U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23924993

Date: JAN. 10, 2023

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) on two grounds. First, the Director concluded that the Petitioner was not the victim of qualifying criminal activity. Second, the Director concluded that the Petitioner had not established that he suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity. The Director concurrently denied the Petitioner's Form I-192, Application for Advance Permission to Enter as Nonimmigrant (waiver application) due to the denial of the underlying U petition. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review 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

U petitioners must establish their eligibility for U-1 nonimmigrant classification by demonstrating they meet the requirements set forth in the Act and regulations, which include demonstrating that "[h]e or she has suffered physical mental abuse as a result of having been a victim of qualifying criminal activity." Section 214(b)(1) of the Act; 8 C.F.R. § 214.14(b)(1).

Qualifying criminal activity must involve 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. Felonious assault and unlawful criminal restraint are among the qualifying crimes listed at section 101(a)(15)(U)(iii) of the Act. The term "any similar activity" refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutory list of qualifying criminal activities. 8 C.F.R. § 214.14(a)(9).

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 Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B) from a law enforcement official. Sections 101(a)(15)(U)(i)(III) and 214(p)(1) of the Act. U petitioners must also establish that the certifying agency detected, investigated, or prosecuted this qualifying criminal activity. "Investigation or prosecution" of qualifying criminal activity "refers to 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).

The record as a whole must support the certification of that victimization in order to establish a petitioner's eligibility for U nonimmigrant status. Section 214(p)(1), (4) of the Act; 8 C.F.R. § 214.14(c)(2)(ii), (4). Although a petitioner may submit additional evidence along with the Supplement B to establish U-1 eligibility, we determine, in our sole discretion, the credibility of and the weight to give all of the evidence, including the Supplement B. Section 214(p)(4) of the Act; 8 C.F.R. § 214.14(c)(4).

II. ANALYSIS

In 2008, the Petitioner was stopped at gunpoint by two individuals who took his wallet, cell phone, and money. The Petitioner reported this crime to the police and assisted in the investigation; the two men were ultimately convicted of robbery. The Petitioner then filed a U petition in 2016.

The Director denied the U petition, concluding that the Petitioner had not shown substantial mental or physical abuse. The Director also found the Petitioner had not demonstrated that the crime prosecuted, robbery, constituted qualifying criminal activity. The Director cited first to New York's robbery statutes and noted that robbery was not a qualifying crime. The Director then turned to an analysis of similar crimes, specifically felonious assault, to determine if a similar crime was detected, investigated, or prosecuted. The Director cited to New York's assault statutes, which criminalize different conduct in the first through third degrees. N.Y. Penal Law §§ 120.00, 120.05, 120.10 (McKinney 2008). The Director indicated that felonious assault had not been established, finding as follows: "Actual physical injury is required for assault to be charged. Serious physical injury is required for felony assault to be charged. There were no physical injuries in this robbery."

On appeal, the Petitioner argues that the Director erred in finding a lack of substantial mental abuse. The Petitioner also argues that the qualifying crime of felonious assault was in fact committed. The Petitioner does not contest the Director's finding that physical injury was not suffered at the time of the incident. However, he argues that he was diagnosed with post-traumatic stress disorder (PTSD), that his PTSD has caused functional impairments, and that these impairments do meet the requirements for showing physical injury.

A. Law Enforcement Did Not Detect, Investigate, or Prosecute Any Qualifying Criminal Activity

1. Relevant Evidence

The U petition contained two different Supplement B certifications. The Petitioner submitted a Supplement B certified in July 2015 by the [redacted] District Attorney (DA Supplement B). The DA Supplement B checks "Other" as the qualifying crime and specifies "Robbery." The DA Supplement B then lists section 160.10 of the New York Penal Code and describes the crime as a

"[g]unpoint robbery of wallet, cellphone, and cash." When asked to describe any known or documented injury, the DA notes that there was no physical injury.

The second Supplement B was certified in August 2015 by the [redacted] Police Department (PD Supplement B). The PD Supplement B specifies "Other: Robbery 1" and "Unlawful Criminal Restraint" as the qualifying crimes and indicates the Petitioner was the victim of "New York State Penal Law 160.15.4 (Robbery 1)." No other criminal statutes are cited. The PD Supplement B describes the crime as follows: "The victim was approached by two males, who displayed a handgun, and told him not to move. The suspects then stole property from the victim." When asked to describe any known or documented injury, the PD Supplement B indicates no injuries were stated.

The Petitioner also submitted a police department statement form (PD Statement) prepared [redacted] 2008, the same night as the crime. For the PD statement, the Petitioner was interviewed with the assistance of a Spanish translator and provided a detailed description of the crime. The Petitioner stated that his friend was dropping him off in front of his home and he was standing in his driveway when he was approached by two males. The men initially asked for directions, but one then pulled out a gun. The gun was pointed at the Petitioner and at his friend, and the Petitioner was ordered not to move. The unarmed male went through the Petitioner's pockets, removing his wallet, cell phone, and cash. The armed man then searched his friend's vehicle; during this time the unarmed man continued to stand near the Petitioner and his friend and again indicated that neither should move. The men then fled in a vehicle.

An incident report was prepared on the night of the incident by [redacted] PD. This incident report lists robbery in the first degree as the offense and specifies subsection four. N.Y. Penal Law § 160.15(4) (McKinney 2008) (enhancing the charge to first degree robbery when a firearm is displayed). The incident report indicates that the Petitioner was "confronted by two unknown black males who proceeded to display what appeared to be a handgun and forcibly stole property." [redacted] PD prepared another incident report one week later to document the arrest of two individuals and the impounding of a vehicle.

Finally, the Petitioner submitted paperwork obtained from the [redacted] courts. A certificate of disposition confirms that the two perpetrators were ultimately convicted of robbery in the second degree and sentenced to prison.

In response to a request for evidence (RFE) from the Director, the Petitioner included an affidavit outlining the robbery. The Petitioner indicated that the armed individual "grabbed" him around the shoulder or collar and pressed the weapon behind his neck and head. A psychosocial report was also submitted where the Petitioner indicated the armed man pushed the Petitioner forward and pinned him against a vehicle to restrain him. The Petitioner contended that the gun was pressed forcefully enough to cause pain in his head which persisted for a week.

2. Neither the District Attorney nor the Police Department of [redacted] Detected, Investigated, or Prosecuted the Qualifying Crime of Felonious Assault

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 . . . .").

The Petitioner has not established that the qualifying crime of felonious assault was detected, investigated, or prosecuted by either the police or the district attorney during the pendency of the case. As outlined above, the Petitioner provided two Supplement B forms, various police reports, and court disposition records. Neither of the Supplement B reports has the box for felonious assault checked or contains any other reference to felonious assault. Additionally, neither Supplement B indicates that any physical injury occurred during the robbery; on the contrary, these reports indicate that no injuries were reported. All the records consistently indicate that robbery in the first degree was the crime investigated and prosecuted. No other charges or statutes are listed on the police records, and the defendants were not convicted of any other offenses. These reports make clear that the only crime investigated or detected was robbery. Three separate police reports were prepared for this case, including the detailed PD statement prepared with witness testimony from the Petitioner. There is likewise no mention of physical injury in these reports. While the Petitioner later submitted additional evidence in response to the RFE which lays out a physical component to the robbery, no such physical harm was noted in law enforcement records. This subsequently-submitted information does not aid the Petitioner in meeting his burden of showing that qualifying criminal activity was actually detected by law enforcement. As the reports prepared by these law enforcement agencies are silent as to physical injury, and none of the evidence acquired after the fact was prepared by or attested to by law enforcement, the Petitioner's assertions cannot be substituted for what law enforcement wrote. The evidence submitted is insufficient to establish that law enforcement detected, investigated, or prosecuted any felonious assault as perpetrated against the Petitioner.

The Petitioner argues that even in the absence of actual physical injury at the time of the incident, his PTSD and anxiety have caused functional impairments and should be considered physical injuries that could underlie an assault. Even assuming, *arguendo*, that law enforcement actually detected such injuries during the investigation of the case, the Petitioner's argument is at odds with New York law. At the time of the criminal offense, assault was defined in New York as the intentional or reckless causing of physical injury to another person, or the negligent infliction of physical injury with a deadly weapon or dangerous instrument. N.Y. Penal Law § 120.00 (McKinney 2008) (classifying third degree assault as a misdemeanor).

Assault is also punishable in the first and second degree in New York; both of these classes of assaults are felonies. Therefore, a U petitioner in New York must show that law enforcement detected, investigated, or prosecuted either first or second degree assault in order to establish felonious assault

as the qualifying crime. N.Y. Penal Law §§ 120.05, 120.10 (McKinney 2008). Second degree assault can be charged in the following circumstances:

> 1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or
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> 2. With intent to cause physical injury to another person, he causes injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or
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> . . . .
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> 4. He recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or
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> . . . .
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> 6. In the course of and in furtherance of the commission of attempted commission of a felony…or in the immediate flight therefrom, he, or another participant if there be any, causes physical injury to a person other than one of the participants.

N.Y. Penal Law § 120.05 (McKinney 2008).[1]

Assault in the first degree has four possible charging categories; they all require either serious physical injury or permanent disfigurement. N.Y. Penal Law § 120.10 (McKinney 2008). Regardless of the subsection ultimately charged, both felony assault statutes require a showing of either physical injury or serious physical injury.

Physical injury is defined by statute as "impairment of physical condition or substantial pain." N.Y. Penal Law § 10.00 (McKinney 2008). New York courts have consistently interpreted this section to require direct physical impairment or infliction of pain rather than the type of secondary injury the Petitioner proposes. *See, e.g.*, *People v. McDowell*, 270 N.E.2d 716 (N.Y. 1971) (requiring a degree of physical impairment or substantial pain beyond a reference to a black eye); *People v. Henderson*, 708 N.E.2d 165, 166 (N.Y. 1999) ("In defining "physical injury" as consisting of "substantial pain," the Legislature intended to set a threshold of something more than a mere technical battery.").

Contrary to the assertions of the Petitioner on appeal, he has not established that felony assault under either sections 120.05 or 120.10 of the N.Y. Penal Law were at any time detected, investigated, or prosecuted as perpetrated against him. As outlined above, on both of the Supplement B forms submitted, law enforcement indicated that the Petitioner was the victim of criminal activity involving or similar to only robbery and cited only to this section of the criminal code. The law enforcement reports and court documents likewise do not reference or otherwise indicate that the offenses of felony assault in the first or second degree were at any time detected, investigated, or prosecuted as

[1] Assault in the second degree has 14 categories of chargeable conduct. The remaining categories are dependent on the victim's status as a minor, the commission of the assault at a school, or the victim's status a healthcare, public service, or law enforcement agent. As they are not relevant to this appeal, these categories have been omitted. N.Y. Penal Law § 120.05 (McKinney 2008).

perpetrated against the Petitioner. 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 or any other qualifying criminal activity as perpetrated against him. Instead, the preponderance of the evidence indicates that law enforcement detected, investigated, or prosecuted, and the Petitioner was the victim of, robbery under New York law.

3. New York's Robbery Statute is Not Substantially Similar to An Enumerated Qualifying Crime

The crime investigated and prosecuted, robbery, is not substantially similar to the felonious assault statutes cited above. At the time of the offense, robbery was defined in New York as follows:

> Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:
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> 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
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> 2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

N.Y. Penal Law § 160.00 (McKinney 2008).

Robbery and assault differ substantially in New York's penal code. Robbery requires multiple elements that are not contained in the assault statutes: the use or immediate threatened use of physical force, the taking of another's property, and the specific intent to use such force in order to take property or to compel the provision of property. Unlike New York's assault statutes, there is no requirement that physical injury or serious physical injury be caused during the commission of the crime. New York's assault statutes do not require the intent to take property as an element of the offense, and instead require an intent to cause injury. Because of these divergent elements, the Petitioner cannot establish that the prosecuted crime of robbery is substantially similar to felonious assault.

Furthermore, there is no indication on record, and Petitioner has not argued on appeal, that robbery is substantially similar to any of the remaining listed offenses. We acknowledge and consider the significant trauma that this armed robbery has caused the Petitioner and do not doubt the level of fear and anguish caused by this crime. However, the Petitioner has not met his burden of showing by a preponderance of the evidence that a law enforcement agency detected, investigated, or prosecuted one of the 28 enumerated offenses listed at 101(a)(15)(U)(iii) of the Act or any substantially similar offense.[2]

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[2] While not addressed in the Director's decision or on appeal, we note that the PD Supplement B also checked off the qualifying crime of unlawful criminal restraint. A review of New York's penal code shows that unlawful imprisonment is the New York state equivalent; this statute criminalizes restraining another person. N.Y. Penal Law § 135.05 (McKinney 2008). Restraint is defined as the intentional restriction of a person's movements without consent and by physical force or intimidation. N.Y. Penal Law § 135.00 (McKinney 2008). The Supplement B forms, law enforcement reports, and

III. CONCLUSION

The Petitioner has not established that law enforcement detected, investigated, or prosecuted the commission of a qualifying crime as required to demonstrate U eligibility. Because our decision that the Petitioner was not the victim of qualifying criminal activity is dispositive of his motion, we decline to reach and hereby reserve the Petitioner's arguments regarding whether he suffered substantial physical or mental abuse as a result of qualifying criminal activity. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (noting that "courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

ORDER: The appeal is dismissed.

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court documents in the case do not reference this statute, and there is no indication in the law enforcement records that unlawful imprisonment was detected, investigated, or prosecuted.