



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

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

MATTER OF J-M-G-

DATE: JAN. 4, 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 the decision withdrawing the Applicant's temporary protected status (TPS). *See* Immigration and Nationality Act (the Act) § 244, 8 U.S.C. § 1254(a). The Director, Vermont Service Center, withdrew TPS and denied the application for re-registration. The matter is now before us on appeal. The appeal will be dismissed.

On December 2, 2014, the Director withdrew the Applicant's TPS and denied the application for re-registration because the Applicant had: 1) been convicted of two misdemeanors in the United States; and 2) not established that he re-registered for TPS from March 9, 2009, until the current re-registration period, and did not establish good cause for not re-registering.

On appeal, the Applicant asserts that his convictions under California Vehicle Code sections 23152(a) and 23152(b) arose out of the same incident, thereby rendering the two convictions a single offense. The Applicant also asserts that he received ineffective assistance of counsel, as he was erroneously advised by his former counsel that he was not eligible to re-register for TPS.

An alien shall not be eligible for TPS under this section if the Secretary of the Department of Homeland Security (Secretary) 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).

"Misdemeanor" means 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 term "felony" of this section. For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered 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.

Matter of J-M-G-

The first issue to be addressed is the Applicant's criminal history.

The record contains court documentation from [REDACTED] Superior Court of California, which indicates that on [REDACTED] 2008, the Applicant was arrested for driving under the influence, a violation of Vehicle Code (VC) section 23152(a), and driving with .08% or more alcohol in the blood, a violation of VC section 23152(b). On [REDACTED], 2008, the Applicant pled guilty to both misdemeanor offenses. The Applicant was sentenced to serve 12 days in jail, ordered to complete a sheriff's labor program, enroll in an offender drinking program, pay a fine and court costs, and he was placed on probation for 36 months.

On appeal, the Applicant asserts that California Penal Code section 654(a) prohibits punishing an individual under two subsections of law for the same act so that the Applicant can only have received a sentence for one conviction. The Applicant also notes that California case law, *People v. Duarte*, 161 Cal. App. 3d 438, 447 (Cal. Ct. App. 1984), further affirms that an individual cannot be sentenced under two subsections of the law for the same act. The Applicant also contends that his conviction record is ambiguous as to whether he was convicted under one or two subsections of section 23152 VC, as the sentencing memorandum lists the conviction as V.C. 23152(a/b).

The fact that the Applicant's convictions arose in a single incident does not preclude him from being found ineligible for TPS for his two misdemeanor convictions. While the determination of whether the Applicant's crimes arose out of a single scheme of criminal misconduct is relevant to his removability under section 237(a)(2)(A) (ii) of the Act, this determination has no bearing on his eligibility for TPS under section 244 of the Act.

The record contains a case printout from the Superior Court of California, [REDACTED] identifying the filed charges against the Applicant as count one, section 23152(a) VC, and count two, section 23152(b) VC. The same printout further indicates that the Applicant entered pleas of guilty to counts one and two on [REDACTED] 2008, and was sentenced to summary probation and completion of a sheriff's labor program for counts one and two. Accordingly, the submitted court documentation concerning the Applicant's criminal history indicates that he pled to and was sentenced for violations of section 23152(a) and section 23152(b) of the vehicle code on [REDACTED] 2008.

The Applicant's assertions concerning the propriety of his sentencing for two subsections of 23152 VC for the same act are acknowledged. This office, however, is not the proper forum to determine these issues. Rather, those issues are within the jurisdiction of the judicial court. Collateral attacks upon an applicant's conviction "do not operate to negate the finality of [the] conviction unless and until the conviction is overturned." *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996). We "cannot go behind the judicial record to determine the guilt or innocence of the alien." *Id.* (citing *Matter of Fortis*, 14 I&N Dec. 576, 577 (BIA 1974); see also *Matter of Khalik*, 17 I&N Dec. 518, 519 (BIA 1980)). As the Applicant's convictions and sentences have not been overturned, they must be considered in this present TPS application.

Accordingly, the Applicant is ineligible for TPS due to his misdemeanor convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). There is no waiver available, even for

humanitarian reasons, of the requirements stated above. Consequently, the Director's decision to withdraw TPS and deny the application for re-registration on this ground will be affirmed.

The second issue to be addressed is the Applicant's failure to re-register during the required periods.

Section 244(c)(3)(B) of the Act, and the related regulation in 8 C.F.R. § 244.14(a)(2) provide that an applicant's TPS may be withdrawn if the applicant fails, without good cause, to register annually, at the end of each 12-month period after the granting of such status, in a form and manner specified by the Secretary.

An applicant who has been granted TPS must re-register periodically in accordance with U.S. Citizenship and Immigration Services (USCIS) instructions. 8 C.F.R. § 244.17(a). TPS shall be withdrawn if the applicant fails, without good cause, to register. 8 C.F.R. § 244.17(b).

On July 31, 2014, the Director issued a notice of intent to deny advising the Applicant that he had not filed an application for re-registration for TPS since September 7, 2007. The Applicant was advised that without evidence of timely re-registrations or good cause for failing to re-register between March 9, 2009, and the current re-registration period, the current Form I-765, Application for Employment Authorization, would not be approved.

The Applicant, in response, asserted that he a previous attorney misled him into believing that he was not eligible to re-register for TPS due to his criminal record.

On appeal, the Applicant contends that he had good cause for failing to register and cites to an unpublished decision from our office that considered whether ineffective assistance of counsel constitutes good cause for not registering for TPS. However, the Applicant's reliance upon an unpublished decision is misplaced. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Further, it is noted that the Applicant has not complied with the threshold requirements of an ineffective of assistance of counsel claim. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) (requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel).

The Applicant's statements submitted on appeal have been considered. However, for the reasons stated above, it is determined the statements are not sufficient to establish a finding of failure to register for good cause as stipulated in 8 C.F.R. § 244.17(b). Consequently, the Director's decision to withdraw TPS and deny the application for re-registration for failure to re-register for TPS during the re-registration requisite periods will be affirmed.

The appeal is dismissed for the above stated reasons. 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 not been met.

Matter of J-M-G-

ORDER: The appeal is dismissed.

Cite as *Matter of J-M-G-*, ID# 14184 (AAO Jan. 4, 2016)