



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

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

MATTER OF J-S-A-

DATE: APR. 6, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

APPLICATION: FORM I-821, APPLICATION FOR TEMPORARY PROTECTED STATUS

The Applicant, a native and citizen of El Salvador, seeks review of a decision withdrawing the Applicant's temporary protected status (TPS). *See* Immigration and Nationality Act (the Act) § 244, 8 U.S.C. § 1254a. The Director, Vermont Service Center, denied the re-registration TPS application and withdrew the Applicant's TPS. The matter is now before us on appeal. The appeal will be sustained.

The Applicant was granted TPS by an immigration judge on October 29, 2008. The Director, in a March 10, 2014, decision withdrew the Applicant's TPS because the Applicant did not respond to a September 24, 2013, notice of intent to deny (NOID). The Director, in the September 24, 2013, NOID, requested the submission of certified judgment and conviction documents from courts for all the Applicant's arrests.

On appeal, the Applicant submits court and police records related to his arrests and asserts that he remains eligible for TPS, as he was not convicted of more than one misdemeanor.

The Director may withdraw the status of an alien granted TPS under section 244 of the Act at any time if it is determined that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. 8 C.F.R. § 244.14(a)(1).

An alien shall not be eligible for TPS under this section if the Secretary of the Department of Homeland Security finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

A misdemeanor is a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under the felony definition in this section. For purposes of this definition, any crime punishable by imprisonment for a maximum term of 5 days or less shall not be considered a misdemeanor. 8 C.F.R. § 244.1.

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than 1 year, regardless of the term actually served, if any. There is an exception when the offense is

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defined by the state as a misdemeanor and the sentence actually imposed is 1 year or less, regardless of the term actually served. Under this exception, for purposes of 8 C.F.R. § 244 of the Act, the crime shall be treated as a misdemeanor. 8 C.F.R. § 244.1.

The term conviction means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Act.

Section 101(a)(48)(B) of the Act provides, “any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”

The record reflects that the Applicant has been arrested on three separate dates:

- 1) On [REDACTED] 2003, the Applicant was arrested and charged with violating section 23152(A) of the California Vehicle Code (VC), driving under the influence of alcohol and/or drugs, and section 23152(B) VC, driving with .08% or more of alcohol in the blood. On [REDACTED] 2003, the Applicant was convicted of section 23152(B) VC. The Applicant was sentenced to 3 years of summary probation and a fine.
- 2) On [REDACTED] 2011, the Applicant was arrested and charged with violating section 11550 of the California Health and Safety Code (H&S), use or under the influence of any controlled substance; section 11377(A) H&S, possession of a controlled substance; section 11364 H&S, drug paraphernalia possession; and 8 U.S.C. § 1325, improper entry by an alien. The record does not contain certificates of disposition for these charges.
- 3) On [REDACTED] the Applicant was arrested and charged with violating section 11377(A) of the California H&S code, possession of a controlled substance as a misdemeanor. On [REDACTED] 2012, the charge against the Applicant was dismissed by the prosecutor pursuant to section 1385 of the penal code, in the furtherance of justice.

The Applicant asserts that after his arrest on [REDACTED] 2011, he was in custody for approximately 24 hours before he was picked up by Immigration and Customs Enforcement (ICE) officers. The Applicant further asserts that he was released after approximately 4 hours of detention with ICE, but was not ordered to appear in either criminal or immigration court.

On appeal, the Applicant submitted a letter from the [REDACTED] Sheriff's Department, listing the charges against the Applicant from his [REDACTED] 2011, arrest, as noted above, after conducting a name search of their records. The letter also stated that the Applicant was incarcerated from [REDACTED] 2011, to [REDACTED] 2011, and released to an unlisted agency of custody. The

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Applicant also submitted a letter from the Superior Court of California, [REDACTED] indicating that, after a thorough search of all court records, excluding those records that are sealed or confidential, a case relating to the Applicant's [REDACTED] 2011, arrest was not found.

A search of governmental records confirms that the Applicant was detained by ICE on [REDACTED] 2011, and there is no indication that the Applicant was convicted of any of the charges from his [REDACTED] 2011, arrest.

Section 23152(b) VC provides that it is a misdemeanor to drive with .08% or more of alcohol in your blood. A first offense violation of 23152(b) VC carries a maximum penalty of 6 months incarceration.

The record reflects that on [REDACTED] 2003, the Applicant pled *nolo contendere* to a violation of section 23152(b) VC, and the court found him to be guilty. The Applicant was sentenced to 3 years of summary probation and fines. As the Applicant entered a plea of *nolo contendere* to a violation of section 23152(b) VC and was sentenced to some form of penalty and restraint on his liberty, he has been convicted of that charge for immigration purposes in accordance with Section 101(a)(48)(A) of the Act. Further, since the maximum penalty for this conviction is 6 months of incarceration, the Applicant has been convicted of a misdemeanor in accordance with 8 C.F.R. § 244.1.

The present record reflects that the Applicant has one misdemeanor conviction for TPS purposes. As such, the Applicant has not committed a felony or two or more misdemeanors in the United States, which would render him ineligible for TPS under section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

In application proceedings, it is the Applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met. Accordingly, the Director's March 10, 2014, decision will be withdrawn and the Applicant's TPS reinstated.

ORDER: The appeal is sustained.

Cite as *Matter of J-S-A-*, ID# 11102 (AAO Apr. 6, 2016)