U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19522032

Date: FEB. 18, 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 the Petitioner did not establish she was the victim of a qualifying crime and therefore necessarily did not establish the remaining eligibility criteria for U nonimmigrant status. The matter is now before us on appeal. On appeal, the Petitioner submits additional evidence and a brief asserting the Director erred. 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.

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).

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, 375 (AAO 2010). To meet this burden, petitioners must submit, as required initial evidence, 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 Procedural History

The Petitioner filed her U petition in January 2016, accompanied by a Supplement B that was signed and certified by the Chief of the Town of [redacted] Police Department in [redacted] Wisconsin (certifying official) in July 2015, based on criminal activity committed against the Petitioner in [redacted] 2011. In part 3.1 of the Supplement B, the certifying official marked boxes indicating that the Petitioner was the victim of criminal activity involving or similar to "Felonious Assault" and "Other." At part 3.3, the certifying official cited to sections 346.63(1)(a), 346.63(1)(b), and 346.63(2)(a)1-(a)2 of the Wisconsin Statutes, relating to offenses for operating while under the influence of intoxicants or other drugs, as the specific statutory citations for the offenses investigated or prosecuted as perpetrated against the Petitioner. When asked to provide a description of the criminal activity being investigated or prosecuted, the certifying official wrote, "Please see addendum." However, no addendum was attached to the Supplement B. In describing any documented injury to the victim, the certifying official noted that, as a result of the incident, the Petitioner's hair was burned by flames from the crashed vehicle, several of her ribs were fractured, her wrist was injured, and she suffered abdominal and lower back pain. Due to her injuries, the certifying official indicates the Petitioner was transported for emergency medical care and had to attend a rehabilitation clinic for her wrist. Regarding the Petitioner's helpfulness, the certifying official stated that she provided police with statements and information regarding "the vehicular assault" of which she was a victim and appeared in court four times to testify against the perpetrator.

The accident report accompanying the Supplement B indicates the Petitioner was the victim of a motor vehicle accident where the perpetrator was cited for violation of sections 346.63(2)(a)1 and 346.63(1)(b) of the Wisconsin Statutes, relating to offenses involving driving under the influence, and section 346.57(2), relating to speeding violations. The criminal court complaint accompanying the Supplement B indicates that the perpetrator was charged with two counts of operating while under the influence of an intoxicant (OUI) causing injury (a second and subsequent offense), a felony in violation of sections 346.65(3p), 346.63(2)(a)1, and 939.50(3)(h) of the Wisconsin Statutes, and two counts of operating with prohibited alcohol concentration causing injury (a second and subsequent offense), a felony in violation of sections 346.65(3p), 346.63(2)(a)2, and 939.50(3)(h) of the Wisconsin Statutes. The perpetrator was also charged with two misdemeanor offenses of OUI (second offense) under sections 346.63(1)(a) and 346.65(2)(am)2 of the Wisconsin Statutes, and operating with prohibited alcohol concentration (second offense) under sections 346.63(1)(b) and 346.65(2)(am)2. Court

[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.

records indicate that the perpetrator was convicted of two counts of OUI-causing injury (first offense), a misdemeanor in violation of section 346.63(2)(a)1 of the Wisconsin Statutes. The records indicate that the remaining charges against the perpetrator were dismissed.

After issuing a request for additional evidence (RFE) and receiving a timely response, the Director denied the U petition, concluding that the record demonstrated that the Petitioner was the victim of the misdemeanor offense of OUI-causing injury under section 346.63(2)(a)1 of the Wisconsin Statutes, which is not a qualifying crime and is not substantially similar to the state equivalent of the qualifying crime of felonious assault under Wisconsin law.

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* (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; *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 . . . .").

The Petitioner has not met her burden of establishing that law enforcement detected, investigated, or prosecuted the qualifying crime of felonious assault in Wisconsin, as being perpetrated against her, and that she was a victim of said crime, as she asserts. As a preliminary matter, the Petitioner asserts that because the state of Wisconsin does not have a felonious assault statute, aggravated battery under section 940.19 of the Wisconsin Statutes, a felony, is the state equivalent. We acknowledge that there is no criminal statute for assault in Wisconsin but note that the common law definition for assault in a civil action for damages in Wisconsin requires an act with "intent to harm." *See McCluskey v. Steinhorst*, 45 Wis. 2d 350, 357, 173 N.W.2d 148, 152 (1970); *see also Donner v. Graap*, 134 Wis. 523, 115 N.W. 125, 127 (1908). Battery under section 940.19(1) similarly requires an act that causes bodily harm to another and is done with "intent to cause bodily harm." *See also* Wis. Stat. Ann. § 940.19(4)-(6) (West 2011) (defining felony aggravated battery as requiring the performance of acts that are done with the intent to cause either bodily harm or great bodily harm, or which intentionally cause bodily harm and were done by conduct that creates a substantial risk of great bodily harm); *Dunn v. State*, 55 Wis. 2d 192, 197, 197 N.W.2d 749, 751 (1972) (stating that attempted aggravated battery in Wisconsin requires "the intent to cause bodily harm which would have become great bodily harm if [the defendant's] actions had not been interrupted by the intervention of another person or some other extraneous factor"). Accordingly, there is sufficient basis to conclude that the battery involves or is the equivalent of assault in Wisconsin and likewise, felony aggravated battery the

equivalent of a felonious assault, as the Petitioner asserts. *See* Section 101(a)(15)(U)(iii) of the Act (defining qualifying criminal activity as "involving" one of the enumerated criminal activities listed therein or any similar activity"); 8 C.F.R. § 214.14(a)(9) (same). Regardless, the record does not indicate that law enforcement detected, investigated, or prosecuted the crime of felony aggravated battery in Wisconsin as being perpetrated against the Petitioner. We acknowledge that at part 3.1 of the Supplement B the certifying official checked the box indicating that she was the victim of criminal activity involving or similar to the qualifying crime of felonious assault. However, the Supplement B, when read as a whole and in conjunction with other evidence in the record, does not establish that law enforcement actually detected, investigated, or prosecuted the qualifying crime of felonious assault or felony aggravated battery 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").

Here, the law enforcement records submitted, including the Supplement B, accident report, and court records, indicate that the only crimes detected as perpetrated against the Petitioner were OUI-causing injury under Wisconsin Statutes section 346.63(2)(a)1, operating a vehicle while having a prohibited alcohol concentration causing injury under Wisconsin Statutes section 346.63(2)(a)2, OUI under Wisconsin Statutes sections 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration under Wisconsin Statutes 346.63(1)(b). While the police accident report and the criminal complaint also include citations to sections 346.65(2)(am)2, 346.65(3p), and 939.50(3)(h) of the Wisconsin Statutes, those provisions relate to the classification of the criminal activity as a felony and corresponding sentencing enhancements based on the number of times a perpetrator has been convicted of certain specified crimes. None of the law enforcement and court records submitted reflect that the certifying agency detected, investigated, or prosecuted a felony battery or assault as having been perpetrated against the Petitioner.

On appeal, the Petitioner argues that, although the crimes listed in the accident report, criminal complaint, and conviction documents do not include felonious assault, or the Wisconsin equivalent crime of aggravated battery, the facts of the criminal activity involved show that she was a victim of an aggravated battery involving the use of a vehicle as a dangerous weapon, as defined by the Wisconsin Statutes. Specifically, she notes that the facts show that the perpetrator was a repeat offender who engaged in intentional conduct in operating a vehicle under the influence of alcohol, which is conduct that creates a substantial risk of great bodily injury and that resulted in great bodily injury to her, consistent with felony aggravated assault under section 940.19(4) and (6) of the Wisconsin Statutes. The Petitioner also asserts that the facts and the elements of the crimes detected as perpetrated against her are essentially the same as those required to establish felony injury by intoxicated use of a vehicle under section 940.25 of the Wisconsin Statutes, which in turn she argues is substantially similar to felony aggravated battery under sections 940.19(4) and 940.19(6) of the Wisconsin Statutes.

We acknowledge the Petitioner's assertion on appeal that the facts and elements of the crimes detected reflect she was a victim of a felony aggravated battery. However, evidence describing what may appear to be, or hypothetically could have been investigated or charged as, a qualifying crime as a matter of fact is not sufficient to establish a petitioner's eligibility absent evidence indicating, by a preponderance of the evidence, that relevant law enforcement authorities in fact detected, investigated,

or prosecuted the qualifying crime as perpetrated against the petitioner. Sections 101(a)(15)(U)(i)(III) and 214(p)(1) of the Act; 8 C.F.R. §§ 214.14(a)(2), (a)(9), (b)(3). While qualifying criminal activity may occur during the commission of non-qualifying criminal activity, the qualifying criminal activity must actually be detected, investigated, or prosecuted by law enforcement as perpetrated against the petitioner. *See id.* In this instance, while we do not diminish the seriousness of the criminal activity committed against the Petitioner or the harm she describes having suffered, as discussed, the preponderance of the evidence does not demonstrate that law enforcement at any time actually detected, investigated, or prosecuted an aggravated battery under sections 940.19(4) or 940.19(6) of the Wisconsin Statutes. Likewise, the record does not show that law enforcement detected, investigated, or prosecuted as perpetrated against the Petitioner the felony offense of injury by intoxicated use of a vehicle under section 940.25 of the Wisconsin Statutes, as she also asserts on appeal. None of the law enforcement records submitted below, including the Supplement B, accident report, and court records, indicate that a violation of section 940.25 was detected. Furthermore, injury by intoxicated use of a vehicle requires that the perpetrator cause "great bodily harm" to another human being or unborn child. *See* Wis. Stat. Ann. § 940.25 (West 2011). Here, while the record indicates that the certifying agency detected injury to the Petitioner consistent with the OUI-causing injury offense that was investigated and prosecuted, it does not show the certifying agency detected the Petitioner as having suffered "great bodily harm," as contemplated under section 940.25. Additionally, even if the offense of injury by intoxicated use of a vehicle under section 940.25 of the Wisconsin Statutes had been detected by law enforcement, as the Petitioner concedes, it is not a qualifying crime.

Accordingly, the Petitioner has not met her burden of establishing, by a preponderance of the evidence, that law enforcement detected, investigated, or prosecuted felonious assault or any other qualifying crime as perpetrated against her. Instead, as noted above, we conclude the record indicates that the only crimes which law enforcement detected, investigated, or prosecuted as perpetrated against the Petitioner were OUI-causing injury under Wisconsin Statutes section 346.63(2)(a)1, operating a vehicle while having a prohibited alcohol concentration causing injury under Wisconsin Statutes section 346.63(2)(a)2, OUI under Wisconsin Statutes sections 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration under Wisconsin Statutes 346.63(1)(b), none of which are qualifying criminal activities.[2]

C. The Crimes Detected by Law Enforcement Are Not Substantially Similar to the Qualifying Crime 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

[2] These crimes collectively shall be referred to hereinafter as "the detected crimes."

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. *See also* 8 C.F.R. § 214.14(a)(2), (c)(2)(i) (referencing the certifying agency's authority to investigate or prosecute the qualifying criminal activity perpetrated against a petitioner). 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).

Here, the detected crimes are not specifically listed as qualifying crimes at section 101(a)(15)(U)(iii) of the Act. The Petitioner contends, however, that she was the victim of qualifying criminal activity because the nature and elements of the detected crimes are substantially similar to those of felony aggravated battery under sections 940.19(4) and 940.19(6) of the Wisconsin Statutes, Wisconsin's state equivalent to the qualifying crime of felonious assault.[3]

We conclude that the crimes detected by law enforcement here are distinct from felony aggravated battery under Wisconsin law. All of the detected crimes fall under section 346.63 of the Wisconsin Statutes, which section describes crimes related to operating motor vehicles under the influence of intoxicants or other drugs. At the time of the incident, this section provided, in pertinent part, that:

> (1) No person may drive or operate a motor vehicle while:
>
> (a) Under the influence of an intoxicant . . . which renders him or her incapable of safely driving . . . ; or
>
> . . . .
>
> (b) The person has a prohibited alcohol concentration.
>
> . . . .
>
> (2)(a) It is unlawful for any person to cause injury to another person by the operation of a vehicle while:
>
> 1. Under the influence of an intoxicant . . . which renders him or her incapable of safely driving . . .; or
>
> 2. The person has a prohibited alcohol concentration.

Wis. Stat. Ann. § 346.63 (West 2011).

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[3] As previously noted, the Petitioner also asserts that the offense of injury by intoxicated use of a vehicle under section 940.25 of the Wisconsin Statutes is substantially similar to felony aggravated battery under sections 940.19(4) and 940.19(6). However, given our finding that the crime of injury by intoxicated use of a vehicle under section 940.25 of the Wisconsin Statutes was not detected by law enforcement as perpetrated against the Petitioner, we do not reach the Petitioner's argument on the issue of whether it is substantially similar to a qualifying crime.

Section 940.19 of the Wisconsin Statutes defines battery, as well as substantial battery and aggravated battery, the latter two of which are felonies under state law. At the time of the incident, this section provided, in pertinent part, that:

> (4) Whoever causes great bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class H felony.
>
> . . . .
>
> (6) Whoever intentionally causes bodily harm to another by conduct that creates a substantial risk of great bodily harm is guilty of a Class H felony. . . .

Wis. Stat. Ann. § 940.19 (West 2011).

In contrast to the requirements of aggravated battery, the detected crimes described under section 346.63(1) of the Wisconsin Statutes do not require injury as an element of the offense. Similarly, while the offenses described by section 346.63(2)(a) do require actual injury, neither section 346.63(1) nor 346.63(2)(a) require as an element of the offenses that the perpetrator have caused great bodily harm through an act performed with an "intent to cause bodily harm" or have "intentionally" caused bodily injury, as required for aggravated battery under sections 940.19(4) and (6) respectively.

We acknowledge the Petitioner's assertion that the perpetrator in this case acted intentionally in choosing to drive while intoxicated and that the facts of the crime satisfy the elements of felony aggravated battery in Wisconsin. However, as discussed above, the inquiry to establish whether a certified offense is substantially similar to a qualifying crime is not fact-based. Rather, it entails comparing the nature and elements of the statutes in question. *See* 8 C.F.R. 214.14(a)(9). Here, as noted, in examining the elements of the detected crimes, section 346.63 is silent as to criminal intention on the part of the perpetrator, unlike the requirements for aggravated battery under section 940.19. This conclusion is supported by the definition of "criminal intent" under section 939.23(1) of the Wisconsin Statutes, which provides that when the *mens rea* of "criminal intent" is an element of a crime, "it is indicated by the term 'intentionally,' the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe,'" which are terms not included in section 346.63. *Compare* Wis. Stat. Ann. § 939.23(1) (West 2011), *with* Wis. Stat. Ann. § 346.63 (West 2011). Because section 346.63 of the Wisconsin Statutes lacks the requirement that perpetrators intend to commit the unlawful actions that resulted in harm, the detected crimes are not substantially similar to aggravated battery under Wisconsin law, regardless of whether the facts indicate that the Petitioner acted intentionally. Accordingly, the Petitioner has not established that the nature and elements of the detected crimes are substantially similar to the qualifying crime of felonious assault.

Based on the foregoing, the Petitioner has not demonstrated she was a victim of a qualifying crime or a crime that is substantially similar to a qualifying crime, as required by section 101(a)(15)(U)(i) 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, she necessarily cannot satisfy the remaining criteria at section 101(a)(15)(U)(i) of the Act.

ORDER: The appeal is dismissed.