U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28895779

Date: NOV. 13, 2023

Appeal of Nebraska 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 Nebraska Service Center denied the Form I-918, Petition for U Nonimmigrant Status (U petition), concluding that the record did not establish that the Petitioner was the victim of qualifying criminal activity and suffered substantial physical or mental abuse as a result. 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-1 nonimmigrant classification, a petitioner 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, are being, 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, a petitioner must submit a Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B), from a law enforcement official certifying the petitioner's

helpfulness in the investigation or prosecution of the qualifying criminal activity perpetrated against them.[1] 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 U petitions. 8 C.F.R. § 214.14(c)(4). Although the petitioner 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

A. Relevant Facts and Procedural History

The Petitioner filed his U petition in 2016 along with a Supplement B signed and certified in 2015 (2015 Supplement B) by the Chief of Police, [redacted] California Police Department (certifying official). In response to Part 3.1 of the Supplement B, the certifying official indicated that the Petitioner was the victim of criminal activity involving or similar to conspiracy to commit any of the named crimes and "Other: Terrorist Threats." In response to Part 3.3, which requests the specific statutory citations for the criminal activity investigated or prosecuted, the certifying official listed California Penal Code (Cal. Penal Code) sections 422 (criminal threats), and 242 (battery). The Supplement B additionally describes the factual basis for the charges, explaining that the Petitioner was eating in a restaurant when two masked men, one of whom he recognized as a relative of his ex-spouse, confronted him. One of the suspects punched the Petitioner in the face, causing his nose to bleed, and threatened to go to his house and kill him. The Supplement B also indicates that the Petitioner's ex-relative was a suspected gang member.

The related police report from the [redacted] California Police Department lists the offenses as Cal. Penal Code sections 422, labeling the crime as felony "Threaten Crime With Intent to Terrorize" (criminal threats); 242, misdemeanor battery; and 182(A)(1), conspiracy to commit a crime. The police report states the Petitioner noticed that the perpetrators were "reaching towards their waists as if they had weapons," but he did not actually see a weapon. It also contains one notation under a section labeled "MO Data" mentioning "Assault . . . Strongarm (Hands/Fist/Feet/Etc.)." However, the report lacks any citation to an assault offense or explanation as to the meaning or relevance of the strongarm assault notation, and the only "Offense(s)" cited at the top of each page of the police report are Cal. Penal Code sections 422, 242, and 182. Additionally, an incident report from the [redacted] County Sheriff's Office cites the offense as "242PC" with an offense description of "battery," a misdemeanor, and states that the perpetrator punched the Petitioner in the face during an argument and the Petitioner "was not injured as a result of being punched."

In his personal statement, the Petitioner claimed in relevant part that he was at a restaurant with his family when two men with face coverings entered and approached their table. He recognized one of the men as the spouse of an ex-relative. That man, who the Petitioner knew to be a gang member, accused the Petitioner of insulting his spouse. The men threw hot sauce in the Petitioner's face, punched him in the nose, grabbed him by the shirt, and tried to drag him outside. They also threatened

[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.

the Petitioner and his family, including his infant. The Petitioner noted that he believed the perpetrators were armed because they "reached toward the waistband of their pants a couple of times." The perpetrators left when the police arrived, but the Petitioner and his family continued to fear them.

In response to a request for evidence (RFE) from the Director, the Petitioner submitted a new Supplement B signed by the certifying official in 2021 (2021 Supplement B). The 2021 Supplement B noted at Part 3.1 that the Petitioner was the victim of criminal activity involving or similar to felonious assault, attempt to commit any of the named crimes, and conspiracy to commit any of the named crimes. At Part 3.3, the certifying official cited Cal. Penal Code sections 422 (criminal threats), 242 (battery), and "Conspiracy to commit felony." It also stated, in relevant part, that "it is . . . believed that if the victim had been dragged from the diner by the 2 suspects he would have suffered a greater injury, hence the 'attempt to commit' is related to a felonious assault."

The Director denied the U petition based on a determination that the Petitioner had not established that he was the victim of qualifying criminal activity and suffered substantial physical or mental abuse as a result. The Director explained that criminal threats and battery are not qualifying crimes listed at section 101(a)(15)(U)(iii) of the Act, and the Petitioner had not shown that the crimes perpetrated against him were substantially similar to felonious assault or any other qualifying crime. Additionally, the Director determined that because the Petitioner was not the victim of qualifying criminal activity, he was unable to show that he suffered substantial abuse on account of such criminal activity.

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

The Act requires U petitioners to demonstrate their helpfulness 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 . . . 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 . . . .").

On appeal, the Petitioner clarifies that he does not claim to have been the victim of a completed felonious assault. Instead, he argues that the Director erred in concluding that law enforcement did not detect, investigate, or prosecute, and that he was not the victim of, the qualifying crimes of attempt or conspiracy to commit felonious assault.

The certifying official checked boxes in Part 3.1 of the 2021 Supplement B corresponding to felonious assault, attempt, and conspiracy as the qualifying criminal activity. However, a certifying official's completion of Part 3.1 is not conclusory evidence that a petitioner is or was the victim of qualifying

criminal activity. Part 3.1 of the Supplement B identifies the general categories of criminal activity to which the offense(s) cited in Part 3.3 may relate. *See* 72 Fed. Reg. at 53018 (specifying that the statutory list of qualifying criminal activities represent general categories of crimes and not specific statutory violations). Here, the Supplements B, when read as a whole and in conjunction with other evidence in the record, do not establish that law enforcement actually detected, investigated, or prosecuted the qualifying crime of attempt or conspiracy to commit felonious assault as perpetrated against the Petitioner.

The certifying official did not cite to any assault provision under California law, felonious or otherwise, in Part 3.3 of either Supplement B or elsewhere in the record. The 2015 Supplement B did not indicate that the Petitioner was the victim of criminal activity involving or similar to felonious assault or attempt or conspiracy to commit the same. Although the 2021 Supplement B marked the box for felonious assault at Part 3.1 and stated in the narrative that the Petitioner was the victim of attempt to commit felonious assault because he could have been the victim of felonious assault if he had been dragged from the restaurant, it only provided citations for criminal threats under Cal. Penal Code section 422 and battery under section 242. The 2021 Supplement B also listed "Conspiracy to commit felony" at Part 3.3, but did not provide a citation to suggest that it was conspiracy to commit felonious assault. The related report from the [redacted] Police Department identifies those same offenses as the basis of the investigation, and the report from the [redacted] County Sheriff's Office lists only misdemeanor battery. Although the [redacted] Police Department report also contains a notation referencing "Assault . . . Strongarm (Hands/Fist/Feet/Etc.)," it does not provide any explanation for that notation or a citation in that section of the report, nor does it otherwise cite or indicate that attempt, conspiracy, or commission of felonious assault was detected, investigated, or prosecuted.

In these proceedings, the Petitioner bears the burden of establishing eligibility by a preponderance of the evidence, including that he 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. Considering the totality of the evidence in the record, the Petitioner has not established by a preponderance of the evidence that that law enforcement detected, investigated, or prosecuted attempt, conspiracy to commit, or commission of felonious assault, or any other qualifying crime as perpetrated against him. Instead, the record indicates that law enforcement detected, investigated, or prosecuted, and the Petitioner was the victim of, criminal threats, misdemeanor battery, and conspiracy to commit those crimes under California law.

To the extent that the Petitioner argues that the factual circumstances of the incident establish that he was the victim of attempt and conspiracy to commit felonious assault under California law, 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 law enforcement actually detected, investigated, or prosecuted the qualifying crime as perpetrated against the petitioner. Sections 101(a)(15)(U)(i)(III) and 214(p)(1) of the Act; 8 C.F.R. § 214.14(a)(5). As noted above, the Petitioner has not established that the certifying agency detected, investigated, or prosecuted a qualifying crime as having been perpetrated against him. Moreover, neither of the Supplements B cite to or reference a California assault provision and the accompanying police reports cite only criminal threats, misdemeanor battery, and conspiracy under California law. Despite one reference to strongarm assault committed with "Hands/Fist/Feet/Etc.," without a citation or

explanation, the police report did not list that crime as one of the offenses that formed the basis of the investigation, nor did it cite or otherwise indicate that attempt, conspiracy to commit, or commission of felonious assault occurred. Therefore, the Petitioner has not established that the was victim of attempt or conspiracy to commit felonious assault or any other qualifying crime under section 101(a)(15)(U)(iii) of the Act.

C. Criminal Threats and Misdemeanor Battery Under California Law are not Substantially Similar to a Qualifying Crime

The Petitioner also contends that the nature and elements of criminal threats and battery under California law are substantially similar to attempt and conspiracy to commit felonious assault. He notes the equivalent to felonious assault under California law is assault with a deadly weapon or force likely to product great bodily injury in violation of Cal. Penal Code section 245. The Petitioner states that if the perpetrators had succeeded in their efforts to take him outside the restaurant "so that they could continue to punch and beat him," they would have committed assault with a deadly weapon in violation of Cal. Penal Code section 245, such that the offense should be considered an attempted felonious assault. However, as stated, 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 law enforcement actually detected, investigated, or prosecuted the qualifying crime as perpetrated against the petitioner. Sections 101(a)(15)(U)(i)(III) and 214(p)(1) of the Act; 8 C.F.R. § 214.14(a)(5).

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).

On appeal, the Petitioner submits a new personal statement as well as statements from his spouse and children claiming that they saw the perpetrators flash a gun during the incident.[2] He therefore asserts

[2] The Petitioner's prior submissions stated he thought the perpetrators were armed but did not actually see a weapon. The 2021 Supplement B noted that he "believed that the suspect had a weapon due to the suspects [sic] behavior." In his initial statement, he claimed he "believe[d] they were armed with handguns from the way they reached toward the waistband of their pants a couple of times." The report from the [redacted] Police Department stated the Petitioner saw the suspects reach toward their waists but "never saw a weapon" and that the waiter at the restaurant also told police he "never saw a

that the perpetrators' purpose in trying to take him outside the restaurant was "in order to complete an assault either with a weapon or a firearm, or to complete an assault 'by any means of force likely to produce great bodily injury'" in violation of Cal. Penal Code section 245. He notes that one of the perpetrators was accused of using "force and violence" against him and therefore charged with battery in violation of Cal. Penal Code section 242. Accordingly, he contends the perpetrator committed an offense substantially similar to attempted assault with a deadly weapon or force likely to produce great bodily injury. Cal. Penal Code § 245(a)(4).

However, the Petitioner has not demonstrated that the nature and elements of the crimes law enforcement detected, investigated, or prosecuted as committed against him – criminal threats under Cal. Penal Code section 422, misdemeanor battery under Cal. Penal Code section 242, and conspiracy to commit a crime under Cal. Penal Code section 182 – are substantially similar to a qualifying crime.

Under California law, assault is defined as "an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240. Cal. Penal Code section 245 punishes as a felony the commission of "an assault upon the person of another with a deadly weapon or instrument other than a firearm," with a firearm, or "by any means of force likely to produce great bodily injury . . . ." Cal. Penal Code § 245. We also note that the Supreme Court of California has held that "attempted assault" is not a punishable offense under California law. *See In re James M.*, 9 Cal. 3d 517, 519 (1973).

Criminal threats in violation of Cal. Penal Code section 422 punishes a person "who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat . . . ." Cal. Penal Code § 422(a).

The Petitioner asserts that because criminal threats under Cal. Penal Code section 422 requires a threat "to commit a crime which will result in death or great bodily injury," it is substantially similar to felonious assault under Cal. Penal Code section 245, which he states requires "the threat of a violent injury upon the person of another committed by force likely to produce great bodily injury." Accordingly, he argues that because the perpetrators conspired to commit a criminal threat against him in violation of Cal. Penal Code section 422, they also conspired to commit a felonious assault. He submits a copy of the complaint against one of the perpetrators, which states that criminal threats in violation of Cal. Penal Code section 422 "is a serious felony within the meaning of Penal Code section 1192.7(c)," which also includes felonies such as murder, infliction of great bodily injury on another person, and commission of a felony with the use of a dangerous or deadly weapon.

Under California law, the qualifying crime of felonious assault requires the element of assault, defined as an attempt and present ability to commit a violent injury. Cal. Penal Code § 240. This element is absent from the statute for criminal threats, which encompasses threats made verbally, in writing, or by means of an electronic communication device. Cal. Penal Code § 422. Though we recognize that criminal threats is considered a serious felony under California law, the seriousness of the crime does

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weapon nor heard mention of a weapon." Also, the psychological evaluation he submits on appeal states that he "believed the perpetrators may have had guns underneath their shirts." The Petitioner does not explain on appeal why he and his family members now claim to have seen the perpetrators bear weapons.

not necessarily mean that its nature and elements are substantially similar to the statute for another crime. Here, an analysis of the nature and elements of felonious assault and criminal threats under California law shows they are not substantially similar.[3]

The Petitioner argues that the battery perpetrated against him was substantially similar to attempted felonious assault. Battery as committed against the Petitioner is defined as "any willful and unlawful use of force or violence upon another." Cal. Penal Code § 242. However, battery is distinct in its nature and elements from California's equivalent to the qualifying crime of felonious assault as located in section 245(a) of the Cal. Penal Code.

California law generally punishes battery under section 242 of the Cal. Penal Code as a misdemeanor offense, and did so in this case. *See* Cal. Penal Code §§ 17 and 243 (outlining the classification of the terms felony and misdemeanor and providing the punishments for battery). Misdemeanor battery does not require that a victim suffer an injury as an element of the offense, while assault under Cal. Penal Code section 240 requires the attempt and ability to commit a "violent injury." Rather, "the slightest degree of touching" is sufficient to sustain a charge of misdemeanor battery under California law. *Matter of B.L.,* 239 Cal. App. 4th 1491, 1495 (Cal. 2015) (citing *People v. Myers,* 61 Cal. App. 4th. 328, 335 (Cal. 1998)). Also, unlike the felonious assault provisions, misdemeanor battery can be committed without the use of a weapon, force likely to produce great bodily injury, or any other aggravating circumstance. *See People v. Fuller,* 53 Cal. App. 3d 417, 418 (Cal. 1975) ("A person can commit battery without using a deadly weapon or means likely to produce great bodily harm. While an aggravated assault . . . and battery both include the elements of a simple assault, a violation of Cal. Penal Code section 245 is a greater offense than and separate and distinct from either simple assault or battery."). Based on the foregoing, the Petitioner has not established that the nature and elements of misdemeanor battery are substantially similar to the California law equivalent of felonious assault.

Finally, the Petitioner claims that the facts of the crime make the battery against him an attempted felonious assault because the perpetrators showed a weapon and tried to drag him outside the restaurant. He further states that the protective order he and his family received, which he submits on appeal, was due to the risk of "harm . . . intimidation or dissuasion . . . ." However, 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 felonious assault under California law.

Because the nature and elements of the crimes committed against the Petitioner are not substantially similar to the substantive offense of felonious assault under Cal. Penal Code section 245, they necessarily cannot be considered substantially similar to attempt or conspiracy to commit that same crime. *See People v. Johnson*, 57 Cal. 4th 250, 257 (2013) (explaining that conspiracy under Cal. Penal Code section 182 requires the "specific intent to commit the elements of" the substantive offense, and "'[t]he law of attempt and conspiracy covers inchoate crimes and allows intervention

[3] The Petitioner also argues that his case is factually different from an unpublished AAO decision in which we also determined the nature and elements of criminal threats under Cal. Penal Code section 422 are not substantially similar to felonious assault under Cal. Penal Code section 245. That decision was not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c).

before' the underlying crime has been completed."). Therefore, the Petitioner has not established that he was a victim of a qualifying crime at section 101(a)(15)(U)(iii) of the Act.

D. The Remaining Eligibility Criteria for U-1 Classification

U-1 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. As the Petitioner has not established that he was the victim of qualifying criminal activity, he cannot satisfy the criteria at section 101(a)(15)(U)(i) of the Act. Therefore, we need not reach and hereby reserve the issue of whether the Petitioner has established that he suffered substantial physical or mental abuse as a result of having been the victim of qualifying criminal activity. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *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 the applicant did not otherwise meet their burden of proof).

III. CONCLUSION

The Petitioner has not demonstrated that he was a victim of a qualifying criminal activity, as required. Therefore, he cannot satisfy the eligibility criteria for U nonimmigrant status.

ORDER: The appeal is dismissed.