U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-A-Z-

DATE: JAN. 8, 2016

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;
>
> . . . .

> (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:
> rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18, United States Code); 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' refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities." The regulation at 8 C.F.R. § 214.14(a)(14) states, in pertinent part, "*Victim of qualifying criminal activity* generally means an alien who has suffered direct and proximate harm as a result of the commission of qualifying criminal activity."

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 an 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, a citizen of Mexico, indicates that he last entered the United States around 2001, without admission, inspection, or parole by U.S. immigration officials. The Petitioner filed the instant Form I-918, Petition for U Nonimmigrant Status, with an accompanying Form I-918 Supplement B, U Nonimmigrant Status Certification, on July 2, 2013. On February 19, 2014, the Director issued a request for evidence (RFE) that the crime listed on the Form I-918 Supplement B was similar to a qualifying crime. The Petitioner responded with a brief and additional evidence. On February 5, 2015, the Director denied the Form I-918, concluding that the record was insufficient

to establish that the Petitioner was a victim of qualifying criminal activity, and accordingly, had not demonstrated his eligibility. The Petitioner filed a timely appeal. On appeal, the Petitioner claims that he was a victim of criminal conduct which is substantially similar to felonious assault, a qualifying crime.

III. ANALYSIS

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

A. Certified Criminal Activity

Chief Deputy District Attorney, District Attorney (certifying official), signed the Form I-918 Supplement B on March 8, 2013, listing the criminal activity of which the Petitioner was a victim at Part 3.1 as "Other: failure to control animal." In Part 3.3, the certifying official referred to California Penal Code (CPC) § 399(b) as the criminal activity that was investigated or prosecuted. At Part 3.5, which asks the certifying official to briefly describe the criminal activity being investigated or prosecuted, the certifying official stated, "The defendant was prosecuted for failing to control a mischievous animal," and the Petitioner "suffered great bodily injury due to dog bites."

B. CPC § 399(b) Is Not Qualifying Criminal Activity

The Petitioner bears the burden of proof to demonstrate his eligibility for U nonimmigrant classification. Section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 214.14(c)(4); *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). That burden includes showing that the Petitioner was the victim of a qualifying crime that was investigated or prosecuted by a certifying law enforcement agency. The regulation at 8 C.F.R. § 214.14(c)(4) provides USCIS with the authority to determine, in its sole discretion, the evidentiary value of evidence, including a Form I-918 Supplement B.

The Form I-918 Supplement B indicates that the Police Department investigated "Mischievous animal causing serious bodily injury" under CPC § 399(b). This crime is not specifically listed as qualifying criminal activity 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, "[C]riminal 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 certified offense must be substantially similar to one of the qualifying criminal activities in the statutorily enumerated list. The inquiry, therefore, is not fact-based, but rather, entails comparing the nature and elements of the statutes in question.

In support of his petition, the Petitioner has provided a detailed description of the events of which he was a victim, and he refers to the violent propensities of the dogs that attacked him, the actions that a neighbor took to protect herself from those dogs, an Internet article that reported the attack, and medical documentation of the injuries he sustained because of the attack. Although we do not minimize the injuries sustained by the Petitioner and the impact that this event has had upon him, our inquiry does not rely on 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 certified and the qualifying crimes. *See* C.F.R. § 214.14(a)(9).

CPC § 399(b) states:

> If any person owning or having custody or control of a mischievous animal, knowing its propensities, willfully suffers it to go at large, or keeps it without ordinary care, and the animal, while so at large, or while not kept with ordinary care, causes serious bodily injury to any human being who has taken all the precautions that the circumstances permitted, or which a reasonable person would ordinarily take in the same situation, is guilty of a misdemeanor or a felony.

CPC § 240 defines assault as, "[A]n unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." For an assault in California to be classified as a felony, however, there must be an aggravating factor involved, such as use of a deadly weapon, force likely to produce great bodily injury, caustic chemicals or flammable substances, or assault against a specific class of persons (such as peace officers, fire fighters, custodial officers, or school employees). CPC §§ 244, 244.5, 245, 245.3, 245.5.

Although both felonious assault and mischievous animal causing serious bodily injury involve "bodily injury," CPC § 399(b) does not involve an "unlawful attempt, coupled with a present ability" on behalf of the perpetrator to commit a bodily injury against another. Instead, CPC § 399(b) involves a person failing to prevent a mischievous animal under their control from causing bodily injury to another. As such, the nature and elements of the two crimes are not substantially similar.

The Petitioner asserts that CPC § 399(b) is substantially similar to felonious assault under California law because both involve serious bodily injury and, whereas section 399(b) of the CPC requires actual harm from a prohibited act, felonious assault only requires likely harm to the victim. The Petitioner also asserts that a finding of criminal negligence is required under section 399(b) of the CPC which is substantially similar to the requirements for assault under California law. Specifically, the Petitioner argues that criminal negligence is similar to the "natural and probable consequences doctrine" of assault, which requires an intentional act that would lead a reasonable individual to realize that physical force would be applied to another as a direct and probable consequence of that

act, regardless of the individual's subjective awareness. *See People v. Aznavoleh,* 210 Cal.App.4th 1181, 1183 (2012); *see also People v. Flores,* 216 Cal.App.4th 251, 259 (2013).[1]

Although the Petitioner correctly identifies that both crimes may require a particularly serious level of harm to a victim, there is a significant difference of the requisite element of intent between the two crimes, and they cannot be considered substantially similar when those elements differ. CPC § 399(b) requires an individual to exercise ordinary care, which the California courts have defined as criminal negligence. *See* 216 Cal.App.4th at 259. In contrast, the California courts have determined that to sustain a conviction for an assault, a general intent crime, "[M]ere recklessness or criminal negligence is . . . not enough . . . because a jury cannot find a defendant guilty of assault based on facts he should have known but did not know [citation omitted]." *People v. Williams,* 26 Cal.4th 779, 788 (2001). Because the requisite element of intent is lesser to sustain a charge under CPC § 399(b) than is required for an assault, the Petitioner has not established that CPC § 399(b) is substantially similar to felonious assault in California.

The Petitioner has not established that the elements of the certified crime, section 399(b) of the CPC, are substantially similar to felonious assault under CPC §§ 244, 244.5, 245, 245.3, 245.5 or any other qualifying crime at 101(a)(15)(U)(iii) of the Act. Accordingly, the Petitioner has not established that he is the victim of qualifying criminal activity, as required by section 101(a)(15)(U)(i) of the Act, and he thereby cannot demonstrate that he meets any of the remaining eligibility criteria at 101(a)(15)(U)(i)(I) – (IV) of the Act.

IV. CONCLUSION

In these proceedings, 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). The Petitioner has not established that he was the victim of a qualifying crime. He is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U)(i) of the Act.

[1] The Petitioner further cites to *People v. Knoller,* arguing that the California Supreme Court applied the "natural and probable consequences doctrine" to uphold a conviction for second degree murder because of the dangerous actions of dog owners, in which two dogs "broke free" from the owner's control and "mauled a woman to death." 41 Cal.4th 139 (2007). However, the elements of second degree murder are not at issue in this case. Moreover, section 399 of the CPC contains a separate subsection concerning the death of an individual, like the victim in *Knoller*, because of the failure to control a mischievous animal. The record does not reflect that this subsection of CPC 399 was investigated or prosecuted in the instant case.

ORDER: The appeal is dismissed.

Cite as *Matter of A-A-Z-*, ID# 15003 (AAO Jan. 8, 2016)