



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

In Re: 15775638

Date: MAR. 08, 2022

Appeal of Nebraska Service Center 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 Nebraska Service Center denied the Form I-918, Petition for U Nonimmigrant Status (U petition). The Director concluded that the record did not establish the Petitioner was the victim of qualifying criminal activity. 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 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. 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 relating to criminal activity that occurred in [ ] 2015. With the petition he submitted a Supplement B, police and court records, personal affidavits, and a mental health evaluation. The Supplement B, certified by the [ ] Indiana, Prosecutor's Office, indicates at Part 3 that the Petitioner was victim the criminal offences involving or similar to felonious assault and other: see attached, where it then provides the Indiana Code (IC) for:<sup>1</sup>

IC 35-42-5-1(1) Robbery taking property by force or threatening the use of force while armed

IC 35-48-4-6(a) Possession of a narcotic drug

IC 35-42-2-9(b) Strangulation

IC 35-42-2-1(b)(1) Battery resulting in bodily injury

IC 35-47-2-1 Felon carrying a handgun without a license

On the Supplement B the certifying official described the criminal activity being investigated as the defendant trying to take items from a convenience store without paying when the Petitioner attempted to stop him from leaving and was threatened with a handgun. The Supplement B states that the Petitioner "was not physically injured as he was able to lock himself inside the cashier cabin." For description of known injuries to the victim, the Supplement B provides that the Petitioner experienced anxiety that interfered with his ability to perform simple daily tasks and requested transfer to another workplace due to his fear to work at the same station. The Supplement B indicates that the Petitioner provided officers with details of the crime and testified as a witness for the prosecuting office.

In an Affidavit for Probable Cause a police officer describes responding to report of an armed robbery at a gas station, and that upon entering the business a clerk did not say anything but pointed toward the suspect speaking with another clerk and made "a motion with his hands indicating" that the suspect had a gun. The officer describes wrestling the suspect to the ground but finding no firearm. The officer states that the clerks claimed that the suspect approached a counter but when asked by a clerk for payment for gas and merchandise the suspect lifted his shirt, stated "I don't have money, I have this" and placed his hand on a semi-automatic pistol. The clerks reported that the suspect then left to get gas but had reentered the store for merchandise when officers arrived. The report describes interviewing the suspect's girlfriend at the scene who described an earlier physical altercation she had with the suspect where he attempted to strangle her. The report notes that a handgun was discovered under a car seat and that the suspect told police that he never pointed or flashed the gun, but the clerk

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<sup>1</sup> Review of the record shows that of the certified crimes only robbery pertains to the Petitioner.

may have seen it under his shirt. The report goes on to describe transferring the suspect to jail where narcotics were found on his person.

Evidence in the record includes a letter to the Petitioner from a county deputy prosecuting attorney noting that the Petitioner may have information about the case and a subpoena signed by the defendant's attorney for the Petitioner to testify on behalf of the defendant. The court documents include a count for level 3 felony armed robbery with the count indicating that while armed with a deadly weapon, a handgun, the suspect took property in the presence of another (identifying the Petitioner's coworker by name) by use of force or by threatening force by showing a handgun. In his affidavit submitted with the U petition the Petitioner claimed that the suspect pointed a pistol at him when the Petitioner tried to stop him from leaving the store without paying for items, so the Petitioner locked the cashier cabin door to keep himself and his colleague safe, then called police. The Petitioner stated that he testified at a deposition and that following the incident, though he was not physically injured, he experienced anxiety and nightmares.

In denying the petition the Director indicated that the Supplement B and police report listed the qualifying criminal activity as aggravated robbery, which is not a qualifying crime. The Director determined that the appropriate comparison of Indiana statutes to determine substantial similarities with a crime found within regulation were robbery under IC 35-42-5-1, battery under IC 35-42-2-1, and aggravated battery under IC 35-42-2-1.5. The Director concluded that aggravated battery requires contact with an assailant via touch or bodily fluids, that a battery charge is predicated on touching another in a rude, insolent, or angry manner, and that the police report and Supplement B indicated there were no injuries. The Director determined that regulations explicitly define any similar activity as offenses in which the nature and elements of the offense are substantially similar to the statutorily enumerated list of qualifying criminal activities where mere overlap or commonality is not sufficient to establish that the offense is substantially similar to a qualifying crime. The Director found that the Petitioner was victim of aggravated robbery with a firearm under Indiana law, but it is not equivalent to or substantially similar to a qualifying crime. The Director went on to find that since the Petitioner did not establish that he was victim of qualifying criminal activity he was prevented from meeting the other statutory requirements for U nonimmigrant classification.

#### **B. Law Enforcement Did Not Detect, Investigate, or Prosecute the Qualifying Crime of Felonious Assault as Perpetrated Against the Petitioner**

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*, 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 . . .”).

Although the Supplement B provides citations for five certified crimes as detected, investigated, or prosecuted, review of the record clarifies that armed robbery was the only certified criminal activity perpetrated against the Petitioner. Armed robbery is not specifically listed as qualifying criminal activity at section 101(a)(15)(U)(iii) of the Act, therefore the Petitioner must establish that the nature and elements are substantially similar to a statutorily enumerated criminal activity. 8 C.F.R. § 214.14(a)(9). On appeal the Petitioner does not contest the Director’s finding that armed robbery is not a qualifying crime, but rather argues that it is substantially similar to the qualifying criminal activity felonious assault.

### C. Armed Robbery is Not Substantially Similar to the Qualifying Crime 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.

The Indiana Code does not contain a provision for assault. On appeal the Petitioner asserts through counsel that the Director erred in comparing armed robbery to battery, arguing that the proper analysis is to the qualifying criminal activity of felonious assault and that here the correct comparison is with the Indiana statute for intimidation at IC 35-45-2-1. The Petitioner recounts that a man was stealing merchandise when the Petitioner told him to pay, with the man then placing his hand on a pistol and threatening to shoot. The Petitioner maintains that armed robbery is defined under Indiana law as using a deadly weapon to knowingly or intentionally take property from another or in their presence by using or threatening use of force or putting any person in fear, while assault under federal common law is defined as putting another in apprehension of harm.<sup>2</sup> He contends that armed robbery requires that an assault occur in using or threatening force or putting a person in fear of force. The Petitioner maintains that Indiana does not refer to the crime as assault but rather as intimidation which it defines as when a person communicates a threat with the intention that another person engages in conduct against their will. The Petitioner notes that although commonly a misdemeanor, intimidation can be a felony where the person draws or uses a deadly weapon. He contends that armed robbery is substantially similar to felony assault/intimidation in that a conviction requires that a felony assault took place. The Petitioner argues that for robbery in Indiana the prosecution must prove the defendant took another’s property by using or threatening force on any person or to put any person in fear, and that

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<sup>2</sup> The Petitioner cites the United States Supreme Court decision *Ladner v. United States*, 358 U.S. 169, 177 (1958).

to prosecute intimidation in Indiana the prosecution must prove the defendant communicated a threat with the intent that another person engages in conduct against their will; in his situation allowing the defendant to leave a store without paying for merchandise. The Petitioner also argues that both crimes become felonies if a deadly weapon is used.

At the time of the criminal activity perpetrated against the Petitioner, the Indiana criminal code provided, in pertinent parts:

#### 35-42-5-1 Robbery

A person who knowingly or intentionally takes property from another person or from the presence of another person:

(1) by using or threatening the use of force on any person; or

(2) by putting any person in fear;

commits robbery, a Level 5 felony. However, the offense is a Level 3 felony if it is committed while armed with a deadly weapon or results in bodily injury to any person other than a defendant, and a Level 2 felony if it results in serious bodily injury to any person other than a defendant.

#### 35-45-2-1 Intimidation

(a) A person who communicates a threat to another person, with the intent:

(1) that the other person engage in conduct against the other person's will;

(2) that the other person be placed in fear of retaliation for a prior lawful act

(2) Level 5 felony if:

(A) while committing it, the person draws or uses a deadly weapon;

Ind. Code §§ 35-42-5-1, 35-42-2-1 (West 2015)

Although the Indiana statutes for armed robbery and intimidation have some similarity, a preponderance of evidence does not demonstrate that they are substantially similar in order for the Petitioner to establish that he was victim of qualifying criminal activity. The Indiana court of appeals has found that armed robbery and intimidation do not contain the same elements. In *Waibel v. State*, 808 N.E.2d 750 (2004), the court concluded that intimidation at IC 35-45-2-1 is established by proof that the defendant communicated a threat to another person with the intent that the person engage in conduct against his will, while the material elements of robbery 35-42-5-1 are established by proof that the defendant knowingly and intentionally took property by using or threatening the use of force or by placing a person in fear; thus intimidation was not an inherently included lesser offense of robbery. *Id.* at 757. In that decision the court of appeals cited a decision by the Supreme Court of Indiana, *Wethington v. State*, 560 N.E.2d 496, 509 (Ind. 1990), that noted the element of intimidation which distinguishes it from robbery is the communication of a threat to induce compliance with the communicator's will.

The regulations explicitly define the term “any similar activity” as “offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of qualifying criminal activities.” 8 C.F.R. § 214.14(a)(9). This determination does not involve a factual inquiry

into the underlying criminal acts, but rather entails comparing the nature and elements of the statutes in question to determine whether crimes are substantially similar.

Based on the foregoing, the Petitioner has not established the nature and elements of armed robbery are substantially similar to intimidation under Indiana law and therefore has not demonstrated that he was a victim of any 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, he necessarily cannot satisfy the criteria at section 101(a)(15)(U)(i) of the Act.

**ORDER:** The appeal is dismissed.