



**U.S. Citizenship
and Immigration
Services**

Non-Precedent Decision of the
Administrative Appeals Office

In Re: 17527864

Date: FEBRUARY 3, 2022

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), concluding that the Petitioner did not establish that she was the victim of a qualifying crime. The matter is now before us on appeal. On appeal, the Petitioner submits additional evidence including, a brief and a statement asserting that she was the victim of qualifying criminal activity and has established eligibility for U-1 nonimmigrant classification. The Administrative Appeals Office reviews 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-1 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 investigating or prosecuting the qualifying criminal activity. Section 101(a)(15)(U)(i) of the Act. 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).

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).

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 U petitions. 8 C.F.R. § 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).

II. ANALYSIS

A. Relevant Facts and History

The Petitioner filed her U petition in October 2015 with a Supplement B signed and certified in May 2015 by the Director of Immigrant Affairs for the [redacted] New York District Attorney's Office (certifying official). The certifying official indicated the event forming the basis for the U petition occurred in [redacted] 2011 but did not check any of the boxes pertaining to qualifying criminal activities under Part 3.1, and instead notated "assault in the third." In Part 3.3. of the Supplement B, the certifying official listed New York Penal Law (N.Y. Penal Law) section 120.00(1) as the specific statutory citation investigated or prosecuted as perpetrated against the Petitioner and referenced the criminal complaint for the Criminal Court of the City of New York. The criminal complaint indicated that the defendant was also charged with harassment in the second degree, in violation of N.Y. Penal Law section 240.26(1). New York law classifies each of the crimes charged as misdemeanor offenses. When asked to provide a description of the criminal activity, the certifying official referred to the criminal complaint which states that the female perpetrator knocked the Petitioner to the ground, and along with an unapprehended male perpetrator, kicked the Petitioner repeatedly about the body and head. The complaint further indicates that the Petitioner sustained lacerations and bruises to her head and body. The Petitioner also submitted photographs purported to show the injuries she sustained as a result of the assault. In her statement, the Petitioner asserts that she was treated at the scene of the incident, and although she sustained a broken nose, she declined treatment at a hospital because her children were with a babysitter, and she did not trust that the babysitter would remain with her children if she was delayed.

The Director issued a request for evidence (RFE) asking the Petitioner to submit additional evidence to demonstrate that the crime listed on the Supplement B is a qualifying crime or one substantially similar to a qualifying crime. In response to the RFE, the Petitioner submitted a brief arguing that she is a victim of felonious assault as prescribed by N.Y. Penal Law section 120.05(1) which provides that a person is guilty of assault in the second degree, a Class D felony, when with intent to cause serious physical injury to another person, he causes such injury to such person or to a third person. After reviewing the Petitioner's response, the Director denied the U petition concluding that misdemeanor assault in the third degree was not a qualifying crime and the evidence in the record did not establish that the Petitioner was a victim of criminal activity substantially similar to felonious assault.

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 contends that she was the victim of the qualifying crime of felonious assault. Specifically, she contends that assault in the third degree under N.Y. Penal Law section 120.00 is substantially similar to the qualifying crime of felonious assault. The record does not support the Petitioner's contentions.

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

The Act requires U petitioners to demonstrate their helpfulness 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 . . .").

On appeal, the Petitioner accurately notes that the equivalent crime to felonious assault in New York is assault in the second degree under N.Y. Penal Law section 120.05. We also acknowledge the Petitioner's contention that she was the victim of felonious assault in that when two individuals, including a male, decide to repeatedly kick a woman in the head rather than another part of her body, an intent to cause serious physical injury may be inferred. However, evidence describing what may appear to be—or hypothetically could have been charged as—a qualifying crime is not sufficient to establish a petitioner's eligibility. Rather, the record must reflect that the certifying law enforcement agency detected, investigated, or prosecuted the qualifying crime as perpetrated against a petitioner under the criminal laws of its jurisdiction. Petitioners must establish their helpfulness to law enforcement investigating or prosecuting qualifying criminal activity "in violation of Federal, State, or local criminal law." Sections 101(a)(15)(U)(i)(III), (iii) of the Act; 8 C.F.R. § 214.14(a)(2), (a)(9), (b)(3).

In this case, the certifying official did not check the box indicating that the Petitioner was the victim of a felonious assault and did not provide the statutory citation to any felonious assault provision of New York law. Further, neither the Supplement B nor the criminal complaint cites to or references any felony-level assault or battery provision under New York law and no other pertinent evidence in the record indicates 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) (providing 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 Form I-918, Supplement B"). Rather, upon review of the Supplement B and the criminal complaint, law enforcement consistently identified the offense as misdemeanor assault. Accordingly, the Petitioner has not met her burden of establishing, by a preponderance of the evidence, that law enforcement

investigated or prosecuted the qualifying crime of felonious assault as occurring against her, and as a result, she has not shown that she is one 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).

C. Assault in the Third Degree Under New York Law is Not Substantially Similar to the Qualifying Crime of Felonious Assault

The Petitioner contends that she was the victim of qualifying criminal activity because the factual circumstances and nature and elements of the certified offense of the criminal activity perpetrated against her are substantially similar to those of felonious assault. 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. 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 offense against the Petitioner, New York law defined assault in the third degree as “[w]ith intent to cause physical injury to another person, [a person] causes such injury to such person or to a third person; or [a person] recklessly causes physical injury to another person; or . . . [w]ith criminal negligence, [a person] causes physical injury to another person by means of a deadly weapon or dangerous instrument.” N.Y. Penal Law § 120.00 (McKinney 2009). As stated above, the relevant statutory provision specifies that “[a]ssault in the third degree is a class A misdemeanor.” *Id.* New York law categorizes felonious assault as either assault in the first degree or assault in the second degree. N.Y. Penal Law §§ 120.05 (“Assault in the second degree is a class D felony.”) and 120.10 (“Assault in the first degree is a class B felony.”). An individual commits assault in the first degree, in pertinent part, when “with intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, [a person] causes such injury to such person or to a third person; or . . . [u]nder circumstances evincing a depraved indifference to human life, [a person] recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person; or . . . [i]n the course of and in furtherance of the commission or attempted commission of a felony or of immediate flight therefrom, [a person], or another participant if there be any, causes serious physical injury to a person other than one of the participants.” N.Y. Penal Code § 120.10 (McKinney 2021). Similarly, an individual commits assault in the second degree, in pertinent part, when “with intent to cause serious physical injury to another person, [a person] causes such injury to such person or to a third person; or . . . [w]ith intent to cause physical injury to another person, [a person] causes such injury to such person or to a

third person by means of a deadly weapon or a dangerous instrument” N.Y. Penal Code § 120.05 (McKinney 2021). Additionally, an individual can commit assault in the second degree if the assault involves a protected class of persons. N.Y. Penal Code § 120.05(3) (McKinney 2021). Accordingly, for an assault to be classified as a felony in New York, an aggravating factor must be present, such as during the commission of another felony, involving a protected class of persons, or resulting in serious physical injury. See e.g., N.Y. Penal Code §§ 120.05, 120.10 (McKinney 2021) (outlining aggravating factors, terms of imprisonment, and fines for felonious assaults).

Considering the foregoing, assault in the third degree is distinct in both its nature and elements from New York’s equivalents to the qualifying crime of felonious assault. As a preliminary matter, we note that New York law punishes assault in the third degree under section 120.00 of the New York Penal Code as a misdemeanor offense. See N.Y. Penal Code §§ 10.00 and 70.15(1) (outlining the classification of the terms felony and misdemeanor and providing the punishments for assault in the third degree). The crime of assault in the third degree is also distinct in its elements from New York’s equivalents to the qualifying crime of felonious assault. For instance, assault in the third degree does not require a specific intent as an element of the offense, which is required under both of New York’s felonious assault provisions. *People v. Walls*, 24 A.D.2d 529, 529 (N.Y. App. Div. 1965). Furthermore, as previously mentioned, only “physical injury” not “serious physical injury” is required for a conviction for assault in the third degree. *People v. Pirozzi*, 237 A.D.2d 628, 631 (N.Y. App. Div. 1997). Also, unlike New York’s felonious assault provisions, assault in the third degree can be committed without the use of a deadly weapon or dangerous instrument or any other aggravating circumstance. See *id.*; see also *People ex rel. Johnson v. Redman*, 23 Misc.2d 58, 60 (N.Y. Sup. Ct. 1960) (stating that “[t]he use of a dangerous weapon such as a knife is not an element of the lesser degree of [third degree] assault”). Based on the foregoing, the Petitioner has not established that the nature and elements of assault in the third degree are substantially similar to felonious assault statutes in New York and, accordingly, has not demonstrated that she was a victim of a qualifying crime at section 101(a)(15)(U)(iii) of the Act.

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 is ineligible for U nonimmigrant classification under section 101(a)(15)(U) of the Act.

ORDER: The appeal is dismissed.