U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 1221860

Date: AUG. 31, 2020

Motion on Administrative Appeals Office Decision

Form I-918, Petition for U Nonimmigrant Status

The Petitioner seeks "U-1" nonimmigrant classification as a victim of qualifying criminal activity under sections 101(a)(15)(U) and 214(p) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1101(a)(15)(U) and 1184(p). The Director of the Vermont Service Center denied the Form I-918, Petition for U Nonimmigrant Status (U petition). We dismissed the Petitioner's appeal.

This matter is now before us on a motion to reopen and reconsider. The Applicant submits additional evidence and a brief asserting that she has demonstrated her eligibility for U-1 nonimmigrant classification. Upon review, we will dismiss the motion to reopen and motion to reconsider.

I. LAW

A motion to reopen must state new facts to be proved and be supported by affidavits or other evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

To qualify for U-1 nonimmigrant classification, a petitioner must establish that they: have suffered substantial physical or mental abuse as a result of having been the victim of qualifying criminal activity; possess information concerning the qualifying criminal activity; and have been helpful, are being helpful, or are likely to be helpful to law enforcement authorities investigating or prosecuting the qualifying criminal activity. Section 101(a)(15)(U)(i) of the Act.

A "victim of qualifying criminal activity" is defined as an individual who has "suffered direct and proximate harm as a result of the commission of qualifying criminal activity." 8 C.F.R. § 214.14(a)(14). Where the direct victim of qualifying criminal activity is deceased due to murder or manslaughter, certain family members may be considered victims. Id. at § 214.14(a)(14)(i). The qualifying family members in this situation are the direct victim's spouse, children, and, if the direct victim was under 21 years of age at the time of the criminal activity, the direct victim's parents and unmarried siblings under the age of 18. Id. "Qualifying criminal activity" is "that involving one or more of" the 26 types of crimes listed at section 101(a)(15)(U)(iii) of the Act or "any similar activity

in violation of Federal, State, or local criminal law." Section 101(a)(15)(U)(iii) of the Act; 8 C.F.R. § 214.14(a)(9).

U.S. Citizenship and Immigration Services (USCIS) has sole jurisdiction over U petitions and the petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 214.14(c)(4); Matter of Chawathe, 25 &N Dec. 369, 375 AAO 2010). As a part of meeting this burden, a petitioner must submit a Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B), from a law enforcement official certifying a petitioner's helpfulness in the investigation or prosecution of the qualifying criminal activity. Section 214(p)(1) of the Act; 8 C.F.R. § 214.14(c)(2)(i). The petitioner must also provide a statement describing the facts of their victimization as well as any additional evidence they want USCIS to consider to establish that they are a victim of qualifying criminal activity and have otherwise satisfied the remaining eligibility criteria. 8 C.F.R. § 214.14(c)(2)(i)-(iii). Although a petitioner may submit any relevant, credible evidence for us to consider, USCIS determines, in its sole discretion, the credibility of and weight given to all the evidence, including the Supplement B. Section 214(p)(4) of the Act; 8 C.F.R. § 214.14(c)(4).

II. ANALYSIS

A. The Petitioner Has Not Established That She is a Victim of Qualifying Criminal Activity under 8 C.F.R. § 214.14(a)(14)

The record reflects that the Petitioner's partner, M-D-,[1] was murdered in the first degree in [redacted] 2016, as he was shot in the head while driving his taxi cab.[2] On motion, the Petitioner asserts that she qualifies as the victim of qualifying criminal activity as she lived together as a family with M-D- and their three children, and was pregnant with their fourth child at the time he was murdered, and thereby suffered direct and proximate harm as a bystander to his murder.

1. The Meaning of "Direct and Proximate Harm" in the Regulatory Definition of Victim

The U-related provisions of the Act include, but do not define, the term "victim." While the relevant regulations define a "victim of qualifying criminal activity" as "generally mean[ing] an alien who has suffered direct and proximate harm as a result of the commission of qualifying criminal activity," 8 C.F.R. § 214.14(a)(14), neither the Act nor the regulations define the term "direct and proximate harm." The Petitioner relies on the language of the preamble to the U Interim Rule in support of her assertion that she is a victim of qualifying criminal activity. The preamble references, most relevantly, the Mandatory Victim Restitution Act of 1996 (MVRA), the Crime Victim's Rights Act of 2004 (CVRA), and the Attorney General Guidelines for Victim and Witness Assistance (AG Guidelines) as "informative resource[s] in the development of th[e] . . . definition of victim" at 8 C.F.R. § 214.14(a)(14). See Interim Rule, New Classification for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014, 53016 (Sept. 17, 2007). Both the MVRA and CVRA define "crime victim" as a "person directly and proximately harmed as a result of the commission of" a crime, 18 U.S.C. §§ 3663(a)(2) and 3771(e). The AG Guidelines consider an individual to be a "victim" of an offense if "the alleged harm [was] a . . . 'but-for' consequence" and "reasonably

[1] Initials are used to protect the identity of the individual.
[2] The crime at issue in this matter, murder, is a qualifying crime at section 101(a)(15)(U)(iii) of the Act.

foreseeable result of the charged offense." AG Guidelines at 8-9 (rev. May 2012).[3] The Petitioner states that, looking to this broad formulation, the harm she suffered was a direct, natural, and foreseeable result of qualifying criminal conduct.

However, unlike the broad formulation that may apply in the context of crime victim restitution and assistance, the term "direct and proximate" as used in the definition of victim for U nonimmigrants at 8 C.F.R. § 214.14(a)(14) is genuinely ambiguous and subject to reasonable agency interpretation. See Kisor v. Wilkie, 139 S. Ct. 2400, 2415-16 (2019) (stating that if, after consideration of "the text, structure, history, and purpose of a regulation . . . genuine ambiguity remains, . . . the agency's reading must . . . be 'reasonable'" to warrant deference). Interim Rule, New Classification for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014, 53016 (Sept. 17, 2007).

As noted above, the U nonimmigrant regulations recognize the devastating impact that certain crimes can have on close family members and the vital role that those family members can play in the investigation and prosecution of the relevant offense. See 8 C.F.R. § 214.14(a)(14)(i) (extending eligibility to specified family members when the direct victim of the qualifying criminal activity is "deceased due to murder or manslaughter, or is incompetent or incapacitated, and therefore unable to provide information concerning the criminal activity"); 72 Fed. Reg. at 53017 ("Family members of murder, manslaughter, incompetent, or incapacitated victims frequently have valuable information regarding the criminal activity that would not otherwise be available to law enforcement officials because the direct victim is deceased, incapacitated, or incompetent.").

However, beyond the immediate family members of deceased, incompetent, or incapacitated victims specified in 8 C.F.R. § 214.14(a)(14)(i), USCIS likewise recognized the statutory limits inherent in, and necessary to the application of, the definition of the term "victim" in the U-related provisions of the Act. While the MVRA, CVRA, and AG Guidelines speak to the mandatory rights of, and provision of restitution to, victims of crimes, these sources do not address, nor define, these individuals' eligibility for immigrant or nonimmigrant status under the Act. See 18 U.S.C. §§ 3663(a)(1) (allowing a federal criminal court to order restitution to any victim of a specified series of offenses) and 3771(a) (laying out the mandatory rights of crime victims, including the right to be protected from the accused, receive notice of any proceeding, and receive full and timely restitution); AG Guidelines at 1 ("Federal victims' services and rights laws are the foundation for the AG Guidelines"). Accordingly, USCIS addressed the MVRA, CVRA, and AG Guidelines in the preamble to the U Interim Rule as only an "informative resource." 72 Fed. Reg. at 52016. The MVRA, CVRA, and AG Guidelines are not cited in the Act or the regulatory definition of "victim of qualifying criminal activity" or anywhere else in the U nonimmigrant implementing rule at 8 C.F.R. § 214.14.

This distinction is critical to the structure, purpose, and goals of the U nonimmigrant program. The program was created in order to "strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking . . . and other crimes while offering protection to . . . crime victims in keeping with the humanitarian interests of the United States,"

[3] The AG Guidelines were originally published in May 2005; however, they were updated to "reflect[] current statutory provisions, recogniz[e] the technological and legal changes that have taken place since the previous Guidelines were promoted, and incorporate[] best practices" in October 2011.

creating a unique immigration benefit that provides a path to lawful permanent residency and naturalization. Victims of Trafficking and Violence Protection Act (VTVPA) of 2000, Pub. L. 106-386, 114 Stat. 1464, sec. 1513(a)(2); sections 245(m) and 316 of the Act, 8 U.S.C. §§ 1255(m) and 1427 (providing for, and laying out the eligibility requirements of, U-based adjustment of status to that of a lawful permanent resident and subsequent nationality through naturalization). The Petitioner asserts on motion that narrowly interpreting U eligibility would artificially limit the universe of persons encouraged to assist law enforcement. However, Congress recognized the narrow scope of individuals that would be eligible for the benefit by placing a cap on the number of principal U nonimmigrant visas available per fiscal year. Section 214(p)(2) of the Act limits principal U nonimmigrant status to just 10,000 individuals per fiscal year. This statutory cap reflects congressional intent to create an immigration benefit limited to only certain individuals who were victims of qualifying criminal activity, as opposed to any individual impacted by a crime.[4] Aligned with this congressional intent, 8 C.F.R. § 214.14(a)(14) expressly limits who may be considered a victim eligible for U nonimmigrant classification.

Given the purpose behind, and limited scope of, the statute and regulation, USCIS did not intend for "direct and proximate harm" to encompass all "but-for" and "reasonably foreseeable" harm that may be applicable in victim restitution or other, distinct contexts. Instead, USCIS implemented the statutory scheme as set forth by Congress by concluding that "direct and proximate harm" generally encompassed only those individuals against whom qualifying criminal activity is directly committed. 8 C.F.R. § 214.14(a)(14); 72 Fed. Reg. at 53016 ("The AG Guidelines also state that individuals whose injuries arise only indirectly from an offense are not generally entitled to rights or services as victims."). On motion, the Petitioner contends that unless the statute and regulations are interpreted expansively, there would never be a victim of the qualifying crime of murder, and other offenses such as obstruction of justice and solicitation to commit other crimes such as witness tampering. However, USCIS specifically explained that the statutory list of qualifying criminal activities includes "murder or manslaughter, the direct targets of which are deceased" and "witness tampering, obstruction of justice, and perjury, which are not crimes against a person." 72 Fed. Reg. at 53017. Consequently, USCIS explained "this rule extends the definition of victim beyond the direct victim of qualifying criminal activity" only in "certain circumstances. See new 8 C.F.R. 214.14(a)(14)(i) & (ii)." Id. As discussed in detail below, the Petitioner has not demonstrated that she qualifies as a victim by virtue of any of the familial relationships to deceased, incompetent, or incapacitated victims specified at 8 C.F.R. § 214.14(a)(14)(i).

The Petitioner additionally contends that, although she was not present at the time of M-D-'s murder, she suffered direct and proximate harm as a bystander to the crime, contending that there is nothing in the relevant regulations that requires a person to be physically present to be directly and proximately harmed by criminal conduct. However, when referencing a "bystander" in the preamble to the U Interim Rule, USCIS explained that any exercise of discretion to extend eligibility to individuals against whom a qualifying crime was not directly committed would be limited, and generally only be contemplated for those who were present during the commission of particularly violent qualifying criminal activity and concurrently suffered an unusually direct injury as a result of the crime. See 72

[4] We additionally note that, to date, the U nonimmigrant status program is vastly oversubscribed, with pending principal U petitions reaching 151,758—a number over 15 times the annual statutory cap—and a total pending case load of 255,495 petitions. Department of Homeland Security, USCIS, Form I-918, Petition for U Nonimmigrant Status (Jan. 2020), available at https://www.uscis.gov/tools/reports-studies/immigration-forms-data.

Fed. Reg. at 53016 ("USCIS does not anticipate approving a significant number of [petitions] from bystanders, but will exercise its discretion on a case-by-case basis to treat bystanders as victims where that bystander suffers unusually direct injury as a result of a qualifying crime. An example of an unusually direct injury suffered by bystander would be a pregnant bystander who witnesses a violent crime and becomes so frightened or distraught at what occurs that she suffers a miscarriage.").

2. The Petitioner Did Not Suffer Direct and Proximate Harm as a Result of the Commission of Qualifying Criminal Activity

The Petitioner has not established, by a preponderance of the evidence, that she suffered direct and proximate harm as a result of the commission of qualifying criminal activity because the murder of M-D- was not perpetrated against her. The Petitioner also has not established that she warrants a favorable exercise of discretion to nonetheless consider her a victim for U nonimmigrant purposes as a bystander to a violent crime who contemporaneously suffered an unusually direct injury.

As stated, the Petitioner has not asserted that she was physically present at the time the criminal activity was perpetrated. The Petitioner was notified by police officers at her home after M-D- was shot. When the Petitioner arrived at the hospital, M-D- was on life support machines, and removed from the machines after tests to determine brain activity. As such, the Petitioner has not demonstrated temporal or physical proximity to the perpetration of the violent crime. The Petitioner asserts that she suffered serious emotional and psychological injury, directly and proximately caused by the murder of M-D-. The Petitioner's Supplement B indicates that the shock of finding out about her husband's death affected the Petitioner, who was pregnant at the time. And, Petitioner's counsel specified the Petitioner "has been getting psychological help to cope with the premature loss of her husband." The record contains a therapist evaluation diagnosing the Petitioner with adjustment disorder five weeks after M-D-'s death. The evaluation specifies that the Petitioner reported depression, suicidal thoughts, an inability to concentrate, nightmares, and severe sleep and appetite disturbances. We acknowledge that the death of M-D- emotionally and psychologically impacted the Petitioner, his wife. However, the Petitioner, her Supplement B, and Petitioner's counsel specify that the emotional impact she suffered resulted from learning of, and coping with, her husband's death. The Petitioner does not argue and has not established that these emotional injuries occurred concurrent with the violent crime perpetrated against M-D-. As stated, if a qualifying crime was not directly committed against an individual, bystander classification would generally include only those present during the commission of particularly violent qualifying criminal activity who concurrently suffered an unusually direct injury as a result of the crime. And, the Petitioner in this matter was not physically present during the commission of the violent crime committed against M-D-, and though she suffered direct injury, such injury was not suffered concurrently.

Viewed in the totality, the Petitioner has not met her burden of establishing that she is a direct victim of qualifying criminal activity eligible for U nonimmigrant classification. She has not shown that she suffered direct and proximate harm as a result of the commission of qualifying criminal activity, as 8 C.F.R. § 214.14(a)(14) requires.

B. The Petitioner Has Not Established That She is a Victim of Qualifying Criminal Activity under 8 C.F.R. § 214.14(a)(14)(i)

On motion, the Petitioner further asserts that she qualifies as a victim of qualifying criminal activity under 8 C.F.R. § 214.14(a)(14)(i). In our prior decision on appeal, incorporated here by reference, we determined that the Petitioner did not establish that her 2006 customary marriage to M-D- was registered and legally recognized in Senegal under the Code de la Famille Sénégalais. Specifically, we noted that under Senegalese law, a customary marriage must be registered with the civil registrar, and if not registered within six months of the marriage celebration, the spouses may seek an "authorization d'inscription," which requires an application for a judgment from the local justice of the peace. Senegalese law further provides that marriages are noted in the birth records of both spouses, including whether such marriage is monogamous or polygamous, once the civil registrar is notified of a marriage. We further noted that both means of marriage registration, registration with the civil registrar and the application for a judgment, require personal appearances. In addition, we noted that the U.S. Department of State's Reciprocity Schedule for Senegal indicates that a "Certificat de Mariage Celebre" and a "Certificat de Mariage Constate" are the only types of evidence recognized as acceptable to establish a legally recognized marriage. Based on the evidence of record, we concluded that the Petitioner had not submitted sufficient evidence of a legally-recognized marriage to M-D- in Senegal.

On motion, the Petitioner submits 2017 judicial file records from the Appeal Court of [redacted] one referring to her and the other to M-D-, indicating that after viewing their birth certificates: the Petitioner, daughter of [redacted]' is married, and M-D- is married. The Petitioner asserts that this evidence demonstrates that her 2006 marriage to M-D- was properly registered with Senegalese authorities. On appeal, however, we noted that the Petitioner submitted a contradictory 2017 "Certificat de Celibat," stating that there is no mention in the margin of her birth record of any marriages. The Petitioner claims on motion that the Petitioner's "Certificat de Celibat" was previously submitted only to demonstrate that she was single on [redacted] 2006, prior to the registration of her marriage to M-D-, and to show she was not married to another individual prior to that marriage. Despite the Petitioner's claims, the Petitioner's "Certificat de Celibat," issued in February 2017, states that after verifying "act n# 3943/1979 dated on [redacted] 2006 [b]earing no mention of marginal marriage certifies that [Petitioner] . . . is single and is not registered on the marriage registers of civil status of the Principal Center of [redacted]." The 2017 "Certificat de Celibat" does not state, as claimed by the Petitioner, that her birth record only reflected that she was single until 2006. The face of the February 2017 "Certificat de Celibat" stating that the Petitioner is single and not registered on the marriage registers contradicts the October 2017 judicial file record indicating that the Petitioner's birth certificate reflects that she is married, and contradicts the Petitioner's claim that her 2006 marriage to M-D- was legally registered in Senegal. In addition, neither of the judicial file records claiming the Petitioner's marital status indicate whether her marriage was registered as monogamous or polygamous. As stated on appeal, though Senegal permits polygamous marriages, such marriages are not recognized as valid marriages for U.S. immigration purposes. See Matter of H, 9 I&N Dec. 640 (BIA 1962). Further, though we noted on appeal that customary Muslim marriages can be performed by proxy, we also found that the requisite registration of such marriage requires the physical presence of both spouses before the local civil registrar, in accordance with Articles 114 and 146 of the Code de la Famille Sénégalais. Because the Petitioner claims she last entered the United States in May 2001 and has subsequently not returned to Senegal, she could not demonstrate her physical presence in Senegal to meet this requirement. The Petitioner does not address her physical presence in Senegal since May 2001 on motion. Finally, neither of these documents include the evidence recognized as acceptable to demonstrate a legally recognized in marriage in Senegal by the Department of State

Reciprocity Schedule for Senegal: a "Certificat de Mariage Celebre" and a "Certificat de Mariage Constate."

Overall, on motion, the Petitioner has not overcome our previous determination that she has not demonstrated she had a qualifying familial relationship to M-D- such that she could be considered a victim of a qualifying crime under 8 C.F.R. § 214.14(a)(14)(i).

C. The Remaining Eligibility Criteria for U-1 Nonimmigrant Classification

U-1 nonimmigrant classification has four separate and distinct statutory eligibility criteria, each of which is dependent upon a showing that a petitioner was the victim of qualifying criminal activity. Section 101(a)(15)(U)(i)(I)-(IV) of the Act. Since the identified basis for denial is dispositive of the Petitioner's motion, we decline to reach and hereby reserve the Petitioner's additional arguments concerning her eligibility for U classification. See INS v. Bagamasbad, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); see also Matter of L-A-C-, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The Petitioner has not met her burden of establishing, by a preponderance of the evidence, that she was the victim of qualifying criminal activity. Accordingly, she is ineligible for U nonimmigrant classification under section 101(a)(15)(U) of the Act.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.