U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25612156

Date: MAR. 31, 2023

Appeal of Nebraska Service Center 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) as a victim of qualifying criminal activity.

The Director of the Nebraska Service Center (Director) denied the Form I-918, Petition for U Nonimmigrant Status (U petition), concluding that the Petitioner was not 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 establish that they were a victim of qualifying criminal activity that was detected, investigated, or prosecuted by law enforcement. Section 101(a)(15)(U)(i) of the Act; 8 C.F.R. § 214.14(a)(5). Qualifying criminal activity includes 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). 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.

II. ANALYSIS

In January 2016, the Petitioner filed the instant U petition with a Supplement B signed and certified by the [redacted] County District Attorney's Office, as well as other documentation claiming he was

the victim of robbery under section 160.10 of the New York Penal Law (NYPL) and that it was substantially similar to felonious assault as defined by federal law. The Supplement B indicates that the statutory citation of the criminal activity that was investigated and/or prosecuted by the [redacted] County District Attorney's Office was NYPL 160.10(2)(b), and PL 160.10(1), Robbery in the second degree, but the certifying official checked the box for felonious assault.

The Director denied the Petitioner's Form I-918 after determining that the Petitioner was the victim of robbery in the second degree under sections 160.10(2)(b), and 160.10(1) of the NYPL, which was not a qualifying criminal activity and was not substantially similar to second-degree assault under section 120.05 of the NYPL. The Director also concluded that no felonious assault was otherwise detected, investigated, or prosecuted by law enforcement.

On appeal, the Petitioner again argues that he was the victim of criminal activity involving or similar to the qualifying crime of felonious assault. First, Petitioner argues that assault in the second degree, NYPL § 120.05, is similar to forcibly stealing, NYPL § 160.00, specifically noting the perpetrator used a firearm. Second, relying on United States v. Pereira-Gomez, 903 F.3d 155, 164–65 (2d Cir. 2018), Petitioner contends that both felony robbery and felonious assault under New York are "crimes of violence" requiring violent force capable of causing physical pain or injury to another person. ""[R]obbery" as it is defined in N.Y. Penal Law § 160.00, qualifies as a "crime of violence" under the "force clause"" for purposes of federal sentencing enhancement. Id. At 166. Third, Petitioner asserts that the nature of the detected, investigated and prosecuted crime evinces an intent to cause serious physical injury, because multiple perpetrators surrounded the Petitioner and one perpetrator put a gun to the Petitioner's head. Petitioner submits that the Supplement B certifies that felonious assault was detected and investigated and is similar to the prosecuted crime felony robbery with a weapon, New York PL § 160.10(2)(b).

The record establishes and the Petitioner does not dispute he was a victim of robbery pursuant to section 160.10 of the NYPL as the crime detected and investigated in this case and that it is not listed as a qualifying criminal activity in section 101(a)(15)(U)(iii) of the Act. As noted above, when a certified offense is not a qualifying criminal activity specifically listed in 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.

While the Petitioner asserts robbery is substantially similar to felonious assault in part because a gun was involved and a group of perpetrators surrounded the victim, the proper inquiry is not an analysis of the factual details underlying the criminal activity, but a comparison of the "nature and elements" of the crime that was investigated with a qualifying crime. See 8 C.F.R. § 214.14(a)(9) (describing the process to determine similarities between two statutes). Additionally, mere overlap with, or commonalities between, the certified offense and the statutory equivalent, however, is not sufficient to establish that the offense involved or was substantially similar to a qualifying crime. The Petitioner's claim that section 160.10 of the NYPL is substantially similar to felonious assault because of any factual circumstances, such as use of a gun or surrounding the victim, is therefore insufficient to establish that robbery is substantially similar to felonious assault.

The Petitioner argues that the equivalent crime to felonious assault in New York is assault in the second degree, NYPL § 120.05, which provides that a person is guilty of assault in the second degree,

a Class D felony, when, "[w]ith intent to cause serious physical injury to another person, he causes such injury to such person or to a third person..." NYPL § 120.05(1) (McKinney 2021). Section 120.05 also specifies the intent to cause, or actual causing of, physical injury to a person as an element of the statute. In contrast, NYPL §160.10(1) states that a person is guilty of robbery in the second degree, a Class C felony, "when he forcibly steals property and when... [h]e is aided by another person actually present." NYPL § 160.10(1) (McKinney 2013). And, NYPL §160.10(2)(b) states that a person is guilty of robbery in the second degree, a Class C felony, "when he forcibly steals property and when... in the course of commission of the crime or of immediate flight therefrom, he or another participant in the crime...[d]isplays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm," NYPL § 160.10(2)(b) (McKinney 2013).

The elements of robbery in the second degree under NYPL section 160.10 are distinct from those of felony-level assault in New York. The statute investigated and prosecuted in this case involves the stealing of property of another by force, and does not specify the intent to cause, or the actual causing of, physical injury to another person. Moreover, New York law specifically recognizes that the acts constituting a robbery are separate and distinct from the acts constituting an assault, each requiring different intent. The distinct crime of second-degree assault is committed with the intent to cause physical injury, not the intent to take property that is required for robbery. See People v. Murray, 749 N.Y.S.2d 411 (2002); People v. Hayes, 84 A.D.3d 463, 464, 922 N.Y.S.2d 79, 80 (2011) (Consecutive sentences are proper for separate and distinct acts which violate more than one section of the Penal Law, even if such acts are part of a 'continuous course of activity). Accordingly, the Petitioner has not established that the criminal activity of which he was a victim, robbery in the second degree, under NYPL sections 160 .10(1) and 160.10(2)(b), is substantially similar to NYPL section 120.05 felonious assault.

The Petitioner next asserts that robbery in the second degree, pursuant to NYPL sections 160 .10(1) and 160.10(2)(b), meets the definition of aggravated or felonious assault in section 351 of Title 18 of the United States Code.[1] However, 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 U 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 by the [redacted] County District Attorney's Office as perpetrated against the Petitioner took place in New York. The [redacted] County District Attorney's Office applied New York state law. The record does not indicate, and the Petitioner does not assert on appeal, that the relevant offense occurred in more than one jurisdiction or crossed state lines such that the federal authorities had concurrent jurisdiction over the robbery. Accordingly, and contrary to the Petitioner's assertion on appeal, the similarity of the federal assault statute to robbery in the second

[1] Section 351 of Title 18 of the United States Code which makes it a crime to commit an assault against Congressional, Cabinet and Supreme Court officials. The Petitioner is not a member of any of these classes of persons.

degree, pursuant to NYPL sections 160 .10(1) and 160.10(2)(b), is irrelevant to the determination of whether he was the victim of qualifying criminal activity and helpful to law enforcement authorities in the investigation or prosecution of it.

For the foregoing reasons, the Petitioner has not established on appeal that the criminal activity of which he was a victim, robbery in the second degree under NYPL sections 160 .10(1) and 160.10(2)(b), involves or is substantially similar to the statutorily enumerated qualifying crime of felonious assault.

III. CONCLUSION

The Petitioner has not demonstrated that he was the victim of a qualifying crime or an offense that is substantially similar to a qualifying crime. 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. As the Petitioner has not established that he was the victim of qualifying criminal activity, he necessarily cannot satisfy the criteria at section 101(a)(15)(U)(i) of the Act.

ORDER: The appeal is dismissed.