



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

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

MATTER OF A-N-U-

DATE: JULY 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 the Petitioner did not establish that he has been a victim of qualifying criminal activity. Accordingly, the Director also determined the Petitioner did not establish that he meets any of the remaining eligibility criteria at section 101(a)(15)(U)(i)(I)-(IV) of the Act. We dismissed the Petitioner's appeal and denied a subsequent motion to reconsider.

The matter is again before us on a motion to reconsider. On motion, the Petitioner submits a brief and a copy of the brief submitted with his previous motion. The Petitioner reasserts that he was a victim of theft, which "falls within the general nature of the list of crimes enumerated" as qualifying criminal activity. The Petitioner further asserts that the Board of Immigration Appeals (Board) has determined theft to be similar to extortion, which is a qualifying crime.

Upon review, we will deny the motion to reconsider.

I. APPLICABLE LAW

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 U.S. Citizenship and Immigration Services 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).

As discussed in our prior decisions, incorporated here by reference, under the regulation at 8 C.F.R. § 214.14(a)(9), a victim of qualifying criminal activity must demonstrate the "nature and elements of the offense[] are substantially similar to the statutorily enumerated list of criminal activities." Also discussed previously, the interim rule for U nonimmigrant status provides, in part, "for a criminal activity to be deemed similar to one specified on the statutory list, the similarities must be

substantial.” New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53014, 53018 (Sept. 17, 2007).

The burden of proof is on a petitioner to demonstrate eligibility by a preponderance of the evidence. See *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). A petitioner may submit any evidence for us to consider; however, we determine, in our sole discretion, the credibility of and the weight to give that evidence. See section 214(p)(4) of the Act; 8 C.F.R. § 214.14(c)(4).

II. ANALYSIS

The sole crime certified on the Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B), as being “investigated or prosecuted” was “Maryland Criminal Law Section 7-104.” The certifying official did not specify any particular provision under section 7-104 such as “Unauthorized control over property,” section 7-104(a) or “Unauthorized control over property – By deception,” section 7-104(b). In our prior decisions, we determined that the Petitioner did not establish that theft generally under section 7-104 was one of the statutorily enumerated crimes or substantially similar to one of those crimes.

A. Deference to Agency Interpretation of Its Regulations

The Petitioner contends on motion that our interpretation of the regulation “would not pass the interpretive reasonableness test” as established by the U.S. Supreme Court in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) and discussed in *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). The Petitioner generally refers to the *Skidmore* decision without specifying the particular factors that must be considered under what he denotes is “the interpretive reasonableness test.” However, in its decision, the Court noted it “has long given considerable and in some cases decisive weight to . . . interpretative regulations of . . . other bodies that were not of adversary origin[,]” and further stated the weight accorded by judicial courts to an administrative agency’s decision “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. at 140.

In addition, the Petitioner’s case arises in the jurisdiction of the U.S. Fourth Circuit Court of Appeals, which addressed the *Christensen* decision and the type of review the judicial courts must give to an agency’s interpretation of its regulations, stating:

Generally, courts must defer to an agency’s interpretation of its own regulation, regarding that interpretation as ‘controlling unless plainly erroneous or inconsistent with the regulation.’ *Auer v. Robbins*, 519 U.S. 452, 461 . . . (1997) . . . [The] holding [in *Christensen*] addresses only an agency’s use of a policy statement, manual, or the like to interpret a *statute*; it does not address the deference to be afforded when an agency employs these materials to state the agency’s interpretation of its own *regulations* When an agency interprets its own regulations, as opposed to a statute, *Auer* deference applies.

Humanoids Group v. Rogan, 375 F.3d 301, 305-06 (4th Cir. 2004); see *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 838, 842-44 (1984) (stating “[w]ith regard to judicial review of an agency’s construction of the statute which it administers, if Congress has not directly spoken to the precise question at issue . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” (footnote omitted)).

As in his previous motion, the Petitioner argues that we have misapplied the regulation and contends, “[n]owhere in the regulation is there any requirement that the similar activity must match up to a particular offense specified in the statutory list” The Petitioner further states that “the regulation merely requires that a criminal offense have nature and elements similar to the statutory list, as opposed to one particular crime.” To the contrary, the regulation at 8 C.F.R. § 214.14(a)(9) specifically states that the terms “*Qualifying crime or criminal activity* includes **one or more of the following or any similar activities** in violation of Federal, State or local criminal law of the United States (emphasis added).” The regulation further 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** (emphasis added).” Accordingly, the crime certified on the Supplement B as being detected or investigated must either be a statutorily enumerated crime or a crime with nature and elements substantially similar to one of the statutorily enumerated crimes.

Also as asserted in his previous motion, the Petitioner again cites to language in the interim rule and argues that we erred in interpreting the regulation. Specifically, he states that as a victim of non-qualifying criminal activity, he is not required to establish the investigation or prosecution of a qualifying crime when “there is some connection between the non-qualifying crime and qualifying criminal activity[.]” To support this assertion, the Petitioner refers to the example provided in the preamble concerning domestic violence, a qualifying crime, discovered during the course of an investigation for embezzlement and fraud, non-qualifying crimes. The Petitioner avers that the individual provided in the example was prosecuted “for the non-qualifying crimes of federal embezzlement and fraud, which are not substantially similar to any enumerated crimes on the statutory list.” The Petitioner further argues that “[n]othing contained in the [example] remotely suggests that the qualifying crime . . . was either investigated or prosecuted, since the guidance only offers the qualifying crime as ‘discovered.’” The regulation at 8 C.F.R. § 214.14(a)(5) states, “*Investigation or prosecution* refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity.” The example provided in the interim rule demonstrates that a qualifying crime, such as domestic violence, may be detected or discovered during the investigation of non-qualifying crimes such as embezzlement or fraud even though the domestic violence crime may not ultimately be charged or prosecuted. A petitioner may demonstrate eligibility for U-1 nonimmigrant classification, if the crime for which he or she was a victim included the detection, investigation, or prosecution of an enumerated crime or one substantially similar to an enumerated crime. Here, the Petitioner has not demonstrated that our interpretation or application of the regulation at 8 C.F.R. § 214.14(a)(9) to the facts of the Petitioner’s case is “plainly erroneous or inconsistent.”

B. The Certified Theft Offense Under the Maryland Code Annotated Is Not Substantially Similar to Extortion, a Qualifying Crime

On motion, the Petitioner again refers to a Board decision for the proffer that theft is generically defined as including property obtained by extortion. See *Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008).¹ In so doing, the Petitioner asserts, in part, that extortion under section 3-701 of the Maryland Code Annotated and under 18 U.S.C. § 1951, “means obtaining property from another person with the person’s consent, if the consent is induced by the wrongful use of actual or threatened force, violence, or other such means,” and it is irrelevant whether the Maryland Code Annotated has separate provisions for theft and extortion “if their elements have equivalence.”

In *Matter of Garcia-Madruga*, the Board considered whether the respondent’s conviction for welfare fraud in violation of the General Laws of Rhode Island qualified as a theft offense under the aggravated felony provisions of the Act. *Id.* at 437. The Board concluded that the taking of property without consent was required for a theft offense, whereas acquiring property with consent that had been fraudulently obtained was required for fraud or deceit offenses under the aggravated felony provisions of the Act. *Id.* at 440. Of particular note, in its decision, the Board referred to *Soliman v. Gonzales*, in which the U.S. Fourth Circuit Court of Appeals discussed the distinction between theft and fraud offenses when determining whether the appellant’s conviction for fraudulent use of a credit card in violation of the Virginia Code was a theft offense under the aggravated felony provisions of the Act. 419 F.3d 276 (4th Cir. 2005). The Court of Appeals stated, in part, “[t]he key and controlling distinction between these two crimes is therefore the ‘consent’ element—theft occurs without consent, while fraud occurs with consent that has been unlawfully obtained.” *Id.* at 282.

The Board’s conclusion in *Matter of Garcia-Madruga* does not support a finding that the nature and elements of the crime certified in this case, theft in violation of section 7-104 of the Maryland Code Annotated, are substantially similar to extortion. First, the Board’s discussion focused on Rhode Island law, and although it referred to theft convictions throughout the various Circuit Courts of Appeal, including the Fourth Circuit, it did not specifically address the attainment of property through extortion or theft provisions in Maryland. Moreover, as discussed in our previous decision, the theft provisions in Maryland include theft by deception, stating:

- (b) A person may not obtain control over property by willfully or knowingly using deception, if the person:
 - (1) intends to deprive the owner of the property;
 - (2) willfully or knowingly uses, conceals, or abandons the property in a

¹ The Petitioner also refers to another Board decision where the Board determined that extortion is a “categorical theft offense.” As this is an unpublished decision, it is not a binding precedent. Even if we were to defer to the decision as persuasive authority in this case, the Board’s discussion of 18 U.S.C. § 1951 focused on the statute as it related to theft offenses under the aggravated felony provisions of the Act and not extortion or theft as defined in Maryland.

manner that deprives the owner of the property; or

- (3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

MD. Code Ann., tit. 7, § 104 (West 2011).

The theft provisions in Maryland generally require that a theft offense be committed without the property owner's consent. Theft by deception in Maryland requires, as an essential element, attaining the property through deceit, which arguably could be accomplished with the owner's consent, an essential element for extortion as referred to by the Petitioner. However, as we previously discussed, the certifying official did not identify section 7-104(b) as the crime investigated or prosecuted; rather the Supplement B referred to the theft provisions contained in section 7-104 of the Maryland Code Annotated generally. Further, at part 3.5 of the Supplement B, which asks for a brief description of the criminal activity being investigated or prosecuted, the certifying official stated that the Petitioner "filed a criminal complaint for theft[.]" Thus, the only crime certified was theft as defined in Maryland, without any reference to the specific provision of the statute investigated or prosecuted.

Even *assuming arguendo* that the investigated or prosecuted crime included section 7-104(b) of the Maryland Code Annotated, the Petitioner has not established that theft by deception is substantially similar to extortion. Specifically, federal extortion and Maryland laws require the attainment of property through the actual or threatened use of "force, violence, or other such means" which is not an essential element for theft by deception. *Compare* 18 U.S.C. § 1951 (2011) *and* MD. Code Ann. § 3-701(b) (West 2011) *with* MD. Code Ann. § 7-104(b). Accordingly, even if section 7-104(b) had been certified as the criminal activity detected or investigated, the Petitioner has not established that crime is substantially similar to extortion, a qualifying crime.²

III. CONCLUSION

Upon review, the Petitioner's motion does not overcome our prior determinations that he has not demonstrated that he is a victim of qualifying criminal activity. In addition, the Petitioner has not established that we incorrectly applied pertinent law or agency policy, that we ignored or mischaracterized the evidence, or that our prior decisions were erroneous based on the evidence of record at the time.

² On motion, the Petitioner also claims that he "would be able to pursue a criminal complaint for obstruction of justice," a qualifying crime, if the perpetrator or someone acting on his behalf "sought to prevent [the] Petitioner from being a witness" in the theft case. The Petitioner, however, has not established that obstruction of justice was investigated in his case; the general theft provision was the only crime certified on the Supplement B. Moreover, as indicated in our prior decisions, the Petitioner does not provide an analysis to demonstrate substantial similarity between theft and obstruction of justice.

Matter of A-N-U-

The Petitioner bears the burden of proof to establish his eligibility. 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. Accordingly, the motion to reconsider will be denied.

ORDER: The motion to reconsider is denied.

Cite as *Matter of A-N-U-*, ID# 16914 (AAO July 14, 2016)