



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

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

MATTER OF A-E-R-M-

DATE: SEPT. 30, 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, in pertinent part, 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. Whether abuse is substantial is based on a number of factors, including but not limited to: The nature of the injury inflicted or suffered; the severity of the perpetrator’s conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions. No single factor is a prerequisite to establish that the abuse suffered was substantial. Also, the existence of one or more of the factors automatically does not create a presumption that the abuse suffered was substantial. A series of acts taken together may be considered to constitute substantial physical or mental abuse even where no single act alone rises to that level;

(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:

(b)(6)

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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 entered the United States in May 2002, without inspection, admission, or parole. The Petitioner filed the instant Form I-918 with an accompanying Form I-918 Supplement B, U Nonimmigrant Status Certification, on May 24, 2013. On January 28, 2014, the Director issued a request for evidence (RFE) that the crime listed on the law enforcement certification was similar to a qualifying crime and that the petitioner suffered resultant substantial physical or mental abuse. The Director also requested a signed victim statement. The Petitioner responded with additional evidence, which the Director found insufficient to establish the Petitioner's eligibility. Accordingly, the Director denied the Form I-918 because the Petitioner did not establish that she was the victim of qualifying criminal activity and could therefore not meet any of the other requirements. The Petitioner timely appealed the denial of the Form I-918. On appeal, the Petitioner submits a brief in which she asserts that battery is similar to felonious assault, a qualifying crime.

III. ANALYSIS

We conduct appellate review on a *de novo* basis. Based on the evidence in the record, the Petitioner has not overcome the Director's decision to deny the Petitioner's Form I-918.

A. Certified Criminal Activity

In her personal statement, the Petitioner recounted that she was battered by another individual. The Petitioner submitted a Form I-918 Supplement B that was signed by Violent Crimes Unit [REDACTED], [REDACTED], California, Police Department, on [REDACTED] 2013. [REDACTED] listed the criminal activity of which the petitioner was a victim at Part 3.1 as felonious assault and battery-injuries. In Part 3.3, [REDACTED] referred to California Penal Code § 242, battery, as the criminal activity that was investigated or prosecuted. The police report also lists the nature of the call/report title as battery.

B. Misdemeanor Battery under California Law is not Qualifying Criminal Activity

The Form I-918 Supplement B and incident report from the Alameda Police Department indicate that misdemeanor battery was investigated. The crime of misdemeanor 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 misdemeanor battery offense 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.

Under California law, misdemeanor battery is “any willful and unlawful use of force or violence upon the person of another.” Cal. Penal Code § 242 (West 2015). In California, felony battery occurs when serious bodily injury is inflicted during the battery. Cal. Penal Code § 243(d) (West 2015). Serious bodily injury is defined as “a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.” Cal. Penal Code § 243(f)(4) (West 2015). California law defines assault “as an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” Cal. Penal Code § 240 (West 2015). For an assault in California to be classified as a felony, there must be an aggravating factor involved. Felonious assault in California involves assault with a deadly weapon or force likely to produce great bodily injury, assault with caustic chemicals or flammable substances, or assault against a specific class of persons (such as peace officers, fire fighters, custodial officers or school employees). Cal. Penal Code §§ 244, 244.5, 245, 245.3, 245.5 (West 2015).

No elements of misdemeanor battery under Cal. Penal Code § 242 are similar to felonious assault under Cal. Penal Code §§ 244, 244.5, 245, 245.3, or 245.5. The statute investigated in this case involves using willful or unlawful force or violence upon another, and does not require violent or great bodily injury, the use of a weapon or caustic/flammables substances, or assault against a protected class as a necessary component. Felonious assault in California, however, involves an attempt, with a present ability, to commit violent injury upon another with an aggravating factor such as those listed above. In addition, felony battery involves the infliction of serious bodily injury. The distinction between the battery statutes is recognized under California law, which categorizes battery under CPC § 242 as a misdemeanor. Therefore, the offenses are not substantially similar.

The certifying official’s indication at Part 3.1 that the Petitioner was the victim of a felonious assault is without support in the record. The only crime certified at Part 3.3 of the Form I-918 Supplement B was battery, and the police report noted that the crime was battery. There is no evidence that the certifying agency investigated an attempted or actual felonious assault against the Petitioner, and the certifying official does not explain why at Part 3.3 he provided a citation for misdemeanor battery, not felonious assault under California law, if a felonious assault against the Petitioner was actually investigated or prosecuted.¹ We recognize that qualifying criminal activity may occur during the commission of a nonqualifying crime; however, the certifying official must provide evidence that the

¹ 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).

qualifying criminal activity was investigated or prosecuted. Here, the evidence of record does not demonstrate that the crime of felony assault was investigated or prosecuted.

On appeal, the Petitioner claims that she is the victim of felonious assault because her attacker used fists to fight her, and had a malicious purpose. However, as previously stated, 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 crimes that were investigated and the qualifying crimes. See 8 C.F.R. § 214.14(a)(9). The Petitioner has not established that the nature and elements of Cal. Penal Code § 242 (misdemeanor battery) are substantially similar to Cal. Penal Code §§ 244, 244.5, 245, 245.3, 245.5 (felonious assault), or any other qualifying crime at section 101(a)(15)(U)(iii) of the Act and there is no evidence in the record that aggravated assault was actually detected or investigated at the time the crime was reported or thereafter.² 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 she was the victim of qualifying criminal activity, she also did not establish that she 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 she was the victim of qualifying criminal activity, she also did not establish that she possesses information concerning such a crime or 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 she was the victim of qualifying criminal activity, she also did not establish that she 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

As the Petitioner did not establish that she was the victim of qualifying criminal activity, she also did not establish that 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

² In her brief, the petitioner cites to an online dictionary's definition of "felonious" and to the federal definition of a "crime of violence" at 18 U.S.C. § 16. Whether the facts surrounding the criminal activity would qualify it as a crime of violence under 18 U.S.C. § 16(a) or would be considered "felonious" is irrelevant here as that is not the standard listed in the regulations.

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violated a U.S. federal law that provides for extraterritorial jurisdiction to prosecute the offense in a U.S. federal court, as required by section 101(a)(15)(U)(i)(IV) of the Act.

IV. CONCLUSION

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.

Cite as *Matter of A-E-R-M-*, ID#14245 (AAO Sept. 30, 2015)