



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

In Re: 27315158

Date: JUL. 13, 2023

Appeal of Nebraska Service Center 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 petition, concluding that the record did not establish that the Petitioner was the victim of a qualifying criminal activity or a crime substantially similar to a qualifying criminal activity. The matter is now before us on appeal. 8 C.F.R. § 103.3.

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 qualify for U-1 nonimmigrant classification, a petitioner must establish that she: has suffered substantial physical or mental abuse as a result of having been the victim of qualifying criminal activity; possesses information concerning the qualifying criminal activity; and has been helpful, is being helpful, or is 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).

## II. ANALYSIS

The Petitioner filed her Form I-918, Petition for U Nonimmigrant Status (U petition) in July 2017 with a Supplement B signed and certified by a Division Chief with the [redacted] District Attorney's Office in [redacted] California (certifying official) in March 2017 based on criminal activity committed against the Petitioner in [redacted] 2016. The certifying official checked a box indicating that the Petitioner was the victim of criminal activity involving or similar to "Felonious Assault." The certifying official listed section 23153(a) (driving under the influence (DUI) causing injury) and (b) (driving while having 0.08 percent, by weight, of alcohol in the blood and causing injury) of the California Vehicle Code (Cal. Veh. Code) as the specific statutory citation investigated or prosecuted. When asked to provide a description of the criminal activity being investigated or prosecuted and any known injury to the Petitioner, the certifying official indicated that on the night of [redacted] 2016, "defendant was operating a vehicle [redacted] while under the influence of alcohol. Defendant recklessly drove his truck into petitioner's [redacted] that she was driving, causing physical injuries to the petitioner." The certifying official further stated that the Petitioner suffered constant neck and back pain, numbness in the legs and hands, and lost wages. The traffic collision report provided with the U petition identified the incident as a multivehicle traffic collision. The narrative portion of the traffic collision report provided further details about the incident including that the perpetrator, who displayed signs of intoxication, hit two vehicles. The Petitioner submitted a personal statement that confirmed the information in the traffic collision report.

After reviewing the petition and supporting documents, the Director issued a request for additional evidence (RFE) to demonstrate that the crimes listed on the Supplement B are substantially similar to one of the qualifying crimes listed in the Act and regulations. The Director subsequently denied the U petition, concluding that the record did not demonstrate that the Petitioner was the victim of a qualifying crime, and that the offense was not substantially similar to the qualifying crime of felonious assault. The Director further noted that the record did not establish that the certifying agency investigated or prosecuted the qualifying crime of felonious assault in California as having been perpetrated against the Petitioner.

### B. The Petitioner Was Not the Victim of Qualifying Criminal Activity

#### 1. 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 acknowledges that the perpetrator was charged with the crime of DUI with injuries but claims that the Director’s decision that the record did not establish that the qualifying crime of felonious assault was detected, investigated, or prosecuted, “vitiates the intent and spirit of the catchall phrase, ‘or any similar activities’ in 8 C.F.R. section 214.14(a)(9).” The Petitioner contends that the Director’s “reasoning would require that the statutory citations listed on the Form I-918, Supplement B, be a categorically [sic] match--rather than have substantially similar elements--to ‘felonious assault,’ the box checked on the form.”

Insomuch as the Petitioner is arguing that she was the victim of a felonious assault based on the factual circumstances of the crime, her argument is unavailing. 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 law enforcement actually 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)(5). Here, there is insufficient evidence in the record establishing that law enforcement detected, investigated, or prosecuted any type of felonious assault 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”).

Although the certifying official checked the box in part 3.1 of the Supplement B to indicate that the criminal activity involved or was similar to the offense of “Felonious Assault,” in part 3.3, which requests the statutory citations for the criminal activity investigated or prosecuted, the certifying official only cited to Cal. Veh. Code section 23153(a) and (b) corresponding to DUI with injuries. The certifying official did not cite to any provisions involving assault under California law or describe the offense as involving an assault, stating instead that the perpetrator “recklessly drove his truck into petitioner’s [redacted] that she was driving, causing physical injuries to the petitioner.” Moreover, the remaining evidence in the record, including the traffic collision report and pronouncement of judgement against the perpetrator, does not reference any assault provisions under California law or otherwise indicate that any assault crimes were at any time detected, investigated, or prosecuted by law enforcement as perpetrated against the Petitioner.

Therefore, the record indicates that DUI with injuries under Cal. Veh. Code section 23153(a) and (b) were detected, investigated, or prosecuted by the certifying agency as perpetrated against the Petitioner. The record does not indicate that felonious assault or any other qualifying crimes were detected, investigated, or prosecuted as perpetrated against the Petitioner.

## 2. Driving Under the Influence Causing Bodily Injury Is not the Equivalent of or Substantially Similar to the Qualifying Crime of Felonious Assault

Driving under the influence and causing bodily injury under sections 23153(a) and (b) of the Cal. Veh. Code are not specifically listed as qualifying crimes under section 101(a)(15)(U)(iii) of the Act. When a certified offense is not a qualifying criminal activity under section 101(a)(15)(U)(iii) of

the Act, as here, 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. 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. 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)(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). 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).

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). Sections 23153(a) and (b), however, require a person, while under the influence of alcohol or while having 0.08 percent or more alcohol in their blood, to drive a vehicle, break a law while driving the vehicle or neglect a duty imposed while driving the vehicle, and in so doing cause bodily injury to another person. The elements of these two statutes therefore differ in several respects, as sections 23153(a) and (b) require (1) driving; (2) the driver to be under the influence of alcohol; and (3) the concurrent commission of an unlawful act or neglected driving duty, which section 245 of the Cal Penal Code does not.

Regarding the nature of the two offenses, the California Supreme Court has specifically indicated that intoxication should not be considered in determining whether someone commits an assault. *People v. Hood*, 462 P.2d 370, 379 (Cal. 1969). Furthermore, assault in California requires an intentional act, whereas sections 23153(a) and (b) can be committed based on negligence or recklessness. *Compare People v. Williams*, 111 Cal. Rptr. 2d 114, 123 (Cal. Ct. App. 2001) (holding that although the crime of assault does not require a specific intent to cause injury it still does require an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another and affirming that mere recklessness or criminal negligence is not enough because a jury cannot find a defendant guilty of assault based on facts he should have known but did not know), *with People v. Oyaas*, 219 Cal. Rptr. 243, 246 (Cal. Ct. App. 1985) (holding a violation of section 23153 of the Cal. Veh. Code may be established even where the perpetrator's neglect of duty amounts to no more than ordinary negligence or a neglect of the duty which the law imposes on any driver to exercise ordinary care at all times and maintain proper control of his or her vehicle). Finally, the legislative purpose behind section 23153 of the Cal. Veh. Code is to reduce highway deaths and injuries, and to punish more severely drivers who commit a concurrent unlawful act or breach of duty while driving under the influence. *See People v. Weems*, 62 Cal. Rptr. 2d 903, 907 (Cal. Ct. App. 1997). As felonious assault under section 245(a) of the Cal. Penal Code does not require either vehicular violations or driving under the influence, it does not share these legislative purposes.

The Petitioner contends that recklessness is “culpability of a higher degree than negligence or gross negligence, but less than an intentional wrong” as found in *People v. Watson*, 30 Cal. 3d 290 (1981), and states that someone “acts recklessly when that person knows that it is highly probable that his or her conduct will cause harm; but, such person nevertheless knowingly or intentionally disregards this risk (emphasis removed) *California Jury Instructions*, Criminal Fall 2015 Ed., p. 1005.” However, California assault offenses require at least a general intent to commit an injury, and negligence alone is insufficient to meet the requirements of an assault. See *People v. Williams*, 26 Cal. 4th 779, 788-790, 29 P.3d 197 (2001) (holding that although the crime of assault “does not require a specific intent to cause injury,” it still does require “an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another,” and affirming that “mere recklessness or criminal negligence is [] not enough [] because a jury cannot find a defendant guilty of assault based on facts he should have known but did not know.”); *People v. Wright*, 100 Cal. App. 4th 703, 721–24, 123 Cal. Rptr. 2d 494, 509–11 (2002) (affirming that although assault does not require a specific intent to injure the victim, it nevertheless requires the general intent to commit a battery or an act that would reasonably result in a battery).

Based on the foregoing, the Petitioner has not established the nature and elements of sections 23153(a) and (b) of the Cal. Veh. Code are substantially similar to a felonious assault under section 245 of the Cal. Penal Code.

### III. CONCLUSION

The Petitioner has not demonstrated that a qualifying crime was detected, investigated, or prosecuted as required by 8 C.F.R. § 214.14(a)(5). Therefore, she has not demonstrated that she is a victim of a qualifying crime or a crime substantially similar to one of the qualifying crimes enumerated at section 101(a)(15)(U)(iii) of the Act.

**ORDER:** The appeal is dismissed.