



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUL 28 2015**

FILE #: A [REDACTED]
PETITION RECEIPT #: [REDACTED]

IN RE: Petitioner: [REDACTED]

PETITION: Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)

ON BEHALF OF PETITIONER:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks nonimmigrant classification under section 101(a)(15)(U) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(U), as an alien victim of certain qualifying criminal activity.

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."

Facts and Procedural History

The petitioner is a native and citizen of Mexico who claims to have entered the United States as a minor in March 1994. The record does not indicate, and the petitioner does not assert, that he was admitted, inspected, or paroled into the United States at the time of his entry. The petitioner filed the instant Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), with an

accompanying Form I-918 Supplement B, U Nonimmigrant Status Certification (Form I-918 Supplement B), on October 15, 2012. The director subsequently issued a Request for Evidence (RFE) establishing that the claimed criminal activity, namely battery, set forth on the Form I-918 Supplement B was substantially similar to one of the qualifying criminal activities enumerated at section 101(a)(15)(U)(iii) of the Act. The petitioner responded to the RFE with additional evidence, which the director found insufficient to establish the petitioner's eligibility.

The director denied the petition, concluding that the petitioner had not established that battery under Indiana law was substantially similar to the qualifying criminal activities of felonious assault and domestic violence as asserted, and consequently, did not demonstrate that he was a victim of qualifying criminal activity, had suffered resultant substantial physical or mental abuse, possesses information concerning the qualifying criminal activity, has 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 the denial of the Form I-918 U petition. On appeal, the petitioner submits a brief and additional evidence, asserting that the crime of battery in Indiana is similar to the qualifying crime of felonious assault.

Claimed Criminal Activity

In his personal statements, the petitioner indicated that in 2009, while he as a freshman in high school, neighborhood kids verbally and physically abused him because of his sexual orientation as he was walking home from school one day. The petitioner recalled that three guys followed him, attempted to provoke him to fight them and called him derogatory names. He called his sister on his mobile telephone for help, but before she could arrive, the three attackers started pushing him around and one punched him in the mouth. The assailants ran off when the petitioner's sister arrived, threatening to call the police. The police were called and the petitioner went to the hospital as he had suffered an injury to his mouth. While in the hospital, the petitioner learned that several kids with baseball bats had surrounded his sister's house shouting for him to come and fight. He stated that he suffered profoundly because of this and other incidents, and even became afraid to go to school and started seeing a therapist because of depression.

The Form I-918 Supplement B that the petitioner submitted was signed on July 2, 2012 by M [REDACTED], [REDACTED] Attorney, Bartholomew County Prosecutor's Office, Columbus, Indiana (certifying official). The certifying official indicated "Battery" next to the box marked "other" in Part 3.1 of the certification, which inquires about the type of criminal activity of which the petitioner was a victim. In Part 3.3, the certifying official listed sections 35-42-2-1 (battery), 35-45-1-3 (disorderly conduct), and 35-44-3-3 (resisting law enforcement) of the Indiana Code as the corresponding statutory citations for the criminal activity investigated or prosecuted. At Part 3.5, which asks the certifying official to briefly describe the criminal activity being investigated or prosecuted, Mr. [REDACTED] reaffirmed that battery was the relevant criminal activity investigated and prosecuted and that the petitioner provided a statement to the police and juvenile court. The certifying official also indicated at Part 3.6, which asks for a description of any known or documented injury to the petitioner, that the petitioner was a victim of battery resulting in lacerations to his lip.

Analysis

We conduct appellate review on a *de novo* basis. Upon a full review of the record, as supplemented on appeal, the petitioner has not overcome the director's grounds for denial. The appeal will be dismissed for the following reasons.

Misdemeanor Battery under Indiana Law Is Not Substantially Similar to Any Qualifying Criminal Activity

The record shows that the petitioner was a victim of misdemeanor battery¹ on September 1, 2009. 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.² Here, the only criminal activity certified at Part 3.1 of the Form I-918 Supplement B is battery. The certification does not indicate whether the battery offense investigated or prosecuted was a misdemeanor or a felony offense, but the police incident report specifies that the battery offense is a B misdemeanor offense. The record otherwise lacks any evidence from the certifying official or law enforcement records that the qualifying criminal activity of felonious assault was also investigated or prosecuted. Accordingly, although a careful review of the record establishes that the crime of misdemeanor battery committed against the petitioner was investigated and prosecuted, it does not establish that the crime of felonious assault against him was also investigated or prosecuted.

The crime of battery 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 crime investigated, misdemeanor battery, must be substantially similar to one of the qualifying criminal activities in the statutorily enumerated list. 8 C.F.R. § 214.14(a)(9). The inquiry, therefore, is not fact-based, but rather entails comparing the nature and elements of the statutes in question.

At the time of the offense in 2009, the offense of battery at IND. CODE § 35-42-2-1 provided, in pertinent part, as follows:

- (a) A person who knowingly or intentionally touches another person in a rude, insolent, or

¹ The police incident report for the offense, which does not provide a narrative of the underlying circumstances of the criminal offense, indicates that the juvenile victim was a victim of battery (B misdemeanor) and that the state of Indiana was the victim of the remaining offenses, namely disorderly conduct and resisting law enforcement.

² Consequently, the director's reliance upon the underlying facts of the battery offense, as relayed by the petitioner, in determining that the petitioner was a victim of misdemeanor battery rather than felony battery, was improper.

angry manner commits battery, a Class B misdemeanor. However, the offense is:

(1) a Class A misdemeanor if:

(A) it results in bodily injury to any other person;

* * *

(3) a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon;

* * *

IND. CODE § 35-42-2-1 (West 2009). The petitioner correctly notes on appeal that the Indiana Code does not contain a provision for assault, and maintains that battery under Indiana law is substantially similar to the offense of felonious or aggravated assault as defined under the Federal Sentencing Guidelines, which provide in pertinent part:

“Aggravated assault” means a felonious assault that involved

(A) a dangerous weapon with intent to cause bodily injury (i.e., not merely to frighten) with that weapon;

(B) serious bodily injury;

(C) strangling, suffocating, or attempting to strangle or suffocate; or

(D) an intent to commit another felony.

U.S. SENTENCING GUIDELINES MANUAL § 2A2.2 cmt. n.1 (2015). A comparison of the statutory elements of Indiana’s battery statute and the federal definition of aggravated assault under the sentencing guidelines indicate that a misdemeanor battery offense in Indiana is not substantially similar to felonious assault. Misdemeanor battery under IND. CODE § 35-42-2-1 requires a touching of another person in a “rude, insolent, or angry manner,” which may or may not result in bodily injury to that other person, without any additional aggravating factor. In contrast, aggravated assault under the sentencing guidelines requires the further presence of an aggravating factor, such as serious bodily injury³ to the victim, the use of deadly weapon during the commission of the assault,

³ As used in the federal sentencing guidelines, the term “bodily injury” means “any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought,” “serious bodily injury” means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.” U.S. SENTENCING GUIDELINES MANUAL § 1B1.1. cmt. n.1 (2015). The Indiana Code has a similar distinction between the terms “bodily injury” (defined as “any impairment of physical condition, including physical pain) applicable to misdemeanor battery and “serious bodily injury” (defined as “bodily injury that creates a substantial risk of death” or that causes: serious

or the commission of the offense with an intent to commit another felony, none of which are present in the Indiana misdemeanor battery offense. Accordingly, in comparing the statutory elements of misdemeanor battery in Indiana and aggravated assault under the federal sentencing guidelines, the two offenses are not substantially similar. *See* 8 C.F.R. § 214.14(a)(9).

On appeal, the petitioner asserts that the violent acts perpetrated against him because of his sexual orientation constituted a hate crime, could have been subject to federal prosecution as an offense punishable under the Civil Rights Act of 1965, and are analogous to felonious assault because the acts were committed with intent to commit another felony, caused serious and permanent bodily injury, and involved the use of a weapon. However, as stated above, the proper inquiry in determining whether a criminal offense is substantially similar to a qualifying criminal activity (felonious assault) is not an analysis of the factual details underlying the criminal activity, but rather a comparison of the nature and elements of the crime that was investigated and one of the qualifying crimes. *See* 8 C.F.R. § 214.14(a)(9). Here, the criminal activity investigated and prosecuted was misdemeanor battery under IND. CODE § 35-42-2-1, and the petitioner has not demonstrated substantial similarities in the nature and elements of Indiana's misdemeanor battery and felonious assault under the federal sentencing guidelines. 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.

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.

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.

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.

permanent disfigurement, unconsciousness, extreme pain, etc.), the latter elevating the severity of the battery offense to a felony. IND. CODE §§ 35-31.5-2-29; 35-31.5-2-292.

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.

Conclusion

The petitioner has not demonstrated that the offense of misdemeanor battery IND. CODE § 35-42-2-1 is a qualifying crime or substantially similar to one of the qualifying criminal activities listed at section 101(a)(15)(U)(iii) of the Act. Consequently, 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. He, therefore, 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 appeal is dismissed.