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

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

MATTER OF W-W-P-

DATE: SEPT. 21, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Applicant, a native and citizen of Liberia, 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, Texas Service Center, denied the application. The Director concluded that the Applicant was not eligible for TPS because he had been convicted of at least two misdemeanors, a felony, and an aggravated felony, a particularly serious crime.

The matter is now before us on appeal. In the appeal, the Applicant admits the convictions, but asks for reconsideration of the denial of his TPS application. The Applicant asserts that he was not aware of the immigration consequences of the pleas he entered in criminal proceedings. He further suggests that because he was convicted of a felony based on a plea agreement prior to [REDACTED] 1997, the conviction may be subject to waiver consideration under former section 212(c) of the Act, 8 U.S.C. § 1182(c). The Applicant states that he has resided in the United States since 1984 and would like to obtain legal immigration status so that he can remain in the United States with his spouse and two children. Although the Applicant indicated that he would provide court transcripts pertaining to his convictions, we have not received such evidence from the Applicant. We will therefore consider the record complete.

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

I. 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-

....

(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 of Homeland Security] finds that-

- (i) the alien has been convicted of any felony or two or more misdemeanors committed in the United States, or
- (ii) the alien is described in section 208(b)(2)(A).

Section 208(b)(2)(A) of the Act, 8 U.S.C. § 1158(b)(2)(A), includes individuals who were convicted of a particularly serious crime. Under this section, a conviction of an aggravated felony is considered a conviction of a particularly serious crime. Section 208(b)(2)(B)(i) of the Act, 8 U.S.C. § 1158(b)(2)(A).

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

Felony means 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, defines the term “misdemeanor” as:

[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 felony or misdemeanor.

II. ANALYSIS

The general issue in these proceedings is whether the Applicant is eligible for TPS. Upon review of the record, we conclude that the Applicant is statutorily barred from TPS because of his criminal convictions. Neither the Act, nor the pertinent regulations provide for a waiver of statutory ineligibility for TPS.

A. Eligibility

1. Convictions of misdemeanor and felony offenses

The Director determined that the Applicant was ineligible for TPS under section 244(c)(2)(B) of the Act on two separate bases: because he was convicted of more than two misdemeanors and a felony, and also because he was convicted of a particularly serious crime. This determination was made based on the information in the report from the Connecticut Department of Public Safety, which the Applicant submitted in response to the Director's request for evidence. This report indicates that:

- On [REDACTED] 1995, the Applicant was convicted of robbery in the first degree in violation of section 53a-134 of Connecticut General Statutes (Conn. Gen. Stat § 53a-134), for which he was sentenced to 7 years of incarceration, suspended for a period of 5 years. Robbery is classified by the state of Connecticut as a class B felony, punishable by imprisonment of up to 20 years. Conn. Gen. Stat. § 53a-35(b);
- On [REDACTED] 1999, the Applicant was convicted of interfering with an officer in violation of Conn. Gen. Stat § 53a-167a, a class A misdemeanor. The Applicant was sentenced to 1 year incarceration for the offense, suspended for a period of 2 years;
- On [REDACTED] 1999, the Applicant was convicted of illegal possession of marijuana in violation of Conn. Gen. Stat. § 21a-279(c) (1999), a misdemeanor offense. The Applicant was sentenced to 1 year of incarceration, suspended for a period of 2 years;
- On [REDACTED] 2001, the Applicant was convicted of operation a vehicle under the influence or while having an elevated blood alcohol content, in violation of Conn. Gen. Stat. § 14-227a, a misdemeanor offense, for which he was sentenced to 6 months of incarceration, suspended for a period of 1 year;
- On [REDACTED] 2001, the Applicant was convicted of interfering with an officer, in violation of Conn. Gen. Stat § 53a-167a, a class A misdemeanor. While the Applicant was only ordered to pay a fine, class A misdemeanors in Connecticut are punishable by imprisonment of up to 1 year. Conn. Gen. Stat § 53a-36;

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- On [REDACTED] 2002, the Applicant was convicted of assault in the third degree in violation of Conn. Gen. Stat § 53a-61, a class A misdemeanor. The Applicant was sentenced to 1 year incarceration for the offense, suspended for a period of 3 years.

The Applicant does not dispute that he was convicted of the offenses listed above, but claims that he was not aware of the adverse effect that criminal plea agreements would have on his immigration status. The Applicant's claim in these proceedings that he was not properly advised of the immigration consequences of the pleas he entered does not affect the validity of his convictions. While the U.S. Supreme Court held in *Padilla v. Kentucky*, 559 U.S. 356 (2010) that the Sixth Amendment requires criminal defense counsels to advise their noncitizen clients about the risk of deportation arising from a guilty plea, this holding does not apply retroactively to cases made final before *Padilla* was decided in 2010. See *Chaidez v. United States*, 568 US __, 133 S. Ct. 1103, 1113 (2013). Furthermore, a conviction is eliminated for immigration purposes only if it has been vacated based on a ruling that it was legally defective. See *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000); *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006). While the Applicant has submitted a certificate of employability to prove that the Board of Pardons and Paroles of the State of Connecticut granted him a provisional pardon for all convictions, the certificate makes it clear that the pardon only removes barriers to certain employment and does not serve to expunge or otherwise erase the Applicant's criminal record. In absence of evidence that the Applicant's convictions were vacated for procedural or substantive defects, we must conclude that he remains convicted of five misdemeanor offenses and one felony for immigration purposes. All of the misdemeanors, of which the Applicant was convicted, are punishable under Connecticut law by imprisonment of up to 1 year. As such, they are also considered misdemeanors for the purposes of establishing TPS eligibility. 8 C.F.R. § 244.1. In addition, the Applicant's conviction of robbery in the first degree, for which he was sentenced to 7 years of incarceration, meets the definition of a felony in 8 C.F.R. § 244.1. We find, therefore, that because the Applicant had been convicted of five misdemeanors and a felony, the Applicant is ineligible for TPS pursuant to section 244(c)(2)(B)(i) of the Act.

2. Conviction of a particularly serious crime

The Director found that the Applicant's conviction for robbery alone disqualifies the Applicant from TPS, as it is a conviction of a particularly serious crime. Specifically, the Director determined that the offense of robbery is an aggravated felony under section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G). Under this section, the term "aggravated felony" includes a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least 1 year.

The Applicant resides within the jurisdiction of the Second Circuit Court of Appeals (Second Circuit). In considering whether a particular state offense constitutes an aggravated felony for cases arising in the Second Circuit, we first apply "[t]he categorical approach [which] focuses on the intrinsic nature of the offense rather than on factual circumstances surrounding any particular violation." *Abimbola v. Ashcroft*, 378 F.3d 173, 176 (2d Cir. 2004) (citing *Dickson v. Ashcroft*, 346 F.3d 44, 48 (2d Cir. 2003)). We will look to the statute under which the Applicant was convicted

and compare its elements to the relevant definition of aggravated felony set out in section 101(a)(43)(G) of the Act. Under this categorical approach, an offense qualifies as an aggravated felony if “every set of facts violating a statute . . . satisfies the criteria for removability . . . keeping in mind that only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant.” *Id.* (internal citations omitted).

Conn. Gen. Stat § 53a-134, as in effect in 1995 when the Applicant was convicted, provided:

(a) A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime: (1) Causes serious physical injury to any person who is not a participant in the crime; or (2) is armed with a deadly weapon; or (3) uses or threatens the use of a dangerous instrument; or (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm, except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a weapon from which a shot could be discharged

Conn. Gen. Stat § 53a-133(1995), explained that:

A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

Finally, Conn. Gen. Stat § 53a-119 (1995), stated that:

A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner

Accordingly, to be convicted of robbery in violation of Gen. Stat § 53a-134, a person must engage in violent conduct or threaten such conduct, while committing larceny.¹ In *Abimbola v. Ashcroft*, *supra*, the Second Circuit held that third degree larceny under Connecticut law qualifies as a theft offense aggravated felony under section 101(a)(43)(G) of the Act. In reaching its conclusion, the Second Circuit stated that the term “theft offense,” as interpreted by the Board of Immigration Appeals (the Board) in *Matter of V-Z-S-*, 22 I&N Dec. 1338, 1346 (BIA 2000), and by other circuit courts, includes the taking of property “whenever there is a criminal intent to deprive the owner of

¹ The degree of larceny is determined by the value of the property.

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the rights and benefits of ownership, even if such deprivation is less than total or permanent.” *Id.* at 176. The Second Circuit determined that Connecticut offense of larceny, Conn. Gen. Stat § 53a-119, falls within this interpretation, as it requires a person to have the intent to deprive another of property or to appropriate the same to a third person. Because the third degree larceny encompasses the definition of larceny in Conn. Gen. Stat § 53a-119, which contains the “intent to deprive” language mandatory through its subsections, it is a theft offense. *Id.* at 179. In another case, *Almeida v. Holder*, 588 F.3d. 778, 788 (2d Cir. 2009), the Second Circuit reached the same conclusion for second degree larceny under Connecticut law.

The offense of robbery in the first degree in violation of Conn. Gen. Stat § 53a-134 includes commission of larceny as one of its elements. As stated above, the Second Circuit held that larceny is a theft offense for the purposes of section 101(a)(43)(G) of the Act. Accordingly, the offense of robbery in the first degree, of which the Applicant was convicted, is also a theft offense, except that it is accompanied by additional aggravating factors specified in the statute. We conclude therefore, that the Applicant’s conviction of robbery in the first degree is a conviction of a theft offense. Because the Applicant was sentenced to a term of imprisonment exceeding 1 year for this theft offense, the Applicant was convicted of an aggravated felony, as defined in section 101(a)(43)(G) of the Act. We therefore agree with the Director that the Applicant is not eligible for TPS pursuant to section 244(c)(2)(B)(ii) of the Act, as an individual convicted of a particularly serious crime.

The Applicant suggests that this conviction may be subject to a waiver under former section 212(c) of the Act,² because it occurred prior to [REDACTED] 1997, based on a plea bargain. However, the waiver in former section 212(c) of the Act is available only to those individuals who were lawfully admitted to the United States for permanent residence. *See generally Matter of Abdelghany*, 26 I & N Dec. 254 (BIA 2014). Because the Applicant is not a lawful permanent resident of the United States, the waiver provisions in former section 212(c) of the Act are not applicable in these proceedings.

The Applicant is ineligible for TPS based on his misdemeanor and felony convictions, as well as the conviction of a particularly serious crime.³ Nevertheless, the Applicant requests that we reconsider the denial of his TPS, stating that the convictions were the unfortunate results of poor decisions he made when he was younger. The Applicant states that he is not a danger to the United States. He

² Section 212(c), was repealed by section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 (IIRIRA). In 2001, the U.S. Supreme Court rendered a decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), holding that section 212(c) relief remains available to foreign nationals, irrespective of when they were put into proceedings, if their “convictions were obtained through plea agreements [prior to April 1, 1997] and who, notwithstanding those convictions, would have been eligible for 212(c) relief at the time of their plea under the law then in effect.” *Id.* at 326.

³ Although not addressed in the Director’s decision, the record indicates that the Applicant may also be ineligible for TPS pursuant to section 244(c)(1)(A)(iii) of the Act based on his inadmissibility to the United States. Specifically, the Applicant’s 1999 conviction for illegal possession of marijuana is a conviction for a controlled substance violation, which makes the Applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 212(a)(A)(i)(II). Moreover, because the aggregate sentences for the Applicant’s convictions exceed 5 years, he appears to be inadmissible to the United States under section 212(a)(2)(B) of the Act, 8 U.S.C. § 212(a)(2)(B). We do not reach a detailed analysis of the Applicant’s inadmissibility as we have determined that the Applicant is ineligible for TPS on other grounds.

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claims that he has not been back to Liberia since he was 7 years old, and that it appears from his research that Liberia is not a stable country.

We have considered the Applicant's statements on appeal. However, as there is no waiver available for the Applicant's convictions, even for humanitarian or family unity reasons, we must find that the Applicant is statutorily barred from TPS for the reasons stated above.

B. Discretion

The Applicant has not established that he meets the eligibility requirements for TPS under section 244(c) of the Act. Because we find the Applicant statutorily ineligible for TPS, we do not address whether he merits TPS grant as a matter of discretion.

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 W-W-P-*, ID# 116908 (AAO Sept. 21, 2016)