U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23291384

Date: DEC. 22, 2022

Motion on Administrative Appeals Office 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 From I-918, Petition for U Nonimmigrant Status, concluding that the record did not establish that the Petitioner was a victim of qualifying criminal activity, or a crime substantially similar to a qualifying criminal activity. The Director subsequently denied a motion to reconsider for the same reasons. We dismissed the Petitioner's appeal after determining that law enforcement did not detect, investigate, or prosecute a qualifying crime, or criminal activity involving or substantially similar to a qualifying crime. The matter is now before us on a motion to reconsider. Upon review, we will dismiss the motion.

I. LAW

A motion to reconsider must establish that our 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). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

As stated in our decision on appeal, which we incorporate herein, section 101(a)(15)(U)(i) of the Act provides U nonimmigrant classification to victims of qualifying crimes who possess information regarding the qualifying crime and be helpful to law enforcement officials in their investigation or prosecution of the crime. 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). As required initial evidence, petitioners must submit a Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B), from a law enforcement official certifying the petitioners' 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 Forms I-918. 8 C.F.R.

[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.

§ 214.14(c)(4). Although petitioners 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).

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. 8 C.F.R § 214.14(a)(9). 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)(l5)(U)(iii) of the Act. *Id.*

II. ANALYSIS

A. Relevant Facts and Procedural History

The Petitioner initially sought U nonimmigrant classification claiming she was the victim of robbery and false imprisonment under sections 211 and 236 of the California Penal Code (Cal. Penal Code), respectively. The Director denied the Petitioner's Form I-918, concluding that robbery, and not felonious assault or false imprisonment, was detected, investigated, or prosecuted, and that robbery was not substantially similar to a qualifying criminal activity.[2]

On appeal, the Petitioner claimed that that her Form I-918 was erroneously denied because "[r]obbery in the present case is substantially similar to [f]elonious [a]ssault." We dismissed the appeal, however, concluding that robbery under section 211 of the Cal. Penal Code was the crime detected and investigated, that it was not a qualifying criminal activity listed in section 101(a)(15)(U)(iii) of the Act, and that it was not substantially similar to a felonious assault under California law.

On motion, the Petitioner contends that it was improper for USCIS to find that false imprisonment was not investigated and was not a lesser included offense of robbery, and that robbery is substantially similar to felonious assault and false imprisonment.

B. Law Enforcement did not Detect or Investigate False Imprisonment

The record reflects that at the time the incident was reported, law enforcement investigated the report of a phone stolen at knifepoint and that the incident was described as a robbery pursuant to section 211 of the Cal. Penal Code. The Petitioner also claims on motion that she submitted evidence showing her son was the victim of robbery pursuant to section 211 of the Cal. Penal Code. The record establishes that law enforcement detected and investigated a robbery pursuant to section 211 of the Cal. Penal Code.

[2] We note that the Director did not analyze in his initial decision, or on motion, whether the Petitioner was a direct or indirect victim. *See* 8 C.F.R. § 214.14(a)(14)(i). This distinction similarly was not addressed on appeal or on motion to reconsider but is not dispositive to our decision.

The record does not, however, establish that law enforcement detected or investigated false imprisonment. Neither the initial Supplement B nor any law enforcement record cite to false imprisonment as having been investigated, even though a state statute criminalizing false imprisonment existed at the time of the robbery. *See* Cal. Penal Code § 236 (West 2012). While the certifying official for the second Supplement B indicated in Parts 3.1 and 3.3 that the criminal activity at issue included false imprisonment, he did not address the inconsistency between the initial and second Supplements B regarding the addition of the qualifying criminal activity nor did he provide any updated evidence to support the assertion that false imprisonment was actually detected or investigated. To the extent the Petitioner argues that USCIS should have found that false imprisonment is a lesser included offense of robbery, California has explicitly held that false imprisonment is not a lesser included offense of robbery even though they may share some of the same elements. *See People v. Reed*, 92 Cal. Rptr. 2d 781, 787 (Cal. Ct. App. 2000). Thus, the Petitioner has not established by a preponderance of the evidence that law enforcement detected or investigated false imprisonment.

C. Robbery is not Substantially Similar to Felonious Assault or False Imprisonment

On motion the Petitioner claims that robbery is substantially similar to felonious assault and false imprisonment. As noted above, the record establishes that robbery is the crime that was detected and investigated. Robbery is not listed as a qualifying criminal activity in Section 101(a)(15)(iii) of the Act. Therefore, for the Petitioner to meet her burden to establish robbery is substantially similar to felonious assault or false imprisonment, she must compare the nature and elements of robbery pursuant to 211 of the Cal. Penal Code with felonious assault and false imprisonment as defined by the federal, state, or local jurisdiction's statutory equivalent.

Robbery pursuant to section 211 of the Cal. Penal Code, at the time of the criminal activity against the Petitioner's son, was defined 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." By comparison, assault was defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." *See* Cal. Penal Code § 240 (West 2012). California also recognizes a distinction among assault offenses based on the presence of aggravating factors to determine the severity of the punishment. *Compare* Cal. Penal Code §§ 17, 240, and 241 (defining "assault" and providing that, unless committed against a specific class of persons not applicable here, such crime is punishable as a misdemeanor), *with e.g.* Cal. Penal Code §§ 17 and 245(a) (providing the elements required to sustain a conviction for and classifications of an assault involving a deadly weapon or force likely to produce great bodily injury, and indicating that is it punishable as a felony) (West 2012). The nature and elements of robbery are distinct from assault in California. Notably, robbery involves taking personal property from someone through force and fear, whereas assault requires an attempt to commit violent injury and the present ability to do so. This distinction has been recognized by California courts. *See People v. Wolcott*, 665 P.2d 520, 525 (Cal. 1983). Robbery similarly does not involve an aggravating factor like use of a weapon or great bodily injury that would be required for the assault to be felonious. To the extent the Petitioner claims that felonious assault is a lesser included offense of robbery to establish the crimes are substantially similar, we note that California has explicitly found that assault is not a lesser included offense of robbery. *See Wolcott*, 665 P.2d at 525. In fact, the case cited by the Petitioner, *People v. Guerin*, 99 Cal. Rptr. 573 (Cal. Ct. App. 1972), was made obsolete by a statutory amendment in 1977. *See People v.*

McGreen, 166 Cal. Rptr. 360, 362 (stating, "[w]e agree that since the amendment to section 211, subdivision (a), effective July 1, 1977, eliminating degrees of robbery, assault with a deadly weapon is not, as a matter of law, a lesser included offense of robbery."). Accordingly, robbery pursuant to section 211 of the Cal. Penal Code is not substantially similar to felonious assault in California.

False imprisonment at the time of the criminal activity against the Petitioner's son was defined as, "the unlawful violation of the personal liberty of another." *See* Cal. Penal Code § 236 (West 2012). The nature and elements of robbery are distinct from false imprisonment in California because robbery involves taking personal property through force and fear, whereas false imprisonment has no reference to property and instead only involves a person's personal liberty. This distinction was also recognized by California courts. *See Reed*, 92 Cal. Rptr. 2d at 787. Robbery is therefore also not substantially similar to false imprisonment in California.

III. CONCLUSION

The Petitioner has not demonstrated she was the victim of qualifying criminal activity. As such, the Petitioner has not established that our prior decision was based on an incorrect application of law or USCIS policy, or that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision.

ORDER: The motion to reconsider is dismissed.