U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21819085

Date: MAY 17, 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 at 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 Vermont Service Center Director denied the Petitioner's Form I-918, Petition for U Nonimmigrant Status (U petition). The Petitioner filed an appeal that we subsequently dismissed. The matter is now before us on a motion to reopen and a motion to reconsider. Upon review, we will dismiss both motions.

I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration, (2) be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or policy, and (3) establish that the decision was incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reopen or a motion to reconsider that does not satisfy the above requirements must be dismissed. 8 C.F.R. § 103.5(a)(4).

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. "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 Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

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 that the petitioner possesses information concerning the qualifying criminal activity and has been, is being, or is likely to be helpful in the investigation or prosecution of it. Section 214(p)(1) of the Act; 8 C.F.R.

§ 214.14(c)(2)(i). USCIS has sole jurisdiction over U petitions. 8 C.F.R. § 214.14(c)(1). 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. Section 214(p)(4) of the Act; 8 C.F.R. § 214.14(c)(4).

II. ANALYSIS

The Petitioner filed his U petition in December 2015 based on criminal activity committed against him in 2009. The Director denied the petition, concluding that the Petitioner did not establish that he was a victim of qualifying criminal activity. We dismissed a subsequent appeal on that same basis. Our previous decision on appeal, incorporated here by reference, laid out the facts of this case.

In our prior decision, we found that the preponderance of the evidence did not establish that law enforcement detected, investigated, or prosecuted a qualifying crime as perpetrated against the Petitioner, as required, and that he therefore did not establish that he is the victim of qualifying criminal activity. *See* sections 101(a)(15)(U)(iii) and 214(p)(1) of the Act; *see also* 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 . . . ."). Specifically, we noted that, although the certifying official marked the box at part 3.1 of the Supplement B indicating that the Petitioner was the victim of criminal activity involving or similar to the qualifying crime of felonious assault and described the perpetrators as having hit the Petitioner, neither the Supplement B nor the incident report (police report) cited to, or otherwise referenced, any felony-level assault provisions under California law, as having been detected, investigated or prosecuted as perpetrated against the Petitioner. Rather, we found that the evidence, including the Supplement B and police report, identify robbery under section 211 of the California Penal Code (Cal. Pen. Code), which is not a qualifying crime, as the only crime that was detected, investigated, or prosecuted by law enforcement. We further acknowledged the Petitioner's assertion that the perpetrator hit him during the robbery but concluded that this was insufficient to establish his eligibility where the totality of the evidence did not indicate that law enforcement detected a *felony* assault as having been committed against the Petitioner during the robbery or the presence of any aggravating factors, 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, that render an assault a felony under California law. *See e.g.*, Cal. Penal Code §§ 244, 244.5, 245, 245.3, 245.5 (West 2005) (outlining aggravating factors, terms of imprisonment, and fines for felonious assaults in California). Accordingly, we determined that the Petitioner had not established that he was the victim of qualifying criminal activity. On motion, the Petitioner has not overcome our prior determination on appeal.

The Petitioner contends on motion that we erred in our previous determination and that the robbery under Cal. Pen. Code section 211 that was perpetrated against him is a qualifying crime because the Supplement B indicates the certifying law enforcement agency treats robbery as equivalent to a felonious assault.[1] This argument is unavailing because the Supplement B is not conclusive evidence that a petitioner is a victim of a qualifying crime. *See* 8 C.F.R. § 214.14(c)(4) (stating that the burden

[1] In support of his assertion that robbery is an equivalent of the qualifying crime of felonious assault, the Petitioner also cites the Board of Immigration Appeal's decision in *Matter of Francisco-Alonzo*, 26 I&N Dec. 594, 594 (BIA 2015). However, that case involved a determination of whether a criminal conviction qualifies as an aggravated felony crime of violence under the Act and therefore is inapplicable here in the determination of whether felony robbery is a qualifying crime for purposes of U classification.

"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"). As stated in our prior decision, although the certifying official checked the box at part 3.1 of the Supplement B indicating that the Petitioner was the victim of criminal activity involving or similar to felonious assault, the remainder of 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 felonious assault, or any other qualifying crime, as perpetrated against the Petitioner during the criminal activity of which he was a victim.

Relatedly, the Petitioner asserts that because he was assaulted during a felony robbery, the assault committed against him should be considered felonious. Contrary to the Petitioner's assertion, the U-1 statutory and regulatory provisions indicate that, at a minimum, the qualifying crime of "felonious assault" must involve an assault that is classified as a felony under the law of the jurisdiction where it occurred, distinct from the commission of a misdemeanor assault committed during the course of a separate felony offense. *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). Here, we do not dispute the evidence in the record indicating that the Petitioner was "hit" by the perpetrator during the robbery or that such conduct by the perpetrator may qualify as an assault under California law.[2] However, as we previously determined, the record does not indicate that law enforcement detected a felony level assault as having been committed against him or the presence of aggravating factors that are consistent with a felony assault under California law. Moreover, the Petitioner has not cited to, and we are unaware of, any relevant legal precedent demonstrating that a simple or misdemeanor assault is rendered a felonious assault in California if committed during the commission of a robbery or that a felony robbery involving a simple assault is the equivalent of a felonious assault under California law, as he maintains.

Next, the Petitioner again asserts that we should reconsider our prior decision because the record establishes that the certifying agency detected a felonious "armed" assault based on the underlying facts of the case, as set forth in the Supplement B and police incident report, and the ongoing psychological harm he continues to suffer, as reflected in his statement and elsewhere in the record. Specifically, he argues that the record establishes that he was the victim of felony assault and the equivalent crime of aggravated battery because the perpetrator was armed and threatened him with a "purported gun," placing him in fear of imminent danger and significant bodily injury. The Petitioner further asserts on motion that the factual circumstances of the incident demonstrate the felonious nature of the robbery and assault because the crime took place in close proximity to an ATM machine, as demonstrated by newly submitted evidence,[3] which is an aggravating factor rendering robbery in

[2] California law defines assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Pen. Code § 240 (West 2009). For an assault to be classified as a felony, however, an aggravating factor must be present, as stated, 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. Pen. Code §§ 244, 244.5, 245, 245.3, 245.5 (West 2009) (outlining aggravating factors, terms of imprisonment, and fines for felonious assaults).

[3] The only additional evidence submitted by the Petitioner in support of his motions are printouts from the website "gasbuddy.com" to reflect the close proximity of an ATM to the criminal activity in question. No other new or additional evidence was submitted on motion.

California a first degree felony offense.[4] However, as we discussed in our prior decision, 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). Here, as stated, even if law enforcement detected a robbery involving an assault or battery, and regardless of whether the criminal activity was committed near an ATM (consistent with a first degree felony robbery) as the Petitioner now asserts, the record does not indicate that law enforcement at any time detected, investigated, or prosecuted a *felony* assault (or felony battery) under California law, as having been perpetrated against the Petitioner during the course of the felony robbery.[5] Moreover, contrary to the Petitioner's assertions, the record does not indicate that law enforcement detected the perpetrators' use of an actual firearm or deadly weapon in the commission of the crime. The police report narrative indicates that one of the perpetrators pointed a concealed "simulated" gun at the Petitioner, possibly using a small stick found at the scene to imitate a gun. Significantly, the Supplement B does not indicate that the perpetrators were armed in any manner with a real or simulated gun or other weapon. The Petitioner has not submitted any other relevant evidence indicating law enforcement detected the use of a firearm or other deadly weapon in the incident. As such, the record does not establish that a felony assault was detected by law enforcement based on the use of a firearm or deadly weapon (or presence of another aggravating factor) during the robbery.

The Petitioner further argues that, in finding that the robbery of which he was a victim is not a qualifying crime, USCIS ignored the U Interim Rule's mandate to look broadly beyond the specific crime detected in order to determine whether he was a victim of 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 Petitioner is correct that U-1 eligibility may be established even when the crime detected, investigated or prosecuted by law enforcement is not one of the statutorily enumerated qualifying crimes. When the crime detected is not a qualifying crime, the Petitioner may establish eligibility by demonstrating that the offense involves a qualifying crime or is substantially similar to a qualifying crime. *See* section 101(a)(15)(U)(iii) of the Act (defining qualifying criminal activity as that "involving one or more" of 28 specified crimes or "any similar activity"); *see also* 8 C.F.R. § 214.14(a)(9) (defining "any similar activity" as "criminal offenses in which the nature and elements are substantially similar to the statutorily enumerated list" of qualifying crimes).

Here, as discussed, the Petitioner has not demonstrated that the robbery detected is or involved the qualifying crime of felonious assault under California law. The Petitioner also did not specifically assert on appeal, and we thus did not reach, the issue of whether robbery in California is substantially similar to felonious assault or any other qualifying crime. However, on motion, the Petitioner now

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[4] The Petitioner references section 212.5(b) of the Cal. Pen. Code, which states that every "robbery of any person . . . immediately after the person has used an automated teller machine and is in the vicinity of the automated teller machine is robbery of the first degree."

[5] Battery is defined under California law as "any willful and unlawful use of force or violence upon the person of another." Cal. Pen. Code § 242 (West 2009). Like assault, for battery to be classified as a felony, an aggravating factor must be present, such as the infliction of serious bodily injury or commission of the offense against a specific class of persons. *See e.g.*, Cal. Pen. Code § 243 (West 2009) (outlining punishments for various classes of battery).

contends that robbery under section 211 of the Cal. Pen. Code is "substantially similar to felonious assault under section 101(a)(15)(U)(iii) of the Act."

As discussed above, when a certified offense is not among the qualifying criminal activities listed at 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 those of a qualifying criminal activity. Section 101(a)(15)(U)(iii) of the Act; 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)(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).

In this case, the Petitioner does not identify the specific California felony assault statute(s) which he believes to be substantially similar to robbery and instead only generally asserts that robbery under section 211 of the Cal. Pen. Code is substantially similar to felonious assault under section 101(a)(15)(U)(iii) of the Act, which, however, only provides the general categories of qualifying criminal activity. *See* Interim Rule, 72 Fed. Reg. at 53018 (specifying that the statutory list of qualifying criminal activities represent general categories of crimes and not specific statutory violations). As stated, in order to meet his burden in these proceedings, the Petitioner must show that robbery is substantially similar to one of California's statutory equivalents of a felonious assault. *See* Section 291 of the Act (providing that petitioners bear the burden to demonstrate eligibility); *Matter of Chawathe*, 25 I&N Dec. at 375 (same). As he has not identified the statutory equivalent(s) for a felonious assault in California, he has not met his burden.

Moreover, per our review, robbery is not substantially similar to any of California's felony assault offenses. At the time of the incident, California law defined robbery 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." Cal. Pen. Code § 211 (West 2009). We acknowledge that robbery under section 211 of the Cal. Pen. Code is a felony offense. However, it is otherwise distinct in its elements from California's equivalents to the qualifying crime of felonious assault. Robbery requires a taking of personal property as an element of the offense, which is not required under any of California's felonious assault provisions. Also, unlike the felonious assault provisions, robbery does not require the use of a weapon, force likely to produce great bodily injury, or any other aggravating circumstance, and it can be committed "without attempting to inflict violent injury, and without the present ability to do so . . . ." *People v. Wolcott*, 665 P.2d 520, 525 (Cal. 1983). Based on the foregoing, the nature and elements of robbery are not substantially similar to the qualifying crime of felonious assault in California. Accordingly, the Petitioner has not shown that law enforcement detected, and that he is the victim of, qualifying criminal activity or criminal activity substantially similarly to any of the qualifying crimes listed at section 101(a)(15)(U)(iii) of the Act.

The Petitioner has not identified any legal or factual error in, or presented any new evidence or facts that overcomes, our previous determination that the Petitioner did not establish by a preponderance of

the evidence that he was the victim of a felonious assault, as he claimed, or any other qualifying crime. He therefore has not established his eligibility for U nonimmigrant classification.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.