U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-T-P-P-

DATE: MAY 9, 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) §§ 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 and we dismissed a subsequent appeal. In our prior decision, we withdrew the Director's decision in part, but determined that the Petitioner had not established his eligibility as he had not demonstrated that he was a victim of qualifying criminal activity or criminal activity that was substantially similar to one of the qualifying crimes.

The matter is now before us on a motion to reconsider. On motion, the Petitioner submits a brief. The Petitioner claims that the Director erred in finding that the certifying agency had not detected the criminal offense of felony harassment committed against him, which he asserts is substantially similar to a qualifying criminal activity. He further asserts that he was the victim of the qualifying crime of felonious assault as well.

Upon review, we will deny the motion to reconsider.

I. APPLICABLE LAW

A motion that does not meet the applicable requirements shall be denied. 8 C.F.R. § 103.5(a)(4). 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 (USCIS) 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). Consequently, the motion will be denied for the following reasons.

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 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. RELEVANT FACTS AND PROCEDURAL HISTORY

The Petitioner is a native and citizen of Mexico who claims to have last entered the United States on June 7, 2000, without admission, inspection, or parole. The Petitioner filed the instant Form I-918, Petition for U Nonimmigrant Status, on July 10, 2013, along with a Form I-918 Supplement B, U Nonimmigrant Status Certification. The Director denied the Form I-918, concluding that the Form I-918 Supplement B did not conform to the regulatory requirements for initial evidence as it was not executed by the certifying official within the six months prior to the filing of the Form I-918. The Director further held that the Petitioner had not established that harassment under section 9A.46.020 of the Wash. Rev. Code was a qualifying criminal activity or was substantially similar to one. On appeal, we withdrew in part the Director's decision, but ultimately dismissed the appeal. The Petitioner has now filed a timely motion to reconsider.

III. ANALYSIS

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

A. Qualifying Criminal Activity Was Not Detected

In our September 25, 2015, decision, incorporated by reference here, we determined that the Form I-918 Supplement B submitted below was executed by the certifying official within the six months prior to the filing of the Petitioner's Form I-918, as required by regulation, and consequently, we withdrew the Director's determination to the contrary on this issue. However, pursuant to our *de novo* authority, we dismissed the appeal upon determining that the Petitioner was a victim of the offense of harassment in Washington State, as certified on the Form I-918 Supplement B, which is not, and is not substantially similar to, one of the qualifying criminal activities enumerated at section 101(a)(15)(U)(iii) of the Act. *See* 8 C.F.R. § 214.14(a)(9). Contrary to the Petitioner's assertion, we held that in determining whether a criminal offense is substantially similar to a qualifying crime, we do not engage in a factual analysis of the underlying criminal activity. We further noted that the record did not establish that the certifying agency ever detected felony harassment.

On motion, the Petitioner asserts that we erred in finding that felony harassment was not detected by the certifying agency, and he contends that felony harassment is substantially similar to the qualifying crime of felonious assault. He further contends that the record establishes that he was also a victim of the qualifying criminal activity of felonious assault.

When determining the criminal activity that a certifying agency detected,[1] investigated, or prosecuted, we look to the relevant criminal statute as provided on the Form I-918 Supplement B and on any accompanying reports. Here, the only criminal activity certified at Part 3.1 of the Form

[1] The term "investigation or prosecution," as used in section 101(a)(15)(U)(iii) of the Act, also refers to the "detection" of a qualifying crime or criminal activity. 8 C.F.R. § 214.14(a)(5).

I-918 Supplement B, next to the box marked "Other," is harassment, which is a gross misdemeanor under Washington law and is not an enumerated offense under section 101(a)(15)(U)(iii) of the Act. The certifying official further cited to Wash. Rev. Code section 9A.46.020, corresponding to the offense of harassment, in Part 3.3 of the Form I-918 Supplement B. In describing the criminal activity being investigated or prosecuted in Part 3.5, the certifying official indicated only "harassment" and stated that the case was an "informational case" where no charges were filed. As the Petitioner correctly notes, both gross misdemeanor and felony harassment are covered by the same overall criminal statute, Wash. Rev. Code. section 9A.46.020, and the fact that felony harassment charges were not actually filed does not preclude a finding that the offense was detected by the certifying agency or other law enforcement. However, the record before us lacks any evidence that the certifying agency specifically detected or investigated felony harassment, as the Petitioner maintains on motion. The mere fact that a statute includes both misdemeanor and criminal conduct is insufficient to meet the Petitioner's burden in these proceedings, in which he must demonstrate that a qualifying crime, or a crime substantially similar to a qualifying crime, was in fact detected by the certifying agency. Section 291 of the Act (the Petitioner bears the burden in visa petition proceedings to establish eligibility for the benefit sought). Here, the underlying police report in the record noted only the general offense of harassment Wash. Rev. Code. section 9A.46.020, without specifying whether it was a gross misdemeanor or felony offense. The report also specifically indicated that the threats to the Petitioner "were not defined enough . . . to file harassment charges" against the perpetrator of the offense. The record also includes an updated Form I-918 Supplement B, previously submitted on appeal,[2] which again did not specify felony harassment as the crime detected or investigated. Significantly, in Part 3.5 of the new Form I-918 Supplement B, the certifying official specifically added that "[t]here was no probable cause to believe a crime occurred," and that "[n]o criminal investigation and no criminal charges resulted" from the report of the criminal offense. Consequently, upon review, we find that the record as a whole does not establish that the certifying agency detected or investigated felony harassment.

On motion, the Petitioner asserts that we must determine whether "the facts provided by the certifying agency demonstrate that felony harassment was the crime detected." He further contends that the underlying facts of the criminal activity show that he was also a victim of the qualifying crime of felonious assault. Contrary to the Petitioner's assertion, although a qualifying crime (or a crime substantially similar to a qualifying crime) may occur during the commission of non-qualifying criminal activity, we do not engage in a fact-based inquiry into whether underlying conduct or facts identified by the certifying agency in its investigation may or may not also establish the elements or the occurrence of a qualifying crime. Our factual inquiry focuses only on whether the Form I-918 Supplement B and accompanying reports establish that the certifying agency investigated or prosecuted a qualifying crime as required by section 101(a)(15)(U)(III) of the Act and the regulation at 8 C.F.R. § 214.14(b)(2) and (3). Here, as discussed, the record demonstrates that the certifying agency detected the non-qualifying criminal offense of harassment committed

[2] A Form I-918 Supplement B proffered on appeal does not satisfy the regulatory requirements listed at 8 C.F.R. § 214.14(c)(2)(i) for required initial evidence, where it was not submitted as initial evidence with the Form I-918 and was not executed within the six months preceding the filing of the instant Form I-918.

against the Petitioner, and while felony harassment and/or felonious assault may have also occurred, there is no indication that the certifying agency actually detected or investigated those offenses. Accordingly, a careful review of the record does not establish that the certifying agency detected, investigated, or prosecuted felony harassment or felonious assault committed against the Petitioner.

B. Felony Harassment under Washington State Law is Not Substantially Similar to Felonious Assault

Further, even if felony harassment had been detected, the Petitioner has not demonstrated that it is substantially similar to the qualifying criminal activity of felonious assault. 8 C.F.R. § 214.14(a)(9). As discussed in our prior decision, section 101(a)(15)(U)(iii) of the Act encompasses "any similar activity" to the enumerated crimes, which the regulation defines 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). Consequently, the nature and elements of the crime investigated or prosecuted here 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 a comparison of the nature and elements of the statutes in question.

At the time the offense was reported in 2012, the statute for felony harassment at Wash. Rev. Code section 9A.46.020 provides, in pertinent part:

> (1) A person is guilty of harassment if:
>
> (a) Without lawful authority, the person knowingly *threatens*:
>
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; . . . and
>
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.
>
> (2) (a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.
>
> (b) A person who harasses another is guilty of a class C felony if . . .(ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person. . .

(Emphasis added).

The Petitioner asserts that felony harassment is substantially similar to the qualifying crime of felonious assault, including assault with intent to commit a felony under Wash. Rev. Code section

9A.36.021(1)(e). Misdemeanor assault under Washington State law is found under Wash. Rev. Code 9A.36.041, which states that a person is guilty of assault in the fourth degree, a gross misdemeanor, "if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another." Although assault is not defined by statute in Washington, courts there apply the common law definition of assault. *Clark v. Baines*, 84 P.3d 245, 247 n.3 (Wash. 2004); *State v. Walden*, 841 P.2d 81, 83 (Wash. Ct. App. 1992). Three common law definitions of criminal assault recognized in Washington include: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm. *Clark*, 84 P.3d at 247 n.3. Felonious assault of the lowest degree in Washington is assault in the third degree under Wash. Rev. Code section 9A.36.031, and involves assault with an additional aggravating factor, such as: the use of a weapon or other instrument with criminal negligence resulting in bodily harm; assault against law enforcement or other protected groups; and assault resulting in bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering. Similarly, assault in the second degree involves assault with an even more aggravating factor, including: the commission of assault with an intent to commit a felony; use of a deadly weapon; or intentional assault resulting in reckless infliction of a substantial bodily harm. Wash. Rev. Code § 9A.36.021(1).

The statutory elements of felony harassment under Wash. Rev. Code section 9A.46.020(2)(b)(ii) are not substantially similar to felonious assault under the Washington Criminal Code. Felony harassment involves the communication of a threat to kill and placing the threatened person in reasonable fear that the threat will be carried out through words or conduct. However, felony assault does not require a communication of a threat for a conviction. *State v. Mandanas*, 262 P.3d 522, 526-27 (Wash. Ct. App. 2011). Additionally, a felony harassment conviction does not require an added aggravating factor beyond the threat, such as the use of a weapon or commission of the offense with the intention to commit a felony. Moreover, contrary to the Petitioner's assertions on motion, Washington case law indicates that a plain reading of the harassment and assault statutes shows that the state legislature "intended to distinguish felony harassment and second degree assault as distinct offenses." *Mandanas*, 262 P.3d at 526-27.[3] In fact, the *Mandanas* court specifically held that second degree assault and harassment had different elements. *Id.* at 526. The court found that

[3] The Petitioner mistakenly relies on *State v. Leming* for the proposition that felony harassment under Wash. Rev. Code section 9A.46.020(2)(b)(ii) and second degree felony assault under Wash. Rev. Code section 9A.36.021(1)(e) are substantially similar, and asserts that the Washington court in *Leming* found that the prosecution had to prove the same facts for both criminal offenses. 1387 P.3d 1095 (Wash. Ct. App. 2006). The Petitioner misinterprets *Leming*, in which the court found that the appellant's convictions for felony harassment and second degree assault violated double jeopardy rules because the second degree assault conviction *was predicated on* the felony harassment conviction. 1387 P.3d at 1101-02. Essentially, the appellant's second degree assault conviction under Wash. Rev. Code section 9A.36.021(1)(e) was for assault with intent to commit a felony, where the underlying felony was felony harassment. Consequently, both convictions relied on the same facts of felony harassment, subjecting the appellant to multiple punishments for the same offense in violation of state and federal constitutional rights to be free of double jeopardy. 1387 P.3d at 1102. In fact, more recently, the Washington appellate court in *Mandanas*, determined that convictions for felony harassment and second degree assault (predicated on the use of a deadly weapon) did not violate principles of double jeopardy as they did not rely on the same facts. 262 P.3d at 526-27.

the conduct criminalized under the harassment statute (threats to injure or kill another) was "insufficient to establish an assault," noting that the two offenses, located in different chapters of the Washington Code, had different aims and purposes because assault addressed concerns about physical harm while criminal harassment dealt with preventing invasions of individual privacy. *Id.* Accordingly, we find that felony harassment under the Washington Criminal Code is not substantially similar to the qualifying crime of felonious assault. *See* 8 C.F.R. § 214.14(a)(9). The Petitioner, therefore, has not established that he was the victim of a qualifying crime, as required by section 101(a)(15)(U)(i) of the Act.

IV. CONCLUSION

On motion, the Petitioner has not overcome the grounds for denial, because he has not demonstrated that he was a victim of qualifying criminal activity, as required by subsections 101(a)(15)(U)(i) and (iii) of the Act. He, therefore, also does not meet 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. 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.

ORDER: The motion to reconsider is denied.

Cite as *Matter of P-T-P-P-*, ID# 16458 (AAO May 9, 2016)