U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28107496

Date: DEC. 19, 2023

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 Form I-918, Petition for U Nonimmigrant Status. We dismissed the Petitioner's subsequent appeal and later a combined motion to reopen and reconsider. The matter is now before us on second motion to reopen. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we will dismiss the motion.

I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). The scope of a motion is limited to the prior decision, and jurisdiction for the motion is limited to the official who made the latest decision in the proceeding. 8 C.F.R. § 103.5(a)(1)(i), (ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

II. ANALYSIS

A. Relevant Facts and Procedural History

While we may not individually discuss each piece of evidence the Petitioner submits with his current motion, we have reviewed and considered each one. We incorporate our prior appeal and motion decisions by reference and will repeat only pertinent facts as necessary to address the Petitioner's assertions on motion.

The Petitioner filed his Form I-918 claiming that he was the victim of a qualifying criminal activity perpetrated against him in 2014. In support of the Form I-918, the Petitioner submitted, in part, a police report and court dockets for each defendant in the criminal case, as well as two Supplements B dated in 2015 and 2019, signed and certified by detectives (certifying officials) in the [redacted] Police Department ([redacted]) in [redacted], California. Both of the certifying officials indicated in

Part 3.1 of the Supplements B that the Petitioner was the victim of criminal activity involving or similar to "Felonious Assault." The 2015 Supplement B also indicated the Petitioner was the victim of "Other: Robbery." However, in Part 3.3 of the Supplements B, which requests the statutory citations for the criminal activity being investigated or prosecuted, both certifying officials cited only to section 211 of the California Penal Code (Cal. Penal Code) that corresponds to robbery under California law. Furthermore, in Part 3.5, which requests a description of the criminal activity being investigated or prosecuted, the certifying officials both stated that the Petitioner was robbed and received verbal threats that included being shot if he did not give the perpetrators everything he had. Consistent with this description in the Supplements B, the police report provided that the offense investigated was robbery, and that the suspects were arrested and booked for "211 PC – Robbery." The police report also included a box for "USE OF FORCE" that is unchecked, and where the report describes any weapons used by the suspects, only "VERBAL THREATS" is written. The court dockets in the record similarly reflected that all three of the perpetrators were charged with "211 PC FEL." The Director denied the Form I-918 after determining that the record did not establish that the Petitioner was the victim of a qualifying criminal activity or activity involving or substantially similar to one.

On appeal, the Petitioner submitted a third Supplement B dated in 2020 that was signed by the same certifying official from the [redacted] who executed the 2019 Supplement B. The certifying official on this Supplement B certified that the Petitioner was the victim of felonious assault and conspiracy to commit any of the named crimes, and for the first time cited both sections 211 and 245 of the Cal. Penal Code as the crimes investigated or prosecuted, which corresponded to robbery and felonious assault. In describing the criminal activity that was investigated or prosecuted, the certifying official referenced the underlying police report and stated that the Petitioner "was the victim of violent assault by three assailants who used spray paint as an instrument to inflict serious bodily harm . . . [and] threatened to spray the victim in the face and eyes." We dismissed the appeal after noting, in part, that the 2020 Supplement B was inconsistent with the two previously submitted Supplements B and that the certifying official did not address or explain the inconsistency, and consequently, the record as a whole did not establish a felonious assault was detected, investigated, or prosecuted.[1]

With the Petitioner's previous combined motion to reopen and reconsider, the Petitioner submitted a fourth Supplement B dated in September 2021 and signed by a judge with the Superior Court of [redacted], along with court hearing transcripts and other previously provided evidence. The 2021 Supplement B indicated that the Petitioner was the victim of felonious assault and also cited sections 211 and 245 of the Cal. Penal Code as the crimes investigated or prosecuted. The Judge stated that the Petitioner was the victim of a violent assault and robbery by three criminal street gang members who threatened to shoot the Petitioner with a firearm, spray him with spray paint in the eyes, and throw beer cans at his face with intent to inflict serious bodily harm, and he asserted that this activity was "analogous" to section 245 of the Cal. Penal Code. The Petitioner claimed that the additional evidence was consistent with previously provided evidence and was sufficient to establish that law enforcement detected and investigated a felonious assault. We dismissed the motion, however, after concluding that notwithstanding this new Supplement B from a different certifying official, the 2015 and 2019 Supplements B and other evidence in the record identified robbery as the only crime that was detected, investigated, or prosecuted, that the Petitioner still had not provided a statement from the certifying

[1] The Petitioner did not dispute the Director's determination that robbery was not a qualifying criminal activity or involving or substantially similar to one.

officials addressing the inconsistencies between Supplements B in the record, and that none of the related court documents submitted on that combined motion, including the preliminary hearing transcript, referenced an assault. We therefore determined the Petitioner's new evidence did not establish he was the victim of the qualifying criminal activity of felonious assault or one substantially similar to that offense and was therefore not sufficient to reopen the matter.[2] Separately, we concluded that the Petitioner did not establish that our previous decision was incorrect as a matter of law or policy or was incorrect based on the record at the time of our decision, to warrant reconsideration.

On current motion, the Petitioner submits four more Supplements B, respectively dated and signed in: 2016 by a director in the [redacted] District Attorney's Office; September 2021 by a second director in the same office; October 2021 by a third director in the same office; and 2022 by a detective supervisor in the [redacted]. In Part 3.1 of the 2016 Supplement B, the certifying official from the district attorney's office indicates the Petitioner was the victim of "Other: Robbery" and in Part 3.3 cites only to section 211 of the Cal. Penal Code for robbery as the criminal activity investigated or prosecuted. In Part 3.1 of the September 2021 Supplement B, however, a different certifying official from the same office indicates the Petitioner was also the victim of felonious assault but in Part 3.3 still only cites to section 211 of the Cal. Penal Code for the criminal activity investigated or prosecuted. Part 3.1 of the October 2021 Supplement B from yet another certifying official in the same office indicates the Petitioner was the victim of a felonious assault but in Part 3.3 similarly only cites to section 211 of the Cal. Penal Code as the criminal activity investigated or prosecuted. Finally, in Part 3.1 of the 2022 Supplement B, another certifying official from the [redacted] indicates the Petitioner was the victim of felonious assault, false imprisonment, and an attempt to commit these crimes, and then in Part 3.3 cites to sections 211, 245(a) for assault with a deadly weapon or force likely to produce great bodily injury, and 236 and 237 for false imprisonment as the crimes investigated or prosecuted. In providing these citations, the certifying official annotates that sections 245(a), 236, and 237 were "detected."

The Petitioner asserts that these new facts and evidence establish eligibility, in part, because law enforcement detected qualifying criminal activity under sections 236 and 245(a)(4), for false imprisonment and felonious assault by any means of force likely to produce great bodily injury, respectively. The Petitioner also claims that robbery under section 211 of the Cal. Penal Code is by definition a felonious assault or substantially similar to that offense. Finally, the Petitioner characterizes our previous decision as arbitrary and capricious and alleges, in part, that we added non-statutory requirements to the evaluation of qualifying criminal activity, ignored key information in the police reports, and should have conducted a de novo review.[3]

[2] The Petitioner erroneously claims we determined in our previous decision that he "has not experienced substantial harm as a result of the criminal activity." However, the Director denied solely on the basis that the Petitioner did not establish he was a victim of a qualifying crime, which we affirmed on appeal and motion. Our decisions on appeal and motion did not address whether the Petitioner had established substantial harm.

[3] We did not specifically address the 2021 Supplement B in our previous decision; however, we have considered it in our current decision and for the reasons explained in this decision, the 2021 Supplement B is not sufficient to establish that the Petitioner is the victim of qualifying criminal activity.

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

The Petitioner's new Supplements B submitted on motion do not overcome our prior determinations to establish that law enforcement detected a qualifying criminal activity as having been perpetrated against him. We acknowledge that certifying officials have checked the box in Part 3.1 of the Supplements B corresponding to "felonious assault" in most of the Supplements B, and, the most recent 2022 Supplement B, the certifying official marked, for the first time, the box for "false imprisonment" as the qualifying criminal activity of which the Petitioner was a victim. However, a certifying official's completion of part 3.1 is not conclusory evidence that a petitioner is or was the victim of qualifying criminal activity. *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"). And 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 . . . .").

Here, the eight Supplements B, when read as a whole and in conjunction with the police report, court documents, and other evidence in the record, establish that law enforcement detected, investigated, or prosecuted a robbery pursuant to section 211 of the Cal. Penal Code and do not establish by a preponderance of the evidence that they actually detected, investigated, or prosecuted the qualifying crimes of felonious assault or false imprisonment as perpetrated against the Petitioner. In this regard, we note that all of the Supplements B in this case reflect that section 211 of the Cal. Penal Code, corresponding to robbery, was investigated or prosecuted. And the citations to this section of law in the Supplements B are consistent with the police report and court records showing that robbery pursuant to section 211 of the Cal. Penal Code was investigated and prosecuted.

Conversely, the 2020 Supplement B from the [redacted] that added section 245 of the Cal. Penal Code for the first time as a crime detected or investigated is inconsistent with two initial Supplements B issued by the [redacted]. And a fourth 2022 Supplement B issued by the [redacted] that is included with this motion now adds for the first time section 236 of the Cal. Penal Code for false imprisonment as a crime investigated or detected, which is similarly inconsistent with the other three by that agency. Additionally, the three Supplements B submitted on this motion by certifying officials from the [redacted] District Attorney's Office all certify that section 211 of the Cal. Penal Code was investigated or prosecuted; however, while the two more recently issued in 2021 assert this renders the Petitioner a victim of a felonious assault, the other, issued in 2016, which is more contemporaneous with the crime and prosecution, asserts the Petitioner was the victim of only a robbery and does not cite to the statute for or reference felonious assault as having been perpetrated against the Petitioner. Despite the inconsistencies between the various Supplements, the record on motion still does not contain statements from any of the certifying officials explaining why sections 236 or 245 of the Cal. Penal Code were added to the Supplements B at a later date, or why the criminal activity detected or investigated would be characterized differently by certifying officers within the same office. And

notwithstanding the Petitioner's claim that the Supplements B are overwhelming evidence that a qualifying criminal activity was detected, investigated or prosecuted, the sheer number of Supplements B by themselves, in light of the inconsistencies in them, are insufficient to establish by a preponderance of the evidence that the qualifying crimes of felonious assault or false imprisonment were detected, investigated, or prosecuted.

Finally, the Petitioner asserts that the underlying facts of the crime, including a beer can being thrown at him, threats of being shot (although no weapon was displayed), and being threatened with spray paint, show that felonious assault and false imprisonment was detected. Additionally, he points to the certifying official from the [redacted] in the 2022 Supplement B who provides legal arguments asserting that the police report details all the required elements for the criminal offenses under section 211, 236, and 245 of the Cal. Penal Code, and that it is sufficient that the crimes were detected and investigated even when no conviction exists. We also acknowledge the 2021 Supplement B from the Superior Court submitted on previous motion, which notes that the transcripts of the criminal court proceedings describe the crime activity as a "violent felony" and concludes that the "criminal activity detected is analogous to" felonious assault under that statute. However, evidence describing 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 (emphasis added). Thus, while a felonious assault pursuant to section 245(a)(4) of the Cal. Penal Code and false imprisonment pursuant to section 236 of the Cal. Penal Code hypothetically could have also occurred during the robbery, as explained, the record as a whole does not establish that law enforcement detected, investigated, or prosecuted the qualifying crimes of felonious assault or false imprisonment as having been perpetrated against him.

Notably, the 2022 Supplement B by the [redacted], as stated above, does not include an explanation for why felonious assault and false imprisonment were added years after the [redacted] initially certified only robbery as having been detected. Also, the Superior Court's legal determination that the "detected" activity is "analogous" to a felonious assault does not show that law enforcement actually detected a felonious assault, in addition to robbery, particularly where the police report and court transcripts in the record do not indicate that a felonious assault was detected and in light of the inconsistent Supplements B in the record. Likewise, as explained in our prior decision, the fact that the court transcripts describe the *robbery* as a "violent felony," for purposes of sentencing, does not show that felonious assault was also detected, investigated or prosecuted, as they do not indicate that the charges against the perpetrators included assault. And while a threat of being shot, holding a spray can to one's face, and throwing a beer can at someone hypothetically could have been the basis for detecting and investigating felonious assault, as claimed by the Petitioner, the record does not establish the [redacted] actually detected or investigated the activity in this way. In particular, the police report does not reflect that a firearm or other weapon was actually detected and instead only described the use of "VERBAL THREATS" against the Petitioner. The report additionally left the box for "USE OF FORCE" unchecked. This therefore reflects that law enforcement did not detect or investigate an assault committed "by any means of *force* likely to produce great bodily injury" as suggested by the Petitioner, particularly in the absence of explanations from the certifying officials as to why felonious

assault was added in later Supplements B. *See* Cal. Penal Code § 245(a)(4) (setting forth elements of a felonious assault, including the use of force likely to produce great bodily injury) (emphasis added).[4]

When considering all the credible evidence relevant to the Petitioner's Form I-918, including the new evidence on motion, the record establishes that robbery pursuant to section 211 of the Cal. Penal Code is the only crime that was detected, investigated, and prosecuted. Robbery is not listed as a qualifying criminal activity in Section 101(a)(15)(iii) of the Act, and the Petitioner has also not established that he is the victim of the qualifying criminal activities of felonious assault and false imprisonment as he asserts.

C. Robbery Does Not Involve and Is Not Substantially Similar to Felonious Assault

As noted above, the record establishes that robbery pursuant to section 211 of the Cal. Penal Code is the crime that was detected, investigated, and prosecuted and is not listed as a qualifying criminal activity in Section 101(a)(15)(iii) of the Act. The Petitioner asserts, however, for the first time since the Director's decision, that section 211 of the Cal. Penal Code is by definition a felonious assault under section 245(a)(4) of the Cal. Penal Code or substantially similar to that offense. When a certified offense is not a qualifying criminal activity, petitioners may 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). Thus, in determining whether robbery is substantially similar to felonious assault as the Petitioner asserts, we must compare the nature and elements of robbery pursuant to 211 of the Cal. Penal Code with felonious assault as defined by the federal, state, or local jurisdiction's statutory equivalent.[5] The determination does not involve a factual inquiry into the underlying criminal acts, or a review of the "totality of the circumstances" as advanced by the Petitioner. Mere overlap with, or commonalities between, the certified offense and the statutory equivalent is insufficient to establish that the offense involved or was substantially similar to a qualifying crime.

Initially, we note that California courts have determined that assault is not a lesser included offense of robbery. *People v. Parson*, 79 Cal. Rptr. 3rd 269, 284 (Cal. 2008) (concluding assault is not a lesser included offense because robbery can be committed strictly by means of fear rather than force); *see also People v. Wolcott*, 665 P.2d 520, 525 (Cal. 1983) (explaining that robbery can be committed

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[4] We acknowledge that the Petitioner has suffered emotional harm, and his claim that his resulting mental health diagnosis is typical of the harm suffered as a result of being the victim of a qualifying criminal activity. Such evidence, however, is related to whether he has suffered substantial mental or physical abuse as a result of having been the victim of qualifying criminal activity, which, as noted below, is not dispositive to our decision.

[5] To the extent the Petitioner claims we are improperly narrowing our review to California statutes in determining whether robbery is substantially similar to a qualifying crime, we note that the certifying law enforcement agency must have responsibility for and legal jurisdiction over the investigation or prosecution of the qualifying criminal activity of which a petitioner is a victim. Sections 101(a)(15)(U)(i)(III) and 214(p)(1) of the Act; *see also* 8 C.F.R. §§ 214.14(a)(2), (b)(3), (c)(2)(i) (reiterating that petitioners must demonstrate their helpfulness to a certifying agency in "the investigation or prosecution of the qualifying criminal activity upon which [their] petition is based" and clarifying that the term "certifying agency" is limited to "Federal, State, or local law enforcement agenc[ies], prosecutor[s], judge[s], or other authorit[ies] that ha[ve] responsibility for the investigation or prosecution of" the relevant offense). The crime investigated and prosecuted as perpetrated against the Petitioner took place in California, was investigated by the [redacted], and was prosecuted by the [redacted] District Attorney's Office applying California state law.

without attempting to inflict violent injury and therefore does not include assault as a lesser offense). Thus, being the victim of a robbery does not necessarily involve an assault as the Petitioner maintains.

Additionally, the nature and elements of robbery are distinct from felonious assault under section 245(a)(4) in California. Robbery pursuant to section 211 of the Cal. Penal Code is 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 is 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. California law renders assault a felony offense based on the presence of certain aggravating factors as required elements of the felonious assault, including the use of force likely to produce great bodily injury or a deadly weapon or firearm to accomplish the assault. *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)(4) (providing the elements required for assault involving a deadly weapon or force likely to produce great bodily injury, among others, and indicating they are punishable as a felonies). Accordingly, robbery involves taking personal property from someone whereas an assault does not. And robbery need only be accomplished through force and fear, whereas assault in general requires an actual attempt to commit violent injury combined with the ability to do so. Robbery additionally does not involve an aggravating factor such as the use of force likely to produce great bodily injury as required for a felonious assault under section 245(a)(4) of the Cal. Penal Code. Based on the foregoing, the nature and elements of the two crimes are not substantially similar.[6] The Petitioner has thus not established by the preponderance of the evidence that he is the victim of a qualifying criminal activity or criminal activity that involves or is substantially similar to one.

The Petitioner further characterizes our previous decision as arbitrary and capricious and alleges, in part, that we added non-statutory requirements to the evaluation of qualifying criminal activity, ignored key information in the police reports, and should have conducted a de novo review. A review of the record indicates, however, that we properly applied the statute and regulations to the Petitioner's case under the appropriate standard of review on appeal and on motion, have considered all credible evidence, and have provided sufficient explanation based on statutes and regulations as to why he did not establish his eligibility for U nonimmigrant status.

III. CONCLUSION

The new evidence submitted on motion is insufficient to establish the Petitioner was the victim of a qualifying criminal activity. As the Petitioner has not established that he was the victim of a qualifying

[6] We acknowledge the record reflects that the perpetrators of the robbery received sentence enhancements pursuant to section 186.22 of the Cal. Penal Code as the crime "was committed for the benefit of a gang" and the degree of enhancement was affected by robbery being designated in section 667.5(c) of the Cal. Penal Code as a "violent felony." The Petitioner asserts that, despite this evidence, we "conclude[ed] a violent felony could not be substantially similar to" felonious assault. We did not make any finding as to substantial similarity in our previous decision, however; rather, we determined that the court transcript reference to a violent felony was for purposes of sentencing and was insufficient to show that law enforcement actually detected, investigated or prosecuted felonious assault as perpetrated against the Petitioner.

criminal activity or a crime involving or substantially similar to a qualifying criminal activity, he has not demonstrated eligibility for the requested benefit, and we will dismiss his motion.[7]

ORDER: The motion to reopen is dismissed.

[7] The Petitioner also claims he has suffered substantial mental or physical abuse as a result of having been the victim of qualifying criminal activity, as section 101(a)(15)(U)(i)(I) of the Act requires. As we noted above, whether the Petitioner suffered substantial mental or physical abuse was not the basis for the Director's decision or our subsequent decisions. Regardless, as the Petitioner has not established that he was the victim of a qualifying criminal activity, he necessarily cannot satisfy the criteria at section 101(a)(15)(U)(i) of the Act.