U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-D-D-C-

DATE: NOV. 15, 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 petition. The Director concluded that the Petitioner had not established that he was a victim of qualifying criminal activity and, therefore, he had also not demonstrated the statutory criteria for U nonimmigrant classification under subsections 101(a)(15)(U)(i)(I)-(IV) of the Act. The Petitioner subsequently filed a motion to reconsider the denial, but the motion was dismissed by the Director as not providing new facts or reasons for reconsideration.

The matter is now before us on appeal. On appeal, the Petitioner submits a brief along with additional evidence and copies of previously submitted material. The Petitioner claims that the record demonstrates that he was the victim of the qualifying crime of felonious assault and that he has suffered substantial physical and mental abuse as a result.

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
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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[.]
>
> . . . .
>
> (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 Form I-918, Petition for U Nonimmigrant Status (U petition) and a Form I-192, Application for Advance Permission to Enter as Nonimmigrant (waiver application), claiming to be the victim of a felonious assault. Upon a full review of the record, as supplemented on appeal, the Petitioner has not overcome the Director's grounds for denial.

A. Victim of Qualifying Criminal Activity

1. Criminal Activity Certified as Being Detected,[1] Investigated, or Prosecuted

[1] 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).

The Petitioner submitted a Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B), dated March 15, 2013, signed by [redacted] Special Victims Crime Unit, Sergeant, [redacted] California, Police Department (certifying official). At part 3.3 of the Supplement B, the certifying official cited to section 243 of the California Penal Code, corresponding to the offense of battery, as the criminal activity that was investigated or prosecuted. At part 3.1, the certifying official asserted that the criminal activity committed against the Petitioner involved or is similar to the qualifying crime of "Felonious Assault." At part 3.5, which asks to describe the criminal activity being investigated or prosecuted, the certifying official indicated the Petitioner was on three occasions the victim of felonious assaults at his school, where he was twice thrown to the floor, once pushed, his backpack was taken out of his hands, and he was punched several times in the face. The certifying official also stated that the Petitioner switched schools "because of the assaults." A police Incident Report identifies the "Type of Incident" as battery, is blank at "Type of Weapon Used," and indicates "Violent Crime Notification." An accompanying narrative describes the Petitioner's recounting of three incidents that occurred at his school.

In response to a request for evidence (RFE) from the Director, the Petitioner submitted an updated Supplement B, signed June 10, 2014, by the same certifying official, that was amended at part 3.3 to include section 245(a)(1) of the California Penal Code, which corresponds to assault with a deadly weapon or force likely to produce great bodily injury.

The issue before us is whether felonious assault, a qualifying criminal activity, was actually detected and investigated. However, before we reach this specific issue, we must first discuss the regulation at 8 C.F.R. § 214.14(c)(2)(i), which requires that at the time of filing, a U petition "must include" as initial evidence a Supplement B "signed by a certifying official within the six months immediately *preceding* the filing of Form I-918 (emphasis added)." The Petitioner submitted two Supplements B; the first one accompanied the filing of the U petition, and the second one the Petitioner submitted in response to the Director's request for evidence (RFE).[2] The Supplement B that the certifying official executed nearly *one year after* the filing of the U petition does not conform to the regulation at 8 C.F.R. § 214.14(c)(2)(i). Although we are not required to consider this second one because it was not properly executed in accordance with the governing regulation, we will nevertheless address both Supplements B in our analysis, as the Director did in her decision.

The second Supplement B, certifying that the crime of felony assault was investigated or prosecuted, is insufficient by itself to demonstrate the Petitioner's eligibility. We determine, in our sole discretion, the evidentiary value of a Supplement B. *See* 8 C.F.R. § 214.14(c)(4). Here, neither the Petitioner nor the certifying official provided any explanation for the amended Supplement B. The certifying official did not include any statement or criminal investigative records to identify or

[2] We note that in the RFE, the Director did not inform the Petitioner that a new Supplement B could be submitted as evidence to establish that the Petitioner was the victim of qualifying criminal activity. There is no regulation allowing us to accept a Supplement B in contravention of the regulation, to include one that is signed after the U petition filing date.

explain any deficiency in the initial Supplement B and to support the inclusion of felony assault in the amended Supplement B. This is significant particularly because the underlying police incident report does not support the amended language in the second Supplement B, as the incident report only identifies the offense of battery committed against the Petitioner and does not indicate that law enforcement officials also detected, investigated, or prosecuted felony assault.

Further, the facts in this case do not support that a felonious assault actually occurred, as the Petitioner has not shown that the aggravating factors found in the California felonious assault statutes apply to his case. The Supplement B and police report do not indicate that a deadly weapon was used during the criminal activity committed against the Petitioner and he has not shown that he was assaulted with "force likely to produce great bodily injury." California courts have found that great bodily injury is bodily injury which is significant or substantial, not insignificant, trivial or moderate. (*People v. Armstrong*, 8 Cal.App.4th 1060, 10 Cal.Rptr.2d 839 (1992); *People v. Muir*, 244 Cal.App.2nd 598, 53 Cal.Rptr. 398 (1966); *People v. Covino*, 100 Cal.App.3d 660, 161 Cal.Rptr. 155 (1980). In *Armstrong*, the California Court of Appeals found that the results of injury are often highly probative of the amount of force used, but cannot be conclusive. In the instant case, the Petitioner described the incidents at his school where he was thrown to the ground, scraping his arm, feeling pain in his chest, and bleeding from being punched in his face. A medical document indicates that the Petitioner was seen at a hospital emergency department with complaint of chest wall pain, that he stated "a kid at school pick him up and threw him on the mat," and that he was given acetaminophen, a pain reliever and fever reducer.

Thus, the record of proceedings 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 crime certified is battery.

2. Battery is Not Qualifying Criminal Activity

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

On appeal, the Petitioner maintains that felony battery is substantially similar to felonious assault. He asserts that California has no felonious assault statute but rather lists crimes against the person which involve the threat or use of force and that title 8 of the California Penal Code includes offenses that are felonies and meet the elements of assault pursuant to section 240 of the California Penal Code even though not categorized as felonious assault. In support of his argument that battery

is substantially similar to felony assault, the Petitioner cites *People v. Valdez*, 175 Cal. App. 3d. 103 (1985), specifying that the injury element of the crime of assault is satisfied by any attempt to apply physical force to the victim, and *People v. Golde*, 77 Cal.Rptr.3d 120 (Cal. App. 3d Dist. 2008), finding the present ability element of assault is satisfied when the defendant has attained the means and location to strike immediately.

The Petitioner describes the activities against him and claims they were executed by means of force likely to produce great bodily injury pursuant to section 245(a)(1) of the California Penal Code. He states that the police report calls the crime a battery and that although it provided no specific citation to the California Penal Code, the police report notes it constituted a "violent crime notification." The Petitioner contends that he is arguably the victim of battery under section 243(d) of the California Penal Code as it was an assault that resulted in serious injuries. He asserts that battery with great bodily injury is a felony crime of violence and therefore a felonious assault because it is defined by the U.S. Department of Justice as a serious crime of violence. The Petitioner maintains that officers investigating a crime determine if it is such a threat to public safety that it is a felonious assault and he contends that the facts recorded by the investigating officer were affirmed when the certifying official signed a revised Supplement B that there was a felonious assault. He maintains then that battery under section 243(d) of the California Penal Code is a felony that meets the elements of felonious assault and refers to U.S. Sentencing Commission Guidelines that define aggravated assault as a felonious assault that involved a dangerous weapon, serious bodily injury, or intent to commit another felony.

In the present case, the Supplement B cited to section 243 of the California Penal Code as the criminal activity investigated and the police incident report only identifies the offense of battery committed against the Petitioner. A distinction among battery offenses is recognized under California law by the punishment for the offense based on the presence of aggravating factors. Battery that involves the infliction of serious bodily injury carries a greater penalty than battery without an aggravating factor. *Compare* Cal. Penal Code §§ 243(d) *with* 243(a). Therefore, simple battery and aggravated battery are not substantially similar because both do not involve the presence of aggravating factors or carry the same penalties. Here, the certifying agency identified battery as the investigated offense and does not further distinguish it under section 243 of the California Penal Code. Accordingly, the record of proceedings does not demonstrate that the offense that resulted in the Petitioner's victimization was detected, investigated, or prosecuted by the certifying agency as aggravated battery under section 243(d) of the California Penal Code. The relevant statutory comparison is, therefore, battery as defined under section 242 of the California Penal Code to felony assault under section 245(a)(1).

At the time of the criminal activity against the Petitioner, California law defined battery under section 242 as any willful and unlawful use of force or violence upon the person of another. Cal. Penal Code § 242 (West 2010). California law defined assault "as an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240 (West 2010). For an assault in California to be classified as a felony, there must be an additional

aggravating factor involved, such as the use of a deadly weapon or force likely to produce great bodily injury. *See, e.g.,* Cal. Penal Code §§ 244.5-245.5.

The Petitioner argues that the activities against him were executed by means of force likely to produce great bodily injury pursuant to Cal. Penal Code section 245(a)(1). At the time of the criminal activity against the Petitioner Cal. Penal Code § 245 provided:

> § 245. Assault with deadly weapon or force likely to produce great bodily injury; punishment
>
> > (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 §245 (West 2010).

Battery as defined under section 242 of the California Penal Code and felony assault under section 245(a)(1) are not substantially similar 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. The Petitioner contends that he was the victim of felony battery and then asserts that it is substantially similar to felonious assault. However, the record of proceedings does not show that the Petitioner was the victim of felony battery, and when comparing battery to the felony assault statute they are not substantially similar. This statutory analysis thus does not demonstrate that the nature and elements of the criminal activity investigated are substantially similar to a qualifying crime.

The Petitioner has asserted that battery with great bodily injury is a felony because it is defined by the U.S. Department of Justice as a crime of violence. The definition of a crime of violence is irrelevant as it is not the standard for what is considered qualifying criminal activity for purposes of U classification. We must determine whether battery is substantially similar to qualifying criminal activity under section 101(a)(15)(U)(iii) of the Act. Regardless of whether or not battery is a crime of violence, the elements of battery are not substantially similar to the elements of felonious assault, therefore battery is not substantially similar to a qualifying crime.

The Petitioner refers to U.S. Sentencing Commission Guidelines that define aggravated assault as a felonious assault, but the Guidelines are non-binding rules that set out a uniform sentencing policy for defendants convicted in the United States federal court system, and do not apply to U petitions. The Petitioner also references the intent of U regulations and concern among law enforcement officials that assault disproportionately impacts immigrants, and he asserts that battery with great bodily injury defined by 243(d) is among "myriad" crimes described in the Act because although California has no felonious assault, its elements and punishment meet a national and many states' definition of felonious assault.

Although we recognize the Congressional intent to help victims of crimes and the concerns of law enforcement, we lack the authority to waive the requirements of the statute, as implemented by the regulations. *See United States v. Nixon*, 418 U.S. 683, 695-96 (1974) (as long as regulations remain in force, they are binding on government officials); 8 C.F.R. § 214.14(b)(3). The Petitioner also refers to felonious assault definitions of other states. The Preamble to the U nonimmigrant rule takes into consideration differences among states as it references substantially similar criminal activity. In its Preamble to the U visa rule, U.S. Citizenship and Immigrant Services stated that the statutory list of qualifying criminal activity is a list of general categories of criminal activity and that any similar activity to the activities listed may be a qualifying criminal activity but the similarities must be substantial. The Preamble stated that the rule's definition of "any similar activity" takes into account the wide variety of state criminal statutes in which criminal activity may be named differently than criminal activity found on the statutory list, while the nature and elements of both criminal activities are comparable. A petitioner must show that the criminal activity of which he was victim is a qualifying crime where it occurred, as penal codes of other states are not criminal assault statutes to which we can compare the criminal activity where a petitioner was a victim.

As such, the Petitioner has not demonstrated that he was the victim of qualifying criminal activity, as required by section 101(a)(15)(U)(i) of the Act.

B. Substantial Physical or Mental Abuse

As the Petitioner did not establish that he was the victim of a qualifying crime or criminal activity, he necessarily has also not demonstrated that he suffered substantial physical or mental abuse as a result of having been a victim of a qualifying crime or criminal activity, as required by 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 he was the victim of qualifying criminal activity, he has also not established that he possesses credible or reliable information establishing knowledge concerning details of the qualifying criminal activity, as required by subsection 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 he was the victim of qualifying criminal activity, he necessarily has also not established that he 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.

E. Jurisdiction of Qualifying Criminal Activity

As the Petitioner has not established that he was the victim of a qualifying crime or criminal activity, he has also not established that qualifying criminal activity occurred within the jurisdiction of the United States, as required by subsection 101(a)(15)(U)(i)(IV) of the Act.

III. CONCLUSION

The Petitioner has not demonstrated that he was a victim of qualifying criminal activity. He, 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 K-D-D-C-*, ID# 19798 (AAO Nov. 15, 2016)