U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19062689

Date: MAR. 15, 2022

Appeal of Vermont 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 Vermont Service Center denied the Form I-918, Petition for U Nonimmigrant Status (U petition). The matter is now before us on appeal. On appeal, the Petitioner submits a brief and previously submitted evidence. The Administrative Appeals Office (AAO) reviews all questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015); *see also Matter of D-Y-S-C-*, Adopted Decision 2019-02, at 2 (AAO Oct. 11, 2019). 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 perpetrated against them. 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 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, 375 (AAO 2010). To meet this burden, petitioners must submit, as required initial evidence, 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.

[1] The Supplement B also provides factual information concerning the criminal activity, such as the specific violation of

§ 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 February 2016, accompanied by a Supplement B that was signed and certified by the Chief Deputy District Attorney of the [redacted] District Attorney's Office in [redacted] California (certifying official) in November 2015, based on criminal activity committed against the Petitioner in 2013. In part 3.1 of the Supplement B, the certifying official marked the box indicating that the Petitioner was the victim of criminal activity involving or similar to "Other:" and added in the corresponding space provided, "DUI w/ Injuries." At part 3.3, the certifying official cited to section 23153(b) of the California Vehicle Code (CVC), corresponding to driving under the influence and causing bodily injury to another person" (DUI with injuries), and section 11350(a) of the California Health and Safety Code (CHSC), corresponding to possession of designated controlled substances, as the specific statutory citations for the criminal offenses investigated or prosecuted. Additionally, with respect to the DUI with injuries offense, the certifying official also cited to California Penal Code (CPC) section 12022.7(a), relating to sentencing enhancements for inflicting "great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony"; CPC section 1192.7(c)(8), relating to restrictions on plea bargaining for felonies where the defendant inflicted great bodily injury on any person other than an accomplice; CPC section 667.5(c)(8), relating to increased terms of imprisonment for felonies in which the defendant inflicted great bodily injury on any person other than an accomplice; CVC section 23558, relating to sentencing enhancements for causing injury to more than one victim in the commission of certain driving violations; and CVC section 23566, relating to additional penalties for DUI and traffic offenders with multiple offenses. When asked to provide a description of the criminal activity being investigated or prosecuted, the certifying official indicated that the Petitioner was "a victim in a DUI motor vehicle collision" in which the perpetrator was "under the influence of alcohol and narcotics, and driving with a suspended license for prior DUI charges." The certifying official further noted that the Petitioner suffered pain and injuries to his neck, head, and back.

Accompanying the Supplement B, the Petitioner also submitted the traffic collision report (traffic report) for the offense and a copy of the perpetrator's sentencing order. According to the traffic report, which contained a description of the incident matching that in the supplement B, the perpetrator was initially investigated or prosecuted for "Driving Under the Influence" under CVC section 23152(a). The traffic report also references a DUI report and arrest report which were not submitted. Consistent with the Supplement B, the sentencing order indicates that the charges prosecuted against the perpetrator were: DUI with injuries under CVC section 23153(b), enhanced by CPC sections 12022.7(a), 1192.7(c)(8), and 667.5(c)(8), as well as CVC sections 23558 and 23566; and possession of designated controlled substances under CHSC section 11350(a).

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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.

After reviewing the petition and supporting documents, the Director issued a request for additional evidence (RFE) to demonstrate that the crimes listed on the Supplement B are substantially similar to one of the qualifying crimes listed in the Act and regulations. The Director subsequently denied the U petition, concluding that the record demonstrated that the Petitioner was the victim of the offense of DUI with injuries, which is not a qualifying crime and is not substantially similar to the qualifying crime of felonious assault, as he had asserted in his RFE response. The Director further noted that the record did not establish that the certifying agency investigated or prosecuted the qualifying crime of felonious assault in California as having been perpetrated against the Petitioner and that the application of the sentencing enhancement statutes to the DUI with injuries offense did not elevate the offense to a felonious assault.

B. The Petitioner Was Not the Victim of Qualifying Criminal Activity

1. Law Enforcement Did Not Detect, Investigate, or Prosecute a Qualifying Crime 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* (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 . . . .").

The Petitioner acknowledges that the perpetrator was charged with the crime of DUI with injuries, but argues that the presence of aggravating circumstances, including the use of a deadly weapon, "bring the crime within the purview of a felonious assault . . . akin to CPC [section] 245(a)(1)."[2]

Insomuch as the Petitioner is arguing that he was the victim of a felonious assault based on the factual circumstances of the crime, his argument is unavailing. Evidence describing what may appear to be, or hypothetically could have been charged as, a qualifying crime as a matter of fact is not sufficient to establish a petitioner's eligibility absent evidence that law enforcement actually detected, investigated, or prosecuted the qualifying crime as perpetrated against the petitioner. Sections 101(a)(15)(U)(i)(III) and 214(p)(1) of the Act; 8 C.F.R. § 214.14(a)(5). Here, there is no evidence in the record establishing

[2] The Petitioner also argues that Director erroneously found that the perpetrator committed a simple DUI when he injured the Petitioner. However, there is no indication that the Director made such a finding. Rather, the Director correctly found that law enforcement detected the offense of DUI with injuries under CVC section 23153(b) as perpetrated against the Petitioner and specifically acknowledged the application of the sentencing enhancement statutes.

that law enforcement actually detected, investigated, or prosecuted any type of felonious assault as perpetrated against the Petitioner. *See* 8 C.F.R. § 214.14(c)(4) (stating 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 . . . Supplement B").

Although part 3.1 of the Supplement B includes a box to indicate that the criminal activity involved or was similar to the offense of "Felonious Assault," the certifying official did not mark that box and instead only marked the box for "Other:" and entered "DUI w/ Injuries" in the corresponding space. In part 3.3, which requests the statutory citations for the criminal activity investigated or prosecuted, the certifying official cited to CVC section 23153(b) and CHSC section 11350(a), corresponding to DUI with injuries and the possession of designated controlled substances, respectively. The certifying official also cited to statutes associated with sentencing enhancements and plea bargaining restrictions for DUI with injuries. However, the certifying official did not cite to any provisions involving assault under California law or describe the offense as involving an assault, stating instead that the Petitioner was "a victim in a DUI motor vehicle collision." Moreover, the remaining evidence in the record, including the traffic collision report and sentencing order, does not reference any assault provisions under California law or otherwise indicate that any assault crimes were at any time detected, investigated, or prosecuted by law enforcement as perpetrated against the Petitioner.

Therefore, the record as a whole indicates that DUI with injuries under CVC section 23153(b), with sentencing enhancements, and possession of designated controlled substances under CHSC section 11350(a) were detected, investigated, or prosecuted by the certifying agency as perpetrated against the Petitioner. The record does not indicate that felonious assault or any other qualifying crimes were detected, investigated, or prosecuted as perpetrated against the Petitioner.

2. DUI with Injuries Is not the Equivalent of or Substantially Similar to the Qualifying Crime of Felonious Assault

Neither DUI with injuries nor possession of designated controlled substances are specifically listed as qualifying crimes under section 101(a)(15)(U)(iii) of the Act. The Petitioner contends, however, that he is the victim of qualifying criminal activity because the nature and elements of DUI with injuries under CVC section 23153(b)—when enhanced on account of the infliction of "great bodily injury" as described under CPC sections 12022.7(a) and 667.5(c)(8)—are substantially similar to those of the California equivalent of felonious assault found at CPC section 245(a)(1) (assault with a deadly weapon).[3]

[3] The Petitioner also references assault, felony assault, and aggravated assault definitions, as defined by the online legal dictionary located at www.dictionary.findlaw.com, in support of the assertion that DUI with injuries is substantially similar to the qualifying crime of felonious assault. However, such generic definitions are not relevant in this case because the incident in question took place in California, which has felony assault statutes. We generally refer to external sources for guidance only in those cases arising out of states which do not have a statutory or common law equivalent to the qualifying criminal activity in question. *See* section 101(a)(15)(U)(iii) of the Act (providing that qualifying criminal activity includes "any similar activity in violation of Federal, State, or local criminal law"); *see also* 8 C.F.R. § 214.14(a)(2), (c)(2)(i) (referencing the certifying agency's authority to investigate or prosecute the qualifying criminal activity perpetrated against a petitioner). Therefore, we need not further consider substantial similarity between the offense in question here and the generic assault definitions cited by the Petitioner.

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 criminal activity perpetrated against the Petitioner in 2013, California law defined DUI with injuries as follows:

> It is unlawful for any person, while having 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

Cal. Veh. Code § 23153(b) (West 2013). Also, at the time of the incident, CPC sections 12022.7(a), 1192.7(c)(8), and 667.5(c)(8) all related to either sentence enhancements or restrictions on plea bargaining for felonies in which the perpetrator inflicted "great bodily injury" on any person other than an accomplice in the commission of a felony or attempted felony.

California law defines 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 2013). For assault to be classified as a felony in California, an aggravating factor must be present, such as the use of a deadly weapon or force likely to produce great bodily injury, or an assault against a specific class of persons. *See e.g.*, Cal. Penal Code §§ 244, 244.5, 245, 245.3, 245.5 (West 2011) (outlining aggravating factors, terms of imprisonment, and fines for felonious assaults).

We find that the offense of DUI with injuries under CVC section 23153(b) is distinct in its elements and nature from California's equivalents to the qualifying crime of felonious assault, including assault with a deadly weapon under CPC section 245(a)(1). We acknowledge that a conviction for DUI with injuries with sentencing enhancements under sections 12022.7(a) and 667.5(c)(8) indicates the underlying offense was charged as a felony and involved an aggravating factor relating to the infliction of great bodily injury. However, as the Director correctly indicated, assault under California law requires an intentional attempt to violently injure another person as an element of that offense, whereas DUI with injuries does not require that the injuries in question be the result of an intentional act to injure. Instead, DUI with injuries may be satisfied by showing the injuries resulted from the perpetrator's negligent manner of driving. *See People v. Oyaas*, 173 Cal. App. 3d 663, 669–70, 219

Cal. Rptr. 243, 246–47 (Ct. App. 1985) (holding that DUI with injuries under CVC section 23153 may be established even where the perpetrator's neglect of duty "amounts to no more than ordinary negligence" or a neglect of the "duty which the law imposes on any driver to exercise ordinary care at all times and maintain a proper control of his or her vehicle."). In contrast, California's assault offenses do not involve negligence, nor may they be accomplished unintentionally. *See e.g. Bartosh v. Banning*, 251 Cal. App. 2d 378, 385, 59 Cal. Rptr. 382, 387 (Ct. App. 1967) ("The crimes of assault and battery are intentional torts. In the perpetration of such crimes negligence is not involved."). Additionally, California's felony assault provisions do not require the offense be committed while driving under the influence. To the contrary, the California Supreme Court has indicated that juries should not be instructed to "consider evidence of [a] defendant's intoxication in determining whether [they] committed assault with a deadly weapon on a peace officer or any of the lesser assaults." *See People v. Hood*, 1 Cal. 3d 444, 458–59, 462 P.2d 370, 379 (1969).

We note that the Petitioner asserts that assault, under California law, "does not require specific intent to cause injury." The Petitioner does not cite to any authority to support this assertion. Instead, citing to vehicular manslaughter under CPC section 191.5, the Petitioner reasons that "California law recognizes that vehicles can be deadly weapons and that negligent operation of such vehicles often leads to the foreseeable infliction of harm."[4] However, although "specific intent" to commit the resulting injury or injuries may not be required, as we have discussed above and in contrast to vehicular manslaughter, California assault offenses nevertheless require at least a general intent to commit an injury, and negligence alone is insufficient to meet the requirements of an assault. *See People v. Williams*, 26 Cal. 4th 779, 788-790, 29 P.3d 197 (2001) (holding that although the crime of assault "does not require a specific intent to cause injury," it still does require "an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another," and affirming that "mere recklessness or criminal negligence is [] not enough [] because a jury cannot find a defendant guilty of assault based on facts he should have known but did not know."); *People v. Wright*, 100 Cal. App. 4th 703, 721–24, 123 Cal. Rptr. 2d 494, 509–11 (2002) (affirming that although assault does not require a specific intent to injure the victim, it nevertheless requires the general intent to commit a battery or an act that would reasonably result in a battery); *see also People v. McMakin*, 8 Cal. 547, 548 (1857) (stating that "The intention [for an assault] must be to commit a present, and not a future injury . . . The acts done must be in preparation for an immediate injury."); *People v. Yslas*, 27 Cal. 630, 633 (1865) (holding that in "order to constitute an assault there must be something more than a mere menace" and that an assault has occurred when there is "a clear intent to commit violence accompanied by acts which if not interrupted will be followed by personal injury.").

As evidence of the substantial similarity between DUI with injuries and felonious assault, the Petitioner also references the severity of the injuries he sustained on account of the actions of the perpetrator. However, while we do not question the severity of the injuries the Petitioner suffered, the proper inquiry in assessing substantial similarity is not an analysis of the factual details underlying the criminal activity, but rather, as stated, it entails a comparison of the nature and elements of the crime investigated or prosecuted to those of a qualifying crime. *See* 8 C.F.R. § 214.14(a)(9).

[4] The Petitioner does not assert and the record does not show, however, that he is a victim of vehicular manslaughter. Therefore, we do not consider whether it would be substantially similar to a qualifying crime.

Based on the foregoing, the Petitioner has not established that the nature and elements of a DUI with injuries offense, with sentencing enhancements on account of the perpetrator's infliction of great bodily injury on another person, are substantially similar to those of a felonious assault offense in California, as he asserts. Accordingly, he has not demonstrated that he is a victim of a qualifying crime or a crime substantially similar to one of the qualifying crimes enumerated at section 101(a)(15)(U)(iii) of the Act.

C. 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, the Director properly concluded that he necessarily cannot satisfy the remaining criteria at section 101(a)(15)(U)(i) of the Act. Accordingly, he is ineligible for U nonimmigrant classification.

ORDER: The appeal is dismissed.