



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

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

MATTER OF H-S-

DATE: DEC. 16, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-918, PETITION FOR U NONIMMIGRANT STATUS

The Petitioner seeks nonimmigrant classification as a victim of certain qualifying criminal activity. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. APPLICABLE LAW

Section 101(a)(15)(U) of the Act provides for U nonimmigrant classification to:

(i) subject to section 214(p), an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that --

- (I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);
- (II) the alien . . . possesses information concerning criminal activity described in clause (iii);
- (III) the alien . . . has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and
- (IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States . . .

Felonious assault is listed as qualifying criminal activity in clause (iii) of section 101(a)(15)(U) of the Act.

According to the regulation at 8 C.F.R. § 214.14(a)(9), the term “any similar activity” as used in section 101(a)(15)(U)(iii) of the Act “refers to criminal offenses in which the nature and elements of the offenses are *substantially similar* to the statutorily enumerated list of criminal activities.” (Emphasis added).

The eligibility requirements for U nonimmigrant classification are further explicated in the regulation at 8 C.F.R. § 214.14, which states, in pertinent part:

(b) *Eligibility.* An alien is eligible for U-1 nonimmigrant status if he or she demonstrates all of the following . . . :

- (1) The alien has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity. . . .
- (2) The alien possesses credible and reliable information establishing that he or she has knowledge of the details concerning the qualifying criminal activity upon which his or her petition is based. . . .
- (3) The alien has been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is based
- (4) The qualifying criminal activity occurred in the United States

In addition, the regulation at 8 C.F.R. § 214.14(c)(4), prescribes the evidentiary standards and burden of proof in these proceedings:

The burden shall be on the petitioner to demonstrate eligibility for U-1 nonimmigrant status. The petitioner may submit any credible evidence relating to his or her Form I-918 for consideration by [U.S. Citizenship and Immigration Services (USCIS)]. USCIS shall conduct a *de novo* review of all evidence submitted in connection with Form I-918 and may investigate any aspect of the petition. Evidence previously submitted for this or other immigration benefit or relief may be used by USCIS in evaluating the eligibility of a petitioner for U-1 nonimmigrant status. However, USCIS will not be bound by its previous factual determinations. USCIS will determine, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence, including Form I-918, Supplement B, “U Nonimmigrant Status Certification.”

II. FACTS AND PROCEDURAL HISTORY

The Petitioner is a native and citizen of India who claims to have entered the United States on September 25, 2010, without inspection, admission or parole. On June 7, 2013, the Petitioner filed a Form I-918, Petition for U Nonimmigrant Status, along with a Form I-918 Supplement B,

(b)(6)

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U Nonimmigrant Status Certification. On February 26, 2014, the Director issued a request for evidence (RFE) that the Petitioner was the victim of qualifying criminal activity and is admissible to the United States. In response, the Petitioner filed a Form I-192, Application for Advance Permission to Enter as Nonimmigrant, and additional evidence, which the Director found insufficient to establish the Petitioner's eligibility. Accordingly, the Director denied the Form I-918 and Form I-192.

In her decision denying the Form I-918, the Director noted that assault in the third degree, criminal mischief in the fourth degree, and harassment in the second degree under New York law are not similar to felonious assault or any other qualifying crime, and therefore, the Petitioner did not establish that he was the victim of qualifying criminal activity or that he met the remaining eligibility requirements for the nonimmigrant visa petition. The Petitioner timely appealed the denial. On appeal, the Petitioner claims that assault in the third degree under New York law is substantially similar to the qualifying crime of felonious assault.

III. ANALYSIS

We conduct appellate review on a *de novo* basis. Based on the evidence in the record, we affirm the Director's decision to deny the Form I-918.

A. Certified Criminal Activity

The Form I-918 Supplement B submitted into the record was signed by [REDACTED] Bureau Chief, Integrity Bureau, [REDACTED] New York (certifying official), on April 8, 2013. The certifying official listed the criminal activity of which the Petitioner was a victim at Part 3.1 as assault in the third degree and at Part 3.2 the date the criminal activity occurred as [REDACTED] 2012. In Part 3.3, the certifying official cited New York Penal Law § 120-1 (assault in the third degree) as the criminal activity that was investigated or prosecuted.

B. Misdemeanor Assault is not Substantially Similar to any Qualifying Criminal Activity

When determining what criminal activity a certifying agency detected, investigated or prosecuted, we look to the relevant criminal statute as provided on the Form I-918 Supplement B and on any accompanying reports. According to the certification and the charging documents in this case, the criminal activity that was investigated or prosecuted was N.Y. Penal Law § 120-1, misdemeanor assault.¹ None of the documents references the New York felony assault statutes, or suggests that felony assault was investigated or prosecuted. Accordingly, the record demonstrates that the Petitioner is the victim of misdemeanor assault, rather than felony assault.

¹ The record also contains criminal complaints against two defendants indicating that each was charged with a violation of N.Y. Penal Law § 120.00-1 (assault in the third degree); N.Y. Penal Law 145-1 (criminal mischief fourth degree); and N.Y. Penal Law 240.26-1 (harassment in the second degree). As the Petitioner does not claim that either criminal mischief or harassment is substantially similar to a qualifying crime, we will not discuss these two offenses.

The crime of misdemeanor assault is not specifically listed as a qualifying crime at section 101(a)(15)(U)(iii) of the Act. Although the statute encompasses “any similar activity” to the enumerated crimes, the regulation defines “any similar activity” as “criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities.” 8 C.F.R. § 214.14(a)(9). Thus, the nature and elements of the offense of misdemeanor assault must be substantially similar to one of the qualifying criminal activities in the statutorily enumerated list. *Id.* The inquiry, therefore, is not fact-based, but rather entails comparing the nature and elements of the statute in question.²

On appeal, the Petitioner contends that misdemeanor assault is substantially similar to felonious assault because in New York, misdemeanor assault is punishable by up to a year of imprisonment, and we have determined that a crime punishable by imprisonment of up to one year is similar to felonious assault. The Petitioner does not cite any binding precedent decision in support of his argument. The Petitioner also contends that the facts of the criminal incident are egregious enough to constitute felonious assault. As stated above, we do not analyze the facts of the case to determine whether a crime is substantially similar to a qualifying crime, but compare the nature and elements of the statutes in question.

A person is guilty of assault in the third degree, a misdemeanor, under New York law when, “[w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person . . .” N.Y. Penal Law § 120-1 (McKinney 2012). A person is guilty of assault in the second degree, a felony, when, in part, “[w]ith intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or . . . [w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument. . . .” N.Y. Penal Law § 120.05 (McKinney 2012). The statutory elements of misdemeanor assault under N.Y. Penal Law § 120-1 are not substantially similar to those of felonious assault under N.Y. Penal Law § 120.05. A third degree misdemeanor assault offense under N.Y. Penal Law § 120-1 involves committing an act with the intent to cause physical injury to another person.³ Alternatively, second degree felony assault under N.Y. Penal Law § 120.05 requires, as an element of the offense, an additional aggravating factor, such as, the intent to cause serious physical injury,⁴ the intent to cause physical injury using a deadly weapon or a dangerous instrument, and the intent to cause physical injury to a protected class of persons. As such, the two offenses are not substantially similar. *See* 8 C.F.R. § 214.14(a)(9).

² For purposes of the present analysis, we will compare misdemeanor assault under N.Y. Penal Law § 120-1 (McKinney 2012) to the lesser classification for felonious assault under N.Y. Penal Law § 120.05 (McKinney 2012), a Class D felony.

³ N.Y. Penal Law § 10-9 (McKinney 2012) defines physical injury as “impairment of physical condition or substantial pain.”

⁴ N.Y. Penal Law § 10-9 (McKinney 2012) defines serious physical injury as “physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.”

Accordingly, the Petitioner has not provided the requisite statutory analysis to demonstrate that the nature and elements of N.Y. Penal Law § 120-1 (misdemeanor assault) are substantially similar to felonious assault or any other qualifying crime at section 101(a)(15)(U)(iii) of the Act. The Petitioner is, therefore, not the victim of qualifying criminal activity, as required by section 101(a)(15)(U)(i) of the Act.

C. Substantial Physical or Mental Abuse

As the Petitioner did not establish that he was the victim of qualifying criminal activity, he has also not established that he suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity, as required by section 101(a)(15)(U)(i)(I) of the Act.

D. Possession of Information Concerning Qualifying Criminal Activity

As the Petitioner did not establish that he was the victim of qualifying criminal activity, he has also not established that he possesses credible or reliable information establishing knowledge concerning details of the qualifying criminal activity, as required by section 101(a)(15)(U)(i)(II) of the Act.

E. Helpfulness to Authorities Investigating or Prosecuting the Qualifying Criminal Activity

As the Petitioner did not establish that he was the victim of qualifying criminal activity, he has also not established that he has been, is being or is likely to be helpful to a federal, state, or local law enforcement official, prosecutor, federal or state judge, USCIS or other federal, state or local authorities investigating or prosecuting qualifying criminal activity, as required by subsection 101(a)(15)(U)(i)(III) of the Act.

F. Jurisdiction of Qualifying Criminal Activity

As the Petitioner did not establish that he was the victim of a qualifying crime or criminal activity, he has also not established that qualifying criminal activity occurred within the jurisdiction of the United States, as required by subsection 101(a)(15)(U)(i)(IV) of the Act.

IV. CONCLUSION

The Petitioner has not demonstrated that he was a victim of qualifying criminal activity, as required by subsections 101(a)(15)(U)(i) and (iii) of the Act. Accordingly, he has not demonstrated that he meets the remaining eligibility requirements for visa classification as a U nonimmigrant. *See* subsections 101(a)(15)(U)(i)(I)–(IV) of the Act (requiring qualifying criminal activity for all prongs of eligibility).

The Petitioner bears the burden of proof to establish his eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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ORDER: The appeal is dismissed.

Cite as *Matter of H-S-*, ID# 14765 (AAO Dec. 16, 2015)