U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26040171

Date: July 24, 2023

Service Motion of Administrative Appeals Office Decision

Form I-918, Petition for U Nonimmigrant Status

The Petitioner seeks "U-1" 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 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 Petitioner appealed, and we rejected the appeal. Upon further review, we reopened the matter on our own motion pursuant to 8 C.F.R. § 103.5(a)(5) and provided the Petitioner with 30 days in which to submit a brief. The Petitioner timely filed a brief.[1]

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

U petitioners must establish that qualifying criminal activity was perpetrated against them, and that the certifying agency detected, investigated, or prosecuted this qualifying criminal activity. The record as a whole must support the certification of that victimization in order to establish a petitioner's eligibility for U nonimmigrant status. Section 214(p)(1), (4) of the Act; 8 C.F.R. § 214.14(c)(2)(ii), (4). 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).

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."

[1] Following the rejection of the appeal, the Petitioner filed a motion to reopen and reconsider with our office. As we have reopened the Petitioner's appeal on our own motion, the Petitioner's motion to reopen and consider will be dismissed as moot under separate cover. We have reviewed the documentation included with the Petitioner's motion and incorporate the relevant evidence into this decision.

8 C.F.R. § 214.14(a)(14). "Qualifying criminal activity" is activity "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 the elements of the offenses are substantially similar to the statutory list of criminal activities at section 101(a)(15)(U)(iii) of the Act. 8 C.F.R. § 214.14(a)(9).

As required initial evidence, U petitioners must submit Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B) from a law enforcement official certifying a petitioner's helpfulness in the investigation or prosecution of the qualifying criminal activity. Section 214(p)(1) of the Act; 8 C.F.R. § 214.14(c)(2)(i). The Supplement B is required evidence which informs, but does not solely determine, whether a U petitioner is a victim of qualifying criminal activity. Section 214(p)(1) of the Act; 8 C.F.R. § 214.14(c)(2)(i)-(ii), (c)(4). Although a petitioner may submit any relevant, credible evidence for consideration, USCIS determines, in its sole discretion, the credibility of and weight given to all the evidence, including the Supplement B. 8 C.F.R. § 214.14(c)(4).

II. ANALYSIS

A. Relevant Evidence

The Petitioner was attacked in his home in 2014. He contacted police, who arrested his assailant and initiated criminal proceedings. The Petitioner then filed a U petition in 2015. The Petitioner has provided two different Supplement B certifications. The first, initially submitted with the petition in 2015, was completed by the [redacted] Police Department (2015 Supplement B). The 2015 Supplement B checks "Other" as the qualifying crime and specifies "Assault." It then lists section 18.2-57 of the Virginia Code Annotated (Va. Code. Ann.) and describes the crime as a "simple assault" of the Petitioner. It notes that the Petitioner cooperated, resulting in a successful prosecution. When asked to describe any known or document injury, the 2015 Supplement B indicates that according to the police report, the Petitioner "had swelling to his head and blood coming from his lip."

The second Supplement B certification was prepared in 2020, also by the [redacted] Police Department (2020 Supplement B).[2] The 2020 Supplement B checks obstruction of justice, felonious assault, stalking, and the attempt to commit any of the named crimes. It lists various sections of Virginia's code and describes these citations as follows: "§18.2-22, §18.2-57 – Felonious Assault; § 18.2-460-Obstruction of Justice; . . . § 18.2-91 Breaking and Entering w/Intent." The 2020 Supplement B indicates that the aggressor "broke the window, entered, the apartment and assaulted [the Petitioner] while stealing his phone to try to disallow him from calling the police." The form goes on to state that the Petitioner "suffered substantial physical, psychological and emotional abuse as a result of this incident." The form is not accompanied by a statement from the certifying official or any other documentation explaining the reasoning behind, or justification for, the additional check boxes and statutory citations.

[2] We note that the 2020 supplement B does not list the name of the certifying official. As the sufficiency of this Supplement B is not dispositive, we do not address any possible deficiencies in this form.

The Petitioner also provided an incident report prepared the night of the attack (PD report). The PD report classified the incident as a burglary; it cited breaking and entering with intent to commit a felony and assault and battery as the offenses. Va. Code. Ann. §§ 18.2-91, 18.20-57. The PD report indicates that force was used to gain entry to the home and the assailant was unarmed. Regarding the type of injury to the victim, the PD report indicates "Other Major Injuries." The narrative portion of the PD report details that the assailant entered the home through a window, at which point the Petitioner confronted him. A fight broke out and the Petitioner was hit in the face several times. The reporting officer indicates the presence of swelling above the Petitioner's right temple and blood coming from the inside of his lip. The officer also notes the Petitioner had "minor abrasions and redness on his arms and hands from the struggle." The officer indicates that the assailant had no weapons or burglary tools, but he had taken the Petitioner's phone during the struggle.

The Petitioner submitted a preliminary protective order prepared within days of the attack. This report orders the assailant to keep away from the Petitioner until a full hearing can be conducted. It indicates that the Petitioner was "subjected to an act of force, violence, or threat" and the preliminary order is warranted to protect the health and safety of the Petitioner. In addition, the Petitioner submitted a letter from the Commonwealth's Attorney's office confirming that his attacker was arraigned for statutory burglary of a dwelling.

The remaining evidence presented by the Petitioner includes various affidavits from friends and community members, affidavits prepared by the Petitioner, photos of injuries, and a psychosocial assessment. In these documents, the Petitioner indicates that he was unable to fully communicate with law enforcement due to his limited English; he notes that he was not provided an interpreter in court and that his roommate deliberately minimized the incident when testifying as she was romantically involved with the assailant. He indicates that his assailant was ultimately convicted of simple assault. However, he argues that the underlying criminal act was more severe than this conviction implies, as his assailant threatened to kill him and repeatedly beat his head against a coffee table, causing a momentary loss of consciousness. He provides photographs showing redness, swelling, and abrasions on his arm, hand, and forehead, noting that they were taken approximately one week after the attack.

B. Procedural History

The Petitioner filed the U petition in 2015. The Director issued a request for evidence (RFE) in 2020, advising the Petitioner that he had not established that he was the victim of a qualifying crime and raising perceived discrepancies in the record. In response to the RFE, the Petitioner filed additional letters of support, criminal history reports, the 2020 Supplement B, and a psychosocial evaluation. The Director denied the U petition, concluding that the Petitioner had not demonstrated that the crime investigated, simple assault, constituted qualifying criminal activity. The Director acknowledged that the 2020 Supplement B contained additional citations but assigned diminished weight to it as it was completed after the conclusion of the criminal case. The Director also found discrepancies between the law enforcement reports and the documentation submitted by the Petitioner. Ultimately, the Director determined that the Petitioner had not established being the victim of felonious assault, another enumerated offense, or any substantially similar offense.

On appeal, the Petitioner argues that USCIS erred by requiring a higher standard of proof than a preponderance of the evidence. He further contends that the Director erred in finding that he was not

the victim of a qualifying crime; he argues that he was the victim of the enumerated crimes of attempted felonious assault, breaking and entering, stalking, or criminal activity substantially similar to those crimes. He argues that these offenses are supported by the 2015 and 2020 Supplement Bs. The Petitioner also contests the Director's characterization of certain evidence as discrepant, indicating that any perceived discrepancies have been explained. The Petitioner argues that, as he is in fact a victim of qualifying criminal activity, he has also met the remaining eligibility criteria for U nonimmigrant status.

C. Qualifying Criminal Activity

1. Law Enforcement Did Not Detect, Investigate, or Prosecute Felonious Assault or any Substantially Similar Crime as Perpetrated Against the Petitioner

As stated above, the Act requires U petitioners to demonstrate 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 . . . .").

Virginia generally classifies all assaults as misdemeanors; the Va. Code Ann. punishes assaults as felonies only where the victim is a public official or when the victim sustains a bodily injury and was intentionally assaulted due to their "race, religious, conviction, gender, disability, gender identity, sexual orientation, color or national origin." Va. Code. Ann. § 18.2-57. This is distinct from the vast majority of other state criminal codes, which provide felony penalties for a much wider range of assaultive conduct. *See, e.g.*, N.Y. Penal Law §§ 120.05, 120.10 (punishing as felonies assaults causing serious physical injury or permanent disfigurement, assaults with deadly weapons causing physical injury, and physical injuries caused during the commission of a felony); Fla. Stat. § 784.021 (classifying assaults with deadly weapons and assaults with intention to commit a felony as aggravated assaults).

The Va. Code. Ann. therefore punishes a much narrower subset of conduct as felonious assault when compared to other states. The U visa regulations, as noted above, provide protection for victims of broad classes of criminal activity and are intended to promote the detection and prosecution of criminal activity. As Virginia's restrictive regulations would leave victims who otherwise meet the statutory scheme without recourse, we determine it appropriate to refer to the Model Penal Code (MPC).

The MPC was developed as a guideline to assist states in the revision and codification of their criminal codes; it aims to standardize state criminal law provisions and definitions. *See* MPC § 1.02 (providing, in part, that the "general purposes" of the provisions governing the definitions of, and sentencing for, offenses are "to give fair warning of the nature of conduct declared to constitute an offense[,]" to "differentiate on reasonable grounds between serious and minor offenses[,]" and to "define, coordinate, and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders"); *see also Taylor v. United States*, 495 U.S. 575, 598 n.8 (1990) (directing, in the context of a federal sentence-enhancement statute, that a given offense's generic definition can be drawn from the "sense in which the term is . . . used in the criminal codes of most States" and that an offense's definition in the MPC can serve as an aid in doing so).

Considering the uniquely limited nature of Virginia's felony-level assault provisions, looking to the MPC in this context promotes consistent application of the U provisions of the Act across Federal, state, and local jurisdictions and is consistent with the agency's interpretation of the qualifying criminal activity at section 101(a)(15)(U)(iii) of the Act as "general categories of criminal activity." Interim Rule, *New Classification for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53014, 53018 (Sept. 17, 2007). Further, this aligns with the overall purpose of the U program, which envisioned any assault involving serious or great bodily injury detected, investigated, or prosecuted by law enforcement as perpetrated against U petitioners as qualifying crimes, not just those committed based on a protected characteristic or against a specific public servant. *See* section 101(a)(15)(U)(iii) of the Act (including "felonious assault" as a qualifying crime, without further restriction on why or against whom it is committed).

The MPC defines and classifies both "simple assault" and "aggravated assault." MPC § 211.1. Simple assault is classified as a misdemeanor and aggravated assault is classified as a felony. *Id.* at §§ 211.1(1), (2). Individuals are guilty of aggravated assault if they:

> (a) attempt[] to cause serious bodily injury to another, or cause[] such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to value of human life; or
>
> (b) attempt[] to cause or purposely or knowingly cause[] bodily injury to another with a deadly weapon.

MPC § 221.1(2) (Am. Law Inst. 2018).

In turn, the MPC defines bodily injury as "physical pain, illness or any impairment of physical condition." MPC § 210.0. It defines serious bodily injury as "bodily injury which creates a substantial risk of death or causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Id.* It defines a deadly weapon as a firearm or other instrument known to be capable of producing death or serious bodily injury. *Id.*

In this case, law enforcement records consistently indicate that the attacker was unarmed. Therefore, the Petitioner must rely on law enforcement detection, investigation, or prosecution of an assault or attempted assault causing serious bodily injury. As reflected in the PD report, law enforcement

detected an altercation in which the Petitioner was repeatedly punched, causing swelling, abrasions, a bloody lip, and redness on various areas of his body.[3] The 2015 Supplement B repeats this information. We note that the 2020 Supplement B characterizes the injuries as substantial, and the PD report also classified the injuries as "major." However, the only detailed description of the injuries are those listed in the PD report and detailed above. These types of injuries fall in line with the MPC's definition of bodily injury but fall short of the definition of serious bodily injury. While the Petitioner provided photographs of his injuries taken approximately one week after the incident, they too reflect the abrasions, redness, and swelling generally outlined in the PD report. While the injuries were visible one week after the altercation, this is insufficient to show injury creating a substantial risk of death or permanent disfigurement or protracted loss or impairment of bodily function.

We have reviewed the evidence submitted by the Petitioner in which claims he suffered additional harm during the attack, including having his head struck against a coffee table resulting in loss of consciousness. However, this physical harm was not noted in law enforcement records. The Petitioner indicates that he was unable to initially provide this information due to trauma and language barriers. He indicates that this information formed part of his testimony at trial. However, the Petitioner has not provided trial transcripts or additional attestations from law enforcement to show that these additional allegations were detected, investigated, or prosecuted. The reports in the record prepared by these law enforcement agencies are silent as to any elevated level of physical injury. Therefore, the evidence submitted is insufficient to establish that, upon consideration of the MPC definitions, law enforcement detected, investigated, or prosecuted any felonious assault as perpetrated against the Petitioner.[4]

The Petitioner also argues that a felonious assault was detected because breaking and entering under Va. Stat. Ann. § 18.2-91 was detected by law enforcement.[5] It is true that this statute punishes trespass made with an intent to commit assault and battery as a statutory burglary. Va. Stat. Ann. § 18.2-91. However, even if a statutory burglary was detected, this does not establish by a preponderance of the evidence that a felonious assault was also detected. While statutory burglary is ultimately a felony-level offense in Virginia, the intent to commit any assault elevates trespass to burglary, as opposed to an assault rising to the level of felony under the Virginia code or in the MPC. *Id.* Nor is this criminal statute substantially similar in nature and elements to the qualifying crime of felonious assault. *See* section 101(a)(15)(U)(iii) of the Act (providing that 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"); 8 C.F.R. § 214.14(a)(9) (providing that the term "'any similar activity' refers to criminal offenses in which the nature and elements of the offenses are

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[3] The temporary restraining order provided by the Petitioner is based on his being subjected to force or violence but makes no finding regarding the severity of any injuries. Likewise, while confirming that the assailant was arraigned for statutory burglary, the letter from the Commonwealth Attorney's office is silent as to injuries suffered.

[4] The Petitioner points to a prior decision by our office to show that felonious assault certifications can be supported even when the statutory citation for felony or aggravated assault is absent. As a preliminary matter, the decision cited by the Petitioner was not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy. Moreover, we have reviewed this decision and conclude that it is inapposite. In the referenced case, the elements of aggravated assault under Nevada law (assault with a deadly weapon) were directly attested to in law enforcement reports.

[5] The Petitioner indicates that breaking and entering is one of the 28 enumerated offenses, but it is not. Section 101(a)(15)(U)(iii) of the Act.

substantially similar to the statutorily enumerated list of criminal activities" at section 101(a)(15)(U)(iii) of the Act). The statute requires the entry into a dwelling or other protected area to sustain a conviction; felonious assault as defined in the MPC is not restricted to conduct undertaken only in particular locations. Therefore, the detection of a crime under Va. Stat. Ann. 18.2-91, without more, is insufficient to establish that a felonious assault was detected or investigated.

2. Law Enforcement Did Not Detect, Investigate, or Prosecute Stalking, Obstruction of Justice, or any Substantially Similar Crime as Perpetrated Against the Petitioner

The 2020 Supplement B checks the boxes to indicate the Petitioner was a victim of criminal activity involving stalking and obstruction of justice.[6] Stalking in Virginia is punishable under Va. Stat. Ann. § 18.2-60.3, while obstruction of justice is criminalized under Va. Stat. Ann. § 18.2-460. Critically, however, neither of these statutes was listed on the contemporaneous PD report or the 2015 Supplement B and the certifying official did not submit a statement or other evidence explaining the reasons for, or rationale behind, the added boxes and statutory citations on the 2020 Supplement B. We have reviewed the record and conclude that the Petitioner has not met his burden of showing that either of these qualifying crimes, or a substantially similar crime, was investigated, detected, or prosecuted.

Virginia's stalking statute penalizes repeat conduct placing another person in fear of death or bodily injury. Va. Stat. Ann. § 18.2-60.3. The Petitioner's affidavit notes that his attacker came to his home twice, issued threats or became physically violent, and that both times he was placed in fear. However, the PD report reflects that, while the assailant came to the Petitioner's home twice, during the first encounter he requested only to speak with the Petitioner's roommate. There is no indication in this report that any threatening behavior occurred. The repeated conduct required to support stalking is not reflected in the law enforcement reports.

Turning to obstruction of justice, the PD report reflects that the Petitioner's phone was found in his assailant's possession when police arrived. The 2020 Supplement B indicates that the phone was taken in an effort to prevent the Petitioner from contacting police. The contemporaneous PD report, however, does not reach a conclusion as to why the phone was taken. The 2015 Supplement B makes no mention of the phone and does not provide a citation to obstruction of justice. After reviewing the record as a whole, the Petitioner has not established by the preponderance of the evidence that the taking of the phone demonstrates law enforcement detection of obstruction of justice.

While the Petitioner includes additional allegations in his affidavits that he asserts he was unable to provide to law enforcement at the time of the offense and support that he was the victim of the qualifying crimes of either stalking or obstruction of justice, these facts are not anywhere attested to by law enforcement in the documentation before the Director or in that submitted on appeal. 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

[6] The certifying official did not provide a statutory citation for stalking and instead cited to Va. Stat. Ann. § 18.2-22, which punishes conspiracy to commit felony. As the law enforcement reports provide no indication that the attack was conducted in concert with another, we find no support for this citation and limit our analysis to stalking and obstruction of justice.

perpetrated against the petitioner. Sections 101(a)(15)(U)(i)(III) and 214(p)(1) of the Act. While qualifying criminal activity may occur during the commission of non-qualifying criminal activity, the qualifying criminal activity must actually be detected, investigated, or prosecuted by the certifying agency as perpetrated against the petitioner. *See id.* We acknowledge the trauma this home invasion has caused the Petitioner. However, the Petitioner has not met his burden of showing by a preponderance of the evidence that a law enforcement agency detected, investigated, or prosecuted one of the 28 enumerated offenses listed at 101(a)(15)(U)(iii) of the Act, or any substantially similar offense, as perpetrated against him.

III. CONCLUSION

The Petitioner has not established that law enforcement detected, investigated, or prosecuted a qualifying crime as perpetrated against him, required to demonstrate U eligibility. Because our decision that the Petitioner was not the victim of qualifying criminal activity is dispositive of his appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding the remaining eligibility criteria. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

ORDER: The appeal is dismissed.