U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29160801

Date: NOV. 28, 2023

Appeal of Vermont Service Center 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 Vermont Service Center denied the Form I-918, Petition for U Nonimmigrant Status (U petition), and the matter is now before us on appeal. On appeal, the Petitioner submits a brief and additional evidence. 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

Section 101(a)(15)(U)(i) of the Act provides U-1 nonimmigrant classification to victims of qualifying crimes who suffer substantial physical or mental abuse as a result of the offense. These victims must also possess information regarding the qualifying crime and be helpful to law enforcement officials in their investigation or prosecution of it. *Id.*

"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).

United States Citizenship and Immigration Services (USCIS) has sole jurisdiction over U petitions, and the petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; 8 C.F.R. § 214.14(c)(1), (4); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). As a part of meeting this burden, a petitioner must submit a Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B), from a law enforcement official certifying a petitioner's helpfulness in the investigation or prosecution of the qualifying criminal activity.[1] Section 214(p)(1) of the Act; 8 C.F.R. § 214.14(c)(2)(i). The petitioner must also provide a statement

[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.

describing the facts of his or her victimization as well as any additional evidence he or she wants USCIS to consider in establishing that he or she is a victim of qualifying criminal activity and has otherwise satisfied the remaining eligibility criteria. 8 C.F.R. § 214.14(c)(2)(ii). Although a petitioner may submit any evidence for us to consider, USCIS determines, in its sole discretion, the credibility of and 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).

II. ANALYSIS

The Petitioner filed the instant U petition in May 2016 with a Supplement B certified by a detective supervisor at the [redacted] California Police Department. In Part 3.1 of the Supplement B, for criminal acts, the certifying official checked the box for felonious assault. The certifying official also wrote "Robbery" in the box labeled "Other." In Part 3.2, the certifying official noted that the criminal activity occurred in [redacted] 2003. In Part 3.3, when prompted to provide the specific statutory citation investigated or prosecuted, the certifying official wrote, "CALIFORNIA PENAL CODE SECTION 211 – The felonious taking of personal property through force or fear." At Part 3.5 the certifying official described the criminal activity being investigated as follows, "Two Suspects approached Victim V-C-M-[2] & attempted to rob him. While one Suspect acted as a lookout, the other grabbed V-C-M-' neck in an attempt to snatch C-M-' necklace. . . [ ]."

In March 2021, the Director issued a request for evidence (RFE), seeking additional documentation that the criminal activity listed on the Supplement B was a qualifying criminal activity that was specifically listed in the regulations. The Director also requested a complete list of all the entries and exits the Petitioner made into the U.S. in order to address inadmissibility concerns. In response, the Petitioner submitted his declaration listing his exits and entries, and an April 2021 letter from a licensed clinical social worker indicating that the Petitioner was seen on six occasions in April 2021. The licensed clinical social worker opined that the Petitioner was suffering from Post Traumatic Stress Disorder, With Panic Attacks as a result of the [redacted] 2003 crime. In September 2021, the Director conducted a bona fide determination (BFD) of the file and granted the Petitioner deferred action from removal and employment authorization.

In November 2022, the Director issued a second RFE requesting evidence that the crime of Attempted Robbery under California Penal Code (Cal. Penal Code) section 211 was a qualifying crime; and evidence that the Petitioner experienced substantial physical or mental abuse as a result of being the victim of a qualifying crime. In response, the Petitioner resubmitted the Supplement B and the [redacted] Police Department Preliminary Investigation of Attempted Robbery (police report). The Petitioner also submitted a December 2022 clinical evaluation from a licensed counseling psychologist[3] and March 2023 declarations from himself and his spouse. In addition, the Petitioner

[2] We use initials to protect the privacy of individuals.

[3] After two sessions conducted in November 2022, the licensed counseling psychologist opined that the Petitioner, based on his overall life experiences including the tragic loss of a premature baby in 2004, infertility, job stressors, a 1994 workplace robbery, and three occurrences of sexual assault in his early twenties, met the following diagnosis according to the American Psychiatric Association. (2013) *Diagnostic and statistical manual of mental health disorders* (5th ed.) : F33.1 Major

submitted a brief arguing that although the crime was specifically identified as Robbery, he suffered a felonious assault because the suspects blocked his way, threatened to hurt him, physically touched him with force to try to take the necklace, demanded money and reached in their own pockets signaling that they were looking for what could be a weapon. He also argued that the perpetrators of an *attempted* crime under section 664 of the Cal. Penal Code[4] face the same consequences of their actions even of the crime was not completed, and the fact that he did not lose his property in what he describes as an assault, does not mean that he did not "suffer the attempted robbery and its effects." We agree with the Petitioner that he was a victim of an Attempted Robbery, and that attempted crimes may be punished as though the crimes were successfully executed. The Petitioner also reiterates that his two evaluations show that he has experienced substantial physical and mental abuse and that the Attempted Robbery aggravated a pre-existing mental injury and exacerbated his trauma.

In the decision denying the U petition, the Director noted that Attempted Robbery was not one of the numerated crimes and that there was no assault of any kind investigated or prosecuted. The Director explained that for an assault to rise to a felony level, it must be demonstrated that there was use of a deadly weapon, and the actions would likely produce great bodily injury. Thus, the Petitioner's argument that he was assaulted because two suspects blocked his way "making it seem like they had a weapon," and the two suspects attempted to rip the necklace from his neck, did not amount to any crime other than Attempted Robbery. Consequently, the Director concluded that there was insufficient evidence to establish that this incident rose to the level of a felony or that the incident was similar to felonious assault.[5]

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

On appeal, the Petitioner submits a brief, a job letter and several letters of support attesting to his many positive attributes as a father, worker, and friend. The Petitioner reiterates that in June 2003, after he last entered the U.S., he was the victim of a crime when he was "robbed by force by two assailants" who "ripped off his necklace with force" and he was deeply affected by this crime. Thus, he states he is a victim of felonious assault.

The Act requires U petitioners to demonstrate that they 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 qualifying criminal activity includes "the detection or investigation of a qualifying crime or criminal activity, as

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Depressive Disorder Recurrent, Severe, F40.00 Agoraphobia; F43.10 Post Traumatic Stress Disorder; Z65.4 Victim of Crime; Z91.49 Other Personal History of Psychological Trauma; and Z56.6 Other Physical and Mental Strain Related to Work.

[4] Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts. . . []. *See* Cal. Penal Code § 664.

[5] The Director briefly addressed other eligibility criteria in the initial denial, and concluded that because the Petitioner had not shown he was a victim of qualifying criminal activity, he could not satisfy the remaining eligibility requirements for U nonimmigrant status.

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*, 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 . . .").

In this case, the Petitioner has not met his burden of establishing that law enforcement detected, investigated, or prosecuted a qualifying crime as perpetrated against him. We acknowledge that the certifying official checked the box on the Supplement B indicating that the Petitioner was a victim of felonious assault. However, the Supplement B, when read as a whole and in conjunction with other evidence in the record, as well as California law, does not establish that law enforcement actually detected, investigated, or prosecuted the qualifying crime of felonious assault as perpetrated against the Petitioner. *See* 8 C.F.R. § 214.14(c)(4) (stating that the burden "shall be on the petitioner to demonstrate eligibility" and that "USCIS will determine, in its sole discretion, the evidentiary value of [the] . . . submitted evidence, including the . . . Supplement B"). Under Cal. Penal Code § 240 (West 2020) assault is defined, "as an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another" and for an assault in California to be classified as a felony, there must be an aggravating factor involved, such as the use of a deadly weapon or force likely to produce great bodily injury. *See e.g.,* Cal. Penal Code §§ 244, 244.5, 245, 245.3, 245.5 (West 2020).

Beyond the checked box, the certifying official did not reference the crime of felonious assault as perpetrated against the Petitioner elsewhere in the Supplement B. In addition, although the accompanying police report states that "bodily force," was used in the commission of the crime, the report did not identify any type of assault as perpetrated against the Petitioner. Instead, it identified the offense committed as Attempted Robbery. The narrative section of the police report did not reference any assault provision under California law. The police report states that the perpetrator grabbed the victim's necklace and attempted to pull it off his neck unsuccessfully. Notably, no injuries appear to have been reported at the time of the police report. Finally, although the Petitioner reports and the Supplement B Part 3.6 support the contention that the Petitioner complained of pain to his neck area and he suffered emotional trauma, it does not indicate that an aggravating factor was present, such as use of a deadly weapon or force likely to produce great bodily injury. As a result, the 2016 Supplement B's checked box is inconsistent with the information outlined in the remainder of the document and within the 2003 police report, which served as the basis for the certification of the Supplement B.

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. Moreover, 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). Based on the foregoing, the Petitioner has not established by a preponderance of the evidence that law enforcement detected, investigated, or prosecuted the qualifying crime of felonious assault. Instead,

the record indicates that law enforcement detected, investigated, or prosecuted, the crime of Attempted Robbery.

B. Bona Fide Determination

On appeal, the Petitioner argues that he received a "Bonafide Approval" after submitting evidence to the 2021 RFE regarding the qualifying crime, and that "USCIS was not satisfied with this determination and once again asked for evidence in 2022 regarding this. . . qualifying crime even after issuing deferred action and an accompanying work permit." The Petitioner argues that he waited 8 years for a U visa so that he could apply for adjustment of status and that "USCIS granting the Bonafide Determination and then ultimately denying the U-visa was inconsistent and unfair. . .." The Petitioner additionally argues that he "deserves to be granted his legal status after relying so heavily on it" and he is a person of "excellent moral character." At the outset, we note that the establishment of good moral character is not required for U nonimmigrant status.

Pursuant to 8 U.S.C. 1184(p)(6) and 1103(a), the Department of Homeland Security may conduct a BFD, and if warranted as a matter of discretion, provide employment authorization and deferred action for petitioners with pending U petitions.[6] As a matter of policy, USCIS interprets "bona fide" as part of its administrative authority to implement the statute. Bona fide generally means "made in good faith; without fraud or deceit." *Black's Law Dictionary* (11th ed. 2019). Although some petitioners may meet the requirements for BFD, because it is merely a preliminary assessment of their eligibility, ultimately, they may be denied U nonimmigrant status after a full consideration of the record of proceeding. Those who are ineligible for BFD receive a full adjudication of their U petitions for the waiting list and the next step is final adjudication when visas become available under the yearly statutory cap. *See* https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5.

In determining whether to grant BFD, USCIS discerns whether the petitioner meets the initial filing requirements, does not pose a risk to national security and public safety concerns, and are not encumbered by any other negative factors that would prevent an exercise of discretion. Here, the Petitioner was granted BFD in September 2021. We do note however that the grant of a BFD is not usually preceded by an RFE, as it was in this case. However, we are not required to approve applications or petitions where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988). Nevertheless, based on his May 2016 filing date, the Petitioner was thereafter eligible for a complete and thorough adjudication of his U petition. After the Petitioner submitted his response to the second RFE in March 2023, the Director determined he was ineligible for U nonimmigrant status. We note that a grant of BFD does not guarantee that petitioners will later be granted U nonimmigrant status. We realize the harsh result this may cause the Petitioner, including the loss of his employment authorization based on BFD, but BFD was instituted to alleviate some of the hardships

[6] Deferred action is an act of administrative convenience to the government which gives some cases lower priority for removal. There are currently 319,798 U nonimmigrant petitions pending in the first quarter of FY23. *See* https://www.uscis.gov/sites/default/files/document/data/I918_FY23_Q1.pdf. Thus, the grant of a bona fide determination aims to provide U nonimmigrant petitioners with stability and better equip them to cooperate with and assist law enforcement investigations and prosecutions while they await the outcome of their U nonimmigrant petition.

he experienced while his U petition was pending, and it was not intended to be a permanent benefit nor a precursor to the U visa.

III. CONCLUSION

The Petitioner has not established that law enforcement detected, investigated, or prosecuted a qualifying crime as perpetrated against him as required by section 101(a)(15)(U)(i) of the Act. Nor has he shown the crime perpetrated against him is substantially similar to a qualifying crime. Thus, he necessarily cannot satisfy the remaining eligibility requirements for U nonimmigrant status. *See* subsections 101(a)(15)(U)(i)(I)–(IV) of the Act (requiring qualifying criminal activity for all prongs of eligibility).

As stated above, the burden of proof is on a 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). Here, he has not met his burden.

ORDER: The appeal is dismissed.