



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

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

MATTER OF E-A-V-

DATE: DEC. 22, 2015

MOTION ON ADMINISTRATIVE APPEALS OFFICE 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 and we dismissed a subsequent appeal. The matter is now before us on a motion to reconsider. The motion will be denied.

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[.]

(iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: . . . felonious assault; . . . or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes[.]

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. The alien must possess specific facts regarding the criminal activity leading a certifying official to determine that the petitioner has, is, or is likely to provide assistance to the investigation or prosecution of the qualifying criminal activity. . . . ;

(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, and since the initiation of cooperation, has not refused or failed to provide information and assistance reasonably requested. . . . ; and

(4) The qualifying criminal activity occurred in the United States (including Indian country and U.S. military installations) or in the territories or possessions of the United States, or violated a U.S. federal law that provides for extraterritorial jurisdiction to prosecute the offense in a U.S. federal court.

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 Mexico who claims to have last entered the United States in June 1994, without admission, inspection or parole. The Petitioner filed the instant Form I-918, Petition for U Nonimmigrant Status, on May 31, 2012, along with a Form I-918 Supplement B, U Nonimmigrant Status Certification.¹ The Director issued two requests for evidence (RFE) establishing, among other things, that the criminal offense set forth on the law enforcement certification constituted a qualifying criminal activity or was substantially similar to a qualifying crime. The Petitioner responded to the RFEs with additional evidence.

The Director denied the petition, concluding that the Petitioner had not established that he was a victim of qualifying criminal activity or criminal activity that was substantially similar to one of the qualifying crimes, and consequently, he also had not demonstrated that he suffered resultant substantial physical or mental abuse, possessed information concerning the qualifying criminal activity, had been helpful to authorities investigating or prosecuting qualifying criminal activity, and that such qualifying activity occurred within the jurisdiction of the United States. The Petitioner timely appealed. On appeal, we held that the Petitioner was a victim of the offense of criminal threats, which was not a qualifying criminal activity and was not substantially similar to the qualifying crime of felonious assault, as asserted by the Petitioner below. Accordingly, we also found that the Petitioner did not establish any of the eligibility criteria for U nonimmigrant classification at section 101(a)(15)(U)(i) of the Act. The Petitioner filed a timely motion to reconsider. On motion, the Petitioner submits a brief.

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

We review these matters on a *de novo* basis. A full review of the record does not overcome the grounds of denial to establish the Petitioner's eligibility. Consequently, the motion will be denied for the following reasons.

¹ As we set forth the relevant information contained in the Form I-918 Supplement B in our original decision, we will not do so here again and will instead refer back to our prior decision as needed.

III. ANALYSIS

A. Qualifying Criminal Activity

1. Criminal Threats Is Not A Qualifying Crime or Substantially Similar to A Qualifying Crime

In our May 11, 2015, decision, incorporated here by reference, we held that the Petitioner was a victim of criminal threats under section 422 of the California Penal Code, which was not one of the qualifying criminal activities enumerated at section 101(a)(15)(U)(iii) of the Act. Additionally, we found that although section 101(a)(15)(U)(iii) of the Act also encompasses “any similar activity” to the enumerated crimes, a comparison of the nature and elements established that the offense of criminal threats was not substantially similar to the qualifying crime of felonious assault, as the Petitioner maintained.

On motion, the Petitioner contends that we erred in applying a standard that goes beyond the statute and regulation by construing the term “substantially similar” in the regulatory definition of “any similar activity” to require that a criminal offense have the same nature and elements as one of the qualifying crimes. The Petitioner also disagrees with our determination that an inquiry into whether a criminal offense is “substantially similar” to those of a qualifying crime is not a fact-based one, but rather entails a comparison of the nature and elements of the statutes in question. He maintains that a reasonable interpretation of the phrase “the nature of the offense” implies that an analysis of the underlying facts may be required, and notes that in some cases, such a factual inquiry may be needed “to determine the existence of qualifying criminal activity.”

The implementing 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 crimes investigated must be substantially similar to one of the qualifying criminal activities in the statutorily enumerated list. 8 C.F.R. § 214.14(a)(9). This inquiry is not fact-based, but rather entails comparing the nature and elements of the statutes in question. Accordingly, we concluded in our prior decision that the nature and elements of the offense of criminal threats are not substantially similar to those of felonious assault. The Petitioner cites to no, and we are unaware of any, pertinent precedent decisions or other controlling legal authority in support of his assertions on motion to establish that our decision was based on an incorrect application of the law or USCIS policy. The Petitioner’s contention that the phrase “nature of the offense” implies that we may undergo a fact-based inquiry in determining the substantial similarity of two criminal offenses disregards the fact that the regulatory definition of “any similar activity” requires that *both* the “nature and elements” of the two offenses have to be substantially similar. Thus, even if we were to agree that a factual inquiry is appropriate in comparing the nature of the two offenses, our determination that the *elements* of criminal threats and felonious assault are not substantially similar under a statutory comparison necessitates a conclusion that the offenses are also not substantially similar. The Petitioner has not established on motion that the elements of the two offenses are substantially similar.

Additionally, while there is no question that a qualifying crime may occur during the commission of non-qualifying criminal activity, as the Petitioner maintains, our factual inquiry focuses on whether the Form I-918 Supplement B and the record establishes that the certifying agency *investigated or prosecuted* a qualifying crime as required by section 101(a)(15)(U)(III) of the Act and the regulation at 8 C.F.R. § 214.14(b)(2) and (3). Contrary to the Petitioner's assertions, we interpret the regulatory definition of "any similar activity" to forestall a fact-based inquiry into whether underlying conduct or facts identified by the certifying agency in its investigation may or may not establish "the existence of a qualifying criminal activity," or whether such activity occurred. Here, the record demonstrates that the certifying agency investigated the non-qualifying criminal offenses of criminal threats and vandalism committed against the Petitioner. While the qualifying crime of felonious assault may have also occurred, there is no indication that the certifying agency investigated or detected it.

The Petitioner additionally maintains on motion that criminal threats is substantially similar to felonious assault, specifically as defined under section 245(a)(1) of the Cal. Penal Code, because the corresponding statutes for both offenses allow for a conviction even when there is no intent to commit great bodily injury and because both are considered "serious felonies."² Although neither statute requires intent to commit great bodily injury as a requirement, this is insufficient to show that their required elements are substantially similar. The crime of criminal threats in California relates to an offense where the perpetrator makes a threat to carry out a crime that would result in "death or great bodily injury," even when there is no intention to actually carry out the crime. Cal. Penal Code § 422 (West 2015). However, a conviction for criminal threats does not require an attempt to carry out the threat. In contrast, assault under Cal. Penal Code section 245(a)(1) involves more than a mere threat to cause "death or great bodily injury." Rather, the felony assault provision requires an actual attempt, combined with the ability, to commit violent injury against another person through the use of a deadly weapon or by means of force likely to produce great bodily injury. *See also* Cal. Penal Code § 240 (West 2015) (defining assault). The distinction between the two offenses is also recognized in the California Penal Code, which separately categorizes assault as a crime against the person under Title 8, while criminal threats is found elsewhere under Title 11.5. Accordingly, the two offenses are not substantially similar. *See* 8 C.F.R. § 214.14(a)(9).

2. The Petitioner Is Not A Victim of the Qualifying Crime of False Imprisonment

The Petitioner also contends for the first time on motion that the Petitioner was a victim of the qualifying crime of false imprisonment, as set forth by the certifying official in Part 3.1 of the Form

² The Petitioner also attempts to compare the underlying facts of the criminal offense investigated here, namely criminal threats, to assert that they would satisfy definitions of assault under Black's Law Dictionary and in other state jurisdictions. However, as noted, we do not engage in a fact-based inquiry into the underlying conduct or acts relating to a criminal offense to determine whether a qualifying crime occurred or whether such conduct would satisfy the statutory elements of a qualifying crime (under any jurisdiction). Moreover, even if we compared here the statutory elements of criminal threats with the various assault provisions cited by the Petitioner, he does not provide the requisite statutory analysis to demonstrate the substantial similarities in the nature and elements of criminal threats and those provisions, and only references the various statutes as "instructive" in recognizing the variations in the definitions of assault.

I-918 Supplement B.³ He further asserts that the underlying facts of the criminal offense that was investigated satisfy the statutory elements of false imprisonment, and that there is no requirement that false imprisonment to have also been specifically investigated or prosecuted to establish his eligibility.

As previously discussed, we do not engage in a fact-based inquiry into whether the underlying conduct and facts of a non-qualifying crime also establish that a qualifying criminal activity occurred. Our inquiry focuses instead on whether the Form I-918 Supplement B and the record as a whole establish that the certifying agency investigated or prosecuted the qualifying crime. The regulation at 8 C.F.R. § 214.14(c)(2)(i) specifically requires that the certification state that a petitioner was a victim of qualifying criminal activity that the certifying agency is “investigating or prosecuting.” The regulatory definition of the term “investigation or prosecution,” as used in section 101(a)(15)(U) of the Act, also includes “detection” of a qualifying crime or criminal activity.” 8 C.F.R. § 214.14(a)(5). Thus, while the Petitioner is correct that a qualifying crime may occur during the commission of non-qualifying criminal activity, the certifying official must still provide evidence and the record must establish that the qualifying criminal activity was in fact detected, investigated or prosecuted.

Here, our review does not establish that the certifying agency ever detected, investigated, or prosecuted false imprisonment. 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. Although the certifying official marked the boxes for qualifying crimes of false imprisonment and felonious assault in Part 3.1 in the certification, he listed only the statutes for criminal threats (Cal. Penal Code § 422) and vandalism (Cal. Penal Code § 594(A)), as the offenses the certifying agency actually investigated and/or prosecuted.⁴ The underlying police incident report similarly does not list false imprisonment or a corresponding statute as the offense that was committed against the Petitioner. Accordingly, the Petitioner has not established that he is the victim of qualifying criminal activity of false imprisonment.

In sum, the Petitioner has not established that the offense of criminal threats, of which he was a victim, is substantially similar to the qualifying crime of felonious assault, or that he was a victim of the qualifying crime of false imprisonment. The Petitioner, therefore, has not established that he was the victim of a qualifying crime, as required by section 101(a)(15)(U)(i) of the Act.

³ Neither the Director’s decision or the Petitioner’s initial appeal raised this issue. We will review this issue under our *de novo* authority.

⁴ Part 3.3 of the certification also listed two statutory provisions relating to battery, which the Petitioner conceded below did not relate to offenses committed against him. We determine, in our sole discretion, the evidentiary value of a Form I-918 Supplement B. See 8 C.F.R. § 214.14(c)(4).

B. Substantial Physical or Mental Abuse

As the Petitioner has not established that he was the victim of qualifying criminal activity, he necessarily 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.

C. 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.

D. 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 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.

E. Jurisdiction of Qualifying Criminal Activity

As the Petitioner has not established 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

On motion, the Petitioner has not overcome the grounds for denial, as he has not demonstrated he was a victim of one of the qualifying criminal activities listed at section 101(a)(15)(U)(iii) of the Act. Consequently, the Petitioner does not meet the remaining eligibility requirements for U nonimmigrant status. See subsections 101(a)(15)(U)(i)(I)–(IV) of the Act (requiring qualifying criminal activity for all prongs of eligibility).

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. 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.

ORDER: The motion to reconsider is denied.

Cite as *Matter of E-A-V-*, ID# 15101 (AAO Dec. 22, 2015)