



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

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

MATTER OF J-E-S-

DATE: SEPT. 19, 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) section 244, 8 U.S.C. § 1254a. Temporary Protected Status 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 and withdrew the Applicant's TPS. The Director concluded that the Applicant had been convicted of two misdemeanors committed in the United States and therefore was ineligible for TPS.

The matter is now before us on appeal. In the appeal, the Applicant submits a statement from his spouse and a copy of their marriage certificate, and he claims that his conviction for Assault – Family Member was based on a guilty plea which he entered on the advice of his criminal attorney, even though the underlying facts did not support the charge.

Upon *de novo* review, we will dismiss the appeal. Although the Applicant has provided a statement from his spouse—the alleged victim of his assault—claiming that he should not have been convicted, he has not shown that the conviction was overturned or set aside based on defects in the underlying criminal proceedings. Because the conviction remains valid, the Applicant is ineligible for TPS.

I. LAW

The Applicant is seeking review of a decision withdrawing the Applicant's TPS. 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). Section § 244(c)(2)(B) of the Act states:

(b)(6)

Matter of J-E-S-

An alien shall not be eligible for temporary protected status under this section if the Attorney General finds that-

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

Section 101(a)(48)(A) of the Act provides that:

(A) The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if 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.

The regulation at 8 C.F.R. § 244.1, states, in relevant part:

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.

II. ANALYSIS

The issue in this appeal is whether the Applicant has been convicted of two or more misdemeanors committed in the United States. The record reflects that the Applicant has been convicted of two offenses: DWI 1st Offender BAC .08, and Assault – Family Member. The Applicant does not contest the Director's finding that that these offenses constitute misdemeanors for immigration purposes, a finding which is supported by the record. Instead, the Applicant asserts that he should not have been convicted for Assault – Family Member because the arrest was based on exaggerated or misunderstood facts. He further states that he pled guilty on the advice of his defense attorney.

The record consists of statements from himself, his spouse, his son, and a friend of the family; copies of marriage and birth certificates and identity documents; copies of immigration applications, forms, and related correspondence; records from the [REDACTED] Criminal Court; and employment and

Matter of J-E-S-

financial records. After reviewing the entire record, we find that the Applicant has two valid convictions for misdemeanors, and as a result, he is ineligible for TPS.

A. Conviction for Driving While Intoxicated

In 2006, the Applicant pled guilty to Driving While Intoxicated – 1st Offender BAC .08, a Class B misdemeanor under Tex. Pen. Code § 49.04. He was sentenced to 3 days in county jail, with credit for 2 days already served; a \$250 fine; \$339 in court costs; and suspension of his driver's license for 1 year. Under Tex. Pen. Code § 12.22, a Class B misdemeanor is punishable by a fine not exceeding \$2,000, confinement in jail for up to 180 days, or both.

Because this offense is punishable by confinement for a period of over 5 days, but less than 1 year, it meets the definition of a misdemeanor under the TPS regulations. The Applicant does not contest the validity of this conviction or its classification as a misdemeanor.

B. Conviction for Assault

In 2014, the Applicant pled guilty to Assault – Family Member, a Class A misdemeanor under Tex. Pen. Code § 22.01(a)(1). He was sentenced to 2 days in county jail, with credit for 2 days served; a \$500 fine, and \$237 in court costs. Under Tex. Pen. Code § 12.21, a Class A misdemeanor is punishable by a fine not exceeding \$4,000, confinement in jail for up to one year, or both. Because this offense is punishable by confinement for a period of over 5 days, but less than 1 year, it meets the definition of a misdemeanor under the TPS regulations.

The Applicant does not contest the classification of this offense as a misdemeanor. However, he claims that he should not have been convicted for Assault – Family Member, because he relied on the advice of his defense attorney to his detriment, even though the facts did not support the charge.

In multiple statements, the Applicant's spouse has asserted that the underlying events that led to the Applicant's arrest were misunderstood or exaggerated. She states that the Applicant did not assault her, and that in fact she beat him. The spouse adds that during the altercation, their son became scared and sent a [REDACTED] message to a cousin, who called the police. When the police arrived, they arrested the Applicant and took him to jail. The Applicant and his spouse claim that they explained the facts to the Applicant's defense attorney; however, the attorney did not present their statements to the judge. Instead, the attorney told the Applicant that if he proceeded to trial and was found guilty, he would be sentenced to jail and deported. The Applicant states that his attorney further advised him to plead guilty to minimize his legal costs and time spent in jail.

The Applicant's claims regarding the validity of his conviction for Assault – Family Member do not impact whether his conviction is valid under section 101(a)(48) of the Act, as 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). The Applicant does not assert, and there is no evidence to indicate, that his conviction has been

overturned. 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)). Without evidence that his conviction has been overturned on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, it remains valid for immigration purposes. *See 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).

In sum, the Applicant’s conviction for Assault – Family Member is a valid conviction of a misdemeanor offense. Because of this conviction and his conviction for DWI, which both qualify as misdemeanors for immigration purposes, the Applicant is ineligible for TPS.

III. 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 J-E-S-*, ID# 17270 (AAO Sept. 19, 2016)