



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

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

MATTER OF J-P-B-V-

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 to re-register and withdrew the Applicant's TPS because the Applicant had not provided complete documentation of his criminal history. The Director previously issued a notice of intent to deny (NOID) stating that the Applicant had not provided the judgment and conviction documents for one of his arrests. The NOID instructed the Applicant to provide the missing documents, explaining that re-registration would be denied, and TPS would be withdrawn if the Applicant did not respond timely with the requested information. The Applicant did not respond to the NOID. As a result, the Director determined that the Applicant had not re-registered as required and withdrew TPS, as the Applicant did not submit all documentation required in the Form I-821 instructions or requested by U.S. Citizenship and Immigration Services (USCIS). *See* 8 C.F.R. §§ 244.14(a)(3), 244.9(a).

The matter is now before us on appeal. The Applicant submits additional evidence, including the previously requested documents. He also states that his criminal convictions do not amount to two or more misdemeanors, and therefore he is eligible for TPS.

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

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 an 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 provides:

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

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 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 multiple offenses, including driving while intoxicated (DWI), assault and battery, and driving without a license. The Applicant claims that none of these convictions constitutes a misdemeanor for the purposes of 8 C.F.R. § 244.1. He states that neither the DWI nor the assault and battery conviction is valid, as he did not have effective assistance of counsel during the criminal proceedings. He further asserts that his conviction for driving without a license should not constitute a disqualifying misdemeanor in light of USCIS guidance regarding similar offenses in New York.

After reviewing of all the evidence in the record, we find that the Applicant has at least two convictions for misdemeanors and is therefore ineligible for TPS. The Applicant's convictions for DWI and for assault and battery are misdemeanor convictions under the Act and for purposes of TPS eligibility. Because the Applicant has two misdemeanor convictions, we need not determine whether his conviction for driving without a license constitutes a misdemeanor.

A. Classification of Offenses

As stated above, the Applicant is ineligible for TPS under section 244(c)(2)(B)(i) of the Act for two or more misdemeanor convictions.

In 2007, the Applicant pled guilty to simple assault and battery. At the time of conviction, this offense was a Class 1 misdemeanor under Virginia law, punishable by a maximum of 12 months in jail, or a fine not exceeding \$2,500, or both. Va. Code Ann. § 18.2-57(a), 18.2-11(a) (West 2006).

In 2012, the Applicant pled guilty to driving while intoxicated, first offense, blood alcohol content 0.15 to 0.20, under Va. Code Ann. § 18.2-266 (West 2012). Under Virginia law, this offense is also a Class 1 misdemeanor, punishable by a minimum of five days and maximum of 12 months of confinement, or a fine not exceeding \$2,500, or both. Va. Code Ann. § 18.2-270 (West 2012), 18.2-11(a) (West 2000).

Because they are punishable by up to 12 months of imprisonment, both of these offenses meet the definition of a misdemeanor under the TPS regulations. The Applicant does not claim otherwise.

B. Validity of Convictions

The dispositions of both charges meet the two-prong definition of a "conviction" at section 101(a)(48)(A) of the Act. For each charge, the Applicant entered a guilty plea, thus meeting the first prong. As a result of his guilty plea to the assault and battery charge, he was sentenced to \$91 in costs and 30 days in jail, which was suspended for 30 days. As a result of his guilty plea to the DWI charge, he was sentenced to 60 days in jail, suspended for 60 days; a 12-month suspension of his driver's license; and \$481 in fines and costs. Because each guilty plea resulted in a judge's order imposing a penalty, punishment, or restraint on the Applicant's liberty, each disposition meets the second prong of the definition of a conviction.

However, the Applicant asserts that he should not be found ineligible for TPS because the convictions are invalid due to procedural defects in the underlying proceedings. Specifically, the Applicant claims he lacked effective assistance of counsel insofar as his attorney¹ did not advise him of the immigration consequences of pleading guilty to either charge. The Applicant further states that an effective counsel would have advised him not to plead guilty, but instead to pursue alternative dispositions, such as deferred adjudication after successful completion of anger

¹ The same attorney represented the Applicant in proceedings for both his assault and battery and his DWI arrests.

management classes. Finally, the Applicant claims that he has sought guidance from a different criminal attorney to reopen his conviction for assault and battery, and if permitted to reopen the conviction, he would be eligible for TPS.

The Applicant's arguments regarding the validity of his convictions are unpersuasive, 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 claim, and there is no evidence to indicate, that either 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 either conviction has been overturned on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, each remains valid for immigration purposes.² *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 convictions for assault and battery and for DWI are valid convictions of misdemeanor offenses, and consequently, the Applicant is ineligible for TPS. Because the Applicant is ineligible due to these two convictions, we need not address whether his conviction for driving without a license constitutes a misdemeanor.

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-P-B-V-*, ID# 11115 (AAO Sept. 19, 2016)

² The factual claims regarding the Applicant's interactions with his previous criminal attorney and his current pursuit of post-conviction relief are made in counsel's brief on appeal, unaccompanied by any affidavit or other evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)