U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25857101

Date: JUNE 5, 2023

Motion on Administrative Appeals Office Decision

Form I-918, Petition for U Nonimmigrant Status

The Director of the Nebraska Service Center denied the Petitioner's Form I-918, Petition for U Nonimmigrant Status, after determining that Petitioner was not the victim of a qualifying criminal activity or a crime substantially similar to a qualifying criminal activity. We subsequently dismissed the Petitioner's appeal after concluding that the Petitioner was not an indirect victim of qualifying criminal activity. In making this decision, which we incorporate on motion, we noted that parents of a direct victim of a qualifying criminal activity under the age of 21 may be considered victims themselves (hereafter referred to as an "indirect victim") if the direct victim is deceased due to murder or manslaughter, or is incompetent or incapacitated, and thus unable to provide information concerning the criminal activity or be helpful in the investigation, but determined that the Petitioner did not establish his son was incompetent or incapacitated and thus unable to provide information regarding the crime. The matter is now before us on a motion to reopen and reconsider. 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). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

On motion the Petitioner claims that we erred in our previous decision, that his son was the victim of criminal activity that is substantially similar to a qualifying criminal activity, and that he was incompetent and unable to provide information or be helpful in the investigation. Regarding qualifying criminal activity, the Petitioner asserts that sections 23153(a) and (b) of the California Vehicle Code (Cal. Veh. Code) for driving under the influence of alcohol and causing bodily injury, combined with a sentence enhancement under section 12022.7 of the California Penal Code (Cal. Penal Code), are substantially similar to section 245(a)(1) of the Cal. Penal Code. The Petitioner also asserts that section 20001 of the Cal. Veh. Code for failing to stop at the scene of an accident is

substantially similar to section 191.5(a) of the Cal. Penal Code for gross vehicular manslaughter while intoxicated. Finally, the Petitioner alleges section 20001 of the Cal. Veh. Code is substantially similar to section 245(a)(1) of the Cal. Penal Code.

A. Sections 23153(a) and (b) of the Cal. Veh. Code

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 10l(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 10l(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.

We acknowledge that the perpetrator's conviction under section 23153 of the Cal. Veh. Code with a sentencing enhancement under section 12022.7 of the Cal. Penal Code indicates that the underlying offense was charged as a felony and involved an aggravating factor relating to the infliction of great bodily injury. Based on the foregoing, however, 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(a) of the Cal. Penal Code.

B. Section 20001 of the California Vehicle Code

As noted above, the Petitioner also asserts that section 20001 of the Cal. Veh. Code for failing to stop at the scene of an accident is substantially similar to section 191.5(a) of the Cal. Penal Code for gross vehicular manslaughter while intoxicated, as well as assault under section 245(a)(1) of the Cal. Penal Code.

Initially, section 20001 of the Cal. Veh. Code is not specifically listed as a qualifying crime under section 10l(a)(15)(U)(iii) of the Act and therefore the Petitioner must establish that it is substantially similar to a qualifying criminal activity. Reviewing the nature and elements of section 20001 of the Cal. Veh. Code, we note that this section requires a driver of a vehicle involved in an accident that results in injury to or death of another person to immediately stop the vehicle and provide personal information at the scene, report the accident, and provide reasonable assistance to an injured person. The section does not require the driver to be intoxicated and otherwise describes a standard of conduct for drivers who are involved in accidents causing injury to other persons, whether or not they are responsible for the accident. *People v. Braz*, 76 Cal. Rptr. 2d 531, 534 (Cal. Ct. App. 1998). And the nature of section 20001 of the Cal. Veh. Code is not to punish the injury to the other person, but rather leaving the scene without presenting identification or rendering aid. *Id.* at 535. By comparison, section 191.5(a) of the Cal. Penal Code specially requires a driver to not only be intoxicated but to be responsible for committing an unlawful act that causes death. The Petitioner has therefore not established that the nature and elements of section 20001 of the Cal. Veh. Code are substantially similar to section 191.5(a) of the Cal. Penal Code.

Similarly, while section 20001 of the Cal. Veh. Code may involve injury or death, it notably does not require an intentional act which is required for an assault under section 245 of the Cal. Penal Code. And as discussed above, section 20001 of the Cal. Veh. Code merely requires an individual to stop at the scene of an accident where there is injury to a person and does not require violent injury to be committed upon another. Thus, the Petitioner has not established that the nature and elements of section 20001 of the Cal. Veh. Code are substantially similar to section 245 of the Cal. Penal Code.

III. CONCLUSION

The Petitioner has not established that the crimes detected, investigated, or prosecuted are qualifying criminal activities or substantially similar to a qualifying criminal activity. We previously determined the Petitioner was not an indirect victim of a qualifying criminal activity based on the ability of his son to provide information or be helpful in the investigation. However, a "victim of qualifying criminal activity" generally means a person "who has suffered direct and proximate harm as a result of the commission of *qualifying criminal activity*," and, as noted above, a parent may also be considered a victim if their child was the direct victim of *qualifying criminal activity*. 8 C.F.R. § 214.14(a)(14) (emphasis added). Thus, in either case, the person or their child must have been the victim of a qualifying criminal activity. Because we have determined that the crimes detected, investigated, or prosecuted are not qualifying criminal activities, the Petitioner necessarily cannot meet the definition of either a direct or indirect victim and therefore is ineligible for U nonimmigrant status.

Additionally, while the issue of whether the Petitioner's son was incapacitated or incompetent and thus unable to provide information regarding the crime was addressed in our last decision and on motion, because the failure to establish the Petitioner or his son was the victim of a qualifying criminal activity is dispositive in this case, we need not address whether the Petitioner otherwise qualifies as an indirect victim and hereby reserve the issue. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach").

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.