U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24911400

Date: MAR. 01, 2023

Appeal of Vermont Service Center Decision

Form I-918, Petition for U Nonimmigrant Status

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 substantially similar to a qualifying criminal activity, or that he suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity. The matter is now before us on appeal. 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. 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.

"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.*

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).

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 the petitioners' helpfulness in the investigation or prosecution of the qualifying criminal activity perpetrated against them. Section 214(p)(1) of the Act; 8 C.F.R. § 214.14(c)(2)(i). U.S. Citizenship and Immigration Services (USCIS) has sole jurisdiction over Forms I-918. 8 C.F.R. § 214.14(c)(1). 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 his Form I-918 with Supplement B in 2015 seeking U nonimmigrant classification based on having been the victim of a battery under section 242 of the California Penal Code (Cal. Penal Code) in two separate incidents in 2011. The Director concluded that the Petitioner was the victim of battery under section 242 of the Cal. Penal Code, but that section 242 of the Cal. Penal Code was not a qualifying criminal activity. The Director next determined that the Petitioner did not establish section 242 of the Cal. Penal Code was substantially similar to a felonious assault in California. In making this determination, the Director reviewed the requirements for felony-level assault in California, namely that an assault must either involve the use or threat of use of a deadly weapon or object, or actions likely to produce great bodily injury, and found that the battery did not involve either requirement and thus was not substantially similar. The Director also determined the Petitioner did not establish that he suffered substantial physical or mental abuse.

On appeal, the Petitioner does not contest the Director's finding that he was the victim of battery under section 242 of the Cal. Penal Code or that it is not a qualifying criminal activity. However, the Petitioner highlights that he was pushed to the ground and kicked on the face during one of the incidents and that this was likely to produce serious bodily injury. The Petitioner further claims that the combination of the kicks and the fear generated during the incident makes the battery a felonious assault, and that the record establishes that the Petitioner was also the victim of domestic violence, attempted manslaughter, and attempted murder.

At the outset, the record establishes that the Petitioner was the victim of a battery under section 242 of the Cal. Penal Code and that domestic violence, attempted murder, and attempted manslaughter were not detected, investigated, or prosecuted. We note that the Supplement B submitted by the Petitioner does not check boxes for "domestic violence," "manslaughter," or "murder," and the police reports for both incidents either simply refer to battery without any citation to a section of law, or to

section 243 of the Cal. Penal Code, which describes the punishments for different batteries committed under section 242 of the Cal. Penal Code. While the Petitioner asserts that the likely results of the battery could have produced his death, what hypothetically could have been charged as a qualifying crime is insufficient to establish the Petitioner was the victim of such crime unless there is evidence that law enforcement actually detected, investigated, or prosecuted the qualifying crime. With regard to domestic violence, the record does not reflect that the perpetrator was the Petitioner's spouse, cohabitant, co-parent, former spouse, current or former fiancé, or someone with whom the Petitioner was currently or previously dating, as would be required for a domestic violence offense. *See* Cal. Penal Code §§ 243(e)(1), 273.5(b). The Petitioner had previously submitted a copy of a protective order obtained after the batteries occurred, and claimed this was evidence of domestic violence, but the protective order specifically states that it is for "other than domestic violence," which does not support the Petitioner's claim. The Petitioner does not refer to any specific evidence in the record to establish that law enforcement detected, investigated, or prosecuted attempted manslaughter or murder. Thus, there is insufficient evidence to establish the Petitioner was the victim of domestic violence, manslaughter, or murder.

As noted above, the Petitioner does not contest that he was the victim of a battery or that battery is not a qualifying criminal activity, but instead claims that the details of a battery against him makes it a felonious assault. When a certified offense is not a qualifying criminal activity specifically listed 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 the federal, state, or local jurisdiction's statutory equivalent to a qualifying criminal activity. At the time of the battery, California defined a battery as "any willful and unlawful use of force or violence upon the person of another." Cal. Penal Code § 242. The Petitioner does not proffer which felony-level assault provision of the California penal code battery is substantially similar to, but California defines assault under section 240 of the Cal. Penal Code as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Assault under section 240 of the Cal. Penal Code, however, is punished as a misdemeanor. *See* Cal. Penal Code § 241. For an assault to rise to a felony, and thus be a felonious assault, California requires an assault and the presence of an aggravating factor, for instance, the use of a deadly weapon, firearm, or machine gun, or by any means of force likely to produce great bodily injury. *See* Cal. Penal Code § 245(a)-(d). Comparing the nature and elements of battery to assault, a battery necessarily requires a use of force or violence, whereas an assault only requires an attempt to do so. And battery under section 242 of the Cal. Penal Code does not require aggravating factors such as the use of a deadly weapon, firearm, machine gun, or means of force likely to produce great bodily injury. California courts have similarly held that a battery under section 242 of the Cal. Penal Code is distinguishable from assault under section 245 of the Cal. Penal Code, because such an assault may be committed without committing a battery. *See People v. Yeats*, 136 Cal. Rptr. 243, 245 (Cal. Ct. App. 1977). Finally, while the Petitioner claims that the facts associated with one of the incidents, namely that the Petitioner was on the ground and kicked on the face, make the battery a felonious assault, the proper inquiry is not an analysis of the factual details underlying the criminal activity, but a comparison of the "nature and elements" of the crime that was investigated with those of a qualifying crime. *See* 8 C.F.R. § 214.14(a)(9) (describing the process to determine similarities between two statutes). Based on the above analysis, the Petitioner has not established that the nature and elements of battery under section 242 of the Cal. Penal Code are substantially similar to a felonious assault in California. As the Petitioner has not established that he was the victim of a

qualifying criminal activity or a crime substantially similar to one, he has not established eligibility for U nonimmigrant classification.

As noted above, the Director also determined the Petitioner did not establish that he suffered substantial physical or mental abuse, but this determination is not dispositive to our decision and we therefore decline to address it and hereby reserve the issue. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach").

ORDER: The appeal is dismissed.