



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

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

MATTER OF D-M-G-

DATE: SEPT. 12, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Applicant, a native and citizen of Honduras, seeks Temporary Protected Status (TPS). *See* Immigration and Nationality Act (the Act) section 244, 8 U.S.C. § 1254a. TPS provides lawful status and protection from removal for foreign nationals, of specifically designated countries, who register during designated periods, satisfy country-specific continuous residence and physical presence requirements, are admissible to the United States, are not firmly resettled in another country, and are not subject to certain criminal- and security-related bars.

The Director, Vermont Service Center, denied the application for re-registration for TPS. The Director concluded the Applicant was not eligible to apply for re-registration of TPS because she had not previously been granted TPS.

The matter is now before us on appeal. In the appeal, the Applicant submits additional evidence and states the Director erred in not considering her application for re-registration under the good cause exception. The Applicant asserts the Director also erred in determining that her initial TPS application had been denied as she was previously granted TPS. The Applicant adds that she has met her burden of proof in establishing all the requirements for TPS, and her current application should be approved.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

The Applicant is seeking TPS based on an application for re-registration or renewal of TPS benefits. 8 C.F.R. § 244.17 provides:

- (a) Aliens granted Temporary Protected Status must re-register periodically in accordance with USCIS instructions. Such registration applies to nationals of those foreign states designated or redesignated for more than one year by DHS. Applicants for periodic re-registration must apply during the registration period provided by USCIS

- (b) If an alien fails to register without good cause, USCIS will withdraw Temporary Protected Status. USCIS may, for good cause, accept and approve an untimely registration request.

An applicant must file for TPS within the initial registration period or, if filing for the first time during an extension period, must fall within the categories of individuals eligible for late registration described in 8 C.F.R. § 244.2(f)(2). Such individuals, under 8 C.F.R. § 244.2(g), must file for TPS within 60 days of the expiration of the condition that qualifies them for late registration.

Section 244(c)(2)(B) of the Act provides that an applicant is ineligible for TPS if she has been convicted of any felony or two or more misdemeanors committed in the United States. 8 C.F.R. § 244.1 defines felony as a crime committed in the United States that is punishable by imprisonment of more than one year.

The TPS misdemeanor definition includes crimes committed in the United States that are punishable by one year or less, but not less than 5 days. 8 C.F.R. § 244.1.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), provides that a conviction for immigration purposes is: 1) a guilty judgment entered by a court against an alien, or when adjudication is withheld, 2) a judge or jury made a finding of guilt, 3) the alien entered a plea of guilty, 4) the alien entered a plea of nolo contendere, or 5) the alien admitted sufficient facts to warrant a finding of guilt. In addition, a judge must order some form of punishment, penalty, or restraint imposed on the alien's liberty. Section 101(a)(48)(B) of the Act, 8 U.S.C. § 1101(a)(48)(B), provides that the latter requirement is satisfied by a court's order alone, irrespective of whether the order is suspended or executed.

II. FACTS AND PROCEDURAL HISTORY

A Form I-821, Application for Temporary Protected Status, filed in 2001, was denied in 2004 because the Director determined the Applicant had two misdemeanor convictions in the United States. No appeal was filed from the denial of that application. The application for re-registration before us was filed in 2014.¹

III. ANALYSIS

The issue on appeal is whether the Applicant is eligible to apply for TPS re-registration. The Director determined that the Applicant was not eligible to apply for re-registration because her initial TPS application had been denied. On appeal, the Applicant claims that she has met all the requirements for TPS eligibility under 8 C.F.R. 244.2, was granted TPS in 2002, and continuously re-registered for TPS every year thereafter. The Applicant states that the Director did not consider her request to treat

¹ A previous application for re-registration filed in 2006 was administratively closed.

the current application for re-registration under the good cause exception described in 8 C.F.R. § 244.17(b).

On appeal, the Applicant claims she has one misdemeanor conviction as the other offense for which she was convicted, driving without a license, is a wobbler under the California Penal Code section 19.8, and was subsequently reduced to an infraction. The Applicant cites *Matter of Cota-Vargas*, 23 I&N Dec. 849, 853 (BIA 2005) in support of her claim. The Applicant states she was unable to timely re-register for TPS until her driving without a license conviction was deemed an infraction by the court.

In support of her appeal, the Applicant submits copies of: the decisions denying her initial and re-registration applications for TPS; documents relating to her criminal record, her TPS applications, employment authorization approvals; her birth certificate and passport; and U.S. Citizenship and Immigration Services' (USCIS) policy memoranda issued in 2010, and 2011, relating to TPS adjudications involving New York traffic violations and infractions and no jail or no incarceration certifications.

We have reviewed and considered the entire record in rendering this decision. We find the Applicant is ineligible to re-register for TPS as she was never granted TPS. The Applicant's initial TPS application was denied and there is no pending TPS application from the initial registration period. The Applicant also remains ineligible for TPS due to her two misdemeanor convictions.

A. Eligibility

As stated above, the Applicant has been found ineligible for TPS under 8 C.F.R. § 244.17(a).

The burden of proof is upon the Applicant to establish that she is eligible for TPS. *See* 8 C.F.R. § 244.9(a)(3). Applicants shall submit all documentation as required in the instructions or requested by USCIS. 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. 8 C.F.R. § 244.9(b). To meet her burden of proof, the Applicant must provide supporting documentary evidence of eligibility apart from her own statements. *Id.*

1. Grant of TPS

Regarding the Applicant's claim she was granted TPS, USCIS records reflect that the Applicant applied for and was granted employment authorization in 2002, under 8 C.F.R. § 274a.12(c)(19) as an alien applying for TPS pursuant to section 244 of the Act. While the photocopies of Form I-765, Application for Employment Authorization, submitted on appeal demonstrate the Applicant was approved for employment authorization through July 2004, the Applicant does not submit evidence to establish she was previously approved for TPS. Furthermore, USCIS records do not reflect the Applicant was approved for TPS in 2002, or any time thereafter.

(b)(6)

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2. Re-Registration

Filing an application for TPS during a designated re-registration period does not render all individuals eligible for the benefit sought. The re-registration period is limited to individuals who have previously registered for TPS and whose applications have been granted, or those who did not file during the initial registration period and meet any of the late initial registration criteria described in 8 C.F.R. § 244.2(f)(2) or (g), in addition to the other TPS eligibility requirements. Extension of the Designation of Honduras for TPS, 81 Fed. Reg. 30331 (May 16, 2016).

The Applicant asserts that the Director did not consider her request to treat the current application for registration under the good cause exception. The Applicant claims that she is eligible for a good cause exception she could not re-register for TPS until her traffic violation was deemed an infraction.

The good cause exception applies only to applicants who have previously been approved for TPS and did not willfully fail to submit a re-registration application during the designated TPS extension period. 8 C.F.R. § 244.17. However, at the time of the Applicant's filing for TPS re-registration, she had not been granted TPS. Accordingly, we find that the Applicant is not eligible to demonstrate good cause in her untimely filed TPS re-registration application.

3. Criminal record

The Applicant states that she is eligible for TPS as one of the 2 offenses for which she was convicted, driving without a license, was subsequently reduced to an infraction conviction. The Applicant does not contest her misdemeanor conviction for hit and run.

In 1998, in the [REDACTED] Superior Court of California, the Applicant was adjudged guilty of driving without a license in violation of California Vehicle Code section 12500(a), and hit and run in violation of California Vehicle Code 20002(a). The court determined each offense a misdemeanor, and ordered the Applicant to serve 5 days in the county jail and pay a fine and court costs. The Applicant was placed on probation for 5 years. As the court entered guilty judgments against the Applicant, she was convicted of these crimes under section 101(a)(48)(A) of the Act.

California Vehicle Code section 12500(a) (1996) provides, “[n]o person shall drive a motor vehicle upon a highway, unless the person then holds a valid driver's license issued under this code, except those persons who are expressly exempted under this code.” At the time of the Applicant's conviction, a violation of section 12500(a) was considered a misdemeanor under the California Vehicle Code section 40000.11. A misdemeanor offense under the vehicle code constitutes a maximum sentence of imprisonment in the county jail not exceeding six months. See California Vehicle Code 42002.11.

Driving without a license in California is a “wobbler” offense. This means that, depending on the circumstances, prosecutors can charge this offense as either a misdemeanor or as a non-criminal

infraction. Section 17(d)(2) of the California Penal Code defines when the prosecutor and trial court may exercise their discretion in determining the punishment to be imposed under a “wobbler” statute such as section 12500 of the California Vehicle Code. The court disposition submitted reflects that the traffic violation conviction, driving without a license, was handled as a misdemeanor and not an infraction. As the offense is punishable by less than a year but over 5 days, it is also considered a misdemeanor for immigration purposes under 8 C.F.R. § 244.1.

The misdemeanor conviction of driving without a license was reduced to an infraction 16 years after the Applicant completed her probation. However, if the reduction was a result of a rehabilitative action by the court based on the Applicant's completion of the terms of her probation, the court's action is not recognized in immigration proceedings.

Under the current statutory definition of “conviction” set forth in section 101(a)(48)(A) of the Act, “a state action that purports to abrogate what would otherwise be considered a conviction, as the result of the application of a state rehabilitative statute, rather than as the result of a procedure that vacates a conviction on the merits or on grounds relating to a statutory or constitutional violation, has no effect in determining whether an alien has been convicted for immigration purposes.” *Matter of Roldan*, 22 I&N Dec. 512, 527 (BIA 1999). Any subsequent rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, does not expunge a conviction for immigration purposes. *See id.* at 523, 528; *see also Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (reiterating that if a conviction is vacated for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains “convicted” for immigration purposes), *reversed on other grounds, Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006). There is nothing in the record, and the Applicant has not offered any evidence on appeal to suggest that her original misdemeanor conviction was reduced to an infraction because of a procedural or constitutional violation in the underlying trial court proceedings. Accordingly, the Applicant has been convicted of two misdemeanor convictions committed in the United States, both hit and run and driving without a license. The Applicant is also ineligible for TPS because of her two misdemeanor convictions. 8 C.F.R. § 244.4(a).

IV. CONCLUSION

An applicant for TPS has the burden of proving that he or she meets the requirements for this benefit and is otherwise eligible under the provisions of section 244 of the Act. The Applicant has not established eligibility for TPS as she has not shown that at the time of filing the current application for TPS re-registration, she had been granted TPS, or had a pending TPS application from the initial registration period. The Applicant also has not established eligibility for TPS due to her two misdemeanor convictions. Accordingly, we dismiss the appeal.

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ORDER: The appeal is dismissed.

Cite as *Matter of D-M-G-*, ID# 16132 (AAO Sept. 12, 2016)