U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20882348

Date: MAR. 25, 2022

Motion on Administrative Appeals Office Decision

Form I-918, Petition for U Nonimmigrant Status

The Petitioner seeks "U-1" nonimmigrant classification as a victim of qualifying criminal activity 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), and we dismissed the Petitioner's subsequent appeal. The matter is now before us on a motion to reconsider. The Petitioner submits a brief reasserting his eligibility. Upon review, we will dismiss the motion.

I. LAW

To qualify for U-1 nonimmigrant classification, petitioners must establish 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). 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 of the evidence, including the Supplement B. Section 214(p)(4) of the Act; 8 C.F.R. § 214.14(c)(4).

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)(l)(4). "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 10l(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 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 the above requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

The Petitioner filed his U petition in May 2015 with a Form 1-918, Supplement B, U nonimmigrant Status Certification (Supplement B), certifying that he was the victim of criminal activity involving or similar to "Obstruction of Justice," "Attempt to commit any of the named crimes" and "Other: Burglary, Inhabited." Regarding the statutory citation for the criminal activity investigated or prosecuted, the certifying official listed section 460(a) of the California Penal Code (Cal. Penal Code). The narrative portion of the Supplement B indicates that the Petitioner "arrived home round 9:45 am and found two suspects stealing items from inside the apartment. When seeing [the Petitioner], both suspects tried to flee the scene of the crime. [The Petitioner] was able to prevent one of the suspects from fleeing the scene, but the other suspect escaped." The Petitioner's statement and the felony report for the incident, produced shortly after the incident occurred, largely confirmed the description of the incident in the Supplement B. The Director subsequently denied the petition, concluding that the Petitioner did not establish, as required, that he was a victim of qualifying criminal activity.

In our prior decision, hereby incorporated by reference, we concluded that the Petitioner had not established that he was the victim of qualifying criminal activity under section 101(a)(15)(U) of the Act. We determined, based on the record before us, that burglary in the first degree under section 460(a) of the Cal. Penal Code detected as perpetrated against the Petitioner is not a qualifying crime and is not substantially similar to felonious assault or any other qualifying crime under California law. We acknowledged the Petitioner's contentions that he was a victim of felonious assault under California law based on the factual circumstances of the offense. However, we noted that the Supplement B and the accompanying felony report only referenced section 460(a) of the Cal. Penal Code as the crime the certifying agency detected, investigated or prosecuted. We also noted that the certifying official did not mark the box in Part 3.1 of the Supplement B indicating that the Petitioner was the victim of criminal activity involving or similar to felonious assault. We further acknowledged the Petitioner's contentions that he was the victim of a felonious assault because he was assaulted in the course of the commission of a burglary, a felony offense. However, we noted that the U nonimmigrant statutory and regulatory provisions indicated that a "felonious assault" must involve an assault classified as a felony under the jurisdiction where it occurred, and that the record showed that law enforcement did not detect, investigate or prosecute a felony-level assault provision as perpetrated against the Petitioner. *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); *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).

We also acknowledged the Petitioner's contention that burglary in the first degree under section 460(a) of the Cal. Penal Code is substantially similar to the qualifying crime of felonious assault because two burglars attacked him as they fled his apartment, resulting in him suffering neck strain and whiplash. We conceded that burglary in the first degree and felonious assault involve aggravating circumstances and are inherently violent offenses. However, we noted that the essential elements for burglary in the first degree involved an entry, an inhabited dwelling, and the intent to commit a theft or felony under

California law, unlike a felonious assault in California. *See U.S. v. Park*, 649 F.3d 1175, 1178 (9th Cir. 2011 (citing *People v. Anderson*, 211 P.3d 584, 589 (Cal. 2009) and stating that, "the California Supreme Court has held that first-degree burglary requires proof of two elements: (1) entry into an inhabited dwelling, (2) with the intent to commit a theft or felony."). 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 (West 2022). Under California law, for an assault to be classified as a felony, an aggravating factor must be present, such as the use of a deadly weapon or force likely to produce great bodily injury, or an assault against a specific class of persons. *See e.g.*, Cal. Penal Code §§ 244, 244.5, 245, 245.3, 245.5 (West 2022) (outlining aggravating factors, terms of imprisonment, and fines for felonious assaults). First degree burglary in California does not require as an element of the offense an assault or any of the aggravating factors that renders an assault a felony. As a result, we concluded that the elements of burglary in the first degree and felonious assault in California are not substantially similar, and consequently, the Petitioner did not establish that the nature and elements of burglary in the first degree are substantially similar to felonious assault.

On motion, the Petitioner again contends that he is eligible for U nonimmigrant status. However, he repeats the same arguments made on appeal regarding burglary in the first degree, while requesting a different outcome. Specifically, he again argues that he was the victim of a felonious assault because he was assaulted during the commission of the first degree burglary, and that the burglary offense in turn is substantially similar to the qualifying crime of felonious assault. Because these facts and arguments are cumulative to evidence already submitted and considered, and in the absence of additional facts or information demonstrating the renewed validity of this assertion or establishing error in our prior decision, we do not reconsider them here. As we stated above, the Petitioner 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). Here, he has not satisfied that requirement as he has not demonstrated any error in our prior decision finding that he is not the victim of the qualifying crime of felonious assault.

The Petitioner also now contends that the factual circumstances of the crime perpetrated against him establish that he was also the victim of obstruction of justice.[1] He notes that the ordinary meaning of obstruction of justice includes "willfully interfering with the process of justice and law, especially by influencing, threatening, harming, or impeding a witness, potential witness, juror or judicial or legal officer or by furnishing false information in or otherwise impeding an investigation or legal process." He notes that, "when [he] tried to detain [the perpetrators] inside his apartment by trying to shut his door, the men charged out." He argues that the two perpetrators obstructed justice because they "harmed and impeded [him] who was a witness to their crime and who tried to detain them to turn them over to the authorities." In this case, the Petitioner has not met his burden of establishing, by a preponderance of the evidence, that law enforcement detected, investigated, or prosecuted the qualifying crime of obstruction of justice as perpetrated against him. Section 291 of the Act; 8 C.F.R. § 214.14(c)(4); *Matter of Chawathe*, 25 I&N Dec. at 375; 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 . . . ."). At the

[1] There is no specific obstruction of justice statute under California law. Rather, there are a number of offenses which fall under the category of obstruction of justice in California including: offering false testimony, preparing false evidence, destroying evidence, tampering or intimidating witnesses and resisting arrest or obstructing a police officer (Cal. Penal Code §§ 132, 134, 135, 136.1 and 148).

outset, in regard to the Petitioner's contention that the factual circumstances of the crime establish that he was the victim of obstruction of justice, evidence of what may appear to be, or hypothetically could have been charged as, a qualifying crime as a matter of fact is 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.

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 "Obstruction of Justice." However, the certifying official, in providing the statutory provision(s) for and describing the criminal activity investigated or prosecuted in the Supplement B, did not identify this activity as obstruction of justice under California law or provide a corresponding statute for that offense. In fact, 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 crimes of felonious assault and obstruction of justice as perpetrated against the Petitioner, as asserted. *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 ... Supplement B"). Apart from the checked box at Part 3.1 the Supplement B, none of the remaining evidence in the record cites to or references any obstruction of justice provision under California law or otherwise indicates that obstruction of justice was at any time detected, investigated, or prosecuted by law enforcement as perpetrated against the Petitioner. Specifically, the Supplement B provided the statutory citation for burglary in the first degree as the specific provision of law detected, investigated, or prosecuted. The felony report, which accompanied the original Supplement B, likewise does not reference obstruction of justice as perpetrated against Petitioner, or an attempt to do so. Instead, the report described officers responding to a report of a residential burglary and listed only burglary in the first degree under section 460(a) of the Cal. Penal Code. The Petitioner bears the burden of establishing eligibility by a preponderance of the evidence, including that he was the victim of qualifying criminal activity detected, investigated, or prosecuted by law enforcement. Section 291 of the Act; 8 C.F.R. § 214.14(c)(4); *Matter of Chawathe*, 25 I&N Dec. at 375. Based on the foregoing, the Petitioner has not established, by a preponderance of the evidence, that law enforcement detected, investigated, or prosecuted the qualifying crimes of obstruction of justice or felonious assault as perpetrated against him.[2] Instead, the preponderance of the evidence indicates that law enforcement detected, investigated, or prosecuted, and he was the victim of burglary in the first degree, which is not a qualifying crime.

III. CONCLUSION

The Petitioner has not established that our prior decision concluding that he was not the victim of qualifying criminal activity under section 101(a)(15)(U)(iii) of the Act 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). Accordingly, his motion to reconsider our prior adverse decision is dismissed.

[2] On appeal, the Petitioner does not present any arguments that burglary in the first degree is substantially similar to obstruction of justice under California law. Therefore, we will not further address that argument in this decision.

ORDER: The motion to reconsider is dismissed.