



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

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

MATTER OF S-P-M-

DATE: JULY 25, 2016

APPEAL OF VERMONT SERVICE CENTER 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 petition. The Director concluded that the Petitioner had not established that she was a victim of qualifying criminal activity and that she suffered substantial physical or mental abuse as a result of having been a victim of such activity. Consequently, the Director also found that the Petitioner had not demonstrated the remaining statutory criteria for U nonimmigrant classification under subsections 101(a)(15)(U)(i)(II)-(IV) of the Act.

The matter is now before us on appeal. On appeal, the Petitioner submits a brief. The Petitioner claims that the record demonstrates that she was a victim of qualifying criminal activity or criminal activity that is substantially similar to one of the qualifying crimes, and that she satisfied the remaining eligibility criteria for U nonimmigrant classification.

Upon *de novo* review, we will dismiss the appeal.

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: . . . false imprisonment; . . . 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(b).

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, 376 (AAO 2010). A petitioner may submit any evidence for us to consider in our *de novo* review; 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 Petitioner filed the instant Form I-918, Petition for U Nonimmigrant Status (U petition), on July 7, 2014. Upon a full review of the record, as supplemented on appeal, the Petitioner has not overcome the Director’s grounds for denial.

Matter of S-P-M-

A. Victim of Qualifying Criminal Activity

1. Criminal Activity Certified as Being Detected,¹ Investigated, or Prosecuted

The Petitioner submitted a Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B), dated April 25, 2014, by Lieutenant [REDACTED], [REDACTED] Police Department, Youth and Family Services, [REDACTED] California (certifying official). At part 3.3 of the Supplement B, the certifying official cited to sections 664/211 and 242 of the California Penal Code, corresponding to the offenses of attempted robbery, robbery, and battery, as the criminal activities that were investigated or prosecuted. At part 3.1, the certifying official asserted that these criminal activities committed against the Petitioner involved or are similar to the qualifying crime of “felonious assault.” During the proceedings below, the Petitioner submitted an updated Supplement B, dated January 12, 2015, in which the certifying official amended part 3.1 to indicate that the criminal activities investigated and prosecuted also involved or were similar to the qualifying crime of false imprisonment.² He did not, however, amend part 3.3 to indicate that false imprisonment was one of the crimes that was detected or investigated. Further, the record includes the police incident report for the criminal activity which only identifies strong-arm robbery and misdemeanor battery.

On appeal, the Petitioner contends that investigation of the qualifying crime of felonious assault is inherent in any case where robbery is investigated because of the certifying agency’s likely adherence to guidelines issued by the Federal Bureau of Investigation (FBI) under which a lower offense (such as felonious assault) on a hierarchy list of criminal offenses would not be included in the police report where a higher rated offense on the list (robbery) was also committed and already reported. However, the record contains no evidence that the certifying agency utilized the FBI guidelines in reporting the crimes committed against the Petitioner. It also does not contain evidence that the qualifying crime of felonious assault was detected or investigated. Accordingly, upon our *de novo* review, the record establishes only that the crimes of attempted robbery, robbery and misdemeanor battery were investigated.

2. Robbery and Battery Under the California Penal Code Are Not Qualifying Crimes

The crimes of robbery and battery are not specifically listed as qualifying crimes 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 offenses

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

² The regulation at 8 C.F.R. § 214.14(c)(2)(i) requires that at the time of 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). Although not addressed by the Director, we note that the second Supplement B submitted below does not conform to the regulatory requirement for initial evidence, as it was not executed with the six-month period *prior to* the filing of the U petition.

investigated 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.

The Petitioner asserts that attempted strong-arm robbery under California Penal Code section 664/211 encompasses all the elements of, and thus is substantially similar to, felonious assault under section 245 in California.

Under the California Penal Code, robbery is “the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” Cal. Penal Code § 211. 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. For an assault in California to be classified as a felony, there must be an additional aggravating factor involved, such as the use of a deadly weapon or force likely to produce great bodily injury. *See, e.g.*, Cal. Penal Code §§ 244.5-245.5.

Upon review, the statutory elements of robbery under California Penal Code section 211 are not substantially similar to felonious assault. The statute for robbery investigated in this case involves taking personal property from an individual through the use of force or fear and does not require the presence of an aggravating factor as a necessary component of the offense. In contrast to robbery, felony assault under the California Penal Code does not require the element of “taking,” and involves both an actual attempt, with a present ability, to commit violent injury upon another with the addition of an aggravating factor.

Relying on cases from the California Court of Appeals, the Petitioner asserts on appeal that robbery under Cal. Penal Code section 211, is a violent crime and consequently, is substantially similar to felonious assault. *See People v. Sutton*, 35 Cal. App. 3d 264 (1973) (finding that robbery is a compound felony that includes all the elements of both theft and assault); *People v. Guerin*, 22 Cal. App. 3d 775 (1972) (same). She contends that strong-arm robbery in particular requires “force and contact to the victim,” and like felonious assault, requires that the perpetrator have “the present ability” to commit violent injury as an element. The Petitioner further contends that neither offense requires an actual injury for a conviction.

Notwithstanding the admittedly violent nature of the two offenses, the Petitioner has not established that strong-arm robbery encompasses substantially similar elements to those of felonious assault. To the contrary, subsequent to the decisions in *Sutton* and *Guerin*, the California Supreme Court, in concluding that assault with a deadly weapon was not a lesser included offense of robbery, specifically held that a robbery offense could be committed without an attempt to inflict violent injury and without the present ability to do so, both of which are required elements to constitute assault under California law. *People v. Wolcott*, 665 P.2d 520, 524-26 (Cal. 1983) (addressing the use of enhancement factors, such as “use of a gun” during a robbery offense, to establish the uncharged crime of assault with a deadly weapon as a lesser included offense of robbery). Thus, the

statutory elements of a felony assault offense under California law are not required for a conviction for strong-arm robbery in California.³

On appeal, the Petitioner further asserts that the description of the attempted robbery offense set forth in the Supplement B and in the police report also demonstrates the elements of the qualifying crime of felonious assault. However, as discussed, determining whether the crime investigated and prosecuted is substantially similar to one of the enumerated offenses under the Act does not involve a factual inquiry into the underlying criminal acts, and instead, strictly entails a comparison of the nature and elements of the crime investigated and a qualifying crime. *See* 8 C.F.R. § 214.14(a)(9). Here, this statutory analysis demonstrates that the nature and elements of robbery under section 211 are not substantially similar to felony assault under California law.

Lastly, the Petitioner contends that neither the statute nor the regulations require that every element of the crime investigated match the relevant qualifying crime and that a more flexible approach is expounded in the regulations in determining whether two offenses are substantially similar. Our review does not indicate, and the Petitioner does not cite to any binding or legal authority to show, that the analysis of the nature and elements of the offenses applied here and by the Director is “more exacting” than required.

As the Petitioner has not established that any of the certified crimes⁴ are substantially similar to the qualifying crime of felonious assault, she has not demonstrated that she is a victim of qualifying criminal activity, as required by section 101(a)(15)(U)(i) of the Act.

B. Substantial Physical or Mental Abuse

On appeal, the Petitioner asserts that the record established the substantial physical and mental abuse she suffered as a result of having been a victim of robbery and battery. However, as the Petitioner did not establish that she was the victim of a qualifying crime or criminal activity, she necessarily has also not demonstrated that she suffered substantial physical or mental abuse as a result of having been a victim of a qualifying crime or criminal activity, as required by section 101(a)(15)(U)(i)(I) of the Act. We, therefore, do not engage in further review of the Director’s determination on this issue.

C. Possession of Information Concerning Qualifying Criminal Activity

As the Petitioner did not establish that she was the victim of qualifying criminal activity, she has also not established that she possesses credible or reliable information establishing knowledge

³ The Petitioner contends that the fact that robbery includes the additional element of “taking” does not preclude a finding that it is substantially similar to felonious assault. However, this issue is moot given our finding here that robbery, including strong-arm robbery, does not encompass the statutory elements of felonious assault. *See generally Wolcott*, 665 P.2d at 524-26.

⁴ The Petitioner does not assert on appeal, and the record does not show, that the crime of misdemeanor battery, which the certifying agency also detected and investigated, is substantially similar to one of the qualifying crimes. Accordingly, we do not further address this issue here.

concerning details of the qualifying criminal activity, as required by section 101(a)(15)(U)(i)(II) of the Act.

D. 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 necessarily has also not established 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 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.

E. Jurisdiction of Qualifying Criminal Activity

As the Petitioner has not established that she was the victim of a qualifying crime or criminal activity, she 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.

III. CONCLUSION

The Petitioner has not demonstrated that she was a victim of qualifying criminal activity. She, therefore, necessarily cannot satisfy 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. *See* section 291 of the Act, 8 U.S.C. § 1361; *see also 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 S-P-M-*, ID# 17094 (AAO July 25, 2016)