U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-S-G-

DATE: NOV. 9, 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 (U petition). The Director concluded that the Petitioner had not established that she was a victim of qualifying criminal activity. Consequently, the Director 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 and claims that she was the victim of qualifying criminal activity or criminal activity that is substantially similar to one of the qualifying crimes, because the underlying facts of the criminal activity constitute felonious assault.

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

I. 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: . . . 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 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 U petition, with an accompanying Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B), and a Form I-192, Application for Advance Permission to Enter as Nonimmigrant. The Supplement B, dated October 10, 2013, was signed by a Lieutenant of the [redacted] California, Police Department (certifying official). At part 3.1 of the Supplement B, the certifying official asserted that the offense in part 3.3 involved or was similar to felonious assault, attempt to commit any of the named crimes, and "Other: misdemeanor battery." At part 3.3 of the Supplement B, the certifying official cited to sections 245(a)(1) and 242 of the California Penal Code (felonious assault and battery) as the relevant criminal statutes for the criminal activity that was investigated or prosecuted. At Part 3.5, the certifying official described the criminal activity being investigated or prosecuted as the Petitioner getting into a fight with the suspect and the suspect hitting her repeatedly. The Supplement B describes the known or documented injuries to the Petitioner as "scratches on her face, arms, and neck." Part 4.5, which

asks the certifying official to describe the helpfulness of the victim, stated that the Petitioner gave a statement to police, leading to the arrest of the suspect.

On appeal, the Petitioner asserts that she is an indirect victim of an assault on her year old son, who was in the proximate zone of danger during the suspects attack on her. The Petitioner relies upon 8 C.F.R. § 214.14 which permits a victim's parent to be a victim of the qualifying criminal activity when the victim is under the age of 21. However, the Supplement B and the police report accompanying the Supplement B do not indicate that the Petitioner's son was the victim of the certified criminal activity.

On appeal, the Petitioner also asserts that the underlying facts of the criminal activity investigated by the certifying agency support a finding that she (or her son) was the victim of felonious assault due to her fear of imminent danger.[1] However, in determining whether a felonious assault occurred, the relevant inquiry is not a fact-based one into whether the facts establish that a qualifying criminal activity occurred. Rather, our inquiry focuses on whether the Supplement B, and the record as a whole, establishes that the certifying agency detected, investigated or prosecuted a qualifying crime.[2] *See* 8 C.F.R. § 214.14(a)(9).

A. Criminal Activity Certified as Being Detected,[3] Investigated, or Prosecuted

On appeal, the Petitioner asserts that she is the victim of felonious assault in violation of sections 245(a)(1) and 242 of the California Penal Code. As defined in 8 C.F.R. § 214.14(a)(14), a "victim" for purposes of U classification is a petitioner who has suffered harm as a result of the commission of qualifying criminal activity. The Petitioner also contends that the Supplement B certified the criminal activity under "felonious assault." The Supplement B reflects that the certifying official corrected Part 3.1 by "whiting-out" the box checked "Felonious Assault" and wrote in "Other: misdemeanor battery." Although the certifying official indicated that the Petitioner was a victim of sections 245(a)(1) and 242 of the California Penal Code in part 3.3 of the Supplement B, it does not comport with the certifying official's correction to Part 3.1 or the accompanying police report, which indicates that the criminal activity detected or investigated was "simple, not aggravated assault," in violation of section 242 of the California Penal Code. Accordingly, although the certifying official signed the certification, we give the felonious assault statute cited at Part 3.3 little weight as the certifying official's correction to the felonious assault box in Part 3.1 suggests that he did not

[1] The Petitioner also contends that she was the victim of a "crime of violence" as set forth in 18 U.S.C. section 16. However, whether the criminal activity is a crime of violence is irrelevant because, in determining whether the criminal activity certified is a qualifying crime, we look to the definitions of the qualifying crime(s) under the relevant state statute or common law definition (in this case, whether felony assault under California law was detected, investigated or prosecuted).

[2] Although we give a properly executed Supplement B significant weight, it is not the only evidence that we may consider when determining whether qualifying criminal activity occurred during the commission of, or is substantially similar to, the certified offense(s) in part 3.3. *See* Section 214(p)(4) of the Act; 8 C.F.R. § 214.14(c)(4).

[3] 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).

complete the Supplement B himself. *See* section 214(p)(4) of the Act; 8 C.F.R. § 214.14(c)(4). We therefore rely more heavily upon the police report submitted with the Supplement B to determine the crime(s) which were investigated or prosecuted by the certifying official, which indicates that the criminal activity detected or investigated was "simple, not aggravated assault," in violation of section 242 of the California Penal Code.

The record is insufficient to establish that the certifying agency or another law enforcement agency actually detected, investigated, or prosecuted the qualifying offense of felonious assault as having been committed against the Petitioner. Accordingly, our *de novo* review of the record establishes that the Petitioner was the victim of misdemeanor battery (section 242 of the California Penal Code), which was detected, investigated, or prosecuted by the certifying agency.

B. Misdemeanor Battery is not Substantially Similar to Qualifying Criminal Activity

The statute encompasses "any similar activity" to the enumerated crimes and 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." *See* 8 C.F.R. § 214.14(a)(9). Thus, the nature and elements of the misdemeanor battery offense must be substantially similar to one of the qualifying criminal activities in the statutorily enumerated list.

On appeal, the Petitioner asserts that section 242 of the California Penal Code is a "wobbler" statute under which a suspect can be charged with either a misdemeanor or a felony, and that she should therefore be considered a victim of "felonious assault" as she suffered serious bodily injury. However, as discussed above, the underlying facts of the criminal activity are not relevant to the inquiry as to what criminal activity was detected, investigated, or prosecuted by the certifying agency.

Section 240 of the California Penal Code defines an assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another," and section 242 defines battery as "any willful and unlawful use of force or violence upon the person of another." Cal. Penal Code §§ 240 and 242 (West 2009). While the Petitioner asserts that section 242 of the California Penal Code is a misdemeanor and a felony, the section does not reference either. Further, it appears that the Petitioner may be referring to section 243 of the California Penal Code, a crime which was not detected, investigated, or prosecuted by the certifying agency.[4]

California recognizes a distinction among battery and assault offenses based on the presence of aggravating factors. Battery that involves the infliction of serious bodily injury carries a greater penalty than battery without such factor. *Compare* section 242 of the California Penal Code *with*

[4] Section 243(a) of the California Penal Code punishes simple battery, while sections 243(b)-(d) punish aggravated batteries, such as battery against a peace officer, battery resulting in serious bodily injury, and domestic violence battery. Accordingly, section 243 of the California Penal Code is known as a "wobbler" statute because it punishes both misdemeanor and felony crimes. The California Penal Code does not similarly combine misdemeanor and felony assaults into one section.

section 245(a)(4).[5] Misdemeanor battery is not substantially similar to felonious assault because felony assault involves "force likely to produce great bodily injury" whereas "any willful and unlawful use of force" constitutes a battery and there is no specification to the level of force inflicted. *Compare* section 242 of the California Penal Code *with* section 245(a)(4). For an assault in California to be classified as a felony, there must be an aggravating factor involved. *Compare* section 240 of the California Penal Code *with* sections 244 - 245.5. The police report clearly states that the crime detected or investigated was "simple, *not* aggravated battery (emphasis added)." Accordingly, the record does not establish that the Petitioner was the victim of qualifying criminal activity.

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 M-S-G-*, ID# 12423 (AAO Nov. 9, 2016)

[5] We compare sections 242 and 245(a)(4) of the California Penal Code because the only California felony assault that could possibly apply in the Petitioner's case is section 245(a)(4), which involves force likely to produce great bodily harm, rather than other aggravated factors such as a deadly weapon, caustic chemicals, firearm or machine gun.