



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

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

MATTER OF W-E-R-L-

DATE: SEPT. 19, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Applicant, a native and citizen of El Salvador, 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, California Service Center, denied the application. The Director concluded that the Applicant was not eligible for TPS because he had not met the continuous residence and physical presence requirements, and because he was convicted of a felony offense in the United States.

The matter is now before us on appeal. In the appeal, the Applicant states that the Director erred in denying the application. The Applicant asserts that his deportation to El Salvador, which was the basis for the Director's finding of lack of continuous residence and physical presence, was illegal. Further, the Applicant claims that the Director incorrectly determined that the Applicant was convicted of a felony without a proper analysis of whether the offense of transporting of illegal aliens qualifies as a "wobbler" offense under Utah law, where the Applicant was convicted. In addition, the Applicant avers that under the federal law, an offense must be punishable by imprisonment in excess of 12 months to be considered a felony, and he was sentenced to exactly 12 months of confinement.

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

I. FACTS AND PROCEDURAL HISTORY

The record reflects that the Applicant initially entered the United States without inspection in 1999 and was ordered removed from the United States by an Immigration Judge the same year. In 2002, the Applicant was stopped in Utah while driving with several undocumented foreign nationals in his truck. On [REDACTED] 2002, the Applicant pleaded guilty in the U.S. District Court, [REDACTED] to transporting undocumented aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(ii). He was sentenced to 12 months of incarceration for the offense. In 2003, the Applicant was removed from the United States under the 1999 removal order. The Applicant subsequently returned to the United

States without inspection. In 2013, the Department of Homeland Security (DHS) reinstated the original 1999 removal order pursuant to section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5). In 2015, the Director denied the Applicant's TPS application, finding that the Applicant did not meet the statutory requirements for TPS because he disrupted continuity of his residence and physical presence in the United States and was convicted of a felony offense.

II. LAW

The Applicant is seeking TPS. Section 244(c) of the Act, 8 U.S.C. § 1254a(c) provides, in pertinent part:

(1) In general.-

(A) [A]n alien, who is a national of a state designated [for TPS] . . . meets the requirements of this paragraph only if-

(i) the alien has been continuously physically present in the United States since the effective date of the most recent designation of that state;

(ii) the alien has continuously resided in the United States since such date as the [Secretary of Homeland Security] may designate;

(iii) the alien is admissible as an immigrant, except as otherwise provided under paragraph (2)(A), and is not ineligible for temporary protected status under paragraph (2)(B). . . .

(2) Eligibility standards.-

.....

(B) An alien shall not be eligible for temporary protected status under this section if the [Secretary] finds that-

(i) the alien has been convicted of any felony or two or more misdemeanors committed in the United States

The regulation at 8 C.F.R. § 244.1, defines "felony" as:

[a] crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any, except: When the offense is defined by the State as a misdemeanor and the sentence actually imposed is one year or less regardless of the term actually served. Under this exception for purposes of section 244 of the Act, the crime shall be treated as a misdemeanor.

The regulation at 8 C.F.R. § 244.1 provides:

Continuously physically present means actual physical presence in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences as defined within this section.

Continuously resided means residing in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual and innocent absence as defined within this section or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

Brief, casual, and innocent absence means a departure from the United States that satisfies the following criteria:

- (1) Each such absence was of short duration and reasonably calculated to accomplish the purpose(s) for the absence;
- (2) The absence was not the result of an order of deportation, an order of voluntary departure, or an administrative grant of voluntary departure without the institution of deportation proceedings; and
- (3) The purposes for the absence from the United States or actions while outside of the United States were not contrary to law.

Finally, section 241(a)(5) of the Act provides that reinstatement of a removal order bars an individual from any relief under the Act:

- (a) Detention, Release, and Removal of Aliens Ordered Removed.-

.....

- (5) Reinstatement of removal orders against aliens illegally reentering.- If the [Secretary] finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

Section 274 of the Act, 8 U.S.C. § 1324, provides in pertinent part:

(1) (A) Any person who-

....

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

....

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs-

....

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under title 18, United States Code, imprisoned not more than 5 years, or both;

III. ANALYSIS

The issue in these proceedings is whether the Director properly determined that the Applicant was convicted of a felony and that he disrupted the continuity of his residence and physical presence in the United States. Upon review of the entire record, we conclude that the Director's determination was correct. In addition, we find that the Applicant is ineligible for TPS because the reinstatement of the removal order against the Applicant bars him from any relief under the Act.

A. Eligibility

1. Felony Conviction

The Director determined that the Applicant was ineligible for TPS pursuant to section 244(c)(2)(B) of the Act, because he was convicted of a felony offense in the United States. As stated above, the Applicant pleaded guilty to transporting undocumented aliens and was sentenced to 12 months of incarceration for the offense. For the purposes of TPS, an offense qualifies as a felony if it is punishable by imprisonment for a term of more than one year. 8 C.F.R. § 244.1. The offense of which the Applicant was convicted, transporting of undocumented aliens, is punishable by

imprisonment for up to 5 years. 8 U.S.C. § 1324(a)(1)(B)(ii). Therefore, for the purposes of TPS eligibility, this offense is a felony as defined in 8 C.F.R. § 244.1¹.

The Applicant asserts, however, that the Director should have considered whether the crime of transporting of undocumented aliens is a “wobbler” offense, and requests us to remand the matter to the Director for a proper analysis of whether he was convicted of a misdemeanor under Utah law. The term “wobbler” is specific to certain California offenses, which can be prosecuted as either felonies or misdemeanors. “[A]n offense punishable either by imprisonment in the state prison or by a county jail sentence is said to wobble between the two punishments and hence is frequently called a wobbler offense. . . . Under California law, certain offenses may be classified as either felonies or misdemeanors. These crimes are known as ‘wobblers.’” *Robert L. v. Superior Court*, 69 P.3d 951, 956, n.9 (Cal. 2003) (internal citations omitted). As stated above, the Applicant was convicted of violation of a federal, not state law. While the Applicant suggests that his conviction may have been for a misdemeanor, he does not submit evidence that 8 U.S.C. § 1324(a)(1)(A)(ii) is a “wobbler” statute, or that the Director should have considered the conviction under state, rather than federal law. For these reasons, we find that a remand is not warranted.

In addition, the Applicant claims that the Director erred by not specifying whether the Applicant’s offense was a crime of violence or a trafficking crime for profit. He states that the offense of which he was convicted is not an aggravated felony because under the federal definition of felony in 18 U.S.C. § 3559(a)(5), a crime of violence must be punishable by imprisonment for a term exceeding 1 year. In support of this claim, the Applicant references two decisions of the U.S. Court of Appeals for the Ninth Circuit discussing crimes of violence. However, a conviction of an aggravated felony, as defined in section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43), is an additional ground of statutory ineligibility for TPS² that is separate from ineligibility based on a felony offense conviction in section 244(c)(2)(B)(i) of the Act. The Director denied the Applicant’s TPS because the Applicant was convicted of a felony offense, not because he was convicted of an aggravated felony. While the Director did not make any findings as to whether transporting undocumented aliens was an aggravated felony, the Applicant remains ineligible for TPS because the offense of which he was convicted is a felony as defined in 8 C.F.R. § 244.1. Accordingly, we do not reach the Applicant’s argument that transporting undocumented aliens is not an aggravated felony.

¹ The Applicant’s conviction for transporting undocumented aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(ii), falls within the purview of section 212(a)(6)(E)(i) of the Act, 8 U.S.C. § 1182(a)(6)(E)(i), which makes foreign nationals who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other foreign nationals to enter or to try to enter the United States in violation of law inadmissible to the United States. See *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674 (9th Cir. 2005); see also *Soriano v. Gonzales*, 484 F. 3d 318 (5th Cir. 2007) (knowingly transporting illegal aliens after entry based on prearranged plan constitutes knowing encouragement and assistance of alien’s unlawful entry under section 212(a)(6)(E) of the Act). As the Applicant appears inadmissible to the United States under section 212(a)(6)(E)(i) of the Act, he is also ineligible for TPS pursuant to section 244(c)(1)(A)(iii) of the Act. The record does not reflect that the Applicant applied for, or was granted a waiver of this ground of inadmissibility.

² See section 244(a)(2)(B)(ii) of the Act, 8 U.S.C. § 1254a(a)(2)(B)(ii).

2. Disruption of Continuous Residence and Physical Presence

Persons applying for TPS offered to Salvadorans (and persons without nationality who last habitually resided in El Salvador) must demonstrate continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001. The TPS designation has been extended several times, with the latest extension valid until March 9, 2018. An absence from the United States which is the result of an order of deportation will disrupt a person's continuous residence and physical presence for the purposes of establishing TPS eligibility. *See* 8 C.F.R. § 244.1(2).

The Director found the Applicant was ineligible for TPS because his 2003 departure from the United States under the 1999 order of removal disrupted the continuity of the Applicant's residence and his physical presence in the United States. On that issue, the Applicant claims that his removal from the United States was illegal and, as such, may not be used to deny the TPS. The Applicant requests a remand to clarify the Director's "ambiguous assertions as to [the Applicant's] continuous presence." While the Applicant asserts on appeal that the 1999 order of removal, as well as the 2013 order reinstating the removal were issued in violation of the Act and due process of the law, the Applicant does not submit evidence to support this assertion. The record reflects that in 2015 the Applicant filed a motion to reopen removal proceedings, but an Immigration Judge denied the motion. The Board of Immigration Appeals dismissed the Applicant's appeal, finding no errors in the Immigration Judge's decision.

We do not have jurisdiction to consider whether the Applicant's removal from the United States was in violation of the law. We are bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the circuit court of appeals where the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9thCir. 1987). The Act and the regulations provide that breaks in an individual continuous residence and physical presence result in that individual's ineligibility for TPS, except when the absences from the United States are brief, casual, and innocent. Sections 244(c)(1)(A)(i)-(ii) of the Act; 8 C.F.R. § 244.1. An absence that is the result of the individual's removal from the United States may not be considered brief, casual, and innocent. 8 C.F.R. § 244.1(2). The record reflects that in 2003, the Applicant departed the United States under an order of removal. Therefore, pursuant to the Act and pertinent regulations, we must conclude that the Applicant disrupted the continuity of his residence in the United States, and is ineligible for TPS on that basis.

Although an applicant may obtain a waiver of certain grounds of inadmissibility under section 244(c)(2)(A) of the Act to establish eligibility for TPS, there is no waiver, humanitarian or otherwise, for individuals, such as the Applicant, who were convicted of a felony offense in the United States and who do not meet the continuity of residence requirement.

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3. Ineligibility for Relief When Prior Removal Order Reinstated

Finally, while not addressed in the Director's decision, we find that the Applicant is not eligible for TPS because the 1999 removal order against him was reinstated. The record shows that in 2013, the Immigration and Customs Enforcement (ICE) apprehended the Applicant in ████████ Nevada, after he re-entered the United States without inspection following his 2003 removal from the United States. ICE subsequently reinstated the 1999 removal order pursuant to section 241(a)(5) of the Act, by issuing Form I-871, Notice of Intent/Decision to Reinstate Prior Order, to the Applicant. While the Applicant claims on appeal that the prior order of removal was reinstated without affording the Applicant an opportunity for a reasonable fear proceeding, the record reflects that the Applicant was referred to an asylum office for a credible fear determination in December 2015. The asylum office determined that the Applicant did not establish a reasonable fear of persecution or torture. This determination was affirmed by an Immigration Judge in 2016. Because the Applicant's removal order was reinstated under section 241(a)(5) of the Act, the Applicant is not eligible, and may not apply for any relief under the Act, including TPS. There is no provision under section 244 of the Act or any other statute or regulation that would allow for an exception from this general bar of ineligibility for relief.

B. Discretion

Because the Applicant has not demonstrated statutory eligibility for TPS, we do not address whether he warrants TPS grant as a matter of discretion.

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. Accordingly, we dismiss the appeal.

ORDER: The appeal is dismissed.

Cite as *Matter of W-E-R-L-*, ID# 17121 (AAO Sept. 19, 2016)