U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24664424

Date: JAN. 20, 2023

Appeal of Vermont Service Center 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 Vermont Service Center denied the Petitioner's Form I-918, Petition for U Nonimmigrant Status, concluding that the record did not establish that the Petitioner was a victim of qualifying criminal activity, or a crime substantially similar to a qualifying criminal activity. The matter is now before us on appeal. 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). We review 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 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 term "investigation or prosecution" of a 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).

"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). When a certified offense is not a qualifying criminal activity specifically listed 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. 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)(l5)(U)(iii) of the Act. *Id.*

One qualifying crime under section 101(a)(15)(U)(iii), "felonious assault," must involve an assault that is classified as a felony under the law of the jurisdiction where it occurred. *See* section 101(a)(l5)(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).

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.

II. ANALYSIS

The Petitioner filed his Form I-918 with a Form 1-918 Supplement B, U Nonimmigrant Status Certification (Supplement B), in 2016 seeking U nonimmigrant classification based on having been the victim of a carjacking under section 215(a) of the California Penal Code (Cal. Penal Code). The Director denied the Form I-918 after concluding the Petitioner was the victim of carjacking under section 215 of the Cal. Penal Code, which was not one of the crimes listed in section 101(a)(15)(U)(iii) of the Act, that carjacking was not substantially similar to felonious assault under section 245 of the Cal. Penal Code, and that felonious assault was not otherwise detected or investigated during the commission of the carjacking.

On appeal, the Petitioner does not contest the Director's determination that he was the victim of carjacking under section 215(a) of the Cal. Penal Code or that carjacking is not one of the crimes listed in section 101(a)(15)(U)(iii). Rather, he claims that carjacking is substantially similar to felonious assault and extortion in California, and that a felonious assault and extortion occurred during the commission of the carjacking. The Petitioner's claim is unavailing, however, for the reasons discussed below.

As stated above, when a certified offense is not a qualifying criminal activity specifically listed 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 the federal, state, or local jurisdiction's statutory equivalent to a qualifying criminal activity. At the time of the carjacking, California defined the offense as "the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence...against his or her will and with the intent to either permanently or temporarily deprive the person...of his or her possession, accomplished by means of force or fear." Cal. Penal Code § 215(a). The Petitioner does not proffer which felony-level assault provision of the California penal code carjacking is substantially similar to, but the Director compared section 215(a) to section 245 of the Cal. Penal Code which defines assault with a deadly weapon or force likely to produce great bodily injury. As noted by the Director, California defines assault under section 240 of the Cal. Penal Code as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Assault under section 240, however, is punished as a misdemeanor. *See* Cal. Penal Code § 241. For an assault to rise to a felony under section 245 of the Cal. Penal Code, California requires an assault and the presence of an aggravating factor, for instance, the use of a deadly weapon, firearm, or machine gun, or by any means of force likely to

produce great bodily injury. *See* Cal. Penal Code § 245(a)-(d). Felonious assault under section 245 of the Cal. Penal Code notably does not require the taking of a motor vehicle as an element of the offense, which is a required element of carjacking. Also, unlike section 245 of the Cal. Penal Code, carjacking does not require force likely to produce great bodily injury, the use of a weapon, or any other aggravating circumstance, and can be committed without an intent to commit a violent injury. *See United States v. Baldon*, 956 F.3d 1115, 1124-25 (9th Cir. 2020) (finding that carjacking does not require the intent to inflict physical violence against the person of another and may be accomplished by inducing fear of injury to property alone); *see also People v. Calderon*, 155 Cal. Rptr. 3d 392, 398 (Cal. Ct. App. 2013) (stating that carjacking "requires the use of force or fear, but does not require use of a dangerous or deadly weapon"). The nature and elements of carjacking are therefore distinct from felonious assault under section 245 of the Cal. Penal Code, and as noted above, the Petitioner has not identified another felonious assault provision that carjacking is substantially similar to. Accordingly, the Petitioner has not established that carjacking is substantially similar to felonious assault in California.

The Petitioner also does not specify which section of California law carjacking is substantially similar to with regard to extortion. California does, however, define extortion in section 518(a) of the Cal. Penal Code as "the obtaining of property or other consideration from another, with his or her consent…induced by a wrongful use of force or fear, or under color of official right." Despite the requirement of "force or fear" in both carjacking and extortion, the nature and elements of the two crimes are distinct because extortion requires the consent of the victim, whereas carjacking must be committed against the victim's will. Carjacking additionally requires the specific intent to deprive a victim of a motor vehicle, and the vehicle must be taken from the victim's person or immediate presence, whereas extortion does not require proof of either of these elements relative to the taking of property from a victim. *See People v. Torres*, 39 Cal. Rptr. 2d 103, 110 (Cal. Ct. App. 1995) (holding that extortion does not require proof of an intent to permanently deprive the victim of property or that the property be taken from their "person or immediate presence"). The Petitioner, therefore, has not established that carjacking is substantially similar to extortion in California.

While we recognize that qualifying criminal activity may occur during the commission of non-qualifying activity, the record establishes that law enforcement detected, investigated, or prosecuted carjacking as committed against the Petitioner and did not investigate a felonious assault or extortion. At the outset we note that neither the Supplement B nor the police report refer to any section of law other than section 215 of the Cal. Penal Code. We also note that the Supplement B states that the "victim was in his vehicle when the suspect opened the door, grabbed his arm and forcibly took him out of the car," and indicates that the actions of the perpetrator caused bruises to the Petitioner's head and knee. The police report submitted with the Supplement B reflects that one of the suspects grabbed the Petitioner by the arm and dragged him out of his car and punched him one time in the face. This evidence notably does not refer to any use of a deadly weapon or firearm that is required for a felonious assault. And while we do not seek to diminish the harm suffered by the Petitioner during the incident, the police report states that the Petitioner declined medical treatment and that there were no visible injuries to his face, which is insufficient to establish that law enforcement detected or investigated a "use of force likely to produce great bodily injury." The Petitioner does not identify any other specific evidence to establish law enforcement detected or investigated such a use of force. As such, the record does not show the presence of the aggravating factors needed to establish that a felonious assault was detected or investigated by law enforcement as part of the carjacking. The record also reflects that the

Petitioner was removed from his car by force, rather than by consent, and therefore is insufficient to establish that extortion was detected or investigated as part of the carjacking. The Petitioner has therefore not established that he was the victim of a qualifying criminal activity that occurred during the commission of the carjacking.

U nonimmigrant 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. Because the Petitioner has not established that he was the victim of a qualifying criminal activity or a crime substantially similar to a qualifying criminal activity, he necessarily cannot satisfy the remaining criteria at section 101(a)(15)(U)(i) of the Act.

III. CONCLUSION

The Petitioner has not established that he was the victim of qualifying criminal activity, or a crime involving or substantially similar to a qualifying criminal activity. Accordingly, the Petitioner is not eligible for U nonimmigrant status.

ORDER: The appeal is dismissed.