U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29462752

Date: DEC. 12, 2023

Appeal of Vermont Service Center 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 Vermont Service Center denied the Petitioner's Form I-918, Petition for U Nonimmigrant Status, concluding that the record did not establish that he was a victim of qualifying criminal activity or a crime involving or substantially similar to a qualifying criminal activity. 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

To establish eligibility for U 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).

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.*

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 that the petitioner possesses information concerning the qualifying criminal activity and has been, is being, or is likely to be helpful in the investigation or prosecution of it.[1] Section 214(p)(1) of the Act; 8 C.F.R. § 214.14(c)(2)(i). Although petitioners may submit any relevant, credible evidence for the agency to consider, U.S. Citizenship and Immigration Services (USCIS) determines, in its sole discretion, the credibility of and weight given to all the evidence. Section 214(p)(4) of the Act; 8 C.F.R. § 214.14(c)(4).

II. ANALYSIS

A. Relevant Evidence and Procedural History

The Petitioner filed his Form I-918 in 2016 with a Supplement B signed and certified by a department chief in the [redacted] Police Department (certifying official) in [redacted], California based on criminal activity that occurred in 2014. In response to Part 3.1 of the Supplement B, which provides check boxes for the 28 qualifying criminal activities listed in section 101(a)(15)(U)(iii) of the Act, the certifying official checked the box for "Felonious Assault," "Related Crimes," and "Other:", adding "Robbery." The certifying official identified robbery and receipt of stolen property under sections 211 and 496(a) of the Cal. Penal Code, respectively, in Part 3.3 as the specific statutory citations for the criminal activity investigated or prosecuted. When asked in Part 3.5 to describe the criminal activity being investigated, the certifying official stated that the Petitioner was a victim of a robbery and felonious assault by individuals with whom he had arranged to exchange property. In Part 3.6, which requests a description of any known or documented injury to the Petitioner, the certifying official stated that the Petitioner was assaulted by two male suspects, one of whom struck him in the face multiple times while the second suspect took property from him, which caused "substantial emotional, psychological and physical harm."

The Petitioner also included an investigative report showing that law enforcement responded to a "physical altercation and possible robbery" that occurred at a train station and on board a train where the "[s]uspects took shoes and a phone from the victim and physically assaulted him after a trade for property went wrong." The report lists "211 PC; Robbery; Fel." and "496 (A) PC; Receive/Etc Known Stolen Property; Fel." as the offenses associated with the incident. The narrative section of the report indicates that the Petitioner was punched in the face "approximately [three] or four times" but that "he was able to block [the punches] with his hands" and that one of the perpetrators "tried to strike him with closed fists but was not successful." The officer reported that the Petitioner "had no visible injury on his person" and that he stated "he had no injuries and did not need medical attention."

The Director denied the Form I-918 concluding that the Petitioner was the victim of robbery and receiving known stolen property, which are not qualifying criminal activities nor substantially similar to qualifying criminal activity, and that the assault that occurred during the course of the robbery did not rise to the level of a felonious assault under section 245 of the California Penal Code (Cal. Penal

[1] The Supplement B also provides factual 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.

Code), a qualifying crime. Accordingly, the Director determined that the Petitioner did not establish that he was the victim of qualifying criminal activity as required to establish eligibility for U nonimmigrant classification.

On appeal, the Petitioner claims the Director erred in determining that a felonious assault was not detected and investigated while responding to the robbery. Specifically, the Petitioner states that he is a victim of felonious assault because robbery in California involves an assault combined with a theft and the assault that occurred during the course of the robbery in this case rose to the level of a felony assault because the perpetrators repeatedly struck the Petitioner with closed fists which constitutes "force likely to produce great bodily injury," as required for a felonious assault under section 245(a)(4) of the Cal. Penal Code.[2] Finally, the Petitioner asserts the Director erred in determining that robbery under section 211 of the Cal. Penal Code is not substantially similar to the qualifying crime of felonious assault.[3]

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

As stated above, the Act requires that petitioners 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 a 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 . . . .").

Here, the Supplement B, when read as a whole and in conjunction with other evidence in the record, establishes that law enforcement detected, investigated, or prosecuted a misdemeanor assault, robbery, and receipt of stolen property, but does not establish that law enforcement detected, investigated, or prosecuted the qualifying crime of *felonious* assault as perpetrated against the Petitioner.

We acknowledge the certifying official certified that the Petitioner was the victim of a felonious assault in Part 3.1 of the Supplement B and generally asserted the same in describing the offense in Part 3.5. However, contrary to the Petitioner's assertions on appeal, a certifying official's completion of the Supplement B is not conclusory evidence that a petitioner is or was the victim of qualifying criminal

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[2] The Petitioner does not specify the paragraph within section 245(a) of the Cal. Penal Code, but we note that the use of "force likely to produce great bodily injury" is an element of felonious assault under subsection 245(a)(4) of the Cal. Penal Code.

[3] The Petitioner stated on the Form I-290B that he would submit a brief and/or additional evidence to us within 30 calendar days of filing the appeal in support of these assertions. To date, the Petitioner has not submitted a brief or additional evidence.

activity. *See* Section 214(p)(4) of the Act; 8 C.F.R. § 214.14(c)(4) (providing that USCIS determines, in its sole discretion, the credibility of and weight given to all the evidence). In this case, despite checking the box for "Felonious Assault" in Part 3.1 of the Supplement B, the certifying official only identified robbery and receipt of stolen property under sections 211 and 496(a) of the Cal. Penal Code, respectively, in Part 3.3 as the specific statutory citations for the criminal activity investigated or prosecuted and did not identify any statute corresponding to a felonious assault. Similarly, the investigative report cites to only "211 PC; Robbery; Fel." and "496 (A) PC; Receive/Etc Known Stolen Property; Fel." as the offenses investigated during the incident and makes no reference to a felonious assault.

Furthermore, while the Petitioner maintains that the record indicates that law enforcement detected an assault during the robbery, we note that California courts have explicitly found that assault is not a lesser included offense of robbery. *See People v. Wolcott*, 665 P.2d 520, 525 (Cal. 1983). Therefore, an assault is not necessarily detected or investigated as part of a robbery investigation as the Petitioner asserts. And California law recognizes a distinction among assault offenses based on the presence of aggravating factors to determine whether the assault is punishable as a misdemeanor or felony. *Compare* Cal. Penal Code §§ 17, 240, and 241 (defining "assault" and providing that, unless committed against a specific class of persons not applicable here, such crime is punishable as a misdemeanor), *with e.g.* Cal. Penal Code §§ 17 and 245(a) (providing the elements required for assault involving a deadly weapon or force likely to produce great bodily injury, among others, and indicating they are punishable as a felonies). Therefore, the reference to an assault in the investigative report does not necessarily establish law enforcement detected, investigated, or prosecuted a *felonious* assault during the robbery.

Additionally, 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 the certifying law enforcement agency detected, investigated, or prosecuted the qualifying crime as perpetrated against the petitioner under the criminal laws of its jurisdiction. Sections 101(a)(15)(U)(i)(III) and 214(p)(1) of the Act. Here, the Petitioner claims that the robbery in this case involved an assault that rises to the level of a felonious assault because the facts show the perpetrators repeatedly struck the Petitioner with closed fists, consistent with a felonious assault offense involving the use of "force likely to produce great bodily injury" under section 245(a)(4) of the Cal. Penal Code; however, the record does not show that law enforcement detected a felony level assault was perpetrated against the Petitioner or, more specifically, "force likely to produce great bodily injury" as is required for such offense, as he asserts.[4] As explained above, the certifying official in Part 3.3 of the Supplement did not cite any felonious assault statute, including section 245(a)(4) of the Cal. Penal Code, as having been investigated or prosecuted, nor does the investigative report indicate that a felonious assault under this or any other section of the Cal. Penal Code was detected or

[4] The Petitioner cites to *People v. Medellin*, 258 Cal. Rptr. 3d 867 (Cal. Ct. App. 2020) for the proposition that striking someone with closed fists constitutes "force likely to produce great bodily injury." The Court in that case stated "[t]he force likely to produce *bodily injury* can be found where the attack is made by use of hands or fists." *Medillin*, 258 Cal. Rptr. 3d at 875 (emphasis added). The Court continued, however, saying that "[w]hether a fist…would be likely to cause *great bodily injury* is to be determined by the force of the impact, the manner in which it is used and the circumstances under which the force was applied." *Id.* (emphasis added). Thus, despite the Petitioner's assertion, using fists to strike a person does not necessarily establish "force likely to produce great bodily injury" as is required for a felonious assault under section 245(a)(4) of the Cal. Penal Code.

investigated. Based on the foregoing, the Petitioner has not established that a felonious assault, or any other qualifying criminal activity, was detected, investigated, or prosecuted as perpetrated against him.

C. Robbery Under California Law Is Not Substantially Similar to the Qualifying Crime of Felonious Assault

As stated, the record establishes that law enforcement detected and investigated misdemeanor assault, robbery, and receipt of stolen property. These crimes, however, are not one of the 28 qualifying criminal activities listed in section 101(a)(15)(U)(iii) of the Act, nor does the Petitioner assert that they are. And as noted above, 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). The Petitioner does not claim on appeal that receipt of stolen property or misdemeanor assault involve or are substantially similar to a qualifying criminal activity. Instead, the Petitioner asserts the Director erred in determining that robbery under section 211 of the Cal. Penal Code is not substantially similar to the qualifying crime of felonious assault. Therefore, in assessing whether robbery is substantially similar to felonious assault, we must compare the nature and elements of robbery pursuant to 211 of the Cal. Penal Code with the state equivalent of felonious assault in California under section 245(a).

At the time of the criminal activity in 2014, robbery pursuant to section 211 of the Cal. Penal Code was defined 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." By comparison, assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." *See* Cal. Penal Code § 240. A felonious assault under section 245(a) of the Cal. Penal Code (2014) requires the presence of certain aggravating factors as an element of the offense, including the use of force likely to produce great bodily injury, a deadly weapon, or a firearm. The nature and elements of robbery are distinct from felonious assault under section 245(a)(4) in California. Notably, robbery involves taking personal property from someone through force and fear, whereas assault requires an actual attempt to inflict violent injury and the present ability to do so and does not require a taking. *See Wolcott*, 665 P.2d at 525. Robbery similarly does not require the presence of any aggravating factors that is required for a felonious assault. *See* Cal. Penal Code § 245(a). Based on the foregoing, the nature and elements of the two crimes are not substantially similar. Accordingly, the Petitioner has not established that he was the victim of criminal activity that involves or is substantially similar to felonious assault or any other qualifying criminal activity.

III. CONCLUSION

The Petitioner has not established he was the victim of a qualifying criminal activity. U nonimmigrant 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, he necessarily cannot satisfy the criteria at section 101(a)(15)(U)(i) of the Act and we will dismiss his appeal.

ORDER: The appeal is dismissed.