U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28182440

Date: NOV. 16, 2023

Motion on Administrative Appeals Office 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), concluding that the Petitioner did not establish that she was the victim of a qualifying crime or that she suffered substantial physical or mental abuse as a result of the same. We dismissed the Petitioner's subsequent appeal, finding that the Petitioner had not established that she was the victim of a qualifying crime. We subsequently dismissed a motion to reconsider. The Petitioner submits the instant joint motion to reopen and motion to reconsider. 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). Upon review, we will dismiss the motions.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

A motion to reconsider must establish that our prior 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). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit. At the outset, we note that the Petitioner did not proffer any arguments indicating that we incorrectly applied the law or policy based on the evidence in the record. Thus, we determine that the Petitioner has not established that our decision to dismiss the appeal was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy.

The remaining issue before us is whether the Petitioner has established on motion that our decision to dismiss the appeal should be reopened based on new facts supported by documentary evidence.

On her prior motion to reconsider, the Petitioner asserted that we erred when we determined that interfering with an emergency call was not substantially similar to witness tampering and obstruction of justice under Minnesota law. The Petitioner maintained on motion that the perpetrators' conduct of surrounding the Petitioner, verbally assaulting her by threatening her, and instilling fear in her are substantially similar to "intentionally prevents....attempts to prevent...by means of force or threats of injury to any person or property, a person from providing information to law enforcement authorities concerning a crime. Witness Tampering, Minn. State section Ann. 609.498(1)(d)." And, by preventing, obstructing, and hindering the Petitioner's ability to call law enforcement to help her, the perpetrators denied the police or law enforcement an opportunity to help the Petitioner by arresting or apprehending the perpetrators for robbing and assaulting her, conducts that are "substantially similar to obstruction of legal process."

We acknowledged the fear the Petitioner may have experienced during, and as a result of, the incident, but we explained that 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. Thus, while qualifying criminal activity may occur during the commission of non-qualifying criminal activity, the qualifying criminal activity must actually be detected, investigated, or prosecuted by the certifying agency as perpetrated against the petitioner. *See id.*

As we detailed in our decision to dismiss the motion to reconsider, 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. *Id.* 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). The inquiry, therefore, is not fact-based, but rather entails comparing the nature and elements of the statutes in question.

On motion, the Petitioner submits a letter from her friend D-A-R-[1] who writes that the Petitioner was left with an emotional and psychological scar after the criminal activity.

[1] Initials are used in this decision to protect the identities of individuals.

The Petitioner also submits an updated police report from the [redacted] Police in [redacted] Minnesota. We note that the initial report is dated July 22, 2015, and the supplemental narrative is dated February 13, 2023. In the supplemental narrative, written nearly 8 years after her initial report, the police officer noted that the Petitioner sought to "clarify some of her statements as she feels that they (sic) are specific words that were lost in translation on her previous statement." In her first statement, the Petitioner stated that a rock was thrown at her car, it came through her window hit her in the left side of her head, it was the size of a person's fingertip, and she did not sustain an injury. In the supplemental narrative, the Petitioner now states that at least three rocks were thrown at her and her car, and at least one of them hit her on the left side of her head causing her [a] great deal of pain and a bruise later on. The supplemental narrative stated that the Petitioner, "... emphasized that the rocks were not small and had a circumference of at least 1-2 inches." While in the initial report the Petitioner did not recall that she was verbally abused, she now reported that she "... saw a juvenile female calling her: "What the fuck, fucking bitch, Mexican Bitch" or something like that."

On motion, the Petitioner submits a third Form I-918, Supplement B, U Nonimmigrant Status Certification (Supplement B) dated March 13, 2023. In the narrative section describing the criminal activity being investigated and/or prosecuted, the certifying official now indicates that, "... she had rocks thrown at her car and one of the rocks hit her on her head and (sic) yelled vulgarities at her while she inspected damage of (sic) her vehicle. They approached her in a threatening manner and made contact with her person...[]." In listing the statutory citations for the criminal activity, the certifying official listed Minn. Stat. Ann. sections 609.24, 609.78.2, 609.498, and 609.50 again; and the newly added section 609.245(1) which is aggravated robbery. The Petitioner presumably contends that aggravated robbery constitutes a felonious assault under Minnesota law. Felonious assault is a qualifying criminal activity under the Act. While all relevant, credible evidence in the record will be considered, USCIS determines, in its sole discretion, the credibility of and the weight given to all of the evidence, including the Supplement B. Section 214(p)(4) of the Act; 8 C.F.R. § 214.14(c)(4). Here, although Part 3.1 of the Supplement B indicated that the Petitioner was a victim of the qualifying criminal activity of felonious assault,[2] the certifying official did not list the corresponding Minnesota criminal statutes for felony assault in identifying the criminal offenses that were investigated in Part 3.3 of the Supplement B. While the record shows that the certifying official has now detected aggravated robbery in the first degree under Minn. Stat. Ann. Section 609.245(1), the Petitioner has not established that the offense involves or equates to a felony assault under Minn. Stat. Ann. Sections 609.222 and 609.223(1). Minnesota defines aggravated robbery in the first degree as one who, "while committing a robbery, is armed with a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon, or inflicts bodily harm upon another...[]." Minn. Stat. Ann. section 609.02(6) states that, a ""[d]angerous weapon" means any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or great bodily harm, any combustible or flammable liquid or other device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm, or any fire that is used to produce death or great bodily harm."

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[2] Part 3.1 of the third Supplement B also listed obstruction of justice, witness tampering and attempt to commit any of the named crimes where the Petitioner was a victim. In our prior decisions we discussed at length why the Petitioner did not establish that she was a victim of obstruction of justice and witness tampering as qualifying criminal activities.

We acknowledge that under Minnesota case law, misdemeanor assault is a lesser-included offense of simple robbery which is essentially "a theft accomplished by means of an assaultive act." *State v. Stanifer*, 382 N.W.2d 213, 220 (Minn. Ct. App. 1986). In Minnesota, misdemeanor assault occurs when a person "commits an act with intent to cause fear in another of immediate bodily harm or death," or "intentionally inflicts or attempts to inflict bodily harm upon another." Minn. Stat. § 609.224(1); *see* Minn. Stat. § 609.02(10) (nearly identical definition of assault). However, to render an assault a felony under section 609.222 requires that the perpetrator commit an assault "with dangerous weapons," or alternatively, that the assault is committed "with a dangerous weapon and inflict[]substantial bodily harm." Similarly, assault in the third degree under section 609.223(1) requires the infliction of "substantial bodily harm." While under Minn. Stat. § 609.02(7) "bodily harm" is defined as "physical pain or injury, illness, or any impairment of physical condition," the term "substantial bodily harm" encompasses a greater degree of physical injury and is defined as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture or any bodily member." Minn. Stat. § 609.02(7a). And under Minnesota case law, aggravated robbery requires actual infliction of bodily harm as a required element of the offense. *State v. Burrell*, 506 N.W.2d 34, 37 (Minn. Ct. App. 1993). Intentional infliction of bodily harm constitutes a misdemeanor assault under section 609.224(1)(2). Nevertheless, the commission of a misdemeanor assault during the robbery and the classification of the aggravated robbery as a felony is not sufficient to conclude that a felonious assault occurred and was detected or investigated. As stated, the record does not show that the certifying agency detected conduct establishing the required elements for felony assault under sections 609.222 and 609.223(1), and the Petitioner has not identified any Minnesota statutes under which the certifying agency may have detected conduct that constituted the offense of felonious assault.

Here, the police report updated nearly 8 years after the first report and the latest Supplement B indicate that the Petitioner was hit with a rock during the commission of a robbery. We note that the rock was initially no bigger than a fingertip but has increased in size with a circumference of 1 to 2 inches.[3] In *Acers v. United States*, 164 U.S. 388 (1896), the Supreme Court acknowledged that a large stone (3 inches wide, 9 inches long and an inch and a half to 2 inches thick) could be considered a deadly weapon when used by a defendant to strike the victim in the head, fracturing his skull. While a rock under Minnesota law is not a deadly weapon, as an "article," of 1 to 2 inches in circumference, it is also not a deadly weapon. Because the rock was not large, the Petitioner could not have reasonably believed it to be a dangerous weapon. The Petitioner did not indicate whether she sought medical attention but has now reported experiencing a great deal of pain and bruising. Hence, the evidence does not show that the Petitioner was the victim of substantial bodily harm, the assault was committed with a dangerous weapon, or both, which are required elements to establish either second- and third-degree felony assault under sections 609.222 and 609.223(1). The preponderance of the evidence therefore shows that the Petitioner was likely the victim of aggravated robbery under Minnesota law, and nothing more.

The record as a whole does not show that the certifying agency detected felonious assault, and the offense of aggravated robbery is not amongst the qualifying criminal activities listed in section

[3] And the Petitioner was verbally abused.

101(a)(15)(U)(iii) of the Act. Although the Petitioner has submitted additional evidence in support of the motion to reopen, the Petitioner has not established eligibility for U nonimmigrant status. On motion to reconsider, the Petitioner has not established that our previous decision was based on an incorrect application of law or policy at the time we issued our decision. Therefore, the joint motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.