U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-D-L-A-M-

DATE: JUNE 16, 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 Form I-918, Petition for U nonimmigrant Status. 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 she 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 she was the 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 --
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> (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);
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> (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: . . . unlawful criminal restraint; 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, which provides, in pertinent part, as follows:

(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[.]

As used in section 101(a)(15)(U)(i)(I) and 8 C.F.R. § 214.14(b)(1), the term *physical or mental* abuse is defined at 8 C.F.R. § 214.14(a)(8) as "injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim."

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

Upon a full review of the record, as supplemented on appeal, the Petitioner has not overcome the grounds for denial.

A. Victim of Qualifying Criminal Activity

1. Certified Criminal Activity

The Petitioner filed the instant Form I-918 on September 4, 2013. She initially submitted a Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B), dated "8/19/22," by [redacted] California (certifying official). At part 3.1 of the certification, the certifying official checked the boxes indicating the Petitioner was a "victim of criminal activity involving or similar to . . . felonious assault[,] unlawful criminal restraint," and "Robbery." The Supplement B indicated that the criminal activity took place on [redacted] 2007, and at part 3.3, the certifying official cited only to section 211 of the California Penal Code, corresponding to the offense of robbery, as the relevant criminal statute for the criminal activity that was investigated or prosecuted. At part 3.5, which asks for a description of the criminal activity being investigated, the certifying official stated that the Petitioner was assaulted and robbed while she was pushing her baby daughter in her stroller. Finally, in addressing the Petitioner's injuries at part 3.6, the certifying official indicated that the Petitioner had "[n]o documented physical injuries." During the proceedings below, the Petitioner submitted an updated Supplement B, dated June 20, 2014, in which the same certifying official amended part 3.1 to include the qualifying crime of false imprisonment as one of the criminal activities of which the Petitioner was a victim.[1] He also amended part 3.3 to include citations to sections 245 and 236/237 of the California Penal Code, corresponding to the criminal offenses of felony assault and false imprisonment. Neither the Petitioner nor the certifying official provided an

[1] The regulation at 8 C.F.R. § 214.14(c)(2)(i) requires that at the time of filing, a Form I-918 "must include" as initial evidence a Form I-918 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 neither of the Petitioner's Forms I-918 Supplement B submitted below conform to the regulatory requirement for initial evidence, as the record does not establish that they were executed with the six-month period prior to the filing of the Form I-918.

explanation for the amended Supplement B. The certifying official did not include a letter, reports, or investigative materials to indicate why the initial Supplement B was deficient and to support the additional crimes in the amended Supplement B.

On appeal, the Petitioner asserts that the Supplement B and the underlying facts of the criminal activity demonstrate that she was a victim of the qualifying crimes of felonious assault, unlawful criminal restraint, and/or false imprisonment. She maintains that the police incident report, which only identifies strong-arm robbery under California Penal Code section 211, is not reliable or dispositive here, and that giving more weight to such a report, rather than the Supplement B, would undermine the authority and power granted to a certifying official.

We recognize that a qualifying crime may have occurred during the commission of the non-qualifying robbery offense committed against the Petitioner. However, the record must demonstrate that the certifying agency or another law enforcement entity actually detected, investigated, or prosecuted the qualifying criminal activity. Further, 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). The Petitioner speculates that the criminal activity investigated could be "characterized as a felonious assault, false imprisonment[,] and unlawful criminal restraint," and that the perpetrator could have been charged with "a multitude of other crimes than just those that led to an arrest." However, our factual inquiry is whether the record as a whole, including the Form I-918 Supplement B and any accompanying criminal reports, establishes that the certifying agency or other law enforcement agencies actually detected or investigated the qualifying crime. Here, the Petitioner has not established that the underlying police report is not reliable or inaccurate, as she claims, and apart from the second Supplement B, she has not provided sufficient evidence from the certifying agency or other law enforcement agencies, demonstrating that, in addition to robbery, felonious assault,[2] unlawful criminal restraint, and false imprisonment were also detected and investigated. Accordingly, our review of the record demonstrates that the Petitioner was the victim of robbery under California Penal Code section 211.

2. Robbery Under Section 211 of the California Penal Code is not a Qualifying Criminal Activity

The crime of robbery 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 robbery 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

[2] The Petitioner also asserts that she was the victim of a felonious assault because the "assault [against her] was committed with the intent to commit a felony, to wit, robbery," noting that such an offense was a felony under federal law. However, as discussed herein, the record does not establish that the certifying agency ever detected, investigated, or prosecuted an assault offense.

statutes in question. The Petitioner asserts that the robbery offense committed against her under California Penal Code section 211 is substantially similar to felony assault under California Penal Code section 245(a)(1).[3]

In California, "[r]obbery 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 aggravating factor involved, and felonious assault under former California Penal Code section 245(a)(1) specifically involves assault with a deadly weapon or force likely to produce great bodily injury.

Upon review, the statutory elements of robbery under California Penal Code section 211 are not substantially similar to felony assault under section 245(a)(1). 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 use of a deadly weapon or force likely to produce great bodily injury as a necessary component. Felony assault under California Penal Code section 245(a)(1), does not require the element of "taking," and in contrast to robbery, involves an actual attempt, with a present ability, to commit violent injury upon another with the addition of one of the two cited aggravating factors. Further, 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 an 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 elements of, and are not substantially similar to, the California robbery offense here.

On appeal, the Petitioner notes that robbery and felonious assault offenses under California law are both categorized as crimes against the person and contends that the "essential" elements of the two offenses are substantially similar because both constitute "crimes of violence." The Petitioner asserts that conduct satisfying the "force or fear" element of the robbery offense would also satisfy the "force likely to produce great bodily injury" requirement for felony assault. Specifically, the Petitioner maintains that the underlying facts of the criminal activity against her are sufficient to demonstrate the requisite "force or fear" element of robbery as well as the "force likely to produce great bodily injury" element of felony assault. Thus, the Petitioner contends that the Director erred in finding that perpetrator's conduct did not rise to the level of felonious assault.[4]

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[3] At the time of the 2007 offense, felony assault under section 245(a)(1) of the California Penal Code involved the commission of "an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury."

[4] Insofar as the Director's decision discussed the underlying facts of the robbery in determining whether such criminal activity is substantially similar to one of the qualifying crimes, we withdraw that portion of the decision.

However, as discussed, determining whether the crime investigated and prosecuted is substantially similar to one of the enumerated offenses under the Act does not entail a factual inquiry into the underlying facts, but rather, strictly entails 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). Here, although both offenses can be violent in nature, such a statutory analysis demonstrates that the elements of robbery under section 211 are not substantially similar to felony assault under California law or any other qualifying crime at section 101(a)(15)(U)(iii) of the Act. The Petitioner, therefore, has not established that she is a victim of qualifying criminal activity, as required by section 101(a)(15)(U)(i).

B. Substantial Physical or Mental Abuse

As the Petitioner did not establish that she was the victim of a qualifying crime or criminal activity, she has also not established 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. However, even if the Petitioner established that she was the victim of a qualifying crime or criminal activity, she has not demonstrated that she suffered substantial physical or mental abuse as a result of her victimization. When assessing whether a petitioner has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity, U.S. Citizenship and Immigration Services looks at, among other issues, 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. 8 C.F.R. § 214.14(b)(1).

Here, the certifying official indicated that there was no known or documented injury to the Petitioner resulting from the criminal activity. In describing the criminal incident, the certifying official indicated that the Petitioner fell to the ground after being shoved by her attacker. The incident report similarly indicated that the Petitioner was "shoved [] so hard away from the stroller that she nearly fell to the ground," after which the perpetrator reached into the stroller and took the Petitioner's purse. The report does not indicate that the reporting police officers observed or that the Petitioner reported any injuries.

In the Petitioner's declarations below, she stated that while walking with her daughter, one of the passengers in a car she had seen driving by earlier shoved her against a fence and reached toward her daughter's stroller as though he intended to grab her daughter. The Petitioner recalled holding on to the stroller and wrestling with her attacker, who was stronger and shoved her to the ground. She stated that the perpetrator grabbed her purse from the stroller and said something to her which she was unable to understand. The Petitioner indicated that she felt threatened by his demeanor. She stated that the perpetrator then left in a car and that because her attacker had stolen her cellphone, she was unable to call the police. She recalled that she was in shock and could not shake off the thought that her attacker could have harmed her child.

The Petitioner indicated that that she was crying and screamed for help, and that eventually, a man came out of his home and she asked him to call the police.

The Petitioner asserted that she later experienced intense pain on the right side of her back which lasted several weeks and required over the counter pain medication. She indicated that she did not have the financial means to see a doctor for the pain. The Petitioner also described suffering psychological harm as a result of the fear she experienced that her daughter would be taken from her or harmed. She recalled that she had trouble sleeping for several months and her husband observed her moving her arms while sleeping as though she were pushing someone away. The Petitioner indicated that she is not the same outgoing, trusting person she used to be and always keeps her daughters in the house, locking all the doors. She stated that she lives in fear that her attacker lives in her neighborhood and can still harm her and her children. At the suggestion of friends who were concerned about how she was handling her fears, she indicated that she joined a soccer team from 2010 to 2013, which helped her stop thinking about the crime. However, the Petitioner stated that in 2013, she stopped going because her husband was unable to take her to practice and she refused to go to practice alone. She indicated that she did not pursue counseling because in her culture, only "crazy" people did that. In May 2013, she claimed she went to a counselor for a psychological evaluation, who recommended therapy. Although she felt good speaking with the counselor and about pursuing therapy, she indicated that she did not have the funds to afford it.

The Petitioner also submitted affidavits from her father-in-law and two friends, who indicated that the Petitioner has changed as a result of the robbery committed against her, as she is no longer social and is afraid to go anywhere by herself without her husband or someone accompanying her. Additionally, in two evaluations, a marriage and family therapist intern, and a licensed social worker, of diagnosed the Petitioner as suffering from posttraumatic stress disorder (PTSD) and depression as a result of the robbery, and noted that the considerable previous trauma that she reported having experienced in Guatemala contributed to her elevated response to the robbery. Their second evaluation further noted that the Petitioner had a prior history of victimization and abuse by her employers when she commenced working at the age of 12 in Guatemala. The Petitioner did not address her previous victimization and traumatic experiences in Guatemala in her statements. and also indicated that the Petitioner reported distancing herself from friends and becoming more emotionally isolated in general following the robbery, but that the Petitioner made attempts to go on with her life, including joining a soccer team which gave her relief for brief periods. The evaluations concluded that the Petitioner's conditions were treatable with therapy and/or medication.

Upon review of the record in its entirety, the Petitioner has not demonstrated that she suffered substantial physical or mental abuse as a result of the injuries she sustained from the robbery committed against her. As discussed, the certifying official specifically indicated that no physical injuries were reported. In addition, although the Petitioner described the criminal activity and stated that she suffered pain as a result of being shoved against a fence, the record does not establish that she suffered ongoing or serious pain or lasting physical injury as a result of being shoved during the commission of the criminal offense. Likewise, the Petitioner's statements and the psychological assessments, indicating that she suffers from PTSD and depression and lives in fear for herself and

the safety of her family as a result of the robbery, are insufficient to support a finding that the robbery caused a decline in the Petitioner's mental health or that such decline was a serious or a lasting result of the commission of the offenses. The psychological harm the Petitioner described arose out of a single, isolated criminal incident of a brief duration and involved limited interaction with the perpetrator. The Petitioner's own statements indicated that she actively seeks to overcome the fears and psychological harm she had a result of the robbery by socializing with others and she has in the past successfully obtained some relief from her fears for a number of years by engaging in team sports. We do not minimize the harm Petitioner experienced as a result of the robbery. However, after consideration of the various factors and standard set forth in 8 C.F.R. § 214.14(b)(1), the overall evidence is insufficient to support a finding that the Petitioner suffered physical or mental abuse that was substantial. Accordingly, the Petitioner has not satisfied subsection 101(a)(15)(U)(i)(I) of the Act.

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 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.

III. CONCLUSION

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 M-D-L-A-M-*, ID# 16725 (AAO June 16, 2016)