U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-A-Z-

DATE: SEPT. 7, 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) 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 U petition was not approvable because the evidence did not establish that the Petitioner was the victim of qualifying criminal activity. We dismissed the Petitioner's subsequent appeal.

The matter is now before us on a motion to reconsider. On motion, the Petitioner submits a brief and a statement from counsel.[1] The Petitioner asserts that we erred in finding that the crime of which the Petitioner was a victim was not substantially similar to a qualifying crime. He contends that the crime of mischievous animal causing serious bodily injury is substantially similar to felonious assault, and that we did not consider all elements of the crime of which he is a victim.

Upon review, we will deny the motion to reconsider.

I. LAW

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).

[1] Counsel submitted two similar documents, one labeled a brief and the other labeled a statement, with an explanation that Form I-290B requires both. Form I-290B requires that a petitioner provide the basis for an appeal or motion. That basis can be presented in a legal brief or other type of statement, but submission of a brief is not mandatory. *See Administrative Appeals Office Practice Manual*, Chapter 4.7, https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/practice-manual.

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).

To qualify for U nonimmigrant status under section 101(a)(15)(U) of the Act, a petitioner must establish, in pertinent part, that he or she was the victim of qualifying criminal activity as listed at section 101(a)(15)(U)(iii) of the Act, or "any similar activity." 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 robbery must be substantially similar to one of the qualifying criminal activities in the statutorily enumerated list. *Id.* The inquiry, therefore, is not fact-based, but rather entails comparing the nature and elements of the statutes in question.

II. ANALYSIS

Upon a full review of the record, the Petitioner has not overcome our prior determination. In our previous decision on appeal, incorporated here by reference, we found that the Petitioner was not the victim of qualifying criminal activity as required by section 101(a)(15)(U)(i)(I) of the Act. We indicated that the nature and elements of the certified crime, mischievous animal causing serious bodily injury under California Penal Code (CPC) section 399(b), are not substantially similar to felonious assault under CPC section 240. We explained that, although CPC sections 399(b) and 240 both involve bodily injury, the element of intent of the two crimes differs. We noted that a conviction under CPC section 399(b) requires a finding of criminal negligence, while a finding of "mere recklessness or criminal negligence is . . . not enough" to sustain a conviction under CPC section 240.

On motion, the Petitioner asserts that we failed to consider an element of CPC section 399(b). He states that Cal. Penal Code section 399(b) requires that the owner of an animal "must know the mischievous nature of the animal," and that "this knowledge requirement is substantially the same as that required for assault" under CPC section 240. He contends that because both crimes require knowledge of "facts which put others in danger," the intent required for each crime is also substantially similar.

Although CPC section 399(b) requires an animal's owner to "know[] its propensities" and CPC section 240 requires "actual knowledge of . . . facts," the intent elements of the crimes still differ. A conviction under CPC section 399(b) requires only criminal negligence, not an intentional act. *People v. Flores*, 216 Cal. App. 4th 251, 259 (2013). By contrast, a conviction for assault under CPC section 240 "requires an intentional act . . . ." *People v. Williams*, 26 Cal. 4th 779, 790 (2001); *see also People v. Brown*, 245 Cal. App. 4th 140, 151 (2016). Therefore, the nature and elements of mischievous animal causing serious bodily injury under CPC section 399(b) and felonious assault under CPC section 240 are not substantially similar. Accordingly, the Petitioner has not

demonstrated that he is the victim of qualifying criminal activity as required by subsection 101(a)(15)(U)(i)(I) of the Act.

III. CONCLUSION

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 A-A-Z-*, ID# 17837 (AAO Sept. 7, 2016)