U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20544038

Date: APR. 29, 2022

Appeal of Nebraska Service Center Decision

Form I-918, Petition for U Nonimmigrant Status

The Petitioner seeks "U-1" nonimmigrant classification 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 Nebraska Service Center denied the Form I-918, Petition for U Nonimmigrant Status (U petition), concluding that the Petitioner did not establish that she was the victim of a qualifying crime. The matter is now before us on appeal. We review the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will withdraw the Director's decision and remand the matter for the entry of a new decision consistent with the following analysis.

I. LAW

To establish eligibility for U-1 nonimmigrant classification, petitioners must show 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). "Qualifying criminal activity" is "that involving one or more of" the 28 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). 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" at section 101(a)(15)(U)(iii) of the Act. 8 C.F.R. § 214.14(a)(9).

As required initial evidence, petitioners must submit a Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B), from a law enforcement official certifying the petitioners' helpfulness in the investigation or prosecution of the qualifying criminal activity perpetrated against

them.[1] Section 214(p)(1) of the Act; 8 C.F.R. § 214.14(c)(2)(i). U.S. Citizenship and Immigration Services (USCIS) has sole jurisdiction over U petitions. 8 C.F.R. § 214.14(c)(1). Although petitioners may submit any relevant, credible evidence for the agency 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).

The burden of proof is on a petitioner 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 I&N Dec. 369, 376 (AAO 2010).

II. ANALYSIS

A. Relevant Facts and Procedural History

The Petitioner filed her U petition in May 2015 with an initial Supplement B signed and certified by a detective sergeant of the [redacted] Police Department's Special Victim's Unit in [redacted] California (certifying agency) based on criminal activity perpetrated against her in 2014. The certifying official checked the box indicating that the Petitioner was a victim of criminal activity involving or similar to "Felonious Assault," and at section 3.3, which requests the statutory citation for the criminal activity being investigated or prosecuted, listed "Felonious assault under section 422.7(a) Hate Crime."[2] When asked to provide a description of this criminal activity, the certifying official wrote that while the Petitioner was riding the bus, she became a victim of a hate crime when a man called her "racial slurs concerning Latinos," "told her not to speak Spanish," and physically assaulted her. When asked to provide a description of any known or documented injury to the Petitioner, the certifying official indicated that the Petitioner "did not request medical attention at the scene."

The police incident report accompanying the Supplement B described a similar set of events and clarified that the Petitioner told the responding officer she "did not need a medic and suffered no injuries." This report described the type of incident as battery and as a probation violation and identified the booking charges as violations of section 242 (battery) and 1203.2(a) (sentencing probationer committed to a prison for another offense; report of commitment; commitment or sentence by court which released defendant on probation) of the Cal. Penal Code. The Petitioner provided a statement with her U petition where she provided a narrative of the criminal activity that is similar to that of the Supplement B and the police report.

The Director then issued a request for evidence (RFE) advising that the record did not contain evidence sufficient to support the certifying official's statement that the qualifying crime of felonious assault was investigated or prosecuted as perpetrated against the Petitioner. In this RFE, the Director noted that the statute listed on the Supplement B provided the aggravating factors for a hate crime, but that the incident report in the record showed that the suspects were charged under section 242 of the Cal.

[1] The Supplement B also provides factual information concerning the criminal activity, such as the specific violation of law that was investigated or prosecuted, and gives the certifying agency the opportunity to describe the crime, the victim's helpfulness, and the victim's injuries.

[2] Section 422.7(a) of the California Penal Code (Cal. Penal Code) describes the aggravating factors for punishment of a hate crime, including the present ability to commit or actually causing actual physical injury.

Penal Code (battery) and did not indicate that a hate crime was investigated. With this RFE, the Director asked that the Petitioner submit additional evidence to show that the crime listed on the Supplement B is one of or is substantially similar to the qualifying criminal activities listed at section 101(a)(15)(U)(iii) of the Act. In response, the Petitioner submitted an updated Supplement B certified in April 2021 by the same certifying official that executed the initial Supplement B. In section 3.1 of this updated Supplement B, the certifying official again checked the box indicating that the Petitioner was the victim of criminal activity involving or similar to "Felonious Assault," and at section 3.3, listed the statutory citations for the criminal activity being or having been investigated or prosecuted as perpetrated against the Petitioner as "Felony Assault under [section] 245(a)(4) with Hate Crime [section] 422.7(a)." The certifying official explained in section 4.4 that the updated Supplement B "corrects prior I-918 b in which predicate offense" of Cal. Penal Code section 245(a)(4) was "inadvertently omitted."

Following a review of the record, inclusive of evidence submitted with the Petitioner's RFE response, the Director denied the petition, concluding that the record did not show that the Petitioner was the victim of felonious assault under section 245(a)(4) of the Cal. Penal Code as asserted. Instead, the Director found that the record established that the Petitioner was a victim of the crime of misdemeanor battery in violation of section 242 of the Cal. Penal Code and concluded that, as battery was not one of the qualifying criminal activities listed at section 101(a)(15)(U)(iii) of the Act, and the Petitioner had not shown that battery was substantially similar to one of those activities, the Petitioner had not established that she was a victim of qualifying criminal activity as required.

On appeal, the Petitioner resubmits copies of the updated Supplement B, medical records, and police report in the record below. She contends that the Director erred in determining that she was not a victim of the qualifying crime of felonious assault.

B. The Petitioner Is a Victim of Qualifying Criminal Activity

The Act requires U petitioners to demonstrate that they have "been helpful, [are] being helpful, or [are] likely to be helpful" to law enforcement authorities "investigating or prosecuting [qualifying] criminal activity," as certified on a Supplement B from a law enforcement official. Sections 101(a)(15)(U)(i)(III) and 214(p)(1) of the Act. The term "investigation or prosecution" of qualifying criminal activity includes "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." 8 C.F.R. § 214.14(a)(5). While qualifying criminal activity may occur during the commission of non-qualifying criminal activity, *see* Interim Rule, *New Classification for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant Status* (U Interim Rule), 72 Fed. Reg. 53014, 53018 (Sept. 17, 2007), the qualifying criminal activity must actually be detected, investigated, or prosecuted by the certifying agency as perpetrated against the petitioner. Section 101(a)(15)(U)(i)(III) of the Act; *see also* 8 C.F.R. § 214.14(b)(3) (requiring helpfulness "to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is based . . . .").

We agree with the Director that the record demonstrates, by a preponderance of the evidence, that the certifying agency detected battery as perpetrated against the Petitioner. However, the Director did not

address or consider the evidence of a hate crime penalty enhancement having been detected in determining whether a felonious assault was also detected as perpetrated against the Petitioner.

Upon *de novo* review, when considering the evidence that a hate crime penalty enhancement was detected, the record shows by a preponderance of the evidence that the certifying agency detected the qualifying crime of felonious assault. Specifically, the record reflects that the certifying agency detected misdemeanor assault and battery under California law, with a penalty enhancement for a hate crime at section 422.7(a) of the Cal. Penal Code, that elevated the underlying substantive misdemeanor offense to a felony-level offense. At the time of the offense, section 240 of the Cal. Penal Code defined misdemeanor assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240 (West 2014). At that time, battery was defined as the "willful and unlawful use of force or violence upon the person of another." Cal. Penal Code § 242 (West 2014). California courts have interpreted battery to mean a completed assault. *People v. Heise*, 217 Cal. 671, 673 (1933) (stating that "[b]attery includes assault; in fact, battery is a consummated assault. Assault is, therefore, necessarily included in battery"); *see also People v. Hayes*, 142 Cal. App.4th 175, 180 (2006) (stating that "[a]n assault is an incipient or inchoate battery; a battery is a consummated assault. An assault is a necessary element of battery, and it is impossible to commit battery without assaulting the victim.") (internal quotations omitted). The record here, including the police incident report citing to section 242 of the Cal. Penal Code, reflects that a misdemeanor battery was detected, and consequently, also establishes that a misdemeanor assault under section 240 of the Cal. Penal Code was necessarily detected. Further, both Supplements B, certifying the Petitioner as a victim of criminal activity involving or similar to felonious assault based on the battery perpetrated against her, support a determination that a misdemeanor assault was also detected as perpetrated against her.

The record further demonstrates that the certifying agency detected the battery and assault against the Petitioner as a hate crime, warranting a penalty enhancement under section 422.7(a) of the Cal. Penal Code. At the time of the offense, section 422.7(a) of the Cal. Penal Code provided for an enhanced punishment of a hate crime committed "against the person or property of another for the purpose of intimidating or interfering with that other person's free exercise or enjoyment of any right secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States" when "[t]he crime against the person of another either includes the present ability to commit a violent injury or causes actual physical injury." Cal. Penal Code § 422.7(a) (West 2014). A hate crime, for purposes of section 422.7 and the remainder of Title 11.6 of the Cal. Penal Code, is defined in relevant part as "a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim: . . . Race or ethnicity." Cal. Penal Code § 422.55(a)(4) (West 2014). California case law generally provides that a hate crime penalty enhancement under section 422.7 is separate from the underlying offense and elevates to felony status a crime that would otherwise be punishable as a misdemeanor and was committed because of prohibited bias motivation. *See People v. Morgan* 194 Cal. App. 4th 79, 83 (2011) (stating that section 422.7 "focuses on how the defendant committed the [underlying] crime" and "elevates otherwise misdemeanor conduct to felony conduct because the defendant committed the substantive crime for the purpose of interfering with the victim's civil rights."); *People v. Vasilyan*, 174 Cal. App. 4th 443, 463 (2009) (holding that the hate crime statute "did not define a crime but was merely a penalty provision"); *In re M.S.*, 10 Cal. 4th 698, 896 P.2d 1365, 1380 (1995) (explaining that section 422.7 "raises to felony status" misdemeanors committed because of prohibited bias motivation). Here, both Supplements B specifically cited to the

hate crime penalty enhancement provision under section 422.7(a) as having been detected in the commission of the assault and battery against the Petitioner. Additionally, the record, including both the initial and updated Supplement Bs and the incident report, shows that the certifying agency detected the perpetrator's use of racial slurs during the incident consistent with a hate crime and the penalty enhancement provision under section 422.7 of the Cal. Penal Code. As detailed above, the certifying official also checked the box indicating that the Petitioner was a victim of criminal activity involving or similar to "Felonious Assault." We conclude, therefore, that the preponderance of the evidence shows that the certifying agency detected, and the Petitioner was the victim of, a misdemeanor battery and assault elevated to a felony as a hate crime under section 422.7(a) of the Cal. Penal Code.

Felonious assault is one of the 28 types of crimes listed at section 101(a)(15)(U)(iii) of the Act. Accordingly, the Petitioner has overcome the Director's sole ground for dismissal and shown that she is a victim of qualifying criminal activity. We will remand the matter to the Director for consideration of whether the Petitioner has satisfied the remaining statutory eligibility criteria for U nonimmigrant classification under section 101(a)(15)(U)(i) of the Act, including whether she suffered substantial physical or mental abuse as a result of having been the victim of qualifying criminal activity.

ORDER: The decision of the Director is withdrawn. The matter is remanded to the Director for the entry of a new decision consistent with the foregoing analysis.