



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

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

MATTER OF G-E-G-

DATE: MAY 3, 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 the Petitioner did not establish that he was a victim of qualifying criminal activity. Accordingly, the Director also determined the Petitioner did not establish that he meets the remaining eligibility criteria at section 101(a)(15)(U)(i)(I)–(IV) of the Act. The Director further concluded that the Petitioner did not establish his admissibility to the United States.

The matter is now before us on appeal. On appeal, the Petitioner submits a brief and claims that he has established he has been a victim of qualifying criminal activity and that the Director applied “circular reasoning” when denying the Forms I-918 and I-192, Application for Advance Permission to Enter as a Nonimmigrant.

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: 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.”

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 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. FACTS AND PROCEDURAL HISTORY

The record reflects that the Petitioner, a citizen of Mexico, last entered the United States around 1995 without admission, parole, or inspection. On November 3, 2010, the Petitioner filed the Form I-918, with an accompanying Form I-918 Supplement B, U Nonimmigrant Status Certification.

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III. ANALYSIS

A. Director's Grounds for Denial of the Form I-918 and Form I-192

Although the Petitioner asserts on appeal that the Director applied circular reasoning in denying his Forms I-918 and I-192, a review of the denial of the Petitioner's Form I-918 indicates that in addition to citing the Petitioner's inadmissibility, the Director determined that the criminal activity certified on the Form I-918 Supplement B, was not qualifying criminal activity and was not substantially similar to any qualifying criminal activity. In addition, a review of the denial of the Form I-192 indicates that the Director determined that the Petitioner was not eligible for an exercise of discretion to waive any grounds of inadmissibility because his criminal convictions and activities demonstrated a disregard for U.S. law and a pattern of anti-social behavior. The Director also determined that the Petitioner did not sufficiently establish his rehabilitation and that waiving the grounds would be in the national and public interests. Accordingly, the record of proceedings demonstrates that the Director referred to each of the grounds of eligibility set forth in 8 C.F.R. 214.14(b) and concluded that the Petitioner did not establish his eligibility independently and separately from his inadmissibility.

B. Certified Criminal Activity

██████████ (certifying official), ██████████ Police Department, Youth & Family Services Division, signed the Form I-918 Supplement B, listing the criminal activities of which the Petitioner was a victim at Part 3.1 as involving or being similar to felonious assault. The certifying official also listed the Petitioner as a victim of "Other: hit/run w[ith] injuries – felony" and attempt to commit any of the aforementioned offenses. In part 3.3, the certifying official referred to sections 20001(a) and 21801(a) of the California Vehicle Code as the criminal activities that were 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 Petitioner "was severely injured by a white full-sized van which had made an unsafe left turn . . . [t]he van then fled the scene making no attempt to take responsibility"

C. The Offenses of "Duty to Stop at Scene of Injury Accident" and "Left Turn or U-turn Right of Way" (Cal. Veh. Code §§ 20001(a) and 21801(a)) Are Not Qualifying Criminal Activity

On appeal, the Petitioner asserts that "law enforcement certified that a felonious assault occurred and was being investigated."¹ However, although the Form I-918 Supplement B indicated that the Petitioner was a victim of criminal activity "involving or similar to" a felonious assault, the

¹ The Petitioner also asserts that he was not given a reasonable opportunity to address whether he was a victim of qualifying criminal activity as the Director only requested evidence regarding admissibility. *Assuming arguendo* that the Petitioner should have been notified of the insufficiency of his initial evidence, the Petitioner has presented these arguments and additional evidence for our consideration on appeal. Accordingly, even if we found any error on the part of the Director, any such error would be harmless.

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certifying official did not list a statutory citation for felonious assault as criminal activity that was actually investigated or prosecuted; rather, he cited to the provisions of the California Vehicle Code for “felony hit and run” and “left turning vehicles.” Similarly, the “Traffic Collision Report” indicated only that the [REDACTED] Police Department investigated or prosecuted section 21801 of the California Vehicle Code. The particular offenses which were certified as being investigated or prosecuted are not specifically listed as qualifying criminal activity at section 101(a)(15)(U)(iii) of the Act. Accordingly, the Petitioner has not submitted sufficient evidence to establish that the certifying agency investigated or prosecuted an attempted or actual felonious assault.

The Petitioner further asserts that even if the certified criminal activities are not part of the statutorily enumerated list, they are substantially similar to felonious assault. 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. The inquiry, therefore, is not fact-based, but rather, entails comparing the nature and elements of the statutes in question.

In support of his Form I-918, the Petitioner has provided a detailed description of the events of which he was a victim and of the substantial, permanent, and ongoing injuries he sustained. The Petitioner also submits medical documentation. 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).

At the time of the investigation of the events during which the Petitioner was injured, section 20001 of the California Vehicle Code stated, in relevant part:

- (a) The driver of a vehicle involved in an accident resulting in injury to a person, other than himself or herself, . . . shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of Section[] 20003
- (b)(2) If the accident described in subdivision (a) results in . . . permanent, serious injury, a person who violates subdivision (a) shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than 90 days nor more than one year, or by a fine of not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000), or by both that imprisonment and fine
- (d) As used in this section, ‘permanent, serious injury’ means the loss or permanent impairment of function of a bodily member or organ.

Cal. Veh. Code § 20001 (West 2009).

Under section 21801, the California Vehicle Code also stated, in relevant part:

- (a) The driver of a vehicle intending to turn to the left or to complete a U-turn upon a highway, or to turn left into public or private property, or an alley, shall yield the right-of-way to all vehicles approaching from the opposite direction which are close enough to constitute a hazard at any time during the turning movement, and shall continue to yield the right-of-way to the approaching vehicles until the left turn or U-turn can be made with reasonable safety.

Cal. Veh. Code § 21801 (West 2009).

In 2009, the California Penal Code provided the following, in relevant part:

Section 240. ASSAULT DEFINED . . . an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another

Section 245. Assault with deadly weapon or force likely to produce great bodily injury; . . .

- (a)(1) Any person who commits 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 shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment

Cal. Penal Code §§ 240, 245 (West 2009).

For an assault in California to be classified as a felony, there must be an aggravating factor involved such as a deadly weapon, force likely to produce great bodily injury, or assault against a specific class of persons (peace officers, fire fighters, custodial officers or school employees). *See* Cal. Penal Code §§ 244, 244.5, 245, 245.3, 245.5.

Although both felonious assault and “felony hit and run” are general intent offenses that involve a degree of bodily injury to an individual, California punishes as a “felony hit and run” offense an individual’s flight from the scene of the accident that caused or aggravated the initial injuries, and not any acts that resulted in the accident itself. *People v. Cowart*, 190 Cal.Rptr.3d 278, 286 (2015) (stating, “we find that line of cases persuasively explains why . . . section 20001 subdivision (a) does not criminalize a car accident and its resulting injuries, but instead criminalizes leaving the scene of an accident[.]”); *People v. Valdez*, 116 Cal.Rptr.3d 670, 673 (2010) (stating, “[a]lthough a violation of section 20001 is popularly denominated ‘hit-and-run,’ the act made criminal thereunder is not the ‘hitting’ but the ‘running.’ The legislative purpose of sections 20001 and 20003 is to prevent the driver of a vehicle involved in an injury-causing accident from leaving injured persons in distress

and danger for want of medical care and from attempting to avoid possible civil or criminal liability for the accident by failing to identify oneself" [citations omitted]). As the purpose of section 20001(a) of the California Vehicle Code is to punish an individual for not taking certain actions after a car accident, and not for the commission of an act resulting in the harm of another, the Petitioner has not established that the nature and elements of this offense are substantially similar to a felonious assault in California.

In addition, no elements of "left turning vehicles," section 21801 of the California Vehicle Code, are substantially similar to felonious assault in California. As discussed previously, felonious assault requires an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another with the intent to harm another or with another aggravating factor. In contrast, an offense under section 21801 of the California Vehicle Code is a liability offense without any intent to cause harm. Accordingly, the Petitioner has not established that the nature and elements of an offense by "left turning vehicles" are substantially similar to a felonious assault in California.

The Petitioner has not established that the certified offenses are qualifying criminal activity or that the nature and elements of the offenses are substantially similar to those of any of the qualifying crimes at 101(a)(15)(U)(iii) of the Act, including felonious assault or attempted felonious assault. 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 section 101(a)(15)(U)(i)(I)-(IV) of the Act.

D. Due Process and Appeal of Waiver of Inadmissibility

On appeal, the Petitioner generally asserts due process concerns as the regulations do not provide for the appeal of the denial of a Form I-192. The Petitioner also requests that we delay the adjudication of his appeal until the Immigration Court, which has concurrent jurisdiction over the waiver of his inadmissibility, has reviewed his waiver request.

In general, Constitutional matters, including due process issues, are not within our appellate jurisdiction, and there is no provision which allows us to delay adjudication of the Form I-918 to await a determination in a separate proceeding before the Immigration Court. As correctly observed by the Petitioner, we do not have jurisdiction to determine whether the Director should have favorably exercised her discretion to approve the Form I-192. 8 C.F.R. § 212.17(b)(3). Accordingly, we will limit our *de novo* review to the reasons for the denial of the Petitioner's Form I-918 for which we otherwise have jurisdiction, including whether the Director was correct in finding the Petitioner inadmissible to the United States and requiring an approved Form I-192.

The record of proceedings reflects that the Petitioner entered the United States around 1995 without inspection, parole, or authorization by immigration officials. Accordingly, in her denial of the Petitioner's Form I-192, the Director determined that the Petitioner is inadmissible under sections 212(a)(6)(A)(i) (present without admission or parole) and 212(a)(7)(B)(i)(I) (not in possession of valid passport) of the Act. 8 U.S.C. §§ 1182(a)(6)(A)(i), (a)(7)(B)(i)(I). We agree with the

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Director's finding that the Petitioner is inadmissible to the United States and thus requires an approved Form I-192. The Petitioner does not contest these grounds of inadmissibility on appeal.

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

ORDER: The appeal is dismissed.

Cite as *Matter of G-E-G-*, ID# 16173 (AAO May 3, 2016)