



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

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

In Re: 25612034

Date: MAY 15, 2023

Motion on Administrative Appeals Office Decision

Form I-918, Petition for U Nonimmigrant Status

The Petitioner seeks U 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 Petitioner's Form I-918, Petition for U Nonimmigrant Status, concluding that the Petitioner was the victim of robbery with a firearm under section 14-87 of the North Carolina General Statutes Annotated (N.C. Gen. Stat. Ann.) and that the crime was not a qualifying criminal activity or a crime substantially similar to felonious assault, in particular assault with a deadly weapon under section 14-32 of the N.C. Gen. Stat. Ann. On appeal, we determined that comparison of section 14-87 of the N.C. Gen. Stat. Ann, which was not a qualifying crime, to aggravated assault as defined in the U.S. Sentencing Guidelines Manual was irrelevant, and that the Petitioner did not otherwise identify a felonious assault statute under North Carolina law in which to compare as substantially similar. We then concluded that section 14-87 of the N.C. Gen. Stat. Ann. was not substantially similar to kidnapping under section 14-39 of the N.C. Gen. Stat. Ann. and declined to compare section 14-87 of the N.C. Gen. Stat. Ann. to the federal definition of kidnapping in 18 U.S.C. § 1201 because North Carolina had a kidnapping statute. Because the Petitioner did not establish that section 14-87 of the N.C. Gen. Stat. Ann. was a qualifying crime or one substantially similar to a qualifying crime, we dismissed his appeal. The matter is now before us on a motion to reopen and reconsider. Upon review, we will dismiss the motion.

I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

As stated in our decision on appeal, which we incorporate herein, "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). When a certified offense is not a qualifying criminal activity specifically listed 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. 8 C.F.R. § 214.14(a)(9). 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. *Id.* Mere overlap with, or commonalities between, the certified offense and the statutory equivalent, however, is insufficient to establish that the offense involved or was substantially similar to a qualifying crime.

One qualifying crime under section 101(a)(15)(U)(iii), "felonious assault," must involve an assault that is classified as a felony under the law of the jurisdiction where it occurred. *See* section 101(a)(15)(U)(iii) of the Act and 8 C.F.R. § 214.14(a)(9) (identifying "felonious assault" when committed "in violation of Federal, State or local criminal law" as a qualifying criminal activity).

II. ANALYSIS

On motion, the Petitioner submits an updated Supplement B, wherein the certifying official indicates the Petitioner was the victim of a felonious assault, and that robbery with a firearm under section 14-87 of the N.C. Gen. Stat. Ann. was the criminal activity investigated or prosecuted. The Petitioner claims that we erred in our previous decision by not comparing section 14-87 of the N.C. Gen. Stat. Ann. to felonious assault statutes in North Carolina despite taking notice of their existence, and for not considering the federal definition of felonious assault. The Petitioner further states that robbery with a firearm under section 14-87 of the N.C. Gen. Stat. Ann. is substantially similar to felonious assault under section 14-32 of the N.C. Gen. Stat. Ann. and assault with attempt to commit a felony under federal law.

As we stated in our previous decision, the burden of proof is on the 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). Thus, while the Petitioner claims we should have compared section 14-87 of the N.C. Gen. Stat. Ann. to certain felonious assault statutes in North Carolina, it ultimately was the Petitioner's burden to do so.

As noted above, however, the Director previously determined the Petitioner was the victim of robbery with a firearm under section 14-87 of the N.C. Gen. Stat. Ann., which was not a qualifying crime. The Petitioner did not contest this determination on appeal and similarly does not on motion. Instead, the Petitioner claims, in part, that section 14-87 of the N.C. Gen. Stat. Ann. is substantially similar to section 14-32 of the N.C. Gen. Stat. Ann. which is titled "[f]elonious assault with deadly weapon with intent to kill or inflicting serious injury." A comparison of the nature and elements of the two crimes, however, reveals that they are not substantially similar. Section 14-32 of the N.C. Gen. Stat. Ann. requires that a person either intend to kill or cause serious injury to another person, which are not requirements for robbery with a firearm under section 14-87 of the N.C. Gen. Stat. Ann. And robbery with a firearm under section 14-87 of the N.C. Gen. Stat. Ann. notably requires one to take personal property from another person or certain locations where someone is present, which is not a requirement for felonious assault under section 14-87 of the N.C. Gen. Stat. Ann. The Supreme Court of North Carolina has determined as much, holding that while the crime of robbery as defined in section 14-87 of the N.C. Gen. Stat. Ann. includes an assault with a deadly weapon, the additional elements of "with intent to kill and which inflicts serious injury" in felonious assault as defined in section 14-32 of the

N.C. Gen. Stat. Ann. are not elements of the crime of robbery. *See State v. Richardson*, 185 S.E.2d 102, 107 (1971). Thus, despite some similarity between the two sections of law, the nature and elements of the two crimes are not *substantially* similar, and the Petitioner has thus not established that robbery with a firearm under section 14-87 of the N.C. Gen. Stat. Ann. is substantially similar to a felonious assault in North Carolina.

To the extent the Petitioner also asserts felonious assault and robbery in North Carolina are substantially similar because a felonious assault can occur in the context of a robbery, we note that 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). Such an analysis, however, requires establishing that a qualifying criminal activity was actually detected, investigated, or prosecuted by the certifying agency as perpetrated against a petitioner, which is distinct from comparing the nature and elements of two crimes. *See* section 101(a)(15)(U)(i)(III) of the Act. As noted above, a felonious assault under section 14-32 of the N.C. Gen. Stat. Ann. requires the use of a deadly weapon to either inflict serious injury or with an intent to kill, neither of which are established in the record as having been detected or investigated by law enforcement as part of their investigation of the robbery. Additionally, while we noted above that assault with a deadly weapon is included in the crime of robbery, such a crime is punished as a misdemeanor and therefore is not a “felonious” assault. *See* N.C. Gen. Stat. Ann. § 14-33(c)(1) (punishing assault using a deadly weapon as a Class A1 misdemeanor). Accordingly, the Petitioner has not established that a felonious assault was detected or investigated during the commission of the robbery.

The Petitioner also claims that section 14-87 of the N.C. Gen. Stat. Ann. is substantially similar to felonious assault under federal law. The Petitioner did not provide a specific section of law, but 18 U.S.C. § 113(a)(2) makes it a felony to commit an assault with intent to commit a felony (except murder or sexual abuse), and 18 U.S.C. § 113(a)(3) makes it a felony to commit an assault with a dangerous weapon within intent to do bodily harm, and these appear to mirror the language used by the Petitioner in a legal brief submitted in support of the motion.¹ “Assault” is not defined in the United States Code, however federal courts have defined it as “either a willful attempt to inflict injury upon the person of another, or a threat to inflict injury upon the person of another, which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm.” *United States v. Chestaro*, 197 F.3d 600, 605 (2d Cir. 1999). Robbery with a firearm under section 14-87 of the N.C. Gen. Stat. Ann. requires one to take personal property from another person or certain locations where someone is present, which is not a requirement for felonious assault under either of 18 U.S.C. §§ 113(a)(2) or (3). Additionally, robbery with a firearm under section 14-87 of the N.C. Gen. Stat. Ann. requires use of a firearm, which felonious assault under 18 U.S.C. § 113(a)(2) does not. Finally, while both robbery with a firearm and 18 U.S.C. § 113(a)(3) include dangerous weapons as an element, 18 U.S.C. § 113(a)(3) additionally requires an intent to do bodily harm. Accordingly, the nature and elements of robbery with a firearm under section 14-87 of the N.C. Gen. Stat. are not substantially similar to felonious assault under either of 18 U.S.C. §§ 113(a)(2) or (3). Because the nature and elements of robbery with a firearm under section 14-87 of the N.C. Gen. Stat. Ann. are distinct from

¹ Though not referenced on motion, the Petitioner previously on appeal sought to compare the certified offense to federal sentencing guidelines, however, sentencing guidelines are not a “Federal, State, or local criminal law” and thus are inapplicable in determining whether the certified offense is substantially similar to such a law.

assault under 18 U.S.C. §§ 113(a)(2) and (3), and the Petitioner does not specify any other federal statute as being substantially similar to robbery with a firearm, the Petitioner has not established he was the victim of a crime that is substantially similar to a federal statutory equivalent.

The Petitioner does not identify any error or make any argument regarding our decision on kidnapping and thus we deem the issue waived.

III. CONCLUSION

Unimmigrant 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 that was investigated or prosecuted by law enforcement. As the Petitioner has not established that he was the victim of a qualifying criminal activity or a crime substantially similar to a qualifying criminal activity, he necessarily cannot satisfy the criteria at section 101(a)(15)(U)(i) of the Act and we will dismiss his motion.

ORDER: The motion to reopen and reconsider is dismissed.