U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26554005

Date: MAY 30, 2023

Motion on Administrative Appeals Office 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 Form I-918, Petition for U Nonimmigrant Status (U petition). The Director concluded that the Petitioner had not established that he was a victim of qualifying criminal activity. The Petitioner filed an appeal of the Director's decision denying the U petition with our office. We reviewed the Director's decision de novo and concluded that the Petitioner had not established he was a victim of qualifying criminal activity. The Petitioner has filed a motion to reconsider our decision.

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). We incorporate our December 20, 2022 decision by reference and have reviewed the supplemental materials submitted on motion. Upon review, we will dismiss the motion.

I. LAW

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 establishes eligibility for the benefit sought.

U petitioners must establish their eligibility for U-1 nonimmigrant classification by demonstrating they meet the requirements set forth in the Act and regulations, which include demonstrating that they were a victim of qualifying criminal activity, and that said criminal activity was investigated or prosecuted by law enforcement. Section 214(b)(1) of the Act; 8 C.F.R. § 214.14(a)(5), (a)(9), (b)(1).

II. ANALYSIS

The Petitioner has not demonstrated that our decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. On motion, the Petitioner reiterates the

arguments made on appeal. The Petitioner contends that USCIS was wrong in deciding that law enforcement did not detect, investigate, or prosecute qualifying criminal activity, specifically felonious assault.

To ensure clarity, we will briefly relate pertinent facts as detailed in law enforcement records. We will also further address one of the Petitioner's arguments regarding whether law enforcement detected the qualifying crime of felonious assault or a substantially similar crime.

The Petitioner was the victim of a home invasion in 2008. According to the contemporaneous police report, two men kicked in the Petitioner's door shouting for a person named [redacted]. The men threatened the Petitioner with bodily harm. Upon learning that the Petitioner was not [redacted] the men departed and began to drive around the neighborhood, presumably searching for [redacted]. When the men were arrested, one of them admitted that they had entered the home to confront [redacted].

On motion, the Petitioner notes that aggravated assault, the corresponding crime to felonious assault in Florida's annotated statutes (FSA), can be committed in two separate ways: first, where the assailant uses a deadly weapon, and second, where the assailant commits the assault while intending to commit a felony. Fla. Stat. Ann. § 784.021 (2022). The Petitioner argues both types of aggravated assault contemplated by the FSA occurred in this case. He claims his assailants wielded a bat, a deadly weapon, during the home invasion and assault. He further claims the assault was committed in the course of a burglary, which is always classified as a felony in Florida. He contends that USCIS erred by conflating these two separate means of commission.

The Petitioner's arguments regarding assault with the use of a deadly weapon were fully addressed in our initial decision. We noted that there is no mention of a bat or deadly weapon in any of the law enforcement reports; while we acknowledged the Petitioner's statements that a bat was used, we found that the record did not establish law enforcement's detection of such a criminal act.

For the reasons set forth below, the Petitioner has also not established by a preponderance of the evidence that law enforcement detected, investigated, or prosecuted an assault with the intent to commit a felony.

The Petitioner argues that, although the crimes ultimately prosecuted and certified were criminal mischief, trespass, and providing false information, law enforcement initially detected a burglary with an assault. The Petitioner notes that all burglaries are classified as felonies in Florida. Therefore, the Petitioner contends that the assault must have been committed with the intention of committing a felony, since it was committed during a burglary.

While we agree with the Petitioner's contention that a burglary with assault was detected, this alone does not establish by a preponderance of the evidence that an aggravated assault was detected. The Petitioner's proposed construction of the statute would render all burglaries with assault also aggravated assaults. However, Florida's Supreme Court has specifically approved lower court decisions finding otherwise:

> Examining strictly the statutory elements and the entire range of conduct proscribed by these statutes demonstrates that these are separate offenses for which the Legislature

> intends separate punishments. The statutory elements of aggravated assault include (a) use of a deadly weapon or (b) intent to commit a felony, and neither of these elements is subsumed within a burglary with an assault or battery. . . . Aggravated assault is not necessarily included within a burglary with an assault or battery offense. Simply stated, a defendant can commit a burglary with an assault or battery without also committing an *aggravated* assault.

Tambriz-Ramirez v. State, 248 So.3d 1087, 1088 (Fla. 2018), *quoting Tambriz-Ramirez v. State*, 213 So.3d 920, 922-23 (Fla. Dist. Ct. App. 2017).

Therefore, we must determine whether the record reflects the assailants' intent to commit a felony when the assault was committed. The police reports indicate that the burglary began when the two men kicked down the Petitioner's door; after this felony was underway, the men threatened the Petitioner with bodily harm. The men admitted that they wished to confront a man named [redacted] Under the circumstances, it is reasonable to assume that they intended to harm [redacted] during the confrontation. However, a threat to cause bodily harm, without more, is consistent with misdemeanor assault or misdemeanor battery in Florida, rather than with felony-level offenses. *See* Fla. Stat. Ann. §§ 784.011 (defining a threat by word or act to do violence as a misdemeanor assault), 784.03 (defining intentional touching, striking or causing of bodily harm as a misdemeanor battery). There is no indication in the reports that the men intended to commit any other crimes; once they discovered the Petitioner was not [redacted] they left his home without further incident. Other than the initial burglary, no felonies are listed on the report or otherwise reflected in the investigation narratives. The Petitioner has not demonstrated that the assailants intended to commit a felony during the assault.

The record does not establish, by a preponderance of the evidence, that law enforcement detected an aggravated assault under Florida law. Therefore, the Petitioner has not demonstrated that he was a victim of the qualifying crime of felonious assault or a substantially similar crime.

ORDER: The motion to reconsider is dismissed.