



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

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

MATTER OF M-D-R-H-

DATE: JAN. 20, 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 Acting Director, Vermont Service Center, withdrew the Applicant's TPS. The matter is now before us on appeal. The appeal will be sustained.

On January 15, 2014, the Director withdrew the Applicant's TPS because it was determined that the Applicant had been convicted of two misdemeanors in the United States. The Director determined that the offense of driving under the influence was a conviction because the Applicant had admitted sufficient facts to warrant a finding of guilt.

On appeal, the Applicant submits documentation on the driving under the influence arrest, and two briefs. Therein, the Applicant disputes the Director's finding that his driving under the influence violation is a conviction for immigration purposes. The Applicant asserts that prosecution was deferred and no formal judgment of guilt was entered by the court.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The entire record was reviewed and considered in rendering this decision on appeal.

The Director may withdraw the status of an applicant granted TPS under section 244 of the Act at any time if it is determined that the applicant 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).

"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

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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.

The record reflects that on [REDACTED], 2010, in the [REDACTED] District Court, [REDACTED] the Applicant pled guilty to negligent driving – first degree, a violation of Revised Code of Washington (RCW) 46.61.5249, a misdemeanor. The Applicant was sentenced to serve 90 days in jail, ordered to pay a fine, and placed on probation for 2 years.

The record reflects that on [REDACTED] 2012, the Applicant was arrested and charged with violating section 46.61.502 of the RCW for driving under the influence. On [REDACTED] 2012, in the [REDACTED] District Court, [REDACTED] the Applicant entered a plea of not guilty to that charge. The Applicant was granted deferred prosecution on [REDACTED] 2013. Among other conditions, the Applicant was ordered to pay a fine and placed on probation for five years. The Director determined that as the language in the order of deferred prosecution specified “the defendant does not believe that the defendant is innocent of the charges herein,” the Applicant had been convicted of this offense as he had admitted sufficient facts to warrant a finding of guilt. The Director consequently found that this offense constituted the Applicant’s second misdemeanor conviction for TPS purposes.

Section 46.61.502 of the RCW states, in pertinent part:

- (1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:
 - (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person’s breath or blood made under RCW 46.61.506; or
 - (b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under RCW 46.61.506; or
 - (c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or
 - (d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug...

Driving under the influence is a gross misdemeanor in the state of Washington. RCW § 46.61.502(5). A gross misdemeanor is punishable by up to 364 days imprisonment or by a fine of not more than \$5000, or by both such imprisonment and fine. RCW § 9.92.020.

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A person charged with a gross misdemeanor may petition the court to be considered for a deferred prosecution program. RCW § 10.05.010(1). A person charged with a gross misdemeanor under Title 46 of the RCW (motor vehicles statute) shall not be eligible for a deferred prosecution program unless the court makes specific findings pursuant to RCW § 10.05.020. RCW § 10.05.010(2).

RCW §10.05.020 provides, in pertinent part:

(3) Before entry of an order deferring prosecution, a petitioner shall be advised of his or her rights as an accused and execute, as a condition of receiving treatment, a statement that contains:

(a) An acknowledgment of his or her rights;

(b) an acknowledgment and waiver of the right to testify, the right to a speedy trial, the right to call witnesses to testify, the right to present evidence in his or her defense, and the right to a jury trial;

(c) *a stipulation to the admissibility and sufficiency of the facts contained in the written police report;* and

(d) an acknowledgment that the statement will be entered and used to support a finding of guilty if the court finds cause to revoke the order granting deferred prosecution. The petitioner shall also be advised that he or she may, if he or she proceeds to trial and is found guilty, be allowed to seek suspension of some or all of the fines and incarceration that may be ordered upon the condition that he or she seek treatment and, further, that he or she may seek treatment from public and private agencies at any time without regard to whether or not he or she is found guilty of the offense charged. *He or she shall also be advised that the court will not accept a petition for deferred prosecution from a person who:* (i) *Sincerely believes that he or she is innocent of the charges;* (ii) sincerely believes that he or she does not, in fact, suffer from alcoholism, drug addiction, or mental problems.

[Emphasis added.]

In a notice of intent to dismiss the appeal dated September 10, 2015, the Applicant was advised to submit a certified copy of the police report with a detailed narrative of his arrest on [REDACTED] 2012, for driving under the influence. The Applicant, in response, provides the requested police report and a brief.

While the Director found that the Applicant had admitted to sufficient facts in order to find him convicted of driving under the influence, there are specific requirements which must be met to make such a finding. In order for the admission of a crime or acts constituting the essential elements of a crime to be properly used as a basis for ineligibility, three conditions must be met: 1) the admitted acts must constitute the essential elements of a crime in the jurisdiction in which they occurred; 2) the respondent must have been provided with the definition and essential elements of the crime, in understandable terms, prior to making the admission; and 3) the admission must have been

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voluntary. *Matter of K-*, 7 I&N Dec. 594, 597 (BIA 1957); see also *Matter of G-M-*, 7 I&N Dec. 40, 70 (BIA 1955).

The police report indicates that the Applicant's blood alcohol concentration readings were .137 and .141, and that these readings were taken within 2 hours of the Applicant's driving. Therefore, the Applicant's actions constitute the essential elements of the crime under RCW section 46.61.502(1)(a). However, there is no evidence in the court documentation or the police report that the Applicant was provided with the definition and essential elements of the crime prior to his [REDACTED], 2013, admission. As such, we find that the [REDACTED] 2012, arrest for driving under the influence did not result in a conviction for immigration purposes.

The Applicant has one misdemeanor conviction for negligent driving – first degree, and it does not render the Applicant ineligible for TPS under the provisions of section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a). According to the present record, there are no other known grounds of ineligibility; therefore, the Director's decision to withdraw TPS will be withdrawn, and the Applicant's TPS will be reinstated.

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.

ORDER: The appeal is sustained.

Cite as *Matter of M-D-R-H-*, ID# 11103 (AAO Jan. 20, 2016)