U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17499734

Date: MARCH 1, 2022

Appeal of Vermont Service Center Decision

Form I-918, Petition for U Nonimmigrant Status

The Petitioner seeks "U-1" nonimmigrant classification under sections 101(a)(15)(U) and 214(p) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1101(a)(15)(U) and 1184(p) as a victim of qualifying criminal activity. The Director of the Vermont Service Center revoked the Form I-918, Petition for U Nonimmigrant Status (U petition), finding that the Petitioner's U petition was approved in error. On appeal, the Petitioner asserts that the Director incorrectly revoked the approval of the Petitioner's U petition. The Administrative Appeals Office reviews the questions in this matter de novo. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

To establish eligibility for U-1 nonimmigrant classification, petitioners must show that they: have suffered substantial physical or mental abuse as a result of having been the victim of qualifying criminal activity; possess information concerning the qualifying criminal activity; and have been helpful, are being helpful, or are likely to be helpful to law enforcement authorities investigating or prosecuting the qualifying criminal activity. Section 101(a)(15)(U)(i) of the Act. The burden of proof is on a petitioner to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 214.14(c)(4); Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010).

A "victim of qualifying criminal activity" is defined as an individual who has "suffered direct and proximate harm as a result of the commission of qualifying criminal activity." 8 C.F.R. § 214.14(a)(14). "Qualifying criminal activity" is "that involving one or more of" the 28 types of crimes listed at section 101(a)(15)(U)(iii) of the Act or "any similar activity in violation of Federal, State, or local criminal law." Section 101(a)(15)(U)(iii) of the Act; 8 C.F.R. § 214.14(a)(9). The term "'any similar activity' refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities" at section 101(a)(15)(U)(iii) of the Act. 8 C.F.R. § 214.14(a)(9).

As required initial evidence, petitioners must submit a Form I-918 Supplement B, U Nonimmigrant Status Certification (Supplement B), from a law enforcement official certifying the petitioners' helpfulness in the investigation or prosecution of the qualifying criminal activity perpetrated against them.[1] Section 214(p)(1) of the Act; 8 C.F.R. § 214.14(c)(2)(i). U.S. Citizenship and Immigration Services (USCIS) has sole jurisdiction over U petitions. 8 C.F.R. § 214.14(c)(4). Although petitioners may submit any relevant, credible evidence for the agency to consider, USCIS determines, in its sole discretion, the credibility of and weight given to all the evidence, including the Supplement B. Section 214(p)(4) of the Act; 8 C.F.R. § 214.14(c)(4).

USCIS may revoke an approved U petition following a notice of the intent to revoke and where, most relevantly, "[a]pproval of the petition was in error." 8 C.F.R. § 214.14(h)(2).

II. ANALYSIS

In June 2013, the Petitioner filed her U petition, and it was approved in October 2015. The petition included a Supplement B signed and certified by a sergeant in the [redacted] California Police Department (certifying official). In response to Part 3.1 of the Supplement B, the certifying official indicated that the Petitioner was the victim of criminal activity involving or similar to felonious assault and "Other: arson: property." In response to Part 3.3, which requests the specific statutory citations for the criminal activity investigated or prosecuted, the certifying official listed arson under California Penal Code (Cal. Pen. Code) section 451(d), a felony. The Supplement B additionally describes the factual basis for the charges, explaining that the Petitioner "had her and her husband's two cars set on fire by unknown subjects." The police investigative report indicates that at the time of the incident, the Petitioner and her spouse were asleep in their home, awakened by fire engine sirens, and when they looked outside, they saw that their vehicles were on fire. After the fire department determined that the vehicles were safe to approach, police and fire officials determined that the fires were set intentionally.

In February 2020, the Director issued a notice of intent to revoke (NOIR), advising the Petitioner that the U petition was approved in error because while the Supplement B listed the qualifying crimes as felonious assault and arson, the record did not reflect that the Applicant was a victim of felonious assault, and arson is not a qualifying crime. In response to the NOIR, the Petitioner submitted a brief, a personal affidavit, and case law relating to whether a conviction for arson under Cal. Pen. Code section 451(d) is an "aggravated felony" for immigration purposes.

In January 2021, the Director revoked approval of the U petition, finding that the evidence submitted in response to the NOIR was not sufficient to overcome the grounds for revocation. In revoking the U petition, the Director noted that the Petitioner indicated in her affidavit that she stayed in the house and watched as fire personnel arrived, and the evidence submitted did not indicate that the fire spread to the house. In addition, the Director determined that the record did not contain evidence supporting the Petitioner's claim that the arson of her vehicles was substantially similar to a felonious assault due to the vehicles' proximity to her house and the propensity for fires to spread to nearby dwellings. Therefore, the Director concluded part that while arson under Cal. Pen. Code section 451(d) may be a

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[1] The Supplement B also provides factual information concerning the criminal activity, such as the specific violation of law that was investigated or prosecuted, and gives the certifying agency the opportunity to describe the crime, the victim's helpfulness, and the victim's injuries.

felony, it was not a qualifying crime or substantially similar to felonious assault or any other qualifying criminal activity.

B. Law Enforcement Did Not Detect, Investigate, or Prosecute a Qualifying Crime as Perpetrated Against the Petitioner

The Act requires U petitioners to demonstrate their helpfulness to law enforcement authorities "investigating or prosecuting [qualifying] criminal activity," as certified on a Supplement B from a law enforcement official. Sections 101(a)(15)(U)(i)(III) and 214(p)(1) of the Act. The term "investigation or prosecution" of qualifying criminal activity includes "the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity." 8 C.F.R. § 214.14(a)(5). While qualifying criminal activity may occur during the commission of non-qualifying criminal activity, see Interim Rule, New Classification for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014, 53018 (Sept. 17, 2007), the qualifying criminal activity must actually be detected, investigated, or prosecuted by the certifying agency as perpetrated against the petitioner. Section 101(a)(15)(U)(i)(III) of the Act; see also 8 C.F.R. § 214.14(b)(3) (requiring helpfulness "to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is based . . . .").

On appeal, the Petitioner argues that the perpetrator knew, to a reasonable extent, the possible consequences of setting fire to her vehicles which were "instruments of mass arson" and located in the driveway adjacent to her home. She contends that, but for the intervention of the fire department, the fire could have easily spread to her occupied home and seriously harmed her or her family members. Therefore, the Petitioner asserts that under the totality of circumstances, the offense perpetrated against her meets the definition of felonious assault under California law.

At the outset, while we do not diminish the fear the Petitioner may have experienced during, and as a result of, the incident, evidence describing what may appear to be, or hypothetically could have been charged as, a qualifying crime as a matter of fact is not sufficient to establish a petitioner's eligibility absent evidence that the certifying law enforcement agency detected, investigated, or prosecuted the qualifying crime as perpetrated against the petitioner under the criminal laws of its jurisdiction. Sections 101 (a)(l 5)(U)(i)(III) and 214(p)(1) of the Act. While qualifying criminal activity may occur during the commission of non-qualifying criminal activity, the qualifying criminal activity must actually be detected, investigated, or prosecuted by the certifying agency as perpetrated against the petitioner. See id.

We acknowledge that Part 3.1 of the Supplement B indicates that the Petitioner was the victim of criminal activity involving or similar to the qualifying crime of felonious assault. However, a certifying official's completion of part 3.1 is not conclusory evidence that a petitioner is or was the victim of qualifying criminal activity. Part 3.1 of the Supplement B identifies the general categories of criminal activity to which the offense(s) in Part 3.3 may relate. See Interim Rule, New Classification *for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant Sta*tus (U 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).

In this case, Part 3.3 of the Supplement B lists arson under Cal. Pen. Code section 451(d) as the specific statutory citation investigated or prosecuted. Neither the Supplement B nor the police report cites to or references any felony-level assault provision under California law, and no other pertinent evidence in the record indicates that law enforcement actually detected, investigated, or prosecuted the qualifying crime of felonious assault as perpetrated against the Petitioner. See 8 C.F.R. § 214.14(c)(4) (providing that the burden "shall be on the petitioner to demonstrate eligibility" and that "USCIS will determine, in its sole discretion, the evidentiary value of [the] . . . submitted evidence, including the Form I-918, Supplement B"). Rather, upon review of the Supplement B and the police report, law enforcement consistently identified the offense as arson, and the police report, which served as the basis for the certification of the Supplement B, does not mention or reference a felonious assault, or any other crime. As such, the Supplement B, when read in conjunction with other pertinent evidence in the record, does not establish that law enforcement actually detected, investigated, or prosecuted the qualifying crime of felonious assault as perpetrated against the Petitioner. See 8 C.F.R. § 214.14(c)(4) (providing that the burden "shall be on the petitioner to demonstrate eligibility" and that "USCIS will determine, in its sole discretion, the evidentiary value of [the] . . . submitted evidence, including the Form I-918, Supplement B"). Accordingly, the Petitioner has not met her burden of establishing, by a preponderance of the evidence, that law enforcement investigated or prosecuted the qualifying crime of felonious assault as occurring against her, and as a result, she has not shown that she is one who has suffered direct and proximate harm "as a result of the commission of qualifying criminal activity." 8 C.F.R. § 214.14(a)(14).

C. Arson Under Cal. Pen. Code section 451(d) is Not Substantially Similar to the Qualifying Crime of Felonious Assault

The Petitioner also contends that she was the victim of qualifying criminal activity because the nature and elements of the arson involved in her case are substantially similar to those of felonious assault. When a certified offense is not a qualifying criminal activity under section 101(a)(15)(U)(iii) of the Act, petitioners must establish that the certified offense otherwise involves a qualifying criminal activity, or that the nature and elements of the certified offense are substantially similar to a qualifying criminal activity. Section 101(a)(15)(U)(iii) of the Act (providing that qualifying criminal activity is "that involving one or more of" the 28 types of crimes listed at section 101(a)(15)(U)(iii) of the Act or "any similar activity in violation of Federal, State, or local criminal law"); 8 C.F.R. § 214.14(a)(9) (providing that the term "'any similar activity' refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities" at section 101(a)(15)(U)(iii) of the Act). Petitioners may meet this burden by comparing the offense certified as detected, investigated, or prosecuted as perpetrated against them with the federal, state, or local jurisdiction's statutory equivalent to the qualifying criminal activity at section 101(a)(15)(U)(iii) of the Act. Mere overlap with, or commonalities between, the certified offense and the statutory equivalent is not sufficient to establish that the offense "involved," or was "substantially similar" to, a "qualifying crime or qualifying criminal activity" as listed in section 101(a)(15)(U)(iii) of the Act and defined at 8 C.F.R. § 214.14(a)(9).

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 2022). Under California law, for an assault to be classified as a felony, an aggravating factor must be present, such as the use of a deadly weapon or force likely to produce great bodily injury, or an assault against a specific class of persons. See e.g., Cal. Penal Code §§ 244, 244.5, 245, 245.3, 245.5 (West 2022) (outlining aggravating factors, terms of imprisonment, and fines for felonious assaults).

In the present case, as stated above, evidence in the record indicates that the offense perpetrated against the Petitioner involved an attempt to harm her property and not her person. The Supplement B and police report indicate that the crime investigated was arson pursuant to Cal. Pen. Code section 451(d) which provides that "a person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property." Although a violation of Cal. Pen. Code section 451(d) is a felony, the statute does not require an attempt or the present ability to cause a violent injury to another, great bodily injury or any other aggravating factor which would make it similar to felonious assault. Accordingly, the nature and elements of arson under Cal. Pen. Code section 451(d) are not substantially similar to those of felonious assault.

Lastly, the Petitioner argues that arson under Cal. Penal Code section 451(d) is a crime of violence under 18 U.S.C. § 16, and therefore it constitutes an aggravated felony under section 101(a)(43) of the Act. This argument is inapposite because the question of whether arson under California law is a crime of violence and constitutes an aggravated felony under the Act has no bearing on the Petitioner's eligibility for U nonimmigrant status as a victim of qualifying criminal activity. Arson is not one of the 28 types of crimes listed at section 101(a)(15)(U)(iii) of the Act and, as discussed above, is not substantially similar in its nature and elements to felonious assault under California law.

III. CONCLUSION

The Petitioner has not met her burden of establishing by a preponderance of the evidence that law enforcement detected, investigated, or prosecuted, and that she was the victim of, qualifying criminal activity, as section 101(a)(15)(U)(i) of the Act and 8 C.F.R. § 214.14 require. The Petitioner therefore has not established eligibility for U nonimmigrant status under section 101(a)(15)(U) of the Act, and the Director correctly revoked approval of her U petition.

ORDER: The appeal is dismissed.