U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28078158

Date: OCT. 19, 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 Nebraska Service Center denied the Form I-918, Petition for U Nonimmigrant Status (U petition), finding the Petitioner did not establish he was the victim of a qualifying crime. 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

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.

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).

U.S. Citizenship and Immigration Services (USCIS) has sole jurisdiction over U petitions, and petitioners bear 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)(4); Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010). As a part of meeting this burden, petitioners must submit a Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B), from a law enforcement official certifying their

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). Petitioners must also provide a statement describing the facts of their victimization as well as any additional evidence they want USCIS to consider establishing that they are victims of qualifying criminal activity and have otherwise satisfied the remaining eligibility criteria. 8 C.F.R. § 214.14(c)(2)(ii). Although petitioners may submit any 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

In May 2016, the Petitioner filed her U petition with a Supplement B signed and certified by a supervising Deputy District Attorney in the [redacted] County District Attorney's Office in [redacted], California (certifying official). The certifying official checked a box indicating that the Petitioner was the victim of criminal activity involving or similar to "Felonious Assault." The certifying official cited to section 211 (robbery) of the California Penal Code (Cal. Penal Code) as the specific statutory citation detected, investigated, or prosecuted. The police records accompanying the Supplement B contain a case narrative which mirrors the information in the Supplement B and lists the crimes investigated as "Robbery – Strong Arm" under section 211 of the Cal. Penal Code; Possession of a Controlled Substance under Section 11377(A) of the California Health and Safety Code (Cal. Health and Saf. Code); Under the Influence of a Controlled Substance under Section 11550(A) of the Cal. Health and Saf. Code; and Drug Paraphernalia under Section 11364 of the Cal. Health and Saf. Code.

In May 2021, in response to a request for additional evidence that the Petitioner was the victim of a qualifying crime, the Petitioner submitted a second Supplement B for the same incident that occurred in [redacted] 2013, which was certified by a different supervising Deputy District Attorney in the [redacted] County District Attorney's Office. This certifying official cited to robbery under section 211 (robbery) of the Cal. Penal Code and felonious assault under section 245(a)(4) of the Cal. Penal Code. The same police report underlies both Supplements B and that police report only indicates one penal code offense, Cal. Penal Code 211, robbery.

The Director denied the U petition, concluding that the Petitioner did not establish, as required, that he was the victim of qualifying criminal activity, or a victim of a crime that is substantially similar to qualifying crimes found within the regulations. The Director noted that robbery was the crime actually detected and investigated and that robbery is not a qualifying crime. The Director further determined that the Petitioner had not established that the nature and elements of robbery under California law are substantially similar to a qualifying criminal activity. The Director concluded that the Petitioner's submission did not demonstrate that felonious assault constituted the qualifying criminal activity, and that robbery did not constitute a qualifying criminal activity.

[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.

On appeal, the Petitioner maintains she was the victim of robbery and felonious assault. She claims that the Director erred in not considering the entire record, including the two Supplements B, that the facts of the crime were not correctly evaluated, and that the categorical approach was not applied. She also claims that the Director did not follow the evidentiary standard of "any credible evidence." Finally, the Petitioner claims that the perpetrator's "act" "was an assault committed by means of force likely to produce great bodily injury."

As explained below, the record establishes that law enforcement detected, investigated, or prosecuted strong arm robbery under section 211 of the Cal. Penal Code and this offense is not, does not involve, and is not substantially similar to any qualifying crime enumerated at section 101(a)(15)(U)(iii) of the Act.

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

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 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 her burden of establishing that law enforcement detected, investigated, or prosecuted a qualifying crime as perpetrated against her. We acknowledge that the certifying officials in the first and second Supplements B checked boxes indicating that the Petitioner was a victim of criminal activity involving or similar to felonious assault. And, the second Supplement B also included citation to section 245(a)(4) Cal. Penal Code, assault by means likely to produce great bodily injury. However, 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 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").

In summary, when asked to provide a description of the criminal activity being investigated, the certifying official indicated that in [redacted] 2013, "[a]n armed robbery occurred at the [redacted] Gas Station. While fleeing the store, the perpetrator pushed [the Petitioner], a store clerk." The certifying official stated that the Petitioner "was physically harmed when the perpetrator pushed her. The victim was

also emotionally distraught from the crime. She changed job locations after the crime in order to avoid the location of the crime."

The police records accompanying the Supplement B also contain a case narrative, stating that the Petitioner worked in a gas station and saw the Suspect taking a hat, two bags of chips and chip dip and attempting to leave without paying. The Petitioner confronted the Suspect and took away the hat. The Suspect "pushed [the Petitioner] and fled from the store with the two bags of chip and chip dip. [The Petitioner] followed the Suspect [name omitted] to [street near the railroad tracks]. [The Petitioner] saw Suspect [name omitted] walk north along the railroad tracks and then east into [mobile home park]." The Petitioner gave a description of the Suspect, identified the Suspect to police, identified the stolen property, and shared video footage with the police. The police report lists the relevant crime investigated, which mirrors the information in the Supplement B, as "Robbery – Strong Arm" under section 211 of the Cal. Penal Code.

The Petitioner's June 2021 statement describing the 2013 incident does not match the police report and two Supplements B. The first contact with the Suspect is described as:

> The woman screamed at me. She seemed out of control. The woman screamed at me and threatened me. She said that she was going to hurt me. Then she pushed me to the wall with a lot of force. I could tell that she wanted to hurt me. Luckily, I didn't hit my head or anything when I fell, but I was stunned. The woman ran out of the store.

After the Petitioner collected herself, she pursued the Suspect:

> I got up and followed the woman out of the store to see where she was going. When the woman saw me, she grabbed my arm. The woman pushed me again and this time I fell to the ground. After I fell, I felt a lot of pain in my leg. Then the woman ran off.

There is a conflict between the contemporaneously taken victim statement memorialized in the police report, which describes one instance of physical harm to the Petitioner, i.e., the Suspect pushing the Petitioner before fleeing the store, and the Petitioner's June 2021 statement which describes a second instance of physical harm outside the store, when the Petitioner pursued the fleeing Suspect.

At the outset, we do not diminish the fear the Petitioner may have experienced during, and as a result of, the incident. However, assertions regarding what hypothetically could have been charged as a qualifying crime are 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. Again, we note that 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 . . ..").

As detailed above, the original Supplement B submitted with the Petitioner's U petition and the remaining evidence in the record do not reference any felonious assault provision under California law that was at any time detected, investigated, or prosecuted by law enforcement as perpetrated against the Petitioner. While we acknowledge that in part 3.1 of the Supplement B, the certifying official checked a box indicating that the Petitioner was the victim of criminal activity involving or similar to "Felonious Assault," a certifying official's completion of part 3.1 is not conclusive evidence that a petitioner is 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) 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). Neither the original Supplement B nor the police report cites to or references any felony-level assault provision under California law as detected, investigated, or prosecuted as perpetrated against the Petitioner.

With regard to the second Supplement B submitted, as noted by the Director, the Petitioner has not established that felonious assault under Cal. Penal Code 245(a)(4) was detected, investigated, or prosecuted by law enforcement as perpetrated against her. California law defines assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240. For an assault to possibly be classified as a felony under Cal. Penal Code 245(a)(4), however, an aggravating factor must be present, i.e., any means of force likely to produce great bodily injury. Here, Cal. Penal Code 245(a)(4) is a wobbler statute that may be charged as a felony or a misdemeanor. If convicted of Cal. Penal Code 245(a)(4) as a misdemeanor, the penalties include up to one year in the county jail and a fine up to $1,000. If convicted of Cal. Penal Code 245(a)(4) as a felony, then the penalties include two, three, or four years in a California state prison and a fine up to $10,000. The Petitioner has not met her burden of proof that the requirements of a felony, not misdemeanor, under Cal. Penal Code 245(a)(1) were detected, investigated or charged.

Although, as the Petitioner argues, she may submit "any 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). Here, the contemporaneous 2013 police report's description of the actions against the Petitioner conflicts with the Petitioner's 2021 statement describing two separate physical contacts with the Suspect. Moreover, the police report did not indicate that law enforcement detected or investigated an assault.

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 preponderance of the evidence indicates that law enforcement detected, investigated, or prosecuted robbery under section 211 of the Cal. Penal Code.

C. Robbery under California Law is Not Substantially Similar to the Qualifying Crimes of Felonious Assault or False Imprisonment

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).

At the time of the incident against the Petitioner, California law defined robbery 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." Cal. Penal Code § 211. The felonious intent that robbery requires is the intent to permanently deprive the victim of his property. People v. Mendoza, 74 Cal. App. 5th 843, 850 (2022); see also People v. Torres, 33 Cal.App.4th 37, 50, (1995).

We acknowledge that robbery under section 211 of the Cal. Penal Code is a felony offense. However, robbery is otherwise distinct in its elements from California's equivalents to the qualifying crime of felonious assault. Robbery requires a taking of personal property as a required element of the offense, which is not required under any of California's felonious assault provisions. Also, unlike the felonious assault provisions, robbery does not require the use of a weapon, force likely to produce great bodily injury, or any other aggravating circumstance, and it can be committed "without attempting to inflict violent injury, and without the present ability to do so . . .." People v. Wolcott, 665 P.2d 520, 525 (Cal. 1983). Based on the foregoing, the Petitioner has not established that the nature and elements of robbery are substantially similar to a felonious assault under California law.

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 she was the victim of qualifying criminal activity, or an offense that is substantially similar to a qualifying criminal activity, she necessarily cannot satisfy the criteria at section 101(a)(15)(U)(i) of the Act.

ORDER: The appeal is dismissed.