U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21500553

Date: DEC. 20, 2022

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 Petitioner's Form I-918, Petition for U Nonimmigrant Status, concluding that the Petitioner did not establish that he was a victim of qualifying criminal activity, or a crime substantially similar to a 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 in their investigation or prosecution of the crime. Section 101(a)(15)(U)(i) 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* (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). 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). A "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).

II. ANALYSIS

A. Relevant Evidence and Procedural History

The Petitioner sought U nonimmigrant classification claiming he was the victim of crimes consistent with obstruction of justice under chapter 843 of the Florida Statutes Annotated (FSA), and assault under sections 784.011 and 784.021 of the FSA. In support of his petition, the Petitioner provided a Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B), indicating that law enforcement investigated or prosecuted sections 806.13 (Criminal mischief), 810.08 (Trespass in structure or conveyance), and 901.36 (Prohibition against giving false name or false identification by person arrested or lawfully detained) of the FSA. Police reports submitted with the Supplement B showed that law enforcement made two arrests pursuant to sections 810.02(2)(A) (Burglary), 901.36 (Prohibition against giving false name or false identification by person arrested or lawfully detained), 322.03 (Drivers must be licensed), and 322.34 (Driving while license suspended, revoked, canceled, or disqualified) of the FSA. Court documents show that two men were arrested as a result of the incident and convicted of criminal mischief pursuant to section 806.13(1)(B)(2) of the FSA, trespass pursuant to section 810.08 of the FSA, and giving a false name pursuant to section 901.36 of the FSA.

The Director denied the Petitioner's Form I-918 concluding that the Petitioner was the victim of criminal mischief pursuant to section 806.13 of the FSA, which is not listed in section 101(a)(14)(U) of the Act, and therefore was not a qualifying criminal activity, and that the same statute was not substantially similar to section 784.021 of the FSA, titled "Aggravated assault," because the police report did not mention a deadly weapon or that aggravated assault was investigated. The Director also considered whether giving a false name under section 901.36 of the FSA constituted the qualifying criminal activity of obstruction of justice but concluded that law enforcement did not detect or investigate obstruction of justice and that section 901.36 was not substantially similar to any of the statutes contained in chapter 843 of the FSA relating to obstruction of justice.

On appeal, the Petitioner states that he is the victim of criminal mischief pursuant to 806.13 of the FSA but that USCIS erred in its examination of whether criminal mischief was substantially similar to aggravated assault pursuant to section 784.021 of the FSA. The Petitioner also asserts that he was the victim of an aggravated assault that occurred during the commission of the burglary even if it was not charged by law enforcement. The Petitioner does not identify any error or make any argument regarding the Director's decision on obstruction of justice and we deem the issue waived.

B. Criminal Mischief Pursuant to Section 806.13 of the FSA is not Substantially Similar to Aggravated Assault Pursuant to Section 784.021 of the FSA

As we detailed above, the Director had concluded that section 784.021 constituted a felonious assault under Florida law, but that it was not substantially similar to criminal mischief pursuant to section 806.13 because the record did not establish that the perpetrators were holding a deadly weapon or that

law enforcement investigated the crime of aggravated assault. The Petitioner maintains that the Director erred in its analysis on this point because aggravated assault does not necessarily require the use of a deadly weapon and instead can be accomplished when there is an assault coupled with an intent to commit a felony. We agree with the Director that criminal mischief pursuant to section 806.13 is not substantially similar to aggravated assault pursuant to section 784.021.

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, section 806.13(1) of the FSA stated, "[a] person commits the offense of criminal mischief if he or she willfully and maliciously injures or damages by any means any real or personal property belonging to another, including, but not limited to, the placement of graffiti thereon or other acts of vandalism thereto." By comparison, section 784.011 defined assault as "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Section 784.021 incorporated the above definition to make the assault "aggravated" if the perpetrator used a deadly weapon without an intent to kill or committed the assault with an intent to commit a felony. The nature and elements of criminal mischief are limited to acts against property, whereas an aggravated assault involves acts against a person. Accordingly, the Petitioner has not established that the nature and elements of criminal mischief are substantially similar to aggravated assault.

C. Law Enforcement Did Not Detect, Investigate, or Prosecute a Felonious Assault

As noted above, the Petitioner claims that law enforcement detected and investigated aggravated assault pursuant to section 784.021 of the FSA during the commission of the burglary under section 810.02(2)(a) of the FSA even if it wasn't charged. At the outset, neither the Supplement B nor any law enforcement record cite to section 784.021, and the certifying official did not check a corresponding box on the Supplement B indicating that the Petitioner was the victim of any felonious assault. The record does show that law enforcement detected and investigated burglary pursuant to section 810.02(2)(a), which requires an assault or battery be committed during the commission of a burglary. While section 810.02(2)(a) is punishable as a felony, and an assault or battery must have occurred in order to satisfy the elements of the statute, this does not necessarily establish that a

felonious assault was detected or investigated. Section 784.011 of the FSA defines assault in Florida and punishes a violation of that section as a misdemeanor. A "felonious assault," however, must involve an assault that is classified as a felony under the law of the jurisdiction where it occurred, distinct from a misdemeanor assault or battery committed during the course of another felony, and there is no requirement that a felony-level assault be detected or investigated to satisfy the elements of section 810.02(2)(a) of the FSA. *See Tambriz-Ramirez v. State*, 213 So.3d 920, 923 (Fla. Dist. Ct. App. 2017), *aff'd* 248 So.3d 1087 (Fla. 2018) (explaining that a *simple* assault or battery is necessarily included within a burglary with an assault or battery offense, while *aggravated* assault is not) (emphasis added). Accordingly, law enforcement did not inherently detect or investigate an aggravated assault pursuant to section 784.021 of the FSA through their investigation of a burglary pursuant to section 810.02(2)(a).

As noted by the Director, aggravated assault under section 784.021 of the FSA constitutes a felonious assault but is distinct from simple assault under section 784.011 in that it requires either the use of a deadly weapon or an intent to commit a felony combined with an assault. While the Petitioner states in an affidavit that the perpetrators were wielding a baseball bat, we note that what hypothetically could have been investigated or charged as a qualifying crime is not sufficient to establish eligibility absent evidence indicating, by a preponderance of the evidence, that law enforcement authorities in fact detected, investigated, or prosecuted the qualifying criminal activity as perpetrated against the Petitioner. Sections 101(a)(15)(U)(i)(III) and 241(p)(1) of the Act. In this case, the evidence provided by the Petitioner does not establish that law enforcement detected or investigated the use of a baseball bat or any deadly weapon with the assault.

Furthermore, the record does not establish law enforcement detected or investigated the perpetrators' intent to commit a felony beyond the burglary and subsequent assault. *See Tambriz-Ramirez*, 213 So. 3d at 922 (stating that sections 810.02 and 784.021 of the FSA are separate offenses and each require proof of an element that the other does not); *see also Fesser v. State*, 151 So. 889 (1934) (where an indictment charges an assault with intent to commit a felony, the intent is an essential ingredient of the crime charged and must be proven); *Newsome v. State*, 355 So. 2d 483 (Fla. Dist. Ct. App. 1978) (intent to commit a felony offense was an essential element of section 784.021(1)). While law enforcement may have detected and investigated an assault as part of the burglary at the Petitioner's residence, the record provides no indication that any intent to commit an additional crime, let alone a felonious one, was detected or investigated as part of the assault. Therefore, the Petitioner has not established that law enforcement detected or investigated a felonious assault.

D. The Remaining Eligibility Criteria for U nonimmigrant classification

U nonimmigrant 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 noted by the Director, because the Petitioner has not established that he was the victim of qualifying criminal activity, he necessarily cannot satisfy the criteria at section 101(a)(l5)(U)(i) of the Act.

III. CONCLUSION

The Petitioner has not established that he was the victim of qualifying criminal activity, or a crime involving or substantially similar to a qualifying criminal activity. Accordingly, the Petitioner is not eligible for U nonimmigrant status.

ORDER: The appeal is dismissed.