U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8458762

Date: JUNE 2, 2020

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). The Director of the Vermont Service Center denied the Form I-918, Petition for U Nonimmigrant Status (U petition), and dismissed a subsequent motion to reconsider. The matter is now before us on appeal.[1] On appeal, the Petitioner submits a brief.

The Administrative Appeals Office (AAO) reviews all questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015); *see also Matter of D-Y-S-C-*, Adopted Decision 2019-02, at 2 (AAO Oct. 11, 2019). Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

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 perpetrated against them. Section 101(a)(15)(U)(i) of the Act.

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).

U.S. Citizenship and Immigration Services (USCIS) has sole jurisdiction over U petitions, and petitioners bear the burden of proof 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). As a part of meeting this burden, petitioners must submit a Form I-918

[1] The Petitioner's appeal was initially rejected as untimely; however, we subsequently reopened the proceedings on our own motion pursuant to 8 C.F.R. § 103.5(a)(5)(iii).

Supplement B, U Nonimmigrant Status Certification (Supplement B), from a law enforcement official certifying their helpfulness in the investigation or prosecution of the qualifying criminal activity perpetrated against them.[2] Section 214(p)(1) of the Act; 8 C.F.R. § 214.14(c)(2)(i). 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 of the evidence, including the Supplement B. Section 214(p)(4) of the Act; 8 C.F.R. § 214.14(c)(4).

II. ANALYSIS

A. The Petitioner Was Not the Victim of Qualifying Criminal Activity

The Director denied the U petition, and dismissed the Petitioner's subsequent motion to reconsider, concluding that the Petitioner did not demonstrate that he was a victim of qualifying criminal activity. On appeal, the Petitioner argues that "the charges in [his] case and the entire record establish that [he] was the victim of" attempted felony assault in the second degree and misdemeanor unlawful imprisonment in the second degree under sections 120.05(2) and 135.05 of the Consolidated Laws of New York Annotated (N.Y. Penal Law), New York's equivalent to the qualifying crimes of felonious assault and false imprisonment, "and that law enforcement detected or investigated these crimes." The record does not support the claim that law enforcement authorities detected, investigated, or prosecuted felonious assault, false imprisonment, or any other qualifying crime as perpetrated against the Petitioner in this case.

1. Relevant Evidence

The Petitioner filed his U petition with a Supplement B signed and certified by the Director of the Office of Immigrant Affairs at the [redacted] District Attorney's Office. The Supplement B indicated that the Petitioner was the victim of criminal activity involving or similar to "Other: . . . Burglary in the 2nd" and listed felony burglary in the second degree under section 140.25-2 of the N.Y. Penal Law as the statute investigated or prosecuted as perpetrated against him. When asked to describe the criminal activity and any known or documented injuries to the Petitioner, the Supplement B stated: "See attached papers."

The documents submitted with the Supplement B included: a deposition transcript from the Criminal Court of the [redacted] (deposition transcript), documenting the statements of the [redacted], New York Police Department [redacted] police officer responsible for investigation of the incident; a criminal indictment; and a certificate of disposition. The deposition transcript provided that the Petitioner informed the police officer that, while at home with his wife and their son, he "heard banging sounds emanating from the entrance door to [their] bedroom" and the perpetrator "yelling . . . I'm the police open the door." The Petitioner additionally relayed hearing "the sound of a hard object repeatedly striking and scratching against the lock of the entrance door to [the] bedroom." The Petitioner "exited his bedroom . . . and observed the [perpetrator] . . . exit[] . . . [the] dwelling . . . [and] throw a metal object underneath a vehicle" parked outside the home. [redacted] officers then "recovered a knife from underneath the above mentioned vehicle" which the Petitioner

[2] 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.

identified as removed from "a drawer located in the kitchen" of his home. The deposition transcript and criminal indictment indicated that, based on the circumstances of the offense, the perpetrator was indicted on charges of felony burglary in the second degree, felony criminal impersonation in the first degree, misdemeanor petit larceny, misdemeanor criminal possession of stolen property in the fifth degree, misdemeanor criminal possession of a weapon in the fourth degree, and misdemeanor endangering the welfare of a child in violation of sections 140.25-2, 190.26, 155.25, 165.40, 265.01-2, and 260.10-1 of the N.Y. Penal Law, respectively, by the [redacted] District Attorney's Office. The certificate of disposition established that the perpetrator was ultimately convicted of burglary in the second degree under section 140.25-2 of the N.Y. Penal Law, and sentenced to three years and six months' imprisonment and two years and six months' post-release parole supervision.

2. The [redacted] and [redacted] District Attorney's Office Did Not Detect, Investigate, or Prosecute the Qualifying Crimes of Felonious Assault or False Imprisonment as Perpetrated Against the Petitioner

The Act requires that petitioners have been helpful, are being helpful, or are likely to be helpful" to law enforcement authorities "investigating or prosecuting [qualifying] criminal activity," as documented on a certification from a law enforcement official. Sections 101(a)(15)(U)(i)(III) and 214(p)(1) of the Act. The requisite law enforcement certification must state, in pertinent part, that the petitioner "has been a victim of qualifying criminal activity that the certifying official's agency is investigating or prosecuting." 8 C.F.R. § 214.14(c)(2)(i). "Investigation or prosecution" of qualifying criminal activity "refers to 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).

The Petitioner himself concedes, in his brief on appeal, that "the law enforcement certification lists Burglary in the Second Degree, the crime [the perpetrator] pled guilty to, as the qualifying crime and cites to the statute for Burglary in the Second Degree." However, he asserts that "this is not fatal to [his] claim to eligibility" because the factual circumstances of the offense combined with the charges levied against the perpetrator, as articulated in the deposition transcript and criminal indictment, establish that the qualifying crimes of felonious assault and false imprisonment "occur[red] during a non-qualifying crime." He further asserts that USCIS must, "as a matter of law, . . . consider the entire factual record of the incident in determining whether [a petitioner] is a victim of a qualifying crime." He cites to a series of past AAO non-precedent decisions in support of these assertions.

As a preliminary matter, and as acknowledged by the Petitioner, the cited decisions were not published as precedent and, accordingly, are not binding law and do not bind USCIS in future adjudications. *See* 8 C.F.R. § 103.3(c) (providing that precedential decisions are "binding on all [USCIS] employees in the administration of the Act"). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy. Indeed, in each of the non-precedent decisions cited to by the Petitioner, we determined that the petitioners submitted sufficient evidence to meet their burden of establishing, by a preponderance of the evidence, that law enforcement detected a qualifying crime as having been perpetrated against them, which is not the case here.

Moreover, evidence describing what may appear to be, or hypothetically could have been investigated or charged as, a qualifying crime as a matter of fact is not sufficient to establish a petitioner's eligibility absent evidence indicating, by a preponderance of the evidence, that relevant law enforcement authorities in fact detected, investigated, or prosecuted the qualifying crime as perpetrated against the petitioner. Sections 101(a)(15)(U)(i)(III) and 214(p)(1) of the Act; 8 C.F.R. §§ 214.14(a)(2), (a)(9), (b)(3). 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 law enforcement as perpetrated against the petitioner. *See id.*

Contrary to the assertions of the Petitioner on appeal, he has not established, by a preponderance of the evidence, that the offenses of attempted felony assault in the second degree and misdemeanor unlawful imprisonment in the second degree under sections 120.05(2) and 135.05 of the N.Y. Penal Law, respectively, were at any time detected, investigated, or prosecuted as perpetrated against him. As stated above, on the Supplement B, the [redacted] District Attorney's Office indicated that the Petitioner was the victim of criminal activity involving or similar to only burglary and cited to only felony burglary in the second degree under section 140.25-2 of the N.Y. Penal Law as the statute investigated or prosecuted as perpetrated against him. The deposition transcript documenting [redacted]'s investigation of the incident, as well as the criminal indictment and certificate of disposition, similarly indicate that, based on the specific circumstances of the offense as described by the Petitioner, the perpetrator was indicted on charges of felony burglary in the second degree, felony criminal impersonation in the first degree, misdemeanor petit larceny, misdemeanor criminal possession of stolen property in the fifth degree, misdemeanor criminal possession of a weapon in the fourth degree, and misdemeanor endangering the welfare of a child, and ultimately convicted of felony burglary in the second degree; they do not reference or otherwise indicate that the offenses of attempted felony assault in the second degree and misdemeanor unlawful imprisonment in the second degree under sections 120.05(2) and 135.05 of the N.Y. Penal Law, respectively, were at any time detected, investigated, or prosecuted as perpetrated against the Petitioner.

The Petitioner last asserts that the [redacted] "does not exercise its discretion to grant [Supplements B] arbitrarily" and that the Director erred in not considering "the [redacted]'s internal standards and procedures" and "ability to determine what is qualifying criminal activity as particularly persuasive evidence that [he] was the victim of a qualifying crime that they detected or investigated." However, USCIS determines, in its sole discretion, the credibility of and weight given to all of the evidence, including the Supplement B. Section 214(p)(4) of the Act; 8 C.F.R. § 214.14(c)(4). Moreover, the Supplement B in this case was not issued by the [redacted], but instead by the [redacted] District Attorney's Office as the certifying agency, and as stated above, it did not indicate that either the [redacted] District Attorney's Office or the [redacted] detected, investigated, or prosecuted a qualifying crime as perpetrated against the Petitioner; instead, it indicated that the Petitioner was the victim of criminal activity involving or similar to "Other: . . . Burglary in the 2nd" and that law enforcement only detected, investigated, or prosecuted as perpetrated against the Petitioner felony burglary in the second degree under section 140.25-2 of the N.Y. Penal Law. The Petitioner does not contend on appeal that this offense, or any of the other offenses specified in the criminal indictment, are qualifying crimes or are similar to qualifying crimes. Accordingly, the Petitioner has not met his burden of establishing, by a preponderance of the evidence, that he was the victim of qualifying criminal activity.

B. The Remaining Eligibility Criteria for U-1 Nonimmigrant Classification

U-1 nonimmigrant classification has four separate and distinct statutory eligibility criteria, each of which is dependent upon a showing that petitioners were the victims of qualifying criminal activity. Section 101(a)(15)(U)(i)(I)-(IV) of the Act. The Petitioner argues on appeal that the record evidence establishes that he suffered substantial physical or mental abuse as a result of having been the victim of qualifying criminal activity, as required by section 101(a)(15)(U)(i)(I) of the Act. However, as he has not established that he was a victim of qualifying criminal activity, he has not met that requirement as well as the other eligibility criteria at section 101(a)(15)(U)(i)(II)-(IV) of the Act.

C. The Petitioner is Not Admissible to the United States and the Applicable Ground of Inadmissibility Has Not Been Waived

In denying the Petitioner's U petition, the Director additionally concluded that the Petitioner was inadmissible based upon the underlying denial of his Form I-192, Application for Advance Permission to Enter as Nonimmigrant (waiver application). The Director denied the waiver application, and a subsequent motion to reopen and reconsider, finding that the Petitioner was inadmissible under section 212(a)(6)(A)(i) of the Act (present in the United States without admission or parole) and did not warrant waiver of the applicable ground as a matter of discretion. The Director emphasized that the record indicated that the Petitioner: entered the United States without inspection, admission, or parole in November 2004, was ordered removed to his home country of Ecuador in [redacted]2015, and has remained in the country in violation of the removal order since that time; and was arrested on four occasions, and convicted of three crimes—driving while under the influence (DWI), obstructing government administration, and disorderly conduct—prior to the filing of his U petition.

USCIS determines whether a petitioner is inadmissible—and, if so, on what grounds—when adjudicating a U petition, and has the authority to waive certain grounds of inadmissibility as a matter of discretion. Section 212(d)(14) of the Act, 8 U.S.C. § 1182(d)(14). Petitioners bear the burden of establishing that they are admissible to the United States or that any applicable ground of inadmissibility has been waived. 8 C.F.R. § 214.1(a)(3)(i). To meet this burden, petitioners must file a waiver application in conjunction with the U petition, requesting waiver of any applicable grounds of inadmissibility. 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv). The denial of a waiver application is not appealable. 8 C.F.R. § 212.17(b)(3). Although the AAO does not have jurisdiction to review the Director's discretionary denial of the waiver application, we may consider in our review of the U petition denial whether the Director's underlying determination of inadmissibility was correct.

On appeal, the Petitioner asserts that the Director's denial of his waiver application was "erroneous, as [it] improperly relied on uncorroborated arrest reports and dismissed and sealed charges, failed to analyze the . . . waiver under the proper standard . . . , and gave undue weight to a single, dated DWI conviction." Critically, however, the Petitioner does not contest the ground of inadmissibility determined to be applicable by the Director or otherwise argue that the Director erred in finding him inadmissible to the United States. As stated above, our review on appeal is limited to whether the Petitioner is in fact inadmissible to the United States and, if so, on what grounds. We do not have the authority to review the Director's discretionary determination. The Petitioner has additionally not met

his burden of establishing that he is admissible to the United States or that any applicable ground of inadmissibility has been waived.

III. CONCLUSION

The Petitioner has not met his burden of proof to establish, by a preponderance of the evidence, that he was the victim of qualifying criminal activity, nor has he established that he is admissible to the United States or that all applicable grounds of inadmissibility have been waived. The Petitioner is consequently ineligible for U nonimmigrant classification under section 101(a)(15)(U) of the Act.

ORDER: The appeal is dismissed.