U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16302409

Date: MAR. 18, 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 evidence presented did not establish that the Applicant was a victim of qualifying criminal activity under the Act. The Director then affirmed their previous decision in two subsequent motions to reopen and reconsider. On appeal, the Petitioner submits a brief and indicates that she was a victim of a qualifying crime.

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.

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), which provides 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. Section 214(p)(1) of the Act; 8 C.F.R. § 214.14(c)(2)(i). Petitioners 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)(ii)-(iii).

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). 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

The Petitioner filed the instant U petition in July 2015 with a Supplement B certified by a detective at the [redacted] California Police Department. In Part 3.1 of the Supplement B, for criminal acts, the certifying official checked the box for felonious assault. In Part 3.3, when prompted to provide the specific statutory citation investigated or prosecuted, the certifying official wrote, "211 PC Robbery." The description of the criminal activity being investigated at Part 3.5 indicates that the Petitioner "was walking and talking on her phone when the suspect approached her on a bike…grabbed her phone and pushed her at the same time." Part 3.6, which asks for a description of any known or documented injuries to the victim, states, "victim injured her right elbow and scraped her hands."

Before making their initial decision, the Director issued a request for evidence (RFE), seeking additional documentation that the criminal activity listed on the Supplement B is qualifying criminal activity that is specifically listed in the regulations. In response, the Petitioner submitted additional evidence and claimed that the crime of robbery under California Penal Code (Cal. Penal Code) section 211 was substantially similar to the California equivalent to felonious assault, Cal. Penal Code section 245, because of the use of force in both crimes. However, the Director denied the petition stating that although the record indicates the Petitioner was assaulted, similar to Cal. Penal Code section 240, it did not indicate she experienced felonious assault, similar to Cal. Penal Code section 245. In the two motion decisions following the initial denial, the Director affirmed this finding, explaining that because Cal. Penal Code section 245 is the statute defining the elements of aggravated assault, it is the proper statute for determining what criminal activity would be considered felonious assault in California and whether the elements in the crime of robbery, under Cal. Penal Code section 211, were substantially similar. The Director concluded the aggravating factors present in Cal. Penal Code section 245 were not present in Cal. Penal Code section 211, thus the crimes were not substantially similar. Therefore, the Director concluded that the Petitioner did not establish she was the victim of qualifying criminal activity and denied the petition accordingly.[1]

[1] The Director also addressed other eligibility criteria in the initial denial, but only to conclude that because the Petitioner had not shown she was a victim of qualifying criminal activity, she could not satisfy the remaining eligibility requirements for U nonimmigrant status.

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

On appeal, the Petitioner proffers several reasons why she disagrees with the Director's decisions. First, the Petitioner claims that section 3.1 of the Supplement B should be given deference as the police would not have certified her crime as felonious assault if it did not meet the elements of felonious assault. She also explains that she was a victim of felonious assault because the actions of the perpetrator involved the use of felony level force- being pushed hard to the ground causing injury.

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 . . ..").

In this case, the Petitioner has not met her burden of establishing that law enforcement detected, investigated, or prosecuted a qualifying crime as perpetrated against her. We acknowledge that the certifying official checked the box on the Supplement B indicating that the Petitioner was a victim of felonious assault. However, the Supplement B, when read as a whole and in conjunction with other evidence in the record, as well as California law, does not establish 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) (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").

Under Cal. Penal Code § 240 assault is defined, "as an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another" and for an assault in California to be classified as a felony, there must be an aggravating factor involved, such as the use of a deadly weapon or force likely to produce great bodily injury. *See e.g.,* Cal. Penal Code §§ 244, 244.5, 245, 245.3, 245.5 (West 2020).

Beyond the checked box, the certifying official did not reference the crime of felonious assault as perpetrated against the Petitioner elsewhere in the Supplement B. In addition, although the accompanying police report states that "bodily force," was used in the commission of the crime, the report did not identify any type of assault as perpetrated against the Petitioner; instead, it identified the offense committed as robbery. The narrative section of the police report did not reference any assault provision under California law, stating that police received a call for assistance as a result of a robbery being committed. The report also states that the Petitioner described the perpetrator grabbing

her cellphone from her hand and simultaneously pushing her. Notably, no injuries appear to have been reported at the time of the police report. Finally, although the Petitioner reports and the Supplement B Parts 3.5 and 3.6 support the contention that the Petitioner was pushed to the ground, causing injury to her elbow and scrapes on her hands, it does not indicate that an aggravating factor was present, such as use of a deadly weapon or force likely to produce great bodily injury. As a result, the Supplement B's checked box is inconsistent with the information outlined in the remainder of the document and within the police report, which served as the basis for the certification of the Supplement B.

The Petitioner bears the burden of establishing eligibility by a preponderance of the evidence, including that she was the victim of qualifying criminal activity detected, investigated, or prosecuted by law enforcement. Section 291 of the Act; 8 C.F.R. § 214.14(c)(4); *Chawathe*, 25 I&N Dec. at 375. Moreover, 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). Based on the foregoing, the Petitioner has not established by a preponderance of the evidence that law enforcement detected, investigated, or prosecuted the qualifying crime of felonious assault. Instead, the record indicates that law enforcement detected, investigated, or prosecuted, the crime of robbery.

B. Robbery under California Law is Not Substantially Similar to the Qualifying Crimes of Felonious Assault

Next, the Petitioner contends that robbery, under Cal. Penal Code section 211, is substantially similar to felonious assault because it is only punishable as a felony, includes all the elements of California's assault statute (Cal. Penal Code section 240) and is considered a crime of violence. The Petitioner cites to *People v. Sutton*, 35 Cal. App. 3d 264 (1973), citing *People v. Guerin*, 22 Cal. App. 3d 775 (1972), that robbery is a compound felony which includes all the elements of theft and assault. However, the classification of robbery as a felony and whether robbery is considered a crime of violence and thus an aggravated felony is not relevant to our current analysis of whether robbery, under Cal. Penal Code section 211, is *substantially similar* to felonious assault in violation of State criminal law (in this case California law) and thus would be considered a qualifying criminal activity for purposes of U classification.

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).

The Petitioner contends further that she was the victim of qualifying criminal activity because the nature and elements of robbery under section 211 of the Cal. Penal Code are substantially similar to those of the qualifying crime of felonious assault. Therefore, we must compare the nature and elements of robbery under California law, the crime investigated, with felonious assault, the qualifying crime.

At the time of the incident, California law defined robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Cal. Penal Code § 211 (West 2012). We do acknowledge, as the Applicant states, that robbery under section 211 of the Cal. Penal Code is a felony offense. However, it is otherwise distinct in its elements from California's equivalents to the qualifying crime of felonious assault. Again, 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. But, for an assault in California to be classified as a felony, there must be an aggravating factor involved, such as the use of a deadly weapon or force likely to produce great bodily injury. *See e.g.,* Cal. Penal Code §§ 244, 244.5, 245, 245.3, 245.5 (West 2020) (outlining aggravating factors, terms of imprisonment, and fines for felonious assaults). Unlike the felonious assault statutes in California, robbery does not require the use of a weapon, force likely to produce great bodily injury, or any other aggravating circumstance, and it can be committed "without attempting to inflict violent injury, and without the present ability to do so . . .." *People v. Wolcott*, 665 P.2d 520, 525 (Cal. 1983). As such, the Petitioner has not shown that robbery under Cal. Penal Code section 211 is substantially similar to felonious assault.

C. Possible Equivalents of Felonious Assault in California.

The Petitioner also argues that Cal. Penal Code section 245 is not the equivalent of an aggravated assault statute in California and is thus not an appropriate comparison to felonious assault. She explains that Cal. Penal Code section 245 is not labeled aggravated assault and is punishable both as a felony and a misdemeanor. The Petitioner then indicates that a more proper and fair comparison is the U.S. Sentencing Guidelines definition of aggravated assault as well as the aggravated assault statutes in 12 states and the District of Columbia. We acknowledge that section 245 of the Cal. Penal Code is not labeled as aggravated assault and can be charged as a misdemeanor or a felony, but California law does identify which types of assaults qualify as felonies and why- there must be an aggravating factor involved such as use of a deadly weapon or force likely to produce great bodily injury. Cal. Penal Code §§ 244.5-245.5. Notably, these statutes do not include the commission of theft as an aggravating factor. *Id.* In addition, the appropriate comparison to whether a crime detected in a U petition is substantially similar to a qualifying criminal activity begins with an evaluation of the laws the certifying law enforcement agency has jurisdiction over. *See* section 101(a)(15)(U)(i)(III) of the Act and section 214(p)(l) of the Act; *see also* 8 C.F.R. § 214.14(a)(2), (b)(3), and (c)(2)(i). Here, the crime investigated and prosecuted as perpetrated against the Petitioner took place in California and was certified by the [redacted] Police Department, while applying California state law. Thus, because there is a California equivalent the similarity of the U.S. Sentencing Guidelines definition of aggravated assault or the aggravated assault statutes in other jurisdictions is not controlling in the determination of whether she was the victim of qualifying criminal activity and helpful to law

enforcement authorities in the investigation or prosecution of a crime in California.

Moreover, the fairness of this limitation on appropriate comparisons and the Petitioner's additional assertions that Congress' intent was to help victims of crimes and thus a broader view of "substantially similar" is necessary does not change the analytical framework for the comparison as established by the Act and regulations. As the Petitioner points out, the preamble to the U nonimmigrant rule indicates that the rule's definition of "any similar activity" considers the wide variety of state criminal statutes in which criminal activity may be named differently than criminal activity found on the statutory list. However, as stated previously, the Petitioner must show that the criminal activity of which she was victim is a qualifying crime where it occurred, as penal codes of other states and sentencing guidelines, including the U.S. Sentencing Guidelines, are not criminal assault statutes to which we can compare the criminal activity where the Petitioner was a victim.

As explained above, robbery under section 211 of the Cal. Penal Code is not substantially similar to felony assault in California under sections 244-245.5 of the Cal. Penal Code, which all include an aggravating factor as an element of the offense, because although robbery, under section 211 of the Cal. Penal Code, includes the elements of assault, it does not include an aggravating factor and thus does not include the distinguishing element of felonious assault. As such, the Petitioner has not established that the certified crime of robbery is substantially similar to the qualifying crime of felonious assault.

III. CONCLUSION

The Petitioner has not established that law enforcement detected, investigated, or prosecuted a qualifying crime as perpetrated against her as required by section 101(a)(15)(U)(i) of the Act. Nor has she shown the crime perpetrated against her is substantially similar to a qualifying crime. Thus, she necessarily cannot satisfy the remaining eligibility requirements for U nonimmigrant status. *See* subsections 101(a)(15)(U)(i)(I)–(IV) of the Act (requiring qualifying criminal activity for all prongs of eligibility).

As stated above, 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). Here, she has not me that burden.

ORDER: The appeal is dismissed.