



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

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

MATTER OF A-G-P-

DATE: DEC. 14, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner seeks "U-1" nonimmigrant classification as a victim of qualifying criminal activity. *See* Immigration and Nationality Act (the Act) sections 101(a)(15)(U) and 214(p), 8 U.S.C. §§ 1101(a)(15)(U) and 1184(p). The U-1 classification affords nonimmigrant status to victims of certain crimes who assist authorities investigating or prosecuting the criminal activity.

The Director, Vermont Service Center, denied the Form I-918, Petition for U Nonimmigrant Status (U petition). The Director concluded that the Petitioner was not a victim of qualifying criminal activity and, therefore, could not meet the statutory criteria for U nonimmigrant classification under subsections 101(a)(15)(U)(i)(I)-(IV) of the Act. On appeal, we affirmed the Director's decision.

The matter is now before us on a motion to reopen and motion to reconsider. The Petitioner submits a new Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B) and a brief. The Petitioner asserts that we based our decision on an incorrect application of law by requiring the element of "serious bodily injury" for felonious assault, not comparing common law robbery to every possible type of felony assault under North Carolina law, and for not finding common law robbery to be a felony assault in its own right.

Upon review we will deny the motion to reopen and motion to reconsider.

I. LAW

A motion to reopen "must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." 8 C.F.R. § 103.5(a)(2). A motion to reconsider:

must 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 Service policy. A motion to reconsider a decision on an application or petition must, when filed, also 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).

An individual may qualify for U nonimmigrant classification as a victim of a qualifying crime under section 101(a)(15)(U)(i) of the Act if:

- (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[.]

See also 8 C.F.R. § 214.14(b) (discussing eligibility criteria). Clause (iii) of section 101(a)(15)(U) of the Act lists qualifying criminal activity and states, in pertinent part:

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[.]

As used in the Act, the term “‘any similar activity’ refers to 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).

The Petitioner bears the burden to establish eligibility for classification as a U nonimmigrant. *See* section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); and *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

II. ANALYSIS

In our previous decision, we first determined that the crime certified as being detected, investigated, or prosecuted¹ was common law robbery. We then determined that common law robbery was not a qualifying crime as enumerated by statute or substantially similar to any of those crimes, including

¹ The term “investigation or prosecution,” as used in section 101(a)(15)(U) of the Act, also refers to the “detection” of a qualifying crime or criminal activity.” 8 C.F.R. § 214.14(a)(5).

(b)(6)

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felonious assault, as the Petitioner had argued. Specifically, common law robbery under section 14-87.1 of the North Carolina General Statutes (“Robbery as defined at common law”)² is not substantially similar to felonious assault because felony assault in North Carolina involves “the use of a deadly weapon with either the intent to kill or which inflicts serious injury,”³ whereas robbery does not require the use of a deadly weapon or an “intent to kill or infliction of serious injury.” Compare section 14-32 of the North Carolina General Statutes *with* common law robbery as defined in *State v. Moss*, 418 S.E. 2d 213, 217 (N.C. 1992).

A. Motion to Reopen

On motion, the Petitioner submits a new Supplement B, signed by a [REDACTED] for [REDACTED] North Carolina, on June 20, 2016, more than two-and-a-half years after the filing of the U petition. As in the previous Supplement B initially filed with the U petition, the certifying official again refers to section 14-87.1 of the North Carolina General Statutes (common law robbery) as the criminal activity that was investigated or prosecuted.

The submission of a Supplement B with a U petition is required by statute at section 214(p)(1) of the Act (“The petition filed by an alien under section 101(a)(15)(U)(i) shall contain a certification . . .”). Although there is no statutory filing deadline for a U petition, the regulation at 8 C.F.R. § 214.14(c)(2)(i) requires that, at filing, a U petition “must include” as *initial* evidence a Supplement B “signed by a certifying official within the six months immediately *preceding* the filing of Form I-918.” (Emphasis added). The Supplement B on motion was not submitted as initial evidence in the instant case and was not executed within the 6 months preceding the filing of the U petition. Consequently, the Petitioner’s filing of a new Supplement B on motion does not conform to the regulatory requirements listed at 8 C.F.R. § 214.14(c)(2)(i) for requisite initial evidence.

Even if the new Supplement B had been timely signed and submitted, it does not provide information that significantly differs from the Supplement B and supporting documents submitted and considered below and on appeal. The new Supplement B still cites common law robbery as the crime investigated or prosecuted. The new Supplement B adds that the Petitioner was the victim of “Other: common law robbery” in addition to felonious assault and “related crime(s)” and quotes the

² The North Carolina Supreme Court has stated that common law robbery is:

the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear. . . . The felonious taking element of common law robbery requires “a taking with the felonious intent on the part of the taker to deprive the owner of his property permanently and to convert it to the use of the taker.”

(citations omitted) *State v. Moss*, 418 S.E. 2d 213, 217 (N.C. 1992).

³ “Serious bodily injury” is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization. See N.C. Gen. Stat. § 14-32.4.

arrest warrant in its description of the Petitioner's injuries. This information was present in the record below and addressed in our prior decision.

The Petitioner did not file any other new documentation and the remaining arguments on motion relate to the motion to reconsider. Accordingly, the Petitioner's filing does not meet the requirements for a motion to reopen under section 8 C.F.R. § 103.5(a)(2).

B. Motion to Reconsider

On motion, the Petitioner asserts that we based our decision on the incorrect application of law because we found that the North Carolina General Statutes require the element of "serious bodily injury" for a finding of felony assault. The Petitioner did not previously assert that the certified crime of common law robbery was substantially similar to any specific North Carolina General Statute or common law crime. Therefore, on appeal, we compared common law robbery to certain sub-sections of 14-32 of the North Carolina General Statutes because they are the most general form of felony assault under North Carolina Law.⁴ We also focused on felony assaults pertaining to "serious bodily injury" as the Petitioner asserted below that the "bodily injury" element of the certified crime rendered it a felony assault under North Carolina law.

The Petitioner now contends that we erred in finding that common law robbery is not substantially similar to felony assault under North Carolina law because we did not compare common law robbery to every possible form of felony assault under North Carolina Law that does not involve "serious bodily injury," such as sections 14-31, 14-32(c), 14-34.2 and 14-34.5 of the North Carolina General Statutes (maliciously assaulting in a secret manner; felonious assault with deadly weapon with intent to kill; assault with a firearm or other deadly weapon upon governmental officers or employees, company police officers, or campus police officers; and assault with a firearm on law enforcement, probation, or parole officer or on a person employed at a State or local detention facility). As discussed above, despite the Petitioner's failure to specify the North Carolina statute to which the criminal activity was substantially similar, we compared the certified crime to the most appropriate form of felony assault under North Carolina law.

⁴ Specifically, we cited the crime of assault inflicting serious bodily injury:

Unless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts serious bodily injury is guilty of a Class F felony. "Serious bodily injury" is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

N.C. Gen. Stat. § 14-32.4(a).

Nonetheless, as discussed below, the certified crime of common law robbery is not substantially similar to any other type of felony assault under North Carolina law.

The North Carolina General Statutes provided at the time of the criminal activity:

§ 14-31. Maliciously assaulting in a secret manner

If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be punished as a Class E felon.

§ 14-32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments

- (a) Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon.
- (b) Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon.
- (c) Any person who assaults another person with a deadly weapon with intent to kill shall be punished as a Class E felon.

.....

§ 14-34.2. Assault with a firearm or other deadly weapon upon governmental officers or employees, company police officers, or campus police officers

Unless a person's conduct is covered under some other provision of law providing greater punishment, any person who commits an assault with a firearm or any other deadly weapon upon an officer or employee of the State or of any political subdivision of the State, a company police officer certified pursuant to the provisions of Chapter 74E of the General Statutes, or a campus police officer certified pursuant to the provisions of Chapter 74G, Chapter 17C or Chapter 116 of the General Statutes, in the performance of his duties shall be guilty of a Class F felony.

.....

§ 14-34.5. Assault with a firearm on a law enforcement, probation, or parole officer or on a person employed at a State or local detention facility

- (a) Any person who commits an assault with a firearm upon a law enforcement officer, probation officer, or parole officer while the officer is in the performance of his or her duties is guilty of a Class E felony.
- (b) Anyone who commits an assault with a firearm upon a person who is employed at a detention facility operated under the jurisdiction of the State or a local government while the employee is in the performance of the employee's duties is guilty of a Class E felony.

N.C. Gen. Stat. §§ 14-31, 14-32, 14-34.2 and 14-34.5 (West 2012).

As the other types of felony assault in North Carolina either require "use of a deadly weapon with intent to kill," "assault with a deadly weapon and infliction of serious injury," or "assault with a firearm or any other deadly weapon" upon a special class of persons to which the Petitioner does not belong, common law robbery is not substantially similar to any of the sections of the North Carolina General Statutes to which the Petitioner cites. *Compare* sections 14-31, 14-32, 14-34.2, with 14-34.5 of the North Carolina General Statutes and common law robbery.

The Petitioner further contends that we incorrectly confused battery and assault in North Carolina and references assault as it is defined in North Carolina case law:⁵ as "an overt act or attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or violence must be sufficient to put a person of reasonable firmness in fear of immediate physical injury." *See United States v. Vinson*, 805 F.3d 120, 125 (4th Cir. 2015); *State v. Haynesworth*, 146 N.C.App. 523, 529, 553 S.E.2d 103, 108 (2001); *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). However, such an assault is classified as a misdemeanor. As discussed above and in our previous decision, felony assault in North Carolina requires "the use of a deadly weapon with either the intent to kill or which inflicts serious injury" or other aggravating elements that are not present in common law robbery, such as assault upon law enforcement officials or medical personnel.

The Petitioner also asserts that we erred in not finding common law robbery to be one of the many types of felony assault under North Carolina law. Specifically, the Petitioner contends that common law robbery is by its very nature a felony assault because it includes the element of assault and it is charged at the felony level. North Carolina General Statutes do not classify common law robbery as an assault or felony assault violation. The Petitioner cites to *State v. White*, 369 S.E.2d 813 (N.C. 1988), to reinforce the argument that common law robbery is a serious felony because of the element of assault. As discussed in our previous decision and above, North Carolina has specific statutes to punish felony assaults with elements that are not present in common law robbery. *Compare* sections

⁵ The North Carolina General Statutes do not define assault.

14-31, 14-32, 14-34.2, and 14-34.5 of the North Carolina General Statutes *with* common law robbery. The mere classification of a certified crime as a felony is not sufficient to establish that it is substantially similar to felonious assault or any other qualifying criminal activity listed under section 101(a)(15)(U)(iii) of the Act. As discussed in our previous decision, the relevant inquiry is whether the nature and elements of the certified crime are substantially similar to felonious assault. *See* section 101(a)(15)(U)(iii) of the Act and 8 C.F.R. § 214.14(a)(9). The Petitioner has not shown that the elements of felony assault and common law robbery are substantially similar. Accordingly, the Petitioner has not established that we based our previous decision on an incorrect application of law or policy.

The Petitioner's motion to reconsider does not overcome our prior determination that the crime of common law robbery in North Carolina is not substantially similar to felonious assault, a qualifying crime. The Petitioner, therefore, has not demonstrated that she is a victim of qualifying criminal activity.

III. CONCLUSION

The Petitioner has not established that she is the victim of qualifying criminal activity, as required by section 101(a)(15)(U)(i)(I) of the Act, and she thereby cannot demonstrate that she meets any of the remaining eligibility criteria at section 101(a)(15)(U)(i)(I)-(IV) of the Act.

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Otiende* at 128. Here, that burden has not been met.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of A-G-P-*, ID# 00044999 (AAO Dec. 14, 2016)