MATTER OF E-A-C-F-

DATE: MAR. 22, 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 –
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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);
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> (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
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> (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 . . .
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> . . . .
>
> (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), "[t]he 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."

Regarding the application procedures for U nonimmigrant classification, the regulation at 8 C.F.R. § 214.14(c) states, in pertinent part:

> (2) *Initial evidence.* Form I-918 must include the following initial evidence:
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> (i) Form I-918, Supplement B, 'U Nonimmigrant Status Certification,' signed by a certifying official within the six months immediately preceding the filing of Form I-918. The certification must state that: the person signing the certificate is the head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency, . . .
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> . . . .
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> (4) *Evidentiary standards and burden of proof.* 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 and 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. RELEVANT FACTS AND PROCEDURAL HISTORY

The Petitioner, a citizen of El Salvador, filed the Form I-918, Petition for U Nonimmigrant Status, with an accompanying Form I-918 Supplement B, U Nonimmigrant Status Certification, on January 6, 2014. On December 26, 2014, the Director issued a request for evidence (RFE), providing the Petitioner an opportunity to submit an updated Form I-918 Supplement B, evidence that the crime listed on the Form I-918 Supplement B was qualifying criminal activity, and evidence of his entries into and exits from the United States. The Petitioner responded to the RFE with additional evidence, which the Director found insufficient to establish the Petitioner's eligibility. Accordingly, the Director denied the Form I-918. The Petitioner filed a timely appeal.

III. ANALYSIS

We conduct appellate review on a *de novo* basis. A full review of the record, including the relevant evidence submitted on appeal, does not establish the Petitioner's eligibility.

A. Required Initial Evidence

1. Certifying Official

The Form I-918 Supplement B identified the head of the certifying agency as, "Acting Chief of Police [redacted] and was signed on July 6, 2013, by [redacted] Police Department – [redacted] Patrol Division, as the certifying official. In his response to the RFE, the Petitioner included a letter from [redacted] specifying the individuals designated to sign the Form I-918 Supplement B and the timeframe of those designations. The letter stated as of September 9, 2011, [redacted] assumed the position of Director of Victim Services," and she was "now authorized to take on the role as the certifying official for the Department." The Petitioner also included correspondence from [redacted] dated January 12, 2015, in which she referenced the Petitioner's Form I-918 Supplement B and [redacted] letter. Although the Petitioner asserts that [redacted] "ratified" the Form I-918 Supplement B signed by [redacted] neither [redacted] letter nor [redacted] correspondence indicated that [redacted] was ever authorized as a certifying official. Moreover, the Petitioner has not presented any evidence indicating that [redacted] was authorized by [redacted] to delegate her authority as the certifying official to any other individual. Accordingly, the Petitioner has not submitted a Form I-918 Supplement B, signed by the head of the certifying agency, or by a person in a supervisory role who has been specifically designated by the head of the certifying agency to issue certifications on behalf of that agency, as required by the regulation at 8 C.F.R. § 214.14(c)(2)(i).

2. Timeliness of Form I-918 Supplement B

The Form I-918 Supplement B was signed on July 6, 2013, exactly six months immediately preceding the filing of the Form I-918. We therefore withdraw the Director's finding otherwise. However, as explained above, the Petitioner has not established that an authorized certifying official

signed the Form I-918 Supplement B. Accordingly, the Petitioner has not provided the initial evidence required under 8 C.F.R. § 214.14(c)(2) to establish his eligibility for U status.

B. Certified Criminal Activity

The Form I-918 Supplement B, at part 3.1, listed the criminal activity of which the Petitioner was a victim as involving or being similar to felonious assault. In part 3.3, the Form I-918 Supplement B generally referred to the criminal activity that was investigated or prosecuted as, "Assault and Battery." Part 3.5, which asks for a brief description of the criminal activity being investigated or prosecuted, stated the Petitioner "was the victim of an assault resulting in a laceration to his head."

1. Specific Provision of the Virginia Assault and Battery Statute is not Identified

The crime of "Assault and Battery" 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 "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 certified offense must be substantially similar to one of the qualifying criminal activities in the statutorily enumerated list. Therefore, the inquiry is not fact-based, but rather entails comparing the nature and elements of the statutes in question. 8 C.F.R. § 214.14(a)(9).

In support of his Form I-918, the Petitioner has provided a description of the events of which he was a victim, the injuries he sustained, and the effect the injuries had on his ability to work and his financial obligations. Although we do not minimize the impact of this event on the Petitioner, as previously discussed, 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 with the qualifying crime.

The only crime certified at Part 3.3 of the Form I-918 Supplement B, was "Assault and Battery," without any reference to the specific provision of the statute investigated by the [redacted] Police Department. At the time of the investigation, section 18.2-57 of the Code of Virginia, as referenced by the Petitioner, stated:

> A. Any person who commits a simple assault or assault and battery shall be guilty of Class 1 misdemeanor, and if the person intentionally selects the person against whom a simple assault is committed because of his race, religious conviction, color or national origin, the penalty upon conviction shall include a term of confinement of at least six months, 30 days of which shall be a mandatory minimum term of confinement.
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> B. However, if a person intentionally selects the person against whom an assault and battery resulting in bodily injury is committed because of his race, religious conviction, color or national origin, the person shall be guilty of a

> Class 6 felony, and the penalty upon conviction shall include a term of confinement of at least six months, 30 days of which shall be a mandatory minimum term of confinement.
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> C. In addition, if any person commits an assault or an assault and battery against another knowing or having reason to know that such other person is a judge, a law-enforcement officer . . ., a correctional officer . . ., a person employed by the Department of Corrections . . ., a firefighter . . ., or a volunteer firefighter or lifesaving or rescue squad member . . ., such person is guilty of a Class 6 felony, and, upon conviction, the sentence of such person shall include a mandatory minimum term of confinement of six months.

VA. CODE ANN. § 18.2-57 (West 2009).

The Petitioner asserts on appeal that the U.S. Code does not contain an offense specifically labelled "felonious assault," but it contains felony assault provisions under maritime law. *See* 18 U.S.C. § 113 (e.g., assault with a dangerous weapon, assault resulting in serious bodily injury).[1] He further asserts that section 18.2-57 of the Code of Virginia is similar to these federal provisions, because both penalize felonious conduct resulting in serious bodily injury. As previously discussed, the Form I-918 Supplement B does not specify which provision of the Virginia assault and battery statute was investigated. Even *assuming arguendo* that the investigated crime included section 18.2-57(B) of the Virginia Code, the federal maritime laws require a greater degree of harm to the victim to be defined as a felonious assault (i.e., serious or substantial bodily injury as compared to bodily injury).

The Petitioner further asserts that he was the victim of a felonious assault because he was struck in his forehead with a belt, resulting in a fractured skull, and in a recent decision, we determined "felonious assault involves an attempt, with a present ability, to commit violent injury upon another with a deadly weapon or while committing a felony." As stated previously, we do not minimize the injuries sustained by the Petitioner; however, the decision referenced by the Petitioner is not a precedent decision. *See* 8 C.F.R. § 103.3(c) (precedent decisions designated by the Secretary of Homeland Security are binding on all Service employees in the administration of the Act). Even if we were to defer to the decision as persuasive authority in this case, our discussion involved a comparison of felonious assault and armed robbery as defined in the Florida statutes, which contain elements completely distinct from assault and battery and felonious assault in Virginia.[2]

For an assault in Virginia to have been classified as a felony, there must have been an aggravating factor involved, such as bodily injury because of a protected characteristic (race, religion, color, or national origin), or it must have been committed against a specific class of persons (such as judges,

[1] Not all subsections of 18 U.S.C. § 113 would be considered similar to a felonious assault (e.g., simple assault, assault by striking, beating or wounding).

[2] Moreover, we determined that the armed robbery statute was not substantially similar to felonious assault in Florida.

law enforcement officers, corrections officers, or fire fighters). As the Form I-918 Supplement B does not specify which provision of the Virginia assault and battery statute was detected, investigated, or prosecuted, we are unable to conclude that it contains the requisite information to demonstrate that the certified crime is substantially similar to felonious assault. USCIS will determine, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence, including Form I-918 Supplement B. 8 C.F.R. § 214.14(c)(4).[3] Accordingly, the Petitioner has not established that the nature and elements of the certified crime are substantially similar to felonious assault or any other qualifying crime at 101(a)(15)(U)(iii) of the Act.

2. Crime of Violence and Aggravated Felony

In addition, the Petitioner asserts that he was the victim of a crime of violence as defined under 18 U.S.C. § 16 and an aggravated felony because physical force was used against him. The Petitioner cites to *Mondragón v. Holder,* in which the Fourth Circuit Court of Appeals determined that the appellant did not meet his burden of proof to establish his eligibility for special rule cancellation of removal. 706 F.3d 535, 547 (4th Cir. 2013). The Court applied a modified categorical approach and concluded that despite the appellant's actual conduct, because section 18.2-57 of the Virginia Code contains elements which are "broad" and "cover conduct that was violent or nonviolent," the appellant was unable to establish that his conviction was not an aggravated felony. *Id.* at 545, 547.

To establish his eligibility for U status, the Petitioner bears the burden of proof that he was a victim of qualifying criminal activity, which in this case, requires him to establish that he was the victim of a crime substantially similar to a felonious assault. The definition of a crime of violence is irrelevant as the crime of violence definition applies to whether a conviction is considered an aggravated felony, not whether it is considered a qualifying criminal activity for purposes of U classification.

IV. CONCLUSION

The Petitioner has not established that he is the victim of qualifying criminal activity, as required by section 101(a)(15)(U)(i)(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.

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 met this burden. He is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U)(i) of the Act.

[3] In the absence of any specificity on the Form I-918 Supplement B, even if we were to consider the Warrant of Arrest, the document indicates that the individual accused of victimizing the Petitioner violated section 18.2-57 of the Virginia Code, a Class 1 Misdemeanor. As discussed, the requisite element is lesser to sustain a misdemeanor assault and battery charge under section 18.2-57 than is required for a felonious assault.

ORDER: The appeal is dismissed.

Cite as *Matter of E-A-C-F-*, ID# 15980 (AAO Mar. 22, 2016)