



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

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

MATTER OF R-M-

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 Honduras, 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 to re-register 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 additional evidence and states that the Director erred in assessing the disposition of his charge for Assault on a Female. Specifically, the Applicant asserts that the Director incorrectly concluded that the court's grant of a type of withholding of adjudication called prayer for judgment continued (PJC) constituted a conviction.

Upon *de novo* review, we will dismiss the appeal. The record establishes that the Applicant entered a plea of guilty, and a court ordered him to complete an education program and pay court costs. The disposition therefore meets the definition of a conviction for immigration purposes.

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 that:

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

For purposes of this definition, any crime punishable by a maximum term of five days or less shall not be considered a . . . misdemeanor.

II. ANALYSIS

The issue presented on appeal is whether the Applicant has been convicted of two misdemeanors, and therefore, whether he is ineligible for TPS. He does not contest the Director's determination that the offenses for which he was charged—Assault on a Female and Impaired Driving—meet the definition of a misdemeanor, a finding which is supported by the record and discussed further below. Neither does he contest the conviction for Impaired Driving. Rather, he asserts on appeal that the disposition of his charge for Assault on a Female does not constitute a conviction, because the court did not impose any punishment or penalty.

The record consists of: the Applicant's brief; information printed from the North Carolina Court System website; excerpts from a publication about representing foreign-born criminal defendants; a copy of an unpublished decision from the Board of Immigration Appeals (the Board); records pertaining to the Applicant's arrests; copies of immigration applications, forms, and related correspondence; birth certificates and other identity documents; and records from Immigration Court and from Immigrations and Customs Enforcement.

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After reviewing the entire record, we conclude that the Applicant has two convictions for misdemeanors and is therefore ineligible for TPS. The Applicant entered a plea of guilty to the offense of Assault of a Female, and the court ordered him to complete an education program, adhere to certain conditions, and pay costs as a result. This disposition meets the definition of a conviction under the INA and relevant case law.

As stated above, the Applicant has been found ineligible for TPS under section 244(c)(2)(B)(i) of the Act.

A. Classification of Offenses

In 2005, the Applicant pleaded guilty to Assault on a Female, a Class A1 misdemeanor under N.C. Gen. Stat. Ann. § 14-33(c)(2) (West 2005). This offense is punishable by up to 60 days of imprisonment for individuals with no prior convictions. *See* N.C. Gen. Stat. Ann. § 15A:1340.23(c) (West 2005).

In 2014, the Applicant was convicted of Impaired Driving – Level 3, punishable by a fine up to \$1,000 and imprisonment of a minimum term of 72 hours up to 6 months. *See* N.C. Gen. Stat. Ann. §§ 20-138.1(i) (West 2006), 20-179 (West 2014).

Both offenses constitute misdemeanors for the purposes of TPS, as they are each punishable by imprisonment for more than 5 days but less than 1 year.

B. Validity of Conviction for Assault on a Female

The Applicant claims that the disposition for Assault on a Female does not meet the definition of a conviction under section 101(a)(48) of the Act. He states that the court suspended entering judgment by granting his prayer for judgment continued (PJC), that the court imposed no fine, ordered no form of detention or any other punishment, and that the court only ordered him to pay costs. An order to pay costs, he asserts, is not a punishment or penalty within the meaning of section 101(a)(48)(A)(ii) of the Act.

The Applicant submits several documents which he claims support his assertion that court costs alone do not constitute a punishment or penalty. First, he submits the “Frequently Asked Questions” section from the North Carolina Court System website. One of the entries asks, “What will my punishment be?” and the response lists options including a fine and court costs; probation, a suspended sentence, community service, and restitution; or an active sentence of jail time. The Applicant also submits an excerpt from an undated publication from the [REDACTED] titled [REDACTED]. The excerpt provided states that court costs ordered as a result of a withholding of adjudication are not a punishment and do not satisfy section 101(a)(48)(A)(II) of the Act. The excerpt further states that pretrial intervention or diversion programs, where a defendant does not enter a plea, do not result in a conviction. Finally, the Applicant submits an unpublished decision issued by the Board of

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Immigration Appeals on April 19, 2005, finding no error in an Immigration Judge's determination that an assessment for court costs in a Florida prosecution did not constitute a punishment.

These sources are unpersuasive and do not establish the Applicant's claim that the disposition of his charge is not a punishment or penalty. First, none of these sources are binding legal authority. Further, the [REDACTED] publication does not address the Applicant's specific disposition. While the court granted his request for PJC (similar to a withholding of adjudication), the court ordered more than the payment of costs. The Applicant was required to complete two education or assessment programs and follow any treatment recommendations, and he was required to abide by special conditions, specifically the terms of any protective order put in place during the PJC period. These mandatory programs and condition constitute a penalty or restraint on the Applicant's liberty under section 101(a)(48)(A)(ii) of the Act. *See Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008). Additionally, the [REDACTED] discussion of pretrial intervention or diversion programs addresses situations in which an individual has not entered a guilty plea; however, the Applicant pled guilty to the offense during his proceedings. Where a foreign national pleads guilty or nolo contendere, or is found guilty, but entry of the judgment is deferred by the court to allow for a period of probation and/or completion of a diversion program, the foreign national has been convicted for immigration purposes even if the charges are later dismissed. *See Matter of Marroquin-Garcia*, 23 I&N Dec. 705, 714-15 (A.G. 2005); *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999).

The unpublished decision by the Board is unpersuasive not only because it lacks binding authority, but more so because the Board has since published an opinion directly addressing this issue and holding that the imposition of costs and surcharges in criminal sentencing does constitute a punishment or penalty for the purposes of establishing a conviction. *Cabrera*, 24 I&N Dec. at 460.

In totality, we find that the Applicant's specific circumstances and controlling legal authority establish that the disposition of his charge for Assault on a Female constitutes a conviction under the Act. Accordingly, along with the conviction for Impaired Driving, the Applicant has two convictions for misdemeanors committed in the United States and is therefore 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 R-M-*, ID# 17282 (AAO Sept. 19, 2016)