U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20793638

Date: MAR. 7, 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), due to abandonment. The Petitioner then filed a combined motion to reopen and reconsider the denial due to abandonment. The Director granted the motion to reopen but found the evidence did not establish that the Petitioner was the victim of a qualifying crime. The matter is now before us on appeal. On appeal, the Petitioner submits a statement asserting that he was the victim of qualifying criminal activity and has established eligibility for U-1 nonimmigrant classification. The Administrative Appeals Office reviews the questions in this matter de novo. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

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. 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).

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)(4). 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).

II. ANALYSIS

A. Relevant Facts and Procedural History

The Petitioner filed his U petition in October 2015 with a Supplement B signed and certified in April 2015 by the Director of Immigrant Affairs for the [redacted] New York District Attorney's Office (certifying official). The certifying official indicated the event forming the basis for the U petition occurred in March 2015 but did not check any of the boxes pertaining to qualifying criminal activities under Part 3.1, and instead notated "Assault in the 3rd." In Part 3.3. of the Supplement B, the certifying official listed New York Penal Law (N.Y. Penal Law) section 120.00(1), assault in the third degree, as the specific statutory citation investigated or prosecuted as perpetrated against the Petitioner. When asked to provide a description of the criminal activity, the certifying official referred to the complaint report which states that the Petitioner had an argument with the perpetrator and the perpetrator punched him causing bleeding to his nose and face. In his statement, the Petitioner explained that he was taken to the hospital and treated for a fractured nose "and a very bruised and swollen face and eyes." He further explained that his nose was badly deviated that he had to have it rebroken and reset in order to correct the deviation, which involved having two metal rods inserted up his nostrils. The Petitioner stated that "[i]t was a very mentally tormenting procedure to undergo."

The Director issued a request for evidence (RFE) asking the Petitioner to submit additional evidence to demonstrate that the crime listed on the Supplement B is a qualifying crime or one substantially similar to a qualifying crime. The Petitioner did not respond to the RFE and, therefore, the Director denied the U petition due to abandonment. Thereafter, the Petitioner filed a combined motion to reopen and reconsider. On motion, counsel for the Petitioner explained that there was a post office error and the mail carrier stopped delivering their mail. The Director granted the motion to reopen and issued another RFE.

In response to the newly issued RFE, the Petitioner, through counsel, argued that he is a victim of felonious assault as prescribed by N.Y. Penal Law sections 120.05(1) (assault in the second degree, a class D felony), 120.25 (reckless endangerment), and 110.120.00 (attempted assault). The Petitioner further stated that the "key factors in this case is that what transpired carried an intent to cause serious physical injury and actually caused such injury." After reviewing the Petitioner's response, the Director denied the U petition concluding that assault in the third degree was not a qualifying crime

[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.

and the evidence in the record did not establish that the Petitioner was a victim of criminal activity substantially similar to felonious assault.

On appeal, the Petitioner contends that he was the victim of the qualifying crime of felonious assault. Specifically, he contends that assault in the third degree is substantially similar to the qualifying crime of felonious assault. The record does not support the Petitioner's contentions.

B. Law Enforcement Did Not Detect, Investigate, or Prosecute a Qualifying Crime as Perpetrated Against the Petitioner

The Act requires U petitioners to demonstrate their helpfulness 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, 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 acknowledge the Petitioner's contention that he was the victim of felonious assault in that when the perpetrator punched him with such power and force that it incapacitated him and he was unable to defend himself, an intent to cause serious physical injury may be inferred. However, evidence describing what may appear to be—or hypothetically could have been charged as—a qualifying crime is not sufficient to establish a petitioner's eligibility. Rather, the record must reflect that the certifying law enforcement agency detected, investigated, or prosecuted the qualifying crime as perpetrated against a petitioner under the criminal laws of its jurisdiction. Petitioners must establish their helpfulness to law enforcement "investigating or prosecuting" qualifying criminal activity "in violation of Federal, State, or local criminal law." Sections 101(a)(15)(U)(i)(III), (iii) of the Act; *see also* section 214(p)(1) of the Act (requiring certification from law enforcement establishing the petitioner's helpfulness "in the investigation or prosecution of" qualifying criminal activity"); 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 . . . .").

In this case, the certifying official did not check the box indicating that the Petitioner was the victim of a felonious assault and did not provide a statutory citation to any felonious assault provision of New York law. Further, neither the Supplement B nor the complaint report cites to or references any felony-level assault or battery provision under New York law and no other pertinent evidence in the record indicates that law enforcement actually detected, investigated, or prosecuted the qualifying crime of felonious assault as perpetrated against the Petitioner. *See* 8 C.F.R. § 214.14(c)(4) (providing that the burden "shall be on the petitioner to demonstrate eligibility" and that "USCIS will determine, in its sole discretion, the evidentiary value of [the] . . . submitted evidence, including the Form I-918,

Supplement B"). Rather, upon review of the Supplement B and the complaint report, law enforcement consistently identified the offense as assault in the third degree, a misdemeanor. N.Y. Penal Law § 120.00 (McKinney 2015) (specifying that "[a]ssault in the third degree is a class A misdemeanor."). Accordingly, the Petitioner has not met his burden of establishing, by a preponderance of the evidence, that law enforcement investigated or prosecuted the qualifying crime of felonious assault as perpetrated against him.

C. Assault in the Third Degree Under New York Law is Not Substantially Similar to the Qualifying Crime of Felonious Assault

The Petitioner further contends that he was the victim of qualifying criminal activity because the nature and elements of assault in the third degree are substantially similar to those of felonious assault. When a certified offense is not a qualifying criminal activity under section 101(a)(15)(U)(iii) of the Act, petitioners must establish that the certified offense otherwise involves a qualifying criminal activity, or that the nature and elements of the certified offense are substantially similar to a qualifying criminal activity. Section 101(a)(15)(U)(iii) of the Act (providing that 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"); 8 C.F.R. § 214.14(a)(9) (providing that 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). Petitioners may meet this burden by comparing the offense certified as detected, investigated, or prosecuted as perpetrated against them with the federal, state, or local jurisdiction's statutory equivalent to the qualifying criminal activity at section 101(a)(15)(U)(iii) of the Act. Mere overlap with, or commonalities between, the certified offense and the statutory equivalent is not sufficient to establish that the offense "involved," or was "substantially similar" to, a "qualifying crime or qualifying criminal activity" as listed in section 101(a)(15)(U)(iii) of the Act and defined at 8 C.F.R. § 214.14(a)(9).

At the time of the offense against the Petitioner, New York law defined assault in the third degree as "[w]ith intent to cause physical injury to another person, [a person] causes such injury to such person or to a third person; or [a person] recklessly causes physical injury to another person; or . . . [w]ith criminal negligence, [a person] causes physical injury to another person by means of a deadly weapon or dangerous instrument." N.Y. Penal Law § 120.00. As stated above, the relevant statutory provision specifies that "[a]ssault in the third degree is a class A misdemeanor." *Id.* New York law categorizes felonious assault as either assault in the first degree or assault in the second degree. N.Y. Penal Law §§ 120.05 ("Assault in the second degree is a class D felony.") and 120.10 ("Assault in the first degree is a class B felony."). An individual commits assault in the first degree, in pertinent part, when "with intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, [a person] causes such injury to such person or to a third person; or . . . [u]nder circumstances evincing a depraved indifference to human life, [a person] recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person; or . . . [i]n the course of and in furtherance of the commission or attempted commission of a felony or of immediate flight therefrom, [a person], or another participant if there be any, causes serious physical injury to a person other than one of the participants." N.Y. Penal Code § 120.10 (McKinney 2021). Similarly, an individual commits assault in the second degree, in pertinent part, when "with intent to cause serious physical injury to another person, [a

person] causes such injury to such person or to a third person; or . . . [w]ith intent to cause physical injury to another person, [a person] causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument . . . ." N.Y. Penal Code § 120.05 (McKinney 2021). Additionally, an individual can commit assault in the second degree if the assault involves a protected class of persons. N.Y. Penal Code § 120.05(3) (McKinney 2021). Accordingly, for an assault to be classified as a felony in New York, an aggravating factor must be present, such as causing serious physical injury, causing the same during the commission of another felony, or involving a protected class of persons. *See e.g.*, N.Y. Penal Code §§ 120.05, 120.10 (McKinney 2021) (outlining aggravating factors, terms of imprisonment, and fines for felonious assaults).

Considering the foregoing, assault in the third degree is distinct in both its nature and elements from New York's equivalents to the qualifying crime of felonious assault. As a preliminary matter, we note that New York law punishes assault in the third degree under section 120.00 of the New York Penal Code as a misdemeanor offense. *See* N.Y. Penal Code §§ 10.00 and 70.15(1) (outlining the classification of the terms felony and misdemeanor and providing the punishments for assault in the third degree). The crime of assault in the third degree is also distinct in its elements from New York's equivalents to the qualifying crime of felonious assault. For instance, assault in the third degree does not require a specific intent as an element of the offense, which is required under both of New York's felonious assault provisions. *People v. Walls*, 24 A.D.2d 529, 529 (N.Y. App. Div. 1965). Furthermore, as previously mentioned, only "physical injury," not "serious physical injury," is required for a conviction for assault in the third degree. *People v. Pirozzi*, 237 A.D.2d 628, 631 (N.Y. App. Div. 1997). Also, unlike New York's felonious assault provisions, assault in the third degree can be committed without the use of a deadly weapon or dangerous instrument or any other aggravating circumstance. *See id.*; *see also People ex rel. Johnson v. Redman*, 23 Misc.2d 58, 60 (N.Y. Sup. Ct. 1960) (stating that "[t]he use of a dangerous weapon such as a knife is not an element of the lesser degree of [third degree] assault"). Based on the foregoing, the Petitioner has not established that the nature and elements of assault in the third degree are substantially similar to felonious assault statutes in New York and, accordingly, has not demonstrated that he was a victim of a qualifying crime at section 101(a)(15)(U)(iii) of the Act.

D. The Remaining Eligibility Criteria for U-1 Classification

U-1 classification has four separate and distinct statutory eligibility criteria, each of which is dependent upon a showing that the petitioner is a victim of qualifying criminal activity. As the Petitioner has not established that he was the victim of qualifying criminal activity, or an offense that is substantially similar to a qualifying criminal activity, he is ineligible for U nonimmigrant classification under section 101(a)(15)(U) of the Act.

ORDER: The appeal is dismissed.