



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

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

MATTER OF M-A-M-D-

DATE: SEPT. 26, 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 that he suffered substantial physical or mental abuse as a result of having been a victim of such activity.

The matter is now before us on appeal. On appeal, the Petitioner submits a brief and copies of previously-submitted material. The Petitioner claims that the record demonstrates that he was a victim of qualifying criminal activity or criminal activity that is substantially similar to one of the qualifying crimes, 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 --
 - (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

(b)(6)

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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 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

The Petitioner submitted a Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B), signed on August 30, 2013, by [REDACTED] Detectives, [REDACTED]

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).

California (certifying official).² Part 3.3 of the Supplement B, which lists the statutory citation for the criminal activity being investigated or prosecuted, was left blank by the certifying official. At part 3.1, the certifying official asserted that these criminal activities committed against the Petitioner involved or are similar to the qualifying crime of “felonious assault.” At part 3.5, which asks the certifying official to briefly describe the criminal activity being investigated or prosecuted, the certifying official stated that at the Petitioner’s business a “suspect became upset and attempted to take victim’s necklace off his neck.” At Part 4, Helpfulness of the Victim, the form indicates that the suspect pled guilty to a charge of “theft from person” and was placed on probation. The record of proceedings includes an arrest report that identifies robbery under section 211 of the California Penal Code (CPC) as the offense for which the suspect was arrested.

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. Here, although the certifying official indicated that the Petitioner was a victim of “criminal activity involving or similar to” felonious assault in part 3.1 of the Supplement B, he did not cite to the corresponding California statute for that offense in part 3.3 as the criminal offense that was actually investigated or prosecuted. The certifying official did not list a statutory citation for criminal activity investigated or prosecuted, and only on the police report is section 211 of the California Penal Code, robbery, indicated. The certifying official’s completion of part 3.1 is not conclusory evidence that a petitioner is the victim of qualifying criminal activity. Rather, it is part 3.3 which establishes the crime or crimes that the certifying agency detected, investigated, or prosecuted that resulted in a petitioner’s victimization. The purpose of part 3.1 is only to identify the general category of criminal activity to which the offense(s) in part 3.3 may relate. *See U Nonimmigrant Status Interim Rule*, 72 Fed. Reg. 53014, 53018 (Sept. 17, 2007) (specifying that the statutory list of qualifying criminal activities represent general categories of crimes and not specific statutory violations).

On appeal, the Petitioner contends that he is the victim of a crime that under California law constitutes a qualifying crime and that robbery falls within the enumerated crime of felonious assault. The record of proceedings does not contain evidence that the qualifying crime of felonious assault was detected or investigated. Accordingly, upon our *de novo* review, the record establishes only that the Petitioner was the victim of the crime of robbery.

2. Robbery Under the California Penal Code is Not A Qualifying Crime

The crime of robbery 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.”

² The record of proceedings contains two Supplement B forms: one submitted with the U petition; the other, dated August 2, 2013, submitted in response to a request for evidence (RFE) from the Director. However, because the August 2, 2013 Supplement B is only a copy without an original signature, will we not afford it any weight in these proceedings. *See* 8 C.F.R. § 214.14(c)(2)(i) and (c)(4).

8 C.F.R. § 214.14(a)(9). Thus, the nature and elements of the offenses 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 cites the Black's Law Dictionary definition of felonious assault as "an assault that is of sufficient severity to be classified and punished as a felony." He contends that California law includes assault within crimes such as robbery and cites the California Penal Code's definition of robbery in contending it is a second degree felony. The Petitioner asserts that robbery involves theft by force or fear and that aggravated assault under section 211.1(2) of the Model Penal Code also involves the intent or an attempt to cause serious bodily injury. The Petitioner maintains that the nature and elements of robbery are substantially similar to felonious assault.

Under the California Penal Code robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Cal. Penal Code § 211 (West 2011). California law defines 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 2011). For an assault in California to be classified as a felony, there must be an aggravating factor involved. *Compare* CPC § 240 *with* CPC § 245.

Upon review, the nature and elements of robbery under section 211 of the California Penal Code are not substantially similar to felonious assault. The statute for robbery investigated in this case involves taking personal property from an individual through the use of force or fear, whereas assault involves the commission of a violent injury on a person, with aggravated assault requiring the presence of an aggravating factor as a necessary component of the offense. In contrast to robbery, felony assault under the California Penal Code does not require the element of "taking," and involves both an actual attempt, with a present ability, to commit violent injury upon another with the addition of an aggravating factor. Further, the California Supreme Court, in concluding that assault with a deadly weapon was not a lesser included offense of robbery, specifically held that a robbery offense could be committed without an attempt to inflict violent injury and without the present ability to do so, both of which are required elements to constitute an assault under California law. *People v. Wolcott*, 665 P.2d 520, 524-26 (Cal. 1983) (addressing the use of enhancement factors, such as "use of a gun" during a robbery offense, to establish the uncharged crime of assault with a deadly weapon as a lesser included offense of robbery). Thus, the nature and elements of felony assault under California law are not substantially similar to the California robbery statute.

The Petitioner further maintains that the investigated crime involves theft by force or fear and that assault under the Model Penal Code involves intent or attempt to cause serious bodily injury. As noted, the robbery statute here involves taking personal property from an individual through the use of force or fear and does not involve an intent or attempt to cause a serious bodily injury, as does a felonious assault under the Model Penal Code. Furthermore, felonious assault under the Model Penal Code does not require the element of "taking" as does robbery under section 211 of the

California Penal Code. Accordingly, robbery is not substantially similar to felonious assault under the Model Penal Code.

On appeal, the Petitioner also describes the incident and states that the robbery occurred by way of assault because he was attacked and thus suffered a felonious assault. As noted above, we do not look at the facts of what occurred during the offense to determine whether they describe qualifying criminal activity. We compare the statute that the certifying agency detected, investigated, or prosecuted to the statute relating to one of the qualifying crimes, and the statutes we compare must be substantially similar in their nature and elements. Here, the statutory analysis demonstrates that the nature and elements of robbery under section 211 of the California Penal Code are not substantially similar to felonious assault under California law.

As the Petitioner has not established that the certifying agency detected a qualifying crime during its investigation of the robbery, or that the certified crime is substantially similar to the qualifying crime of felonious assault, he has not demonstrated that he is a 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 section 101(a)(15)(U)(i)(I) of the Act. We, therefore, do not engage in further review of the Director's determination on this issue.

III. CONCLUSION

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-A-M-D-*, ID# 10571 (AAO Sept. 26, 2016)