assault).

- While it is ideal to get a certification that consistently signals a QCA was investigated, a certification that fails to cite what USCIS views as the single relevant QCA statute in the jurisdiction does not amount to a lack of evidence that an LEA detected the qualifying crime. ASISTA still strongly encourages applicants to seek corrections to certifications that are not consistent between items 1, 3, and 6 on p. 2 of the I-918B, but if that is impossible, this opinion gives backup to argue it would be unreasonable for USCIS to treat it as fatal.

As noted, this case is positive but unfortunately non-precedential. Therefore, practitioners considering relying on arguments supported therein should be **mindful that they will likely not succeed before USCIS or even the AAO.** While the denial could then be the center of an APA claim like this, it is critical to note that in some enforcement environments, the denial will also **lead to an NTA** for many applicants. Survivors should be given autonomy to make an informed choice to accept this risk and pursue this approach before the advocate files on their behalf.

If members or OVW STOP/LAV/ELSI grantees have questions about using this opinion to bolster their arguments, they can schedule a **technical assistance (TA) appointment** with an ASISTA staff attorney.